

Why parallel importation of books should be allowed

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There has been much controversy lately with some publishers trying to stop the government from amending s.2(m) of the Indian Copyright Act, clarifying that a parallel import will not be seen as an "infringing copy". This blog post argues that the government should, keeping in mind the larger picture, still go ahead and legalise parallel imports.

[Updated Wednesday, February 2, 2011, to respond to Thomas Abraham's extensive and thoughtful rebuttal of the earlier version this post.]

First off, here is the controversial clause, with the proposed amendment (the insertion of a "proviso", in legalese) being emphasised in bold font-face:

The amendment

2(m) "infringing copy" means,—

(i) in relation to a literary, dramatic, musical or artistic work, a reproduction thereof otherwise than in the form of a cinematographic film;

(ii) in relation to a cinematographic film, a copy of the film made on any medium by any means;

(iii) in relation to a sound recording, any other recording embodying the same sound recording, made by any means;

(iv) in relation to a programme or performance in which such a broadcast reproduction right or a performer's right subsists under the provisions of this Act, the sound recording or a cinematographic film of such programme or performance, if such reproduction, copy or sound recording is made or imported in contravention of the provisions of this Act;

Provided that a copy of a work published in any country outside India with the permission of the author of the work and imported from that country shall not be deemed to be an infringing copy.

Some claim that this amendment to s.2(m) ("provided that... copy") has the potential to destroy the publishing industry. The most lucid explanation of this was in a recent op-ed by Thomas Abraham in the Hindustan Times,

very ominously titled *The Death of Books*. However it seems to us that the publishing industry—especially foreign publishers with distributorships in India—don't want to open themselves up to competition in the distribution market, and are opposing this most commendable move.

What is parallel importation?

Before getting into explanations of why allowing for parallel importation is good, and how the arguments otherwise fall short, we should examine what parallel importation is.

"Parallel import, insofar as copyright is concerned, involves an “original” copyright product (i.e. produced by or with the permission of the copyright owner in the manufacturing country) placed on the market of one country, which is subsequently imported into a second country without the permission of the copyright owner in the second country. For instance, the copyright owner of a book produced in India places the book on the market in India. A trader buys 100 copies of the book from India and imports them to China without the permission of the copyright owner of the book in China. This act of the trader bringing the books into China is called parallel import, the legality of which depends on the copyright law of the importing country (namely China in this example)." (Consumers International, *Copyright and Access to Knowledge: Policy Recommendations on Flexibilities in Copyright Laws* 23 (2006).)

Some fear-mongers try to equate parallel importation with 'anarchy' in markets, and some confusedly claim that this amendment would allow *infringing* copies of books would be permitted. That is simply not true. For parallel importation to be said to happen, the sale must itself be legal. If it is an illegally sold copy (a pirated copy of a book, for instance) that is imported, then it will count as a black market import—not as a parallel import. Allowing for parallel imports will only dismantle monopoly rights over importation, and the amendment makes that amply clear.

Harms on existing books of not allowing parallel importation

Libraries/second-hand bookshops/consumers have no way of knowing if a book was originally imported legally or not, since there is no easy way of telling a parallel-ly imported copy apart from a exclusively imported copy. If one of them, even unknowingly buys/sells a foreign edition about which they are not sure and it turns out it was not legally imported (and there are literally thousands of such books, and I personally own at least a couple dozen foreign editions bought from various second-hand bookshops) then they are committing copyright infringement.

This precisely was argued by the library associations and others in *amici* briefs to the US Supreme Court in the *Costco v. Omega* case. For instance, the brief for the the American Library Association, the Association of College and Research Libraries, and the Association of Research Libraries in Support of Petitioner argues that:

By restricting the application of [the first sale doctrine] to copies manufactured in the United States, the Ninth Circuit’s decision threatens the ability of libraries to continue to lend materials in their collections. Over 200 million books in U.S. libraries have foreign publishers. Moreover, many books published by U.S. publishers were actually manufactured by printers in other countries. Although some books indicate on their copyright page where they were printed, many do not. Libraries, therefore, have no way of knowing whether these books comply with the Ninth Circuit’s rule. Without the certainty of the protection of the first sale doctrine, librarians will have to confront the difficult policy decision of whether to continue to circulate these materials in their collections in the face of potential copyright infringement liability. For future acquisitions, libraries would be able to adjust to the Ninth Circuit’s narrowing of [the first sale doctrine] only by bearing the significant cost of obtaining a “lending license” whenever they acquired a copy that was not clearly manufactured in the United States.

