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Conundrum Related to Nature of Offence of Copyright Infringement

AARYA DESHMUKH¹

ABSTRACT

*The problem with determining the nature of offence under Section 63 of the Copyright Act is that the Act itself does not specify whether the offence of copyright infringement is bailable and cognizable. Hence, Part II of the First schedule of the Code of Criminal Procedure, 1973 which lays down the classification of offences against other Laws has to be referred. The confusion arises due to the language used in Section 63, making an offence under the section punishable with imprisonment “a term which shall not be less than six months but which may extend to three years”. The terms “may extend to three years” makes it difficult to categorize the offence under Section 63 into the three categories provided in the CrPC. To solve this difficulty, various High Courts have made attempts to classify the offence under either category two or category three of the table resulting in contrasting views. This paper aims to critically analyse the legal history of the issue related to determining the nature of offence of copyright infringement and whether the judgement in *M/s Knit Pro International v. The State of NCT of Delhi & Anr.* solves this conundrum.*

Keywords: *Section 63 of the Copyright Act, Nature of Offence, M/s Knit Pro International v. The State of NCT of Delhi & Anr.*

I. INTRODUCTION

Criminal law has traditionally been a tool to safeguard the public interest by justifying criminal punishments for harm done to society by social miscreants, whereas Intellectual Property (hereinafter “IP”) law primarily is meant the protection of private rights of Intellectual Property owners and license holders. Some academicians contend that criminal law is an effective tool to secure more rigorous IP protection because of the prevalence of IP breaches nowadays, particularly those that take the form of ‘counterfeiting’ and ‘piracy’, which directly or indirectly damage the interests of the general public². They believe that criminalizing IP infringement puts a strong deterrence on wilful infringers and forces them to stop infringing activities³. The next

¹ Author is a Recent Graduate from Maharashtra National Law University Nagpur, India.

² Ajay K. Sharma and Dipa Dube, *The Relevance of Criminal Law in Intellectual Property Law Research*, OXFORD ACADEMIC, (Mar. 19, 2023, 03:00 PM), <https://academic.oup.com/book/41122/chapter/350440104>.

³ 9 Irina D. Manta, *The Puzzle of Criminal Sanctions for Intellectual Property Infringement*, 24 HARVARD J. OF L. & TECH. 469, 512 (2011).

argument is that for the intellectual property owners experience enormous losses due to infringement of their works, but in addition to this direct harm they also lose money due to the subsequent litigation that they have to undertake which is exceedingly expensive. By creating disincentives for infringement, criminal prosecution of infringers might lower these litigation costs, or at the very least lessen the burden of enforcement on IP owners by moving the expense of the courts to the government. However, there are other scholars who staunchly oppose imposing of criminal sanctions to curb IP infringement cases. The main and most important reason for its opposition is that imposing criminal sanctions to curb IP infringement cases stands as a deterrent not just on wilful infringers but also innocent lawful users. It is believed that the fear of punishment deters inventors and it is claimed that harsh enforcement may have a harmful effect on creativity and innovation which essential goes against the basic principle of IP protection that is to encourage creativity and innovation in the society⁴.

Copyright infringement means an unauthorized use of any copyrighted work. In India, Copyright Infringement is a criminal offense under the Copyright Act, 1957 (hereinafter “Copyright Act”) and can make individuals liable for fine and even imprisonment. Section 63 of the Act criminalizes Copyright Infringement, while Section 64 gives police officers the power to seize infringing copies of a work without a warrant. The Act was amended in 1984 to increase the penalties for copyright infringement due to the rise of video and music piracy⁵. Earlier the term of imprisonment for Copyright Infringement was for a maximum period of one year, however the amended Section 63 of the Copyright Act lays down that in case of an infringement of Copyright or an infringement of any right provided under the Copyright Act the punishment consists of imprisonment for a term not less than 6 months but which may extend up to 3 years and with the fine which will not be less than 2 lakhs⁶. The amendment in the term of imprisonment for Copyright Infringement has given rise to the question as to the nature of the offence of Copyright Infringement. The key questions are - Whether the police can start an investigation for an offense under Section 63 and Whether or not a person arrested will be granted bail as a matter of right⁷. A cognizable offense is one where a police officer has the authority to make an arrest without a warrant and start an investigation without permission

⁴ Id.

