

Comments on the Cinematograph (Amendment) Bill, 2021

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Preliminary

The Centre for Internet and Society (CIS) is a non-profit organisation that undertakes interdisciplinary research on internet and digital technologies from policy and academic perspectives. The areas of focus include digital accessibility for persons with disabilities, access to knowledge, intellectual property rights, openness (including open data, free and open source software, open standards, open access, open educational resources, and open video), internet governance, telecommunication reform, digital privacy, and cyber-security. The academic research at CIS seeks to understand the reconfiguration of social processes and structures through the internet and digital media technologies, and vice versa.

This submission presents comments by CIS on the Cinematograph (Amendment) Bill, 2021 (“**the Bill**”) which were released on 18 June 2021 for public comments. These comments examine whether the proposed amendments are compatible with established constitutional principles, precedents, previous policy positions and existing law.

While we appreciate the opportunity to submit comments, we note that the time allotted for doing so was less than a month (the deadline for submission was 2 July 2021). Given the immense public import in the proposed changes, and the number of stakeholders involved, we highlight that the Ministry of Information and Broadcasting (MIB) should have provided more time in the final submission of comments.

Further, the Cinematograph (Amendment) Bill of 2019, as has been mentioned in the background to these amendments, was instituted ‘to tackle the menace of film piracy’.¹ The reference to the Parliamentary Standing Committee on Information Technology, and the subsequent report, was also accordingly restricted on the topic of piracy. Therefore, the topic of revisional power, as envisaged by these proposed amendments, has not received the due attention of the Standing Committee. Accordingly, it is important that these revised amendments are referred to the Standing Committee on Information Technology.

Revisional power of the government

One of the key changes that the Bill seeks to incorporate, is the re-introduction of revisional powers to the government, via introduction of a *proviso* to section 6(1) of The Cinematograph Act, 1952 (“**the Act**”).² This amendment seeks to allow the government to order the Chairperson of the Central Board of Film Certification (CBFC) to re-examine any certified films on the ground that they are prejudicial to one of the grounds in Article 19(2).

¹ Ministry of Information & Broadcasting, ‘Public comments sought on the Cinematograph (Amendment) Bill 2021’, 18 June 2021, para 3.c, <<https://mib.gov.in/sites/default/files/Public%20comments%20sought%20on%20Cinematograph%20%28Amendment%29%20Bill%202021.pdf>> [‘MIB Public Comments’]

² The Cinematograph Act, 1952, <<https://legislative.gov.in/sites/default/files/A1952-37.pdf>>

The proposed amendments state two-fold changes to section 6(1) of the Act:

1. Removal of governmental powers of revision for films that have already been certified, as has been held by the Karnataka High Court in *K.M. Shankarappa v. the Union of India* and the subsequent Supreme Court appeal. This is explained in greater detail in the next section, and;
2. Addition of a *proviso* that would allow the Central Government to, if it deems fit, on receipt of a 'reference', direct the Chairman of the Central Board of Film Certification (CBFC) to re-examine an impugned film. The government purportedly derives this power from section 5B(1) of the Act, which lays down that a film shall not be certified if any part of it is against the grounds identified under Article 19(2) of the Indian Constitution.

Absence of key details in power of reference the text of the amendment

There are several concerns with the language of the proposed amendment. *Firstly*, the amendment does not specify who would be authorized to send a 'reference' to the government for re-examination of a film. In the absence of this clarity, we are concerned that this provision would be misused. Akin to the spate of criminal complaints lodged against Netflix³ and Amazon Prime⁴ officials for allegedly hurting 'religious sentiments'⁵, this power to send a 'reference' under the pretext of constitutionally-recognized restrictions would transform into the 'heckler's veto': where freedom of speech and expression, including creative and artistic freedom, is prone to restriction by third parties and majoritarian mobs.⁶

This absence of specificity in the proposed amendment becomes even more apparent when it is contrasted against existing provisions within the Act that allow for government intervention in the certification process. For instance, section 5E allows the government to suspend or revoke certificates granted to a film, on clearly identifiable grounds within the Act, including if the film is displayed in another form than the one in which it was certified.⁷ Further section 5F allows a person aggrieved by such an order under section 5E, to request a review.⁸ These safeguards are statutorily enacted and therefore enforceable.