and, the brief for the Public Knowledge, American Association of Law Libraries, American Free Trade Association, the Electronic Frontier Foundation, Medical Library Association, and the Special Libraries Association in Support of Petitioner states:

The uncertainty created by the Ninth Circuit’s holding [against parallel importation] will harm used bookstores, libraries, yard sales, out-of-print book markets, movie and video game rental markets, and innumerable other secondary markets. Owners of copyright works or goods containing copyrighted elements manufactured abroad will be unable to dispose of these products without authorization at the risk of liability under copyright law’s extensive damages provisions. Furthermore, the chilling effects of the Ninth Circuit’s holding will extend beyond works manufactured abroad. Owners of copies of works will be unable to determine whether they are protected by [the first sale doctrine], as they will not always know where their goods were manufactured. Copyright holders will have little incentive to make clear the location of manufacturing of their copyrighted works,³ as greater uncertainty means a greater ability to sell the right to distribute the goods within the United States. Secondary market sellers who cannot afford to purchase this right will be unable to do business unless they are prepared to engage in lengthy and expensive litigation with an uncertain result. A wide variety of important secondary markets in copyrighted works

and goods with copyrighted elements will suffer without the protection of the first sale doctrine.

Benefits of parallel importation

Dismantling distribution monopoly rights

The benefits that will accrue from allowing for parallel importations are huge. Currently a large percentage of educational books in India are imported, but with different companies having monopoly rights in importation of different books. If this was opened up to competition, the prices of books would drop, since one would not need to get an authorization to import books—the licence raj that currently exists would be dismantled—and Indian students will benefit. This is especially important for students and for libraries because even when low-priced editions are available, they are often of older editions.

Allowing people to import goods without permissions (with appropriate duties) is taken for granted in all other areas, so why not copyrighted works? After all, it is not the act of publication that gets affected, but the right of exclusive distribution. And if that goes away after first sale internationally, that's not a bad thing at all.

Generally, there are two main benefits of allowing for parallel importation: faster introduction of the latest international releases into the domestic country, and lowered prices by decreasing the costs imposed by a monopoly right over distribution.

All the foreign books that an online bookseller like Flipkart delivers in India are procured from international sources. Without parallel importation, Flipkart will have to ask for permission from the book publishers for each foreign book each time it makes a sale. This would cripple Flipkart's business model.

Helping book publishers

Book publishers will be benefited by parallel importation, just as they are benefited by the existence of libraries and second-hand book stores. Libraries and second-hand book stores help with market segmentation, providing access to people who can't afford expensive books at much lower rates, often free. However, the existence of second-hand book stores in almost every city in India—I have personally bought second-hand books everywhere from Jhansi (Leo Tolstoy's *War and Peace*) to Delhi's Darya Ganj market (Edmund Wilson's *Letters on Literature and Politics*)—does not prevent me from buying books first hand. Indeed, Wilson's *Letters* is out of print, and cannot be bought in a store like Crosswords or Gangaram's.

Why do I emphasise second-hand books and libraries? They are artefacts of something variously known as the "first sale doctrine" or the "doctrine of exhaustion" in copyright law: After the first sale of a book, subsequent sales, rentals, etc., cannot be controlled by the copyright owner. Parallel importation

is simply a matter of applying this doctrine to the first sale of the book internationally rather than its first sale in India.

Thus we see that the existence of second-hand books, libraries, and parallel imports, are all dependent on the same rule of copyright law: the first sale doctrine. This doctrine is enshrined in s.14(b)(iv) of the Indian Copyright Act, and has been interpreted by the Delhi High Court to mean first sale in India. The present amendment changes that to mean first sale internationally.

The introduction of the modern "public library" in the mid-19th century led to a surge in literacy, readership, and book sales, and not a decline. Similarly, there is no reason to suppose that allowing parallel importations will lead to a decline in book sales.