⁵ Devansh Dixit, *Copyright Infringement is now a Cognizable and Non-Bailable Offence: A Critical Analysis of the Supreme Court Judgement*, THE IP LAW POST (Mar. 19, 2023, 01:35 AM) <https://iplawpost.wordpress.com/2022/09/09/copyright-infringement-is-now-a-cognizable-and-non-bailable-offence-a-critical-analysis-of-the-supreme-court-judgement/>.

⁶ Copyright Act, 1957, No. 14, Acts of Parliament, 1957 (India).

⁷ Shivendra Singh & Aprajita, *Insight into Nature of Offence of Copyright Infringement*, 13 J. OF I.P.R. 583, 584 (2008).

from a court⁸. A non-cognizable offense is one where a police officer cannot make an arrest without a warrant and must obtain permission from a court to start an investigation⁹. A bailable offense is one where a person arrested has the right to be released on bail¹⁰, while a non-bailable offense is one where bail may be granted at the discretion of the court¹¹.

II. DETERMINING THE NATURE OF CRIMINAL OFFENCES

There are two methods to determine the nature of an offence. The first method is where a determination is made based on the language used in the Section which defines that offence. If a particular Section states that an offence is cognizable, then its nature is determined to be cognizable. An example of the use of the first method is the offences of Trademark Infringement as provided under Section 103, 104, and 105 of the Trade Marks Act, 1999 wherein the Sections specifically mention the cognizability of the offences. However, the Copyright Act does not make any indication about the nature of the offence of Copyright Infringement and hence this method cannot be applied for determination. According to the second method, determination of nature of any offence can be done by making a reference to Part II of the First schedule of the Code of Criminal Procedure, 1973 (hereinafter “CrPC”) which lays down “Classification of offences against other Laws”. This table classifies offences laid down in laws other than the Indian Penal Code, 1860 (hereinafter “IPC”) as ‘Bailable or Non – Bailable’ and ‘Cognizable or Non – Cognizable’ based on the term of imprisonment provided under a particular offence. In this table the first category is of offences are the one’s which have a punishment for imprisonment for more than 7 years which may even extend to being punishable with death. These offences are classified as Cognizable and Non-Bailable. The second category of offences comprises of offences punishable by imprisonment for 3 years or more but no more than 7 years, and these types of offences are also classified as Cognizable and Non-Bailable. The last group of offences are those that have a sentence of imprisonment of less than three years or are merely penalised with a fine, and these offences are non-cognizable and bailable.

The main problem relating to the interpretation of Section 63 is with regard to its categorization. Section 63 of the Copyright Act specifies that the offence of Copyright infringement carries a sentence of imprisonment for a term that must not be less than six months but may be extended

⁸ Chikirsha Mohanty, *What is a Cognizable and Non-Cognizable offence in India?* LAW RATO, (Mar. 19, 2023, 01:37 AM), <https://lawrato.com/indian-kanoon/criminal-law/what-is-a-cognizable-and-non-cognizable-offence-in-india-612#h2Heading2>.

⁹ Sambit Rath, *Difference between cognizable and non-cognizable offences*, IPLEADERS (Mar. 19, 2023, 01:40 AM), <https://blog.ipleaders.in/difference-between-cognizable-and-non-cognizable-offences/>.

¹⁰ Sagar, *Bailable and Non-Bailable offence*, LEGAL SERVICE INDIA, (Mar. 19, 2023, 01:41 AM), <https://www.legalserviceindia.com/legal/article-1017-bailable-and-non-bailable-offence.html>.