³ The Wire Staff, 'Complaint Against Netflix for 'Defaming' India, Hurting Hindu Sentiments', *The Wire*, 4 September 2019

<<https://thewire.in/politics/shiv-sena-netflix-complaint>>

⁴ Quint Entertainment, "'Tandav': Complaint Filed Against Saif Ali Khan, Dimple Kapadia", *The Quint*, 19 January 2021

<<https://www.thequint.com/entertainment/hot-on-web/criminal-complaint-filed-against-makers-of-amazon-prime-video-web-series-tandav-in-delhi-court>>

⁵ Devdutta Mukhopadhyay, 'Now streaming: The chilling effect of the new IT rules', *The Indian Express*, 11 March 2021

<<https://indianexpress.com/article/opinion/columns/new-it-rules-ott-platforms-content-youtube-netflix-amazon-7222873/>>

⁶ See: *Offend, Shock or Disturb: Free Speech Under the Indian Constitution*, Gautam Bhatia (OUP, 2018)

⁷ Section 5E, The Cinematograph Act, 1952

⁸ Id

Similar provisions are, however, not made for the proposed amendment, exacerbating concerns of its potential misuse.

Secondly, the proposed amendment does not clarify important details surrounding the reference process. For instance, it is not clear the number of times a certified film can be called for re-examination, nor is it clear if the final decision of the Chairman of the Board would be binding on the government.

Thirdly, we note that the amendment envisages the re-examination process to be restricted to the Chairman of the Board only. The involvement of the rest of the Board, or of the Advisory Panel, as laid down by section 5 of the Act, is excluded from the process completely. Even *arguendo* this amendment was valid, restricting the authorization for the re-examination to only the Chairman, invalidates the Act, inasmuch it ignores the statutorily established structure for film certification.

Fourthly, as had been stated in the *Shankarappa* decision, the government does not have the power to call for the record of proceedings or make any orders with reference to films already certified by the Board or by the Appellate Tribunal. Post the *Shankarappa* decision therefore, the government's power to call for the record of proceedings was *only* restricted to films that were already pending before the Board. This proposed amendment, however, does not clarify if the government's power to receive a reference for re-examination is related to films already certified, or for pending films. In light of this, this amendment could be potentially utilized to circumvent the established judicial precedent.

Finally, it is pertinent to note that the Cinematograph Act 1952 *already contains* a mechanism to address public order concerns that arise post-certification of a film. Specifically, section 13 provides the central government or a local authority the power to suspend the exhibition of a certified film on the grounds that it is "*likely to cause a breach of peace*".⁹ Hence, it is clear that there exists an adequate alternative mechanism to address post-certification concerns. Accordingly, the government's rationale of enacting the proposed amendment so as to address post certification complaints holds no water.

In light of the reasons enumerated above, we are concerned that the proposed amendment could be utilized to circumvent established judicial precedents. Despite the text of the law purportedly restricting the government's power to refer a pre-certified film for 're-examination', the vague construction of the terms may ultimately allow for the reintroduction of the revisionary powers under the Act.

Separation of powers

Section 6(1) of the Act, which had previously provided revisional powers to the government reads:

⁹ Section 13, The Cinematograph Act, 1952. See: *Sony Pictures Releasing of India Ltd v. State of Tamil Nadu, Prakash Jha*, for an interpretation of Section 13.

*“[...], the Central Government may, of its own motion, at any stage, call for the record of any proceeding in relation to any film which is pending before, **or has been decided by, the Board, or, as the case may be, decided by the Tribunal** [...] and after such inquiry, into the matter as it considers necessary, make such order in relation thereto as it thinks fit, [...]”*

*Provided that no such order shall be made prejudicially affecting any person applying for a certificate **or to whom a certificate has been granted, as the case may be,** except after giving him an opportunity for representing his views in the matter*

[...]” (emphasis supplied).

