To,

Mr. Ravinder IAS,
Joint Secretary,
Department for Promotion of Industry and Internal Trade,
Ministry of Commerce & Industry,
Udyog Bhawan, New Delhi 110011,
India

Subject: Submission against decriminalization of minor offenses under the Copyright Act, 1957

Dear Sir,

We, the Indian Music Industry ("IMI"), welcome the opportunity to present our submissions against decriminalization of minor offenses under the Copyright Act, 1957.

IMI represents the business and trade interests of the Indian recorded music companies on a pan-India basis with a membership base of 204 music labels. IMI is registered under the West Bengal Societies Registration Act, 1961. IMI is affiliated to IFPI, the association representing the recorded music industry worldwide.
**Background**

Today, technology has advanced at a breath-taking pace, enabling access to a large variety of content without limitation of place or time. Globally, the number of internet users has increased in the past 10 years from 1.97 bn in 2009 to 4.54 bn in 2019\(^1\). In India alone, the number of active internet users stands at 504 mn as of November, 2019\(^2\).

The explosion in the number of users online, along with presenting opportunities for businesses to grow, has also become a breeding ground for criminals with wide scale infringement of the valued rights of those who create content. The range of legitimate content services online has been accompanied with an increase in infringement of content online as it provides the greatest opportunities for infringement without detection.

The recorded music industry provides support to formal partner industries as well as informal industries. An estimated INR 8,660 Cr. and 36,800 FTE (Full Time Employment) generated by formal partner industries of television, radio, live events, films and audio OTT, is attributed to the impact of the recorded music industry\(^3\). Thereby, the recorded music industry in India sized at INR 1,278 Cr.\(^4\) makes a sizeable contribution to the Indian economy, both directly and indirectly. In order to ensure that we can protect this investment, there must be effective and appropriately targeted laws and a clear message needs to be sent to infringers and violators of copyright that unauthorised exploitation or abetment of such unauthorised exploitation of intellectual property is impermissible in law and equity.

The issue of copyright piracy in recorded music industry has evolved from the physical realm to digital. The earlier methods of tracking down the offenders and destroying the physical paraphernalia has become obsolete. Digital piracy is resulting in significant revenue losses to the tune of INR 1500 Cr\(^5\) to recorded music industry due to illegal downloads, stream-ripping

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\(^2\)https://tech.hindustantimes.com/tech/news/india-now-over-500-mn-active-internet-users-21-more-women-are-online-now-iamai-story-zK5AWrXyA2WzvyRJFExDl.html#:~:text=According%20to%20IAMAI%27s%20Digital%20in,the%20end%20of%20November%202019.

\(^3\) Deloitte – IMI Economic Impact of the Recorded Music Industry in India, 2019

\(^4\) IFPI Global Music Report 2020

\(^5\) Vision 2022 Document; The Indian Music Convention 2018,
and infringing websites hosting pirated content. Even as we debate different means for countering piracy, it is pertinent to re-iterate that the aftermath of digital piracy is not just revenue losses but the misguided revenues are used to fuel adverse activities such as terrorism.

**The Connection between Copyright Infringement (Piracy) and Terrorism**

Intellectual property crime is one of the fastest growing criminal enterprises worldwide. The primary reason is that intellectual property theft is a low risk, high return crime. According to a United States Trade Representative’s Special 301 report, the real incentive for criminals to begin counterfeiting and piracy operations is that they can begin illegal operations with little capital investment and even if they are caught and charged with a crime, the penalties in most countries do not offer a sufficient deterrent. Apart from infringement of private rights, counterfeiting and piracy activities also give rise to serious organised crimes. Counterfeiting, piracy and smuggling also finance criminals and terrorists who deal in counterfeit goods to launder illegal money. It is now considered fairly undisputed that Copyright Piracy has been infamously considered as an easy choice for funding terrorist activities.