¹¹ Supra note 6.

to three years¹². The phrase “which may extend to three years” is the source of all confusion. The Offence does not fall under the third category as the punishment prescribed is not exclusively less than 3 years however it also does not clearly fall under the second category as the punishment ranges between 6 months up to 3 years and a punishment of less than 3 years can be given. Hence, the issue 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 CrPC and the offence under Section 63 for the sake of categorization essentially hangs in between the second category and the third category. This issue was specifically brought before various High Courts, and they came to two main conclusion regarding whether Copyright infringement is a Non - Cognizable and Bailable offence or a Cognizable and Non - Bailable offence.

III. LEGAL HISTORY OF THE CONUNDRUM

Many High Courts have attempted to resolve the uncertainty regarding the interpretation of Section 63 of the Copyright Act, and the Courts in some cases have ruled the offence under Section 63 to be Non - Cognizable and Bailable, while other Courts have held the offence under Section 63 to be Cognizable and Non – Bailable. Firstly, let’s look at the cases holding the offence under Section 63 to be Non - Cognizable and Bailable.

1. In *Amarnath Vyas v. State Of A.P.*¹³, the Andhra High Court observed that there was no application of the first and third categories listed in Part-II of the Schedule of CrPC to the circumstances of this particular case. The sole issue relevant for discussion in the case was whether or not the second category of the categorization will apply. The Court referred to *Rajeev Chaudhary v. State (N.C.T.) of Delhi*¹⁴ wherein the Court observed that the phrase used in the specific section under consideration was “imprisonment for a term not less than ten years”. The Supreme Court’s ruling, on this was that this phrase could not be equated with imprisonment for ten years or more, and that the phrase would only cover those offences punishable by imprisonment for a clear period of ten years or more. The Apex Court did not believe that a sentence of imprisonment that might last up to 10 years can be compared to a sentence of ten years or more. Hence, the Court differentiated between the phrases ‘may extend to ten years’ and ‘imprisonment for ten years or more’. On the basis of the aforementioned ruling, the Andra Pradesh High Court in *Amarnath Vyas v. State Of A.P* firstly made an observation that the punitive provisions must be interpreted strictly and held

¹² Bhavik Shukla, *Offence of Copyright Infringement Cognizable or Not? : Still a Catch 22 Situation!*, SPICYIP, (Mar. 19, 2023, 01:43 AM), <https://spicyip.com/2020/04/offence-of-copyright-infringement-cognizable-or-not-still-a-catch-22-situation.html>.

¹³ *Amarnath Vyas v. State Of A.P.*, MANU/AP/1214/2006.

¹⁴ *Rajeev Chaudhary v. State (N.C.T.) of Delhi*, MANU/SC/0330/2001.

that Section 63 of the Copyright Act cannot be immediately regarded as being included in the second category just because it does not fall clearly within the realm of the third category. According to the Court's assessment, the phrase "*imprisonment for a duration which may extend up to three years*" would not quite fall under the heading "*imprisonment for three years and upwards*". Therefore, the offence covered by Section 63 of the Act was held to be 'non-bailable'.

2. In *State Govt. of NCT of Delhi v. Naresh Kumar Garg*¹⁵ the same question as to "*whether the offence punishable under Section 63 of the Copyright Act, 1957 (the Act) is bailable or non-bailable*" arose before the Delhi High Court. The Court relied on the judgement of Supreme Court in *Avinash Bhosale v. Union of India*¹⁶, wherein the Court held that an offence under Section 135(1) (ii) of the Customs Act, 1962 is punishable with imprisonment for a term which may extend to three years or fine or with both would be bailable. The Delhi High Court also referred to the judgement of *Rajeev Chaudhary v. State (NCT) of Delhi*¹⁷ where the Supreme Court was interpreting Section 386 of the IPC, which is an offence punishable with imprisonment that could extend to ten years. The Court observed that the expression 'not less than' in the section means that imprisonment should be for 10 years or more, and would only apply to offenses for which the punishment could be imprisonment for a clear period of 10 years or more. It would not apply to offenses for which the punishment could be imprisonment for less than 10 years. Applying this interpretation of 'not less than', the Delhi High Court in this case held Section 63 to be a bailable offence. The Court in this case also referred to Section 64 of the Copyright Act and observed that this section empowers a police officer not below the rank of Sub-Inspector to seize infringing copies of any Copyrighted work. The court noted that if the offense had been Cognizable and Non-bailable, then there would have been no need to specifically authorize the police officer with the power of seizure. This shows that the offense of Copyright Infringement is not considered to be a serious offense and thus the power of seizure is provided to the police officer as a special provision, thus making it Non - cognizable and Bailable.
3. In *Pintu Dey v. State of Rajasthan and Ors*¹⁸, an F.I.R. was filed under Section 63 and 68A of the Copyright Act against the accused. The accused argued that since Sections 63, 65, and 68A of the Copyright Act are Non-cognizable offences under Part II of Schedule I of