In *K.M. Shankarappa v. the Union of India*¹⁰ the petitioner *inter alia* challenged the constitutional vires of section 6(1), arguing that it violates the doctrine of separation of powers enshrined in the basic structure of the Constitution. The Karnataka High Court ruled in the petitioner’s favour, noting:

*“...there is no strict separation of powers under the Constitution in as much as the judicial functions can also be entrusted to authorities other than the judicial authorities; but **this does not mean that the executive can exercise or can be entrusted with the power of judicial review over the decisions of judicial authority, i.e., a Court or a Tribunal...**”¹¹*

The Supreme Court upheld the decision of the Karnataka High Court on appeal.¹² It went to the extent of observing:

*“Section 6(1) is a **travesty of the rule of law** which is one of the basic structures of the Constitution [...] A Secretary and/or Minister cannot sit in appeal or revision over those decisions. [...] Once an Expert Body has considered the impact of the film on the public and has cleared the film, it is no excuse to say that there may be a law-and-order situation. It is for the concerned State Government to see that the law and order is maintained.”¹³*

Accordingly, the parts of section 6(1) relating to post-certification revisionary powers (*the parts in bold above*) of the government were struck down. The reasoning was that these parts violated the basic structure of the Constitution, in as much as they permitted the executive to scrutinise and interfere with quasi-judicial decisions. Therefore, as of today, section 6(1) contains only those parts that permit the central government to call for the record of proceedings *pending* before the Central Board of Film Certification (“CBFC”) and make an order in that regard.

¹⁰ *K.M. Shankarappa v. Union of India*, 1990 SCC Online Kar 149, (‘Shankarappa, Karnataka High Court’).

¹¹ *Shankarappa*, Karnataka High Court, para 16.

¹² *Union of India v. K.M. Shankarappa*, (2001) 1 SCC 582, (‘Shankarappa, Supreme Court’).

¹³ *Shankarappa*, Supreme Court, para 7; the court also made some comments on legislation overruling judicial decisions, which will be dealt with later.

The *Shankarappa* judgments further referred to a crucial precedent. The first is the landmark decision in *K.A. Abbas v. The Union of India & Anr.*,¹⁴ wherein a five-judge bench of the Supreme Court observed that the appeals from the CBFC should lie to a court or independent tribunal, and not the Central Government. Specifically, the court noted:

*“We express our satisfaction that the Central Government will cease to perform curial functions through one of its Secretaries in this sensitive field involving the fundamental right of speech and expression. Experts sitting as a Tribunal and deciding matters quasi-judicially inspire more confidence than a Secretary and therefore it is better that the appeal should lie to a court or tribunal.”*¹⁵

The spirit of the precedent is to limit executive interference in the functional of quasi-judicial bodies. *K.A. Abbas* specifically limited such interference in the context of the Act and executive scrutiny in film censorship decisions. Moreover, the *Shankarappa* judgments cite basic structure as the fundamental basis of their decision. It is settled that the basic structure is unamendable.¹⁶ Therefore, it is clear that the proposed amendment, which is a mere legislation, cannot seek to alter the fundamental basis behind the *Shankarappa* judgments. Accordingly, the proposed amendment nullifies *Shankarappa* in a manner incompatible with judicial precedents. This is explained in more detail in the next subsection.

Further, the proposed amendment also goes against the spirit of the *KA Abbas*. *KA Abbas* had directed the constitution of the film certification appellate tribunal citing the very purpose of ensuring that the executive does not sit in appeal over the CBFC’s decisions. The proposed amendment, which has been floated right after the central government has recently abolished the appellate tribunal altogether,¹⁷ further solidifies executive control over film censorship.

The proposed amendment is additionally vague in its scope — it claims to deal with “revisionary powers”, and then provides the government the power to direct the CBFC to “re-examine” its certification. It is unclear whether the CBFC is bound by the government’s recommendation.

Legislative nullification of judicial decisions

It is settled law that a legislature cannot annul, nullify or overrule a judicial decision. However, it can fundamentally alter the basis of the decision, that is, lawfully remove the

¹⁴ *K.A. Abbas v. Union of India & Anr.*, (1970) 2 SCC 780, (‘*K.A. Abbas*’).