There have been several intelligence reports originating from Britain and USA that trace back the revenues generated from websites offering infringing copyrighted content to the operations of Al Qaeda as also regional terrorist organisation such as Hezbollah and Hamas. It was reported that in 2015, there was a $2.5 million transfer from a DVD pirate Assad Ahmad Barakat to Hezbollah, who received a “thank you” note from the leader of Hezbollah. In fact, in 2017, Mr. Rajnath Singh, the then Home Minister of India had announced a special course

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7Office of the United States Trade Representative, 2003 Special 301 Report

8Mr. Rajnath Singh on Piracy, copyright violation sources of terror funding, available at https://www.livemint.com/Politics/OXVUwsGWgXSvglOa1VGcBM/Piracy-copyright-violation-sources-of-terror-funding-Rajna.html

9(Stephen Carlisle, “How Copyright Piracy Funds Terrorism and Google Removes 180 Million Videos from YouTube,” NovaSoutheasternUniversity.edu,)
in all police training colleges on intellectual property rights stating that piracy and copyright violations are a source of terror financing and money laundering.\(^\text{10}\)

Terror groups, especially, in developing countries have used copyright piracy for funding their terror activities. Developing countries are easy targets for copyright piracy due to the low rate of criminal enforcement mechanism.\(^\text{11}\) In the United States, intellectual property theft/piracy is treated as a white-collar crime and can be investigated by even the FBI.\(^\text{12}\)

Digital Piracy and the platforms supporting it in the current form is a hydra-headed monster; it not only masks behind the veil of anonymity but also regenerates into new forms. The website – songs.pk – is the most visible example.

**Protection of valuable content of the copyright owners under international treaties:**

IMI is of the opinion that the Government should extend their support in protecting valuable creative content by **not** decriminalizing provisions of the Copyright Act, 1957.

Decriminalization of offenses under the Copyright Act, 1957 will result in disturbing the precarious balance between protecting rights of creators and maintaining public access.

Imposing Criminal Sanctions for copyright infringement is in line with India’s international obligations. India is a signatory to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) administered by WTO, which provides for criminal sanctions to apply to copyright infringement occurring on a commercial scale. Therefore, India is bound by its international obligations to impose criminal sanctions for copyright infringement.

**Article 61 of TRIPs provides as below:**

*Members shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale. Remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity. In appropriate cases,*


remedies available shall also include the seizure, forfeiture and destruction of the infringing goods and of any materials and implements the predominant use of which has been in the commission of the offence. Members may provide for criminal procedures and penalties to be applied in other cases of infringement of intellectual property rights, in particular where they are committed wilfully and on a commercial scale.

The international framework providing for the criminalisation of online copyright infringement is reflected in the domestic law of many countries in the world. Annexure A provides for an overview of maximum prison sentences for piracy in EU Member States.

**International Legal Framework providing for the criminalisation of online copyright infringement**

A few examples of countries which provide for criminalisation of online copyright infringement and cases from such jurisdictions are provided below.

**GERMANY**

Criminal liability for copyright infringements is addressed in Article 108 and Article 108a of the Copyright Act:

**Article 108 Infringement of Neighbouring Rights**

(1) Any person who, other than in a manner allowed by law and without the right holder's consent:

1. reproduces, distributes or publicly communicates a scientific edition (Article 70) or an adaptation or transformation of such edition;

2. exploits a posthumous work or an adaptation or transformation of such work contrary to Article 71;

3. reproduces, distributes or publicly communicates a photograph (Article 72) or an adaptation or transformation of a photograph;

4. exploits a performance contrary to Articles 74, 75(1) or (2) or Article 76(1);

5. exploits an audio recording contrary to Article 85;
6. exploits a broadcast contrary to Article 87;

7. exploits a video or video and audio recording contrary to Article 94 or Article 95 in conjunction with Article 94;

shall be liable to imprisonment for up to three years or a fine.

(2) The attempt to commit such an offense shall be punishable.

Article 108a Unlawful Exploitation on a Commercial Basis

(1) Where the person committing the acts referred to in Articles 106 to 108 does so on a commercial basis, the penalty shall be imprisonment for up to five years or a fine.

(2) The attempt to commit such an offense shall be punishable.

Article 108 of the Copyright Act provides that is a criminal offence to violate a record producers’ right of making available to the public, as provided for under Article 85 of the Copyright Act. Section 26, 27 of German Criminal Code provides for criminal liability for inciting and/or being an accessory to a criminal offence.