¹⁵ State Govt. of NCT of Delhi v. Naresh Kumar Garg, MANU/DEOR/208605/2022.

¹⁶ Avinash Bhosale v. Union of India (2007) 14 SCC 325.

¹⁷ Supra Note 11.

¹⁸ Pintu Dey v. State of Rajasthan and Ors, 2015(3) Cr. L.R. (Raj.) 1291

the CrPC, no police officer could conduct an investigation into it without a Magistrate's order as stated in Section 155 of the CrPC. The public prosecutor disputed this, arguing that since Sections 63 and 68A are punished by imprisonment that may last up to three years and the F.I.R. does not need to be quashed since they are under the category of cognizable offences. The Court however relying on the earlier the rulings in the cases of *Rajeev Chaudhary v. State (NCT) of Delhi and Amarnath Vyas*, concluded that the offence punishable under Section 63(a) of the Copyright Act does not come under Part II of Schedule I of the CrPC because it carries a maximum sentence of three years in prison and the phrase "imprisonment for a term which may extend up to three years" does not fall under the definition of non - cognizable offence by virtue of Part II of Schedule I of CrPC.

4. The Madras High Court in *M/S. Sivaji Hi-Tec Foods Pvt Ltd v. The State Rep*¹⁹ and the Rajasthan High Court in *Deshraj v. State Of Rajasthan And Anr*²⁰ relied on the above mentioned judgements and both these High Courts held that the Offence under Section 63 as Non - Cognizable and therefore, in accordance with Section 155 of the CrPC, no police officer had the power to conduct an investigation into an offence that was not cognizable without a magistrate's permission.

There are some other set of judgements given by various High Court therein the Courts have held the offence under Section 63 to be Cognizable and Non – bailable.

1. In *Nathu Ram and Ors. v.State of Rajasthan and Ors*²¹, the High Court of Rajasthan rejected the views of the High Courts of Rajasthan and Andhra Pradesh and observed that the judgement of the Courts in *Amarnath Vyas v. State of Andhra Pradesh* and *Pintu Dey v. State of Rajasthan* did not lay down the correct law. The Court for the purpose of interpreting 'may extend to' made reference to the interpretation as done in classification of the offences under IPC specified under Part I of the First Schedule. The Court noticed that the terms of imprisonment for any period specified in the schedule through its language includes in its description even the term 'upto which' (maximum term) a particular punishment can be extended. This simply means that the maximum term of punishment that may be awarded will be considered for classification and not the minimum period. The Classification for offences outside of IPC will be constructed and interpreted on the basis of classification under Part I of the First Schedule made for offences under the various sections of IPC. The Court declared that, unless specifically stated in the applicable statute,

¹⁹ M/S. Sivaji Hi-Tec Foods Pvt Ltd v. The State Rep, Crl. O.P. No. 1379 of 2019.

²⁰ Deshraj v. State Of Rajasthan And Anr, 2017 (1) WLC (Raj.) (UC) 715.

²¹ Nathu Ram and Ors. V.State of Rajasthan and Ors, MANU/RH/0039/2021.

all offences under “laws other than IPC” that carry a sentence which may extend to a sentence of three years in prison fall under category two of Offences Classified under Part II of First Schedule and are therefore Cognizable and Non-bailable.