¹⁵ *K.A. Abbas*, para 9.

¹⁶ For instance, see *Kesavananda Bharati v. State of Kerala & Anr.*, (1973) 4 SCC 225.

¹⁷ Aayush Saxena, ‘Abolishment of Film Certification Appellate Tribunal: Doomsday for Movie Buffs’, *Bar & Bench*, 10 May 2021,

<<https://www.barandbench.com/apprentice-lawyer/abolishment-of-film-certification-appellate-tribunal-doomsday-for-movie-buffs>>

defect or infirmity pointed out by the court.¹⁸ In *Janapada Sabha Chhindwara v. The Central Provinces Syndicate & Anr.*,¹⁹ a five-judge bench of the Supreme Court noted:

*“It is open to the Legislature within certain limits to amend the provisions of an Act retrospectively and to declare what the law shall be deemed to have been, but it is not open to the Legislature to say that, a judgment of a Court properly constituted and rendered in exercise of its powers in a matter brought before it shall be deemed to be ineffective and the interpretation of the law shall be otherwise than as declared by the Court.”*²⁰

Further, in *State of Tamil Nadu v. State of Kerala & Anr.*²¹, another five-judge bench of the Supreme Court has observed:

*“The doctrine of separation of powers applies to the final judgments of the courts. Legislature cannot declare any decision of a court of law to be void or of no effect. It can, however, pass an amending Act to remedy the defects pointed out by a court of law or on coming to know of it aliunde. In other words, a court’s decision must always bind unless the conditions on which it is based are so fundamentally altered that the decision could not have been given in the altered circumstances.”*²²

This position of law has been affirmed by several other decisions.²³ Most recently, in *Medical Council of India v. State of Kerala & Ors.*,²⁴ a division bench of the Supreme Court has cited a catena of decisions to affirm this position of the law.

The proposed amendments, therefore, by seeking to re-introduce the revisional powers of the government, would essentially nullify the decision in the *Shankarappa* judgments. It is important to reiterate that *Shankarappa* and the precedents cited therein deal with constitutional violations, specifically, the basic structure, rule of law and separation of powers. These doctrines are enshrined in the heart of the constitution, and a mere legislation cannot nullify or depart from them.²⁵

The MIB has justified the re-introduction of the revisional power, on the rationale that the envisaged grounds for such power would be ultimately derived from Article 19(2) of the Indian Constitution.²⁶ However, this cannot be used as a justification for the proposed amendment. This is because the post-certification precedents, as cited above clearly show

¹⁸ *People’s Union for Civil Liberties & Anr. v. Union of India & Anr.*, (2003) 4 SCC 399, para 112.

¹⁹ *Janapada Sabha Chhindwara v. The Central Provinces Syndicate & Anr.*, (1970) 1 SCC 509 (*‘Janapada Chhindwara’*).

²⁰ *Janpada Chhindwara*, para 10.

²¹ *State of Tamil Nadu v. State of Kerala & Anr.*, (2014) 12 SCC 696 (*‘Tamil Nadu/Kerala’*).

²² *Tamil Nadu/Kerala*, para 121.

²³ For instance, see *Cauvery Water Disputes Tribunal in re*, (1993) Sup (1) SCC 96(2), paras 76-79, ; *S.T. Sadiq v. State of Kerala*, (2015) 4 SCC 400, para 12.

²⁴ *Medical Council of India v. State of Kerala & Ors.*, (2019) 13 SCC 185, paras 23-45.

²⁵ See: *People’s Union for Civil Liberties & Anr. v. Union of India & Anr.*, (2003) 4 SCC 399, para 112 (*“As a sequel, it is further contended that the question of altering the basis of judgment or curing the defect does not arise in the instant case as the Parliament cannot pass a law in curtailment of fundamental right recognized, amplified and enforced by this Court.”*)

²⁶ MIB Public Comments, Para 3(c)(ii)

that the CBFC *already* evaluates whether or not a film is violative of Article 19(2) in accordance with the principles prescribed by the central government.