Case Laws

In 2012, in Germany, the Munich District Court found the former administrator of the cyberlocker Uploaded (formerly www.uploaded.to but now www.uploaded.net) liable for criminal offences relating to unauthorised distribution of copyright-protected content and ordered him to pay a fine of €144,000. The administrator was also found to have been operating a linking site called www.DCremix.to. The Court noted the significant revenues he had derived from advertising and the sale premium accounts, as evidenced by the information he had made public on his Facebook page which showed pictures of his Lamborghini and other status symbols.13

In March 2012, the Chemnitz District Court in Germany, found that an individual behind the operation of both a cyberlocker “filefox” and a linking site at www.rmx4u.com was

13See: case no. 1111 Cs 404 Js 44538/07 -8 October 2012. A copy of a judgment (in German) is available from http://raschlegal.de/uploads/media/AG_Muenchen__AZ__Cs_404 Js_44538-07.pdf
criminally liable for aiding and abetting the copyright infringements of the website’s users. The offender was released on probation for a period of 1 year and 6 months.\textsuperscript{14}

**SWEDEN**

Under § 53 of the Copyright Act, anyone who takes actions which involves infringement of the copyright associated with the work can be sentenced to a fine or imprisonment for a maximum of two years, provided that the infringement was intentional or the result of gross negligence. Provisions for sentencing a person for complicity in breach of copyright are included in Chapter 23 § 4 of the Criminal Code, which states not only the person who committed the act can be found liable, but so too can a person who aided and abetted the act in word or deed. The Code also prescribes that this shall apply to any action for which a prison sentence can be imposed under other laws or statutes.

**Case Laws**

Since 2005 there have been at least 33 cases brought against individuals either uploading material to BitTorrent sites or maintaining a hub for infringing materials. These individuals have been accused of copyright infringement or aiding and abetting copyright infringement and have received either a suspended sentence or a prison sentence of between 4 months to 1 year or a fine.

**The Pirate Bay** - Swedish prosecutors commenced criminal proceedings against the operators of the BitTorrent indexing website, the Pirate Bay, in April 2008. The Stockholm District Court held the defendants liable for complicity in breach of the Copyright Act, pursuant to the Swedish Criminal Code, and ordered the defendants to serve prison sentences and pay compensation to rights owners. Having found that the principal offence of copyright infringements by the site’s users had been established (ie. the unlawful making available of copyright protected material), the Court’s findings turned on its examination of the evidence as to whether the defendants had encouraged those infringements, and accordingly, was complicit in them. The Court held:

\textsuperscript{14} Case no. 14 Ds 940 Js 2020/08 -26 March 2012
By providing a website with advanced search functions and easy uploading and downloading facilities, and by putting individual filesharers in touch with another through the tracker linked to the site, the operation run via The Pirate Bay has, in the opinion of the District Court, facilitated and, consequently, aided and abetted these offences.

The defendants argued that they should not be held liable since they had no knowledge of the existence of the particular rights or works specified in the indictment, and therefore, have not intentionally committed the principal offences relating to the specific titles named in the indictment. The Court held that it was sufficient for them to have had intent to bring about the existence of copyright-protected material on the website. The evidence adduced in the case made it clear that the defendants were aware that infringing material was available for sharing via the website. The Court also found that it has been established that the torrent files on the website related to a significant extent to copyright-protected material. The Court also regarded evidence of receipt of advertising revenue as establishing that the utilisation of copyright works through the website had taken place within the framework of a commercial purpose.

The Court found that the defendants could not rely on any of the provisions of the Electronic Commerce Act, which implemented the European E-Commerce Directive, and limited the liability of online service providers. The Court found the Electronic Commerce Act was applicable to the file sharing services provided by the Pirate Bay, because the services were “supplied at a distance, electronically, and at the individual request of users”. Further, the revenue obtained from advertising was found to satisfy the requirement that compensation be derived from the provision of the services. However, the circumstances of the Pirate Bay were not found to fall within the range of protected activities, and in particular, with respect to the hosting of torrent files, because “it must have been obvious to the defendants that the website contained torrent files which related to protected works”.

A request to refer a question to the European Court of Justice regarding the application of the E-Commerce Directive to the case was refused.

The District Court’s judgment was upheld on appeal (although the sentences ordered against the defendants were reduced). In February 2012, the Swedish Supreme Court refused applications for further leave to appeal from those convictions.
UNITED STATES

17 USC § 506 provides as follows:

(a) CRIMINAL INFRINGEMENT. —

(1) IN GENERAL. — Any person who wilfully infringes a copyright shall be punished as provided under section 2319 of title 18, if the infringement was committed —

(A) for purposes of commercial advantage or private financial gain;

(B) by the reproduction or distribution, including by electronic means, during any 180-day period, of 1 or more copies or phonorecords of 1 or more copyrighted works, which have a total retail value of more than $1,000; or

(C) by the distribution of a work being prepared for commercial distribution, by making it available on a computer network accessible to members of the public, if such person knew or should have known that the work was intended for commercial distribution.