2. The Court in *Jitendra Prasad Singh v. State of Assam*²², differentiated between the expressions “punishable with imprisonment for a term, which may extend to three years”, and “if punishable with imprisonment for less than three years”. This distinction was made on the grounds that the phrase “punishable with imprisonment for a term, which may extend to three years”, will mean that the imprisonment may be for a term as long as three years, but the phrase “punishable with imprisonment for less than three years”, will mean that the offence is punishable with imprisonment for a period, which is less than three years. The Court thus held that when seen from this perspective, the offence under Section 63 of the aforementioned Act is non-bailable.
3. In *Abdul Sathar v. Nodal Officer, Anti-Piracy Cell*²³, the Kerala High Court focused on the language used in the Section 63 and the schedule to the CrPC to determine the cognizability of the offence. The Court observed that the second category of offences includes offences which are punishable with imprisonment for “3 years and upwards, but not more than 7 years” and this is inclusive of both 3 years and 7 years. The third category of offences are those that are only punishable with a fine or a sentence of less than three years in jail. Those who are subject to a three-year jail sentence, according to the Court obviously do not fall within this group. The Court held that since the offence of copyright infringement provides a punishment wherein a sentence of 3 years can be provided, it falls under the second category of the Schedule.
4. The Court in *Ani Technologies Private Limited v. State Of Karnataka*²⁴, reviewed various cases where the cognizability of offences punishable with imprisonment which may extend to 3 years was discussed. After discussing all these cases, the Court came to the conclusion that Section 63 is a cognizable offence. The Court observed that merely because Section 64 gives power to the police for search and seizure, the cognizability of Section 63 is not affected. The main focus should be on the maximum punishment which can be provided which in the case of Section 63 of three years and hence the offence would fall under category two of Schedule II of the CrPC In *Piyush Subhashbhai Ranipa v. State Of*

²²Jitendra Prasad Singh v. State of Assam, 2003 (26) PTC 486 (Gau).

²³ Abdul Sathar v. Nodal Officer, Anti-Piracy Cell, AIR 2007 Ker 212.

²⁴ Ani Technologies Private Limited v. State Of Karnataka, MANU/KA/5981/2021.

*Maharashtra*²⁵, the Bombay High Court, discussed various cases previously decided on the matter of cognizability of offences punishable with imprisonment which may extend to 3 years and held that for all offences where there is a possibility of giving a punishment extending to three years, the category two of the Part II of the Schedule-I of CrPC will apply and such offences will be considered as non - bailable²⁶.

IV. THE CONUNDRUM SOLVED

The Supreme Court has attempted to solve this legal issue through its recent judgement in *M/s Knit Pro International v. The State of NCT of Delhi & Anr*²⁷. The Facts of the case are that Knit Pro, the appellant produced knitting needles and 'Lykke Knitting Needles' was one of its products. The appellants alleged that they had copyrights registrations for their products. The appellants accused the respondent for infringing its copyright. An application was filed under Section 156(3) of the CrPC and directions were sought from the Chief Metropolitan Magistrate (hereinafter "CMM") for the registration of a FIR against the petitioner under Sections 51, 63 and 64 of the Copyright Act read with Section 420 of the IPC. The CMM allowed the application under Section 156(3) of the CrPC and directed the concerned police officer to register the FIR under the appropriate provision of law.

The accused, challenged the CMM's order in the High Court of New Delhi in the case of *Anurag Sanghi v. State & Ors*²⁸ on the sole ground that the offence under Section 63 of the Copyright Act is a Non -Cognizable and is a Bailable offence. The accused argued that the offence is non - cognizable since no provision in the Copyright act provided it to be cognizable and since the punishment does not fall under the scope of Part II of the First Schedule of the Cr.P.C, it cannot be said to be cognizable. On the other hand, Knit Pro contended the violation of Section 63 of the Copyright Act comes under Part II of the First Schedule to the Criminal Procedure Code, which states that offences punished by imprisonment for three years or more, but not more than seven years, are cognizable and Non-bailable. The High Court noted that the Part II of the First Schedule of the CrPC categorises offences as either cognizable or non-cognizable based on the potential punishment that might be imposed and the categories provided within it are exhaustive in nature. The Court was of the view that it is not necessary that the language of the Sections stipulating the punishment for an offence must be identical to the language used in Part II of the

²⁵ Piyush Subhashbhai Ranipa v. State Of Maharashtra, MANU/MH/0593/2021.