This is further evidenced by the presence of section 5B(1) in the Act, which mandates that any film which is against the interests of the grounds enumerated in Article 19(2), shall not be certified by the “*authority competent to grant the certificate*”. While this term is not defined within the Act, the operation of Part II of the Act makes it clear that the competent authority to grant film certification is in fact the CBFC and not the executive.

In any case, the *Shankarappa* judgments struck down section 6(1)’s post certification powers, presumably with the existence of Article 19(2) and section 5B(1) on record. We can therefore presume that even the *Shankarappa* judgments have rejected Article 19(2) as a justification for exercise of post-certification powers. Hence, overall, the proposed amendment is incompatible with the precedents on post-certification exhibition of films.

In the *Shankarappa* case, the Supreme Court further notes, “*The Legislature may, in certain cases, overrule or nullify the judicial or executive decision by enacting an appropriate legislation.*” The government has also cited this sentence as a justification for the proposed amendment.²⁷ This sentence, however, cannot be interpreted in vacuum or isolation. It has to be understood in a manner consistent with the aforementioned position of law.

Certified films and public distribution

We are also concerned that the operationalization of the proposed amendments would impact the status of already certified films and their right to be publicly distributed. The proposed amendment (i) can adversely impact the status of already certified films in a manner incompatible with the judicial precedents; and (ii) can pave the way for the government to shirk its own onus to maintaining public order post certification.

Impact on already-certified films

Generally, courts have been reluctant to prohibit the exhibition of a film in situations where the film has already been granted a CBFC certificate. For instance, in *Prakash Jha Productions and Ors. v. Union of India & Ors.*,²⁸ the apex court noted:

*“...since the expert body has already found that the aforesaid film could be screened all over the country, we find the opinion of the High Level committee for deletion of some of the scenes/words from the film amounted to exercising power of pre-censorship, which power is not available either to any high-level expert committee of the State or to the State Government. **It appears that the State Government through the High-Level Committee sought to sit over and override the***

²⁷ MIB Public Comments

²⁸ *Prakash Jha Productions and Ors. v. Union of India & Ors.*, (2011) 8 SCC 372 (‘Prakash Jha’).

decision of the Board by proposing deletion of some portion of the film, which power is not vested at all with the State.²⁹

Two decisions of the Madras High Court further strengthen this point. The first decision is *V. Ramesh v. The Director General of Police*, where the court observed: “It is clear that once the Censor Board (CBFC) clears the movie, there cannot be any other scrutiny by any other person, group etc. Otherwise, it would amount to “Super Censor Board” which is extra constitutional.”³⁰

Similarly, in *Sony Pictures Releasing of India Ltd. & Ors. v. The State of Tamil Nadu & Ors.*, the Madras High Court noted: “When our Courts have considered it their duty and responsibility to intervene when even the Central Board of Film Certification interferes with the fundamental right of freedom of speech and expression, the **duty and responsibility is heavier in this case where the film has got the Censors' approval** and yet, the petitioners have been prevented from exhibiting the film by an order which has no reasonable basis.”³¹

In tandem with these decisions, several other cases have treated the CBFC certificate as providing a strong mandate for exhibition of a film.³² Cases like *Sanjay Leela Bhansali & Ors. v. State of Rajasthan & Ors.*,³³ and *A.R. Murugadoss v. The State*³⁴ have held that a CBFC certificate is a presumption of the film being fit for exhibition on public order grounds. It is only logical that the same holds true for other grounds enumerated in Article 19(2) of the Constitution too. These observations have been succinctly summarised by the Supreme Court in *Viacom 18 Media Private Limited & Ors. v. Union of India & Ors.*³⁵, wherein the court noted:

*“Once the parliamentary legislation confers the responsibility and the power on a statutory Board and the Board grants certification, non-exhibition of the film by the States would be contrary to the statutory provisions and infringe the fundamental right of the Petitioners [...] As advised at present once the Certificate has been issued, there is prima facie a presumption that the concerned authority has taken into account all the guidelines including public order.”*³⁶

Further, the Expert Committee under the chairmanship of Mukul Mudgal in 2013, had stated that ordinarily, the exhibition of a film which has already been certified should not be suspended. Only in specific circumstances, where the exhibition of such a film leads to ‘breach of public order’ or the likelihood of the same, can the government pass an order

²⁹ *Prakash Jha*, para 26.