Under 18 USC § 2, “whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal”.

Case laws

In January 2012, the United States Department of Justice took action against the companies and individuals associated with the well-known cyberlocker MegaUpload, which among other things was offering financial incentives to users to upload popular content. The indictment alleges, conspiracy to commit copyright infringement and money laundering. Multiple bank accounts and millions of dollars’ worth of property were seized by the authorities. Extradition proceedings against the site’s founder, Kim Dotcom, to bring him to trial in the United States are continuing in New Zealand. The indictment alleged that the estimated harm caused by the conspirators’ conduct was over $500 million with the conspirators earning in excess of $150 million in illegal profits from the sale of premium accounts on the site and $25 million in advertising revenue.


Recommendations

As stated above, IMI strongly recommends against decriminalizing of offenses under the Copyright Act, 1957. Additionally, IMI would like to make the following suggestions with respect to the existing provisions under the Copyright Act, 1957 to enhance the penalties provided therein—

1. Changes to Section 64 of the Copyright Act, 1957

IMI proposes the introduction of a provision under Section 64 of the Copyright Act, 1957 for introduction of an expedited process to effectively tackle copyright infringement.

IMI suggests the following in this respect—

- Inclusion of a provision under Section 64 wherein in the event that a complaint of infringement is filed by the copyright owner himself along with proof of ownership such as a registration certificate, such a complaint be routed through a special procedure and the complaint be resolved with immediate effect, without having to undertake the regular procedure as laid down under Section 64(1) of the Copyright Act, 1957.

- Strict penalty provisions be introduced in case of leakage of information regarding complaint against copyright infringement.

We propose that the Copyright Rules, 2013 be modified to the same effect.

2. Online copyright offences be treated as seriously as physical copyright infringement

IMI believes that online copyright offences should be treated as seriously as physical copyright infringement. Harmonising the treatment of such offences shall provide a deterrent effect to criminals and where criminality continues, tangible punitive action.
Such a practice is followed by UK, considered to be a global leader in protection of intellectual property rights. Under the Digital Economy Act, 2017, copyright criminal offenders can be punished with an unlimited fine and up to 10 years in prison. A maximum of 10 years allows the courts to apply an appropriate sentence to reflect the scale of the offending.\textsuperscript{15} Capping the maximum available sentence at a lower level such as three years as provided for under Section 63, Section 63A and Section 63B unnecessarily limits the ability of the courts to apply appropriate sentences in the more serious cases of copyright infringement.

IMI also welcomes the opportunity to make an online/ in-person representation of its concerns before the DPIIT and/or to provide further written information in relation to any questions.

Sincerely,

Blaise Fernandes
President & CEO
The Indian Music Industry

\textsuperscript{15}https://www.lexology.com/library/detail.aspx?g=50abbceb-a59b-4ef5-ba89-5d51dd23dd34
## ANNEXURE A

### MAXIMUM PRISON SENTENCES FOR PIRACY IN EU MEMBER STATES

<table>
<thead>
<tr>
<th></th>
<th>Non-commercial</th>
<th>Commercial</th>
<th>Repeat Offence</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>6 months</td>
<td>2 years</td>
<td>n/a</td>
</tr>
<tr>
<td>Belgium</td>
<td>€100,000 fine</td>
<td>€100,000 fine</td>
<td>3 years</td>
</tr>
<tr>
<td>Cyprus</td>
<td>3 years(^{16})</td>
<td>3 years</td>
<td>4 years</td>
</tr>
<tr>
<td>Czech</td>
<td>2 years</td>
<td>5 years</td>
<td>n/a</td>
</tr>
<tr>
<td>Denmark</td>
<td>6 years</td>
<td>6 years</td>
<td>n/a</td>
</tr>
<tr>
<td>Estonia</td>
<td>3 years</td>
<td>3 years</td>
<td>n/a(^{19})</td>
</tr>
<tr>
<td>Finland</td>
<td>Fine(^{20})</td>
<td>2 years(^{6})</td>
<td>n/a</td>
</tr>
<tr>
<td>France</td>
<td>3 years</td>
<td>3 years(^{21})</td>
<td>n/a</td>
</tr>
<tr>
<td>Germany</td>
<td>3 years</td>
<td>5 years</td>
<td>n/a</td>
</tr>
<tr>
<td>Greece</td>
<td>1 year</td>
<td>10 years</td>
<td>2 - 10 years(^{22})</td>
</tr>
<tr>
<td>Hungary</td>
<td>1 year</td>
<td>8 years</td>
<td>n/a</td>
</tr>
<tr>
<td>Ireland</td>
<td>5 years(^{23})</td>
<td>5 years</td>
<td>n/a</td>
</tr>
<tr>
<td>Italy</td>
<td>€2,065 fine</td>
<td>4 years</td>
<td>n/a</td>
</tr>
</tbody>
</table>