²⁶ Prime Legal, *Non IPC offences with imprisonment that can be extended more than 3- years are non-bailable: High Court of Bombay*, PRIME LEGAL, (Mar. 19, 2023, 02:45 PM), <https://primelegal.in/2021/03/08/non-ipc-offences-with-imprisonment-that-can-be-extended-more-than-3-years-are-non-bailable-high-court-of-bombay/>.

²⁷ *M/s Knit Pro International v. The State of NCT of Delhi & Anr*, 2022 SCC OnLine SC 668.

²⁸ *Anurag Sanghi v. State & Ors*, Crl. M.A. 35858/2018.

First Schedule of the Cr.P.C., however the Court categorically pointed out that the difference in language did not mean that those offences would fall outside the scope of Part II of the First Schedule of the Cr.P.C. The Court did not concur with the judgement given in *Abdul Sathar v. Nodal Officer*²⁹ and *Amarnath Vyas v. State of A.P.*³⁰ wherein Section 63 was held to be non-cognizable and bailable. The High Court started with a discussion of the meaning on “Punishable” and the Court interpreted it to mean that any punishment which can be awarded for a said offence. In this regard, the maximum punishment was to be considered for classification of offences for the sole reason that there is a possibility that the accused might be awarded that maximum sentence. The Court relied on the decision of *Avinash Bhosale v. Union of India*³¹, wherein the Court was discussing Section 135(1) (ii) of the Customs Act, 1962 which provided a punishment similar to that awarded under Section 63 of the copyright act i.e. “punishable with imprisonment for a term which may extent to three years or fine or with both”. The court in this case held Section 135(1) (ii) of the Customs Act to be a bailable offence. Since, the case of *Avinash Bhosle* acted as a precedent for the High Court, relying on that it concluded that merely because the statute provides a maximum punishment for an offence, it is not compulsory that it will be imposed and hence even if Section 63 provides a maximum punishment of 3 years, it is not necessary that a sentence of 3 years would be provided and hence the categorisation should not be based on that. The High Court set aside the decision of the CMM and also the FIR. Hence, an appeal was filed in the Supreme Court against the decision made by the High Court. The main question before the Supreme Court was “Whether the offence under Section 63 of the Copyright Act is a cognizable offence or a Non Cognizable Offence?”

Both the parties presented arguments to support their contentions before the Court. The Respondent accused relied on the decision of the Court in *Rakesh Kumar Paul v. State of Assam*³² to argue that the High Court’s decision was correct and offence under Section 63 was a non-cognizable offence. The Appellant contended that the High Court had misinterpreted the Judgement given by the Court in Rakesh Kumar’s case and had not considered the judgement in *Intelligence Officer, Narcotics Control Bureau v. Sambhu Sonkar*³³, wherein the Court held that for the determination of classification of offences, the maximum sentence that can be awarded has to be taken into consideration. Further it was argued that since a punishment of

²⁹ Supra note 20.

³⁰ Supra note 10.

³¹ Supra note 14.

³² Rakesh Kumar Paul v. State of Assam, (2017) 15 SCC 67.

³³ Intelligence Officer, Narcotics Control Bureau v. Sambhu Sonkar, AIR 2001 SC 830.

“imprisonment for a term which shall not be less than six months but which may extend to three years” can be imposed under Section 63 of the Copyright Act, this offence would fall under category II of the table in Part II of the First Schedule of the CrPC. An offence will be considered Non - Cognizable only when the punishment is less than three years.