³⁰ *V. Ramesh v. The Director General of Police*, 2014 SCC Online Mad 8705, para 25.

³¹ *Sony Pictures Releasing of India Ltd. & Ors. v. The State of Tamil Nadu & Ors.*, 2006 SCC Online Mad 591, para 37.

³² *Indibly Creative (P). Ltd. & Ors. v. Government of West Bengal & Ors.*, (2020) 12 SCC 436, para 43; *Iftikhar Misger & Ors. v. Union of India & Ors.*, MANU/JK/0052/2020, para 13; *Sai Cine Productions v. Central Board of Film Certification & Ors.*, 2019 SCC Online Del 9829, para 12; also see *LIC v. Manubhai D. Shah (Prof.)*, (1992) 3 SCC 637; *Director General, Directorate General of Doordarshan v. Anand Patwardhan*, (2006) 8 SCC 433.

³³ *Sanjay Leela Bhansali & Ors. v. State of Rajasthan & Ors.*, 2018 SCC Online Raj 283, paras 18-19.

³⁴ *A. R. Murugadoss v. The State*, MANU/TN/6937/2018, para 5.

³⁵ *Viacom 18 Media Private Limited & Ors. v. Union of India & Ors.*, (2018) 1 SCC 761 (‘Viacom 18’).

³⁶ *Viacom 18*, para 15.

for the suspension of such film's public distribution.³⁷ However, in such instances, the producer/holder of the certificate must be given a chance to be heard, including allowing them to explain why the distribution should not be suspended.³⁸

The proposed amendments' push for increased post-certification interference, by way of empowering the government to order re-examination of films, runs contrary to the spirit of these precedents.

Onus of governments to maintain public order post-certification

In *Prakash Jha Productions v. the Union of India & Ors.*, the Apex Court affirmed *Shankarappa* to note:

*"It is for the State to maintain law and order situation in the State and, therefore, the State shall maintain it effectively and potentially. Once the Board has cleared the film for public viewing, screening of the same cannot be prohibited in the manner as sought to be done by the State in the present case."*³⁹

This assertion has been followed by *Viacom 18 Media Private Limited v. Union of India & Ors.*, where the Apex Court noted:

*"It is the duty and obligation of the State to maintain law and order in the State. [...] Keeping in view the fact situation, we have no hesitation in stating by way of repetition and without any fear of contradiction that it is the duty of the State to sustain the law and order situation whenever the film is exhibited, which would also include providing police protection to the persons who are involved in the film/in the exhibition of the film and the audience watching the film, whenever sought for or necessary."*⁴⁰

Hence, it is clear that once a film is certified, the onus is on the government to maintain public order. The proposed amendment, therefore, can pave the way for the government to shirk this duty and instead unduly clamp down on freedom of speech and expression.

Recommendation

Delete the proposed *proviso* to section 6(1).

³⁷ Report of the Committee of Experts to Examine Issues of Certification under The Cinematograph Act, 1952, 28 September 2013, <https://mib.gov.in/sites/default/files/Report_of_Expert_committee.pdf>

³⁸ *Id*

³⁹ *Prakash Jha*, paras 25-27.

⁴⁰ *Viacom 18*, para 15; also see *V. Ramesh*, para 17, which states, "assuming for a moment, that if there is any law and problem, the State Government is there to take care of the situation. Once the film is certified for public exhibition by the statutory Board, the petitioner on assumption of law and order problem cannot approach the respondent to register the complaint".

Regulation of film piracy, or anti-camcording measures

The provisions criminalise the act of using audiovisual devices for making copies of or transmitting a film, in any place; and prescribe an increased punishment (from the existing quantum in the Copyright Act, 1957).

