

To be or not to be: Parallel imports of publications

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In an era of free trade, restrictions on parallel international trade in copyrighted materials seem anomalous. India sought to correct the anomaly by amending section 2(m) of the Copyright Act, 1957, to expressly legalize parallel imports. The proposed amendment however created a furore in India's publishing industry with major publishing houses claiming that parallel import restrictions are *sine qua non* for their survival and any change would dismantle the very fabric of creative writing in English in India.

The government backtracked. The Copyright (Amendment) Act, 2012, was passed without the proposed amendment and the National Council of Applied Economic Research (NCAER) was asked to study what harm would ensue to copyright-based industries if restrictions were removed. With the release of the NCAER's report in March 2014, a decision on parallel imports is expected soon.

Legality and current status

Parallel importation occurs when a lawfully made and legitimately acquired copyrighted product is subsequently imported into a different country without the permission of the copyright owner. The legality of parallel imports depends on the scope of the exhaustion doctrine followed in a particular territory. The doctrine stipulates that once the "first sale" of a copyrighted product has been lawfully made, the owner's rights are exhausted insofar as sale or distribution of the legitimately sold copyrighted work is concerned, though all other exclusive rights remain intact.

In a country that follows international exhaustion, a first sale anywhere in the world would exhaust the right of the copyright owner in respect of that country as well. Whereas in the case of national or regional exhaustion, the right of the copyright owner is exhausted only if the

first sale has been made in that country or region. Parallel imports are feasible only where international exhaustion is followed.

As for India, while the Copyright Act does not expressly specify the scope of exhaustion, Delhi High Court in *John Wiley & Sons v Prahabhat Chander Kumar Jain* (2010) held that the act can only be taken to mean national exhaustion, thus making parallel imports to India illegal.

Concerns and responses

Legalizing parallel imports would significantly enhance accessibility and affordability of books in India, particularly educational books, and allow libraries and organizations to import required books from anywhere in the world. Publishers, however, argue that territoriality is an important aspect of copyright. Under the internationally accepted business model of the publishing industry, different publishers have rights to publish territory-specific editions thereby facilitating price discrimination which benefits consumers by encouraging production in line with the needs of specific markets.

The industry's major concern is premised on the assumption that once parallel import restrictions are eliminated, publishers abroad, which usually print excess amounts of most titles, would flood Indian markets with low-priced "remainders" and the local industry, unable to sustain competition, may eventually wane. This concern has merit but, as the NCAER report rightly points out, steps such as imposing anti-dumping duties can resolve this problem.

Publishers also contend that removing parallel import restrictions would lead to low-priced editions (LPEs) of foreign publications being exported from India back to their country of origin to exploit the price gap and thus foreign publishers would no longer produce subsidized

versions for India. However, as the NCAER report rightly states, export and imports are two different subjects and eliminating parallel import restrictions cannot be said to simultaneously legalize export of LPEs from India, which can be controlled by authorities at the border.

Publishers further argue that lifting of parallel import restrictions would make India an open copyright market giving unqualified access to everyone while Indian publishers do not have similar access to other markets. This may not be totally correct in view of the US Supreme court case of *Kirtsaeng v John Wiley & Sons*, wherein it was held that the first sale doctrine "applies to copies of copyrighted work lawfully made abroad" and legalized parallel imports to the US.

The NCAER's report urges producers, consumers and other stakeholders to reach a mutual understanding. If this is not possible, the report suggests going ahead with the amendment of section 2(m) of the act, which essentially would mean legalizing parallel imports in India. The report however cautions that this should be done with requisite safety valves and its impact on the publishing industry should be monitored over time.

After the NCAER report's strong endorsement, India may finally accept parallel imports. The restrictions that publishers are arguing for imply control over distribution channels of copyrighted materials even after first sale, a right not statutorily recognized. Moreover, it is the consumers' prerogative to buy books they want even if their choice is low-quality remainders from abroad. Removal of parallel import restrictions thus is logical and would transform India's publishing industry into a self-sustaining sector, independent of regulatory crutches.

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