In its final judgement the Court reproduced Section 63 of the Copyright Act and Part II of the First Schedule of the CrPC in the judgement to decide on the cognizability of the offence under Section 63. The Court observed that the maximum sentence which can be provided under Section 63 is of 3 years and there is a possibility that a Magistrate can award a sentence of three years and since, only those offences which have a punishment for imprisonment for less than 6 months are classified as Non -Cognizable offence, the offence under Section 63 will be a Cognizable offence. The Court held that the High Court erred in holding the offence under Section 63 as a Non - Cognizable offence.

(A) Implications and Critical Analysis of the Judgement

The decision of the Supreme Court in *M/s Knit Pro International v. The State of NCT of Delhi & Anr* has for the time being settled the question related to cognizability of Section 63 of the Copyright Act. Thus, it is important to look at the implication that this decision will have. The Apex Court has categorised the offence under Section 63 in the second category of Part II Schedule I of CrPC which makes the offence under this Section Cognizable, Non - bailable and triable by a magistrate of first class. This implies that if a police officer receives information of infringement of copyright or violations of any provisions of the Copyright Act, the officer without permission of the magistrate can lodge a FIR under Section 156 of the CrPC and investigate the said offence³⁴. Additionally, this also means that if a complaint is made out against a person for infringement of copyright, that person can be arrested immediately and bail would not be given to him as matter of right and an application would have to be made for bail before a Court under Section 437,438 and Section 439 of CrPC wherein the Court will analyse the facts and the allegations made and the bail will be a matter of discretion of the Court.

Firstly, the main issue with the judgement is that it lacks any form of reasoning for the Court’s decision and fails to provide a ratio. A plain reading of the judgement shows that the reasoning given by the Court merely consists of reproduction of Section 63 and Part II of Schedule I of the CrPC and the Court has made a conclusion based only on this reasoning that a Magistrate may sentence an accused for a period of three years for an offence under Section 63 of the Copyright Act and only based on this it is concluded that it will fall under the category II

³⁴Code of Criminal Procedure, No. 02, Act of Parliament, § 156, 1973 (India).

of Part II of Schedule I of the CrPC However, this issue of cognizability of Section 63, has been going on since long and the Apex Court made no efforts in this judgement to delve into the decisions given by various High Court in order to analyse them and comment on their decisions. The Court in this judgement has simply reproduced the sections in the judgement and a decision has been given without any proper reasoning. This will have a huge impact on its credibility and precedential value. Secondly, the category two of Part II of Schedule I of the Cr.P.C. classifies offences punishable with imprisonment from 3 to 7 years as cognizable and Non-Bailable. The punishment provided under Section 63 of the Copyright Act is not 3 years and upwards but is between the ranges of 6 months to 3 years. In the given judgement, the Court only considered the upper limit of 3 years and did not consider the fact that a punishment for less than 3 years and even a punishment for less than 6 months can be provided for the said offence if the infringement is not made for gain in the course of trade or business. Essentially, now as a result of this a person who ultimately gets punishment for less than 6 months upon trial would also get arrested and investigated without permission of magistrate and will not get bail as a matter of right. The third criticism which can be formed against this judgement is related to the “intent of legislature” theory of Interpretation of Statutes. It can be argued that the legislature did not want the offence under Section 63 of the Act to be classified as cognizable as it did not specifically provide so in the Copyright Act. In this regard a comparison can be drawn to the Trade Marks Act, 1999. While for offences of trademark infringement Sections 103, 104, and 105 specifically provide that these are cognizable offences³⁵. As the Trademark Act specifically mentions the cognizability of the offences, it would signify that the legislature made an exception by making Sections 103, 104 and 105 as cognizable offences and hence felt the need to mention it in the Act. As no mention of cognizability of Section 63 is made in the Copyright Act the general rule of non cognizability should apply to Section 63. Additionally, this ruling opens the door for the lucrative copyright industries to weaponize copyright infringement sections and threaten legal action even against lawful users³⁶. Deeply resourced industries may design a strategic litigation to stifle public discourse and any complaints. Furthermore, Section 52 of the Copyright Act outlines some authorised uses of the copyright that will not be viewed as a copyright violation³⁷. Since Section 63 is now cognizable and non-bailable, an innocent person who has permitted use will be imprisoned and forced to endure hardships until the court does not relieve him and identify him as a permissible user.

