Moral-Economic Deficiency of Criminal Copyright Remedies

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5 September 2023

Introduction

In India, criminal remedies for copyright infringement are primarily governed by Chapter XIII (Offences) of the Copyright Act, 1957 ("Act"). Specifically, Section 63 penalises anyone who 'knowingly infringes' a copyright. It provides for 6 months to 3 years of imprisonment, and a fine of Rs. 50 thousand to 2 lakhs. Although the Copyright (Amendment) Act, 1994 ("1994 Amendment") created an exception for non-commercial infringement ("not…for gain in the course of trade or business"), I argue that the 1994 Amendment fails to address the elephant in the room, i.e., even after this amendment, Section 63 criminalises non-competitive and non-commercial infringement without adequate moral requirement and economic efficiency. To this end, I advance a two-pronged argument on the moral appropriateness and economic efficiency of Section 63 in two kinds of copyright infringement; and, conclude with suggestions for reform.

Moral Appropriateness

Usually, a crime is a moral wrong involving moral culpability. A crime (or moral wrong) has two components: mens rea and actus reus. Under Section 63, the actus reus is the act of infringement; whereas, the mens rea is 'knowing' infringement, or mere knowledge. It does not require any malicious intention or motive underlying this knowledge. This omission implies that even 'knowing' infringements for personal use or charitable (non-commercial and non-competitive) public dissemination are classified as criminal acts. Indeed, malice is not the only motive for infringement.

However, such acts are not sufficiently immoral to justify criminal sanctions. This is because these acts are significantly different from malicious infringement for commercial gain or attaining competitive market advantage. The harm caused, the societal values compromised, and, most importantly, the mens rea are different.

Although there are criminal offences which do not have a strict mens rea requirement, such offences usually have strong countervailing reasons to justify the deviation. With Section 63, however, there are no such countervailing reasons. For copyright infringement, the legislators were mainly concerned with balancing two conflicting values – the interests of copyright owners (authors-publishers) in protecting their works, and the interests of the public in accessing knowledge via such works. In the case of competitive or commercial copyright infringement, the knowledge is guided by the malicious intention of reaping profits from pirated content or gaining a market advantage over your competitor. These acts are usually not guided with the intention of furthering public access to knowledge. Moreover, the economic harm caused to authors is greater than when used for personal use only because of the greater scale of infringement in the former. Criminalising the former type of infringement balances the interests of both copyright owners and society.

However, by criminalising non-commercial and non-competitive infringement (e.g., for personal use), the balance is skewed in favour of the owner's interests. One of the goals of the copyright law – to promote the development of new works – is emphasized others by using criminal punishment to discourage illicit copying. The balance between the two objectives of copyright law is threatened by the emphasis on the incentive to create, which suggests that ensuring public access is less vital. Moreover, community norms regarding copyright infringement indicate that society does not consider infringement for non-commercial purposes as morally wrong.

Economic efficiency

Although criminal remedies tend to be more effective than civil (and administrative) remedies in deterring crime, such effectiveness does not guarantee an economically efficient outcome. As such, the economic efficiency of Section 63 needs to be evaluated using a cost-benefit analysis.

Costs

Regarding the criminalisation of copyright law, Landes & Posner have highlighted the paradox of stifling creativity. By criminalising infringement, the 'second-generation' innovation is stifled – future creators may no longer be able to access previous works; thus, reducing the input available for producing creative outputs. In a developing country with moderate levels of copyright literacy like India, there might be unintended effects of criminalisation. For instance, users who are not sufficiently aware of the copyright law would avoid using copyright works for purposes that may be otherwise legal.

Besides deterrence, imprisonment also has unintended societal costs, including the opportunity cost of sacrificing the productivity of those who are behind bars as well as the direct expenses of constructing, operating, and staffing prisons. Here, the opportunity costs involve the worth of the convict's lost income and the economic injury to their families.