Camcording is already an offence under the Copyright Act, 1957

The stated objective of section 6AA and section 7(1A), which is to deter unauthorised publication and sharing of films on the internet, is already met by the existing Copyright Act, 1957 ("**Copyright Act**"). Applying section 51 of the Copyright Act (read with section 14 and section 2(m)), any person commits infringement when they make a copy of the film or communicate it to the public, or distribute it for trade or in a way that prejudicially affects the copyright owner. In addition to instituting a civil lawsuit against the infringers, the Copyright Act also provides the remedy to register a criminal complaint against any person who knowingly infringes or abets the infringement of copyright in a film, and prescribes punishment.

Offence is poorly defined under section 6AA

The actual focus of section 6AA is the act of "*using any audiovisual recording device in a place*" to knowingly make, attempt, or abet the transmission or making of a full copy or part copy of a film. The provision needs to explicitly state what is prohibited: the circulation or publication on the internet, or storage and issuing of full copies to the public, or both. Use of audiovisual recording devices may happen for section 52 purposes (of the Copyright Act) such as making copies of and publication of movie clips for making reviews, criticism, satire, current-events reporting, educational uses, etc. It is only then that the *proviso* to section 7(1A) (in respect of permitting activities permitted under section 52) will be meaningful.

In absence of these corrections, the amendments in the form of section 6AA and section 7(1A) can criminalise the use of devices in good faith, or for purposes such as use of movie clips for making reviews, criticism, satire, etc (that are protected by section 52 of the Copyright Act).

Lacunae in the construction of section 6AA and section 7(1A)

Absence of definitions of key terms

The section does not define “transmit”, or what constitutes as “knowingly” transmitting, or who the “author” is. The Standing Committee Report of 2019 had also recommended for the term ‘knowingly’ to be defined more clearly, which is necessary to establish intent. Given the severe punishment that this amendment proposes, it is crucial to define this term properly.

Overlaps with Copyright Act, 1957

Distinguish or clarify Transmission in relation to ‘Communication to Public’

In the absence of any definition, the act of transmitting appears similar to the act(s) that are covered by the (copyright) right of “communication to the public”.⁴¹ Creating a right that is undefined and akin to an existing IP right makes the provision highly susceptible to misapplication and distorts the law.

Remove Inconsistencies with the Copyright Act, 1957

As per the Copyright Act, permission or license needs to be sought from the copyright owner, and not the author to do any act protected by copyright.⁴² However, section 6AA requires authorization from the authors, which interferes with existing copyright management and licensing regimes. In copyright law, there exists a distinction between the rights of authors and the copyright owners. For instance, the right to sue for infringement vests with the owner, and not the author.⁴³

Although in the case of films, while the law states that the film producer is the author and as well as the first copyright owner, there exist exceptions to the rule. For instance, the producer may not be the copyright owner if the work was commissioned by or created on the directions of the government or a public undertaking.⁴⁴

Severity of Punishment

If a person is convicted under the Copyright Act, 1957 for infringement, they are liable to be imprisoned for not less than six months upto three years, with a fine between fifty thousand to upto two lakh rupees. In comparison, section 7(1A) prescribes a less severe term of imprisonment, however, the monetary penalty is significantly higher. The minimum penalty is three lakh rupees, extendable to 5% of the audited gross production cost. The proposed penalty is a major deviation from the existing one. The production cost of

⁴¹ Section 2(ff) of the Indian Copyright Act, 1957

⁴² Section 51 of the Indian Copyright Act, 1957

⁴³ Section 52 of the Indian Copyright Act, 1957

⁴⁴ Section 17(dd) of the Indian Copyright Act, 1957

movies distributed in theatres may range from a couple of crore rupees to a hundred crore rupees. It is unreasonable to impose such strict costs at the outset - clearly not a proportionate measure in any way. Even the Copyright Act, 1957 provides for a graded penalty system (distinguishing between first-time and repeat offenders).⁴⁵

Recommendation

Since the offence envisaged to be regulated is already covered by the Copyright Act, the enactment of this penalty would be redundant, and unnecessarily stringent. Accordingly, we recommend deletion of the proposed amendments on anti-camcording. At the very least, we propose that s. 6AA be amended to address the “use of the transmission or copy”, as opposed to the current formulation which penalises “use of audiovisual recording device” for purposes of transmitting or making copies.

⁴⁵ Section 63A of the Indian Copyright Act, 1957