³⁵ Akshat Agrawal & Sangita Sharma, *The Supreme Court's Unsettling Attempt at Settling the Debate on Section 63 of the Copyright Act*, SPICYIP, (Mar. 19, 2023, 02:50 PM), <https://spicyip.com/2022/05/the-supreme-courts-unsettling-attempt-at-settling-the-debate-on-section-63-of-the-copyright-act.html>.

³⁶ Id.

³⁷ Copyright Act, 1957, No. 14, Acts of Parliament, §52, 1957.

Even an innocent user will be scared to utilise any legal copyright because of this, which will act as a strong deterrent. In relation to this, it may be said that the dread of any innocent user effectively defeats the purpose of the copyright statute. The copyright legislation was created to promote originality and innovation. However, if the offence is ruled to be cognizable, it will severely restrict people's ability to express themselves and their free speech. This will happen in two ways: first, the punitive nature will inhibit innovation in any form, and second, the deterrent of creativity will prevent the emergence of even creative endeavours and enterprises. Many creators may be discouraged by their dread of being arrested and the fact that they cannot make bail easily.

V. CONCLUSION

The debate over the imposition of criminal sanctions on intellectual property infringement is a complex and controversial issue that has been ongoing for many years. Some people argue that criminal sanctions are necessary to deter individuals and organizations from engaging in intellectual property infringement, which can harm the creators and owners of intellectual property, as well as the broader economy. Others argue that criminal sanctions are too harsh and can lead to excessive punishment for individuals who may not have fully understood the legal implications of their actions. However, in India both civil and criminal procedures can be undertaken in any case on IP infringement, specifically for Copyright infringement. Section 63 of the Copyright Act lays down that in case of an infringement of Copyright or an infringement of any right provided under the Copyright Act the punishment consists of imprisonment for a term not less than 6 months but which may extend up to 3 years and with the fine which will not be less than 2 lakhs³⁸. Thus, the key question arises about the implications of committing the offence of Copyright Infringement, this means determination about the nature of offence of Copyright infringement. To determine the bailable and cognizable nature of the offence under Section 63, reference should be made to Part II of Schedule I of the CrPC. This table classifies offences laid down in laws other than IPC as "Bailable or Non - Bailable" and "Cognizable or Non - Cognizable" based on the term of imprisonment provided under a particular offence. The main problem relating to the categorization of Section 63 is that it does not clearly fall under either one of the categories of the table. Thus, various High Courts tried to solve the ambiguity related to the interpretation of Section 63 of the Copyright Act. To give finality to the conflicting judgment of these various High Courts, the Supreme Court recently in *M/s Knit Pro International v. The State of NCT of Delhi & Anr*, has held the offence of Copyright

³⁸ Supra note 3

Infringement to be Cognizable and Non – Bailable categorising the offence under Section 63 in the second category of Part II Schedule I of CrPC. The implication of this decision is that if a police officer receives information about copyright infringement or violations of any Copyright Act provisions, the officer may file a FIR under Section 156 of the CrPC and conduct an investigation of the alleged offence without the magistrate's permission. Further if a copyright infringement complaint is made out against a person, that person may be detained immediately and bail will not automatically be granted. There are several flaws of this judgement, however the primary downside is that, it will severely restrict people's ability to express themselves and their free speech and will thereby act as a deterrent towards creative endeavours and enterprises and stifle emergence of copyrightable works. My recommendations would be that, in order to guarantee that innovation is not suppressed, the judiciary should pay attention to the intent behind the Copyright Act as much as it does to the wording that are used. I also believe that the legislature should step in and change the current Copyright legislation as needed to eliminate all the ambiguity and assuage the fears of innocent people.