Moreover, criminal law can be used by resourceful copyright holders to enforce their rights through state resources rather than private civil litigation or settlement, which may be too expensive, time-consuming, or result in unsatisfactory results. Even though it can be helpful in some cases of IPR infringements where certain public interests are at, this may further encourage rent-seeking behaviour among resourceful copyright owners.

Benefits

By denying copyright owners their legal right to operate as the exclusive distributor of copyrighted content and, consequently, to profit from sales and licenses, infringement jeopardizes their financial interests. If they cannot make a profit, creative individuals are less likely to invest time and resources into producing goods, undermining the copyright and constitutional protections for intellectual property. Deterring infringement increases the likelihood that writers will receive money from their work, enhancing their desire to generate original expressive works and advancing one of the objectives of intellectual property legislation, which is to encourage the development of new products.

Analysis

Before reaching a conclusion, it is pertinent to note that the counter-argument to treat copyright on par with tangible property rights fails to take into account the special nature of copyright. Indian legislators specifically differentiated between the two. In the case of tangible property, the goods are rivalrous – if one uses/consumes, another person (including the owner) cannot enjoy its benefits. On the other hand, in the case of copyright, since the copyright holder still has the option to sell the information product after the infringement, the economic harm to the owner is comparatively lesser. The value of employing criminal law is less than one might initially think. The expenses of applying the criminal code, however, can be more than anticipated.

Conclusion

Although the 1994 Amendment attempted to 'deal more effectively' with copyright infringement by adding another proviso to Section 63 to 'suitably guide and limit the discretion of the court to impose penalties below the normal minimum', I have two reservations regarding its appropriateness. Firstly, meting out sub-normal penalties in exceptional cases is merely discretionary. As per the proviso, a court has to provide 'adequate and special reasons' to circumvent the minimum penalties provided in this section. Secondly, and importantly, the classification is rather superficial because acts that are not sufficiently immoral are also classified as criminal. This contradicts the consensus that only moral wrongs must be criminalised. Relatedly, such classification also ignores the difference in relative mens rea of the two kinds of infringement. Limiting criminal liability under Section 63 would help achieve the goal of free access to knowledge better, and provide a more favourable balance between the interests of owners and society. Additionally, international best practice guided by the TRIPS agreement requires criminal remedies only for wilful infringement on a commercial scale. Therefore, India should reconsider limiting the liability for non-commercial and non-competitive infringement to civil remedies considering the comparative efficiency and other conflicting interests involved.

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J.N. Bagga v. All India Reporter Ltd., Nagpur, 1968 SCC Online Bom 14 [not liable under section 63 if no knowledge]; Bunny Reuben v. B. J. Panchal, 1999 SCC Online Bom 603 [knowledge an essential ingredient].

Ting Ting Wu, 'The New Criminal Copyright Sanctions: A Toothless Tiger' (1999) 39 IDEA 527, 527.

Moohr, Crime (n 5); I. Trotter Hardy, 'Criminal Copyright Infringement' (2002) 11 Wm & Mary Bill Rts J 305, 327-332.

David Ormerod, Karl Laid, John Cyril Smith and Brian Hogan, Smith, Hogan, and Ormerod's Criminal Law (16th edn, OUP 2021), ch 5, 150.

Although in some instances the rights of authors and publishers collided, regarding infringement, their interests overlapped. The former is irrelevant for our present discussion.

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Cite as (OSCOLA, 5th ed.): Prachi Mathur, 'Moral-Economic Deficiency of Criminal Copyright Remedies' (*The Innovation Brief*, 5 September 2023) <https://innovationbrief.nludelhi.ac.in/essays/moral-economic-deficiency-of-criminal-copyright-remedies> accessed 18 November 2026.

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Published by the Centre for Innovation, Intellectual Property and Competition, National Law University Delhi. Read online at https://innovationbrief.nludelhi.ac.in/essays/moral-economic-deficiency-of-criminal-copyright-remedies.