\(^{16}\) Data collated in 2012. All sentences of imprisonment may be accompanied by a fine.  
\(^{17}\) E.g., making pirate copies for sale.  
\(^{18}\) Cyprus: only non-commercial violation is distribution of pirate copies to prejudice of copyright holder.  
\(^{19}\) Estonia: a mere trader in pirate copies is punishable with a misdemeanour fine. For a second offence within one year, the maximum sentence is 3 years’ imprisonment. Pirate manufacturers qualify for a 3 year maximum for a first offence.  
\(^{20}\) Finland: maximum monetary penalty in either case is 120 “day fines”, a day fine being normally assessed as one sixtieth of the offender’s net monthly income.  
\(^{21}\) France: where offence is committed in the context of organised crime, maximum is increased to 5 years.  
\(^{22}\) Greece: Maximum increased to 2 years where financial gain sought or damage caused is “particularly great”. 10-year maximum applicable where defendant previously sentenced to immediate imprisonment for a copyright offence; or where offence committed by way of standard practice or defendant poses a serious threat to the protection of copyright.  
\(^{23}\) Ireland: only non-commercial violation is making available to the prejudice of the copyright owner.
<table>
<thead>
<tr>
<th>Country</th>
<th>Penalty</th>
<th>Fine</th>
<th>2 years</th>
<th>3 years</th>
</tr>
</thead>
<tbody>
<tr>
<td>Latvia</td>
<td>Fine</td>
<td></td>
<td>2 years</td>
<td>3 years</td>
</tr>
<tr>
<td>Lithuania</td>
<td>2 years</td>
<td>2 years</td>
<td>n/a</td>
<td></td>
</tr>
<tr>
<td>Luxemburg</td>
<td>€250,000 fine</td>
<td>€250,000 fine</td>
<td>2 years</td>
<td></td>
</tr>
<tr>
<td>Malta</td>
<td>None</td>
<td>1 year</td>
<td>n/a</td>
<td></td>
</tr>
<tr>
<td>Netherlands</td>
<td>6 months</td>
<td>4 years</td>
<td>n/a</td>
<td></td>
</tr>
<tr>
<td>Poland</td>
<td>2 years</td>
<td>5 years</td>
<td>n/a</td>
<td></td>
</tr>
<tr>
<td>Portugal</td>
<td>3 years</td>
<td>3 years</td>
<td>6 years</td>
<td></td>
</tr>
<tr>
<td>Slovakia</td>
<td>2 years</td>
<td>5 years</td>
<td>n/a</td>
<td></td>
</tr>
<tr>
<td>Slovenia</td>
<td>3 months</td>
<td>3 years</td>
<td>n/a</td>
<td></td>
</tr>
<tr>
<td>Spain</td>
<td>None</td>
<td>4 years</td>
<td>n/a</td>
<td></td>
</tr>
<tr>
<td>Sweden</td>
<td>2 years</td>
<td>2 years</td>
<td>n/a</td>
<td></td>
</tr>
<tr>
<td>UK</td>
<td>10 years</td>
<td>10 years</td>
<td>n/a</td>
<td></td>
</tr>
</tbody>
</table>

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24 Slovakia: maximum increased to 5 years if defendant “has committed the act to a significant extent”.
25 Spain: criminal liability is engaged where the defendant seeks to obtain a benefit from the infringement. This may capture any form of exchange, such as use of eDonkey or BitTorrent-type P2P systems.
26 UK: only non-commercial violation is distribution or communication to the public to the prejudice of the copyright owner. For Internet infringements, commercial or non-commercial, the maximum is 2 years.