Helping libraries and the print-disabled

Even currently, many people buy books directly from abroad and have them shipped to India. This is especially necessary for libraries whose patrons—scholars and students—very often need access to the latest books. Currently, libraries often buy books from abroad from Amazon, Flipkart, Alibris, etc. Such acts, within a strict reading of the law, are not legal, since they fall afoul of s.51(b)(iv), since the import is not for the "private and domestic use" of the libraries. This is also of especial concern for organizations working with print-disabled individuals, since the number of books legally available domestically in formats accessible by the print-disabled is very small, and often need to be imported.

Helping all consumers

An excellent report was prepared in 2006 by Consumers International, in which they studied the costs of textbooks in eleven countries, including India, by average purchasing power of each country's citizens, instead of absolute cost. Based on that study, and a detailed investigation of international treaties on copyright and the flexibilities allowed in them, Consumers International recommended that India should amend our law to make it clear that parallel importation of copyrighted works is legal (on page 51 of the report).

Rebutting objections

I will address a few specific objections raised by Mr. Abraham, Nandita Saikia, and others.

1. Authors' won't lose out on royalties

Authors do not lose out on royalties because of parallel importation, just as they do not lose out on royalties because of libraries, nor because of second-hand book stores. For parallel importation to take place, the books have to be purchased legally, and that first sale itself ensures that authors are paid royalties.

Of course, publishing contracts often have a clause that remaindered books will not garner royalties. But in that case, the problem is not parallel importation, but the overstocking and subsequent remaindering of books. The authors wouldn't be paid (or would be paid very little) for remaindered books even if the books weren't imported into India. Parallel importation does not in any way change that.

Indian authors

There is a worry that an Indian author would be hit if remaindered copies of his/her books started entering the Indian market. That would mean that foreign publishers had overstocked that Indian author's book, i.e., that the expectation from the book was much higher than the actual demand. If this happens infrequently, then the author hasn't much to worry about (since remainders aren't a big problem). If it happens frequently, then firstly the publisher should re-adjust to the market and realize that demand is low. Secondly, the author needs to worry more about quality of the book (and whether it caters to foreign audiences) than the possible effects that the availability of cheaper copies of that book would have.

2. Remaindered books are in publishers' control

India has amongst the cheapest book prices in the world. Then why would book publishers be wary of even cheaper books overrunning the Indian market? The reason, Mr. Abraham tells us, is remaindered books. He believes that remaindered books have the potential to destroy the Indian book market. Remaindering of books has been happening for decades. If remaindered books haven't already destroyed all book markets worldwide, then it is unlikely that they will do so suddenly just because parallel importation of books is permitted in India.

Remainders happen because of a miscalculation by the publisher: expecting more demand than was actually present. What happens with that excess stock is controlled by the publishers. They can choose to pulp them, burn them, or even push them into other channels of commerce that Mr. Abraham points out exist in the mature, frontline markets where remaindering happens:

And the reason why they have not destroyed book markets worldwide is because the mature markets exist with multiple strands (chains and high street stores, independents, direct sellers, online sellers, and supermarkets) —so a direct seller will sell the same book a high street store is selling at a much reduced price without it affecting the business of each strand. Each strand is discrete and price sensitivity does not matter the same way.

Since those multiple strands of commerce exist, each of which would enable the seller to get a better profit (being in a developed country) than in India, there is no reason to fear overrunning of the market with remainders.

3. Dumping of books should be tackled separately

An extension of the remaindered books concern is that of India becoming a land where all books will be dumped. This hasn't happened in case of countries like New Zealand, Mexico, Chile, Egypt, Cameroon, Pakistan, Argentina, Israel, Vietnam, South Korea, Japan, and a host of other countries, all of which allow for parallel importation of books. In a 1998 judgment, the United States Supreme Court, some parallel imports of copyrighted goods were legal. That ruling did not cause the downfall of the US book market, despite cheaper books being available outside the US. Australia has allowed for parallel importation of books in one form or another since 1991 (when the law was changed to allow for all parallel of all books that weren't introduced in the Australian market within 30 days of it being released elsewhere in the world). New Zealand did a study after removing the ban on parallel importation, and declared that cheaper books were available on a more timely basis than previously. None of these countries have been overrun by grey market books.

Customs laws are better suited

Even assuming that this fear is well-founded, copyright law is not the best way to deal with the problem. Dumping of books should be regulated by customs laws (anti-dumping and countervailing duties). Using copyright law to regulate apprehended book dumping practices (which might not even happen) is like using a trawler hoping to catch only shrimp: it is naive to think that there won't be unintended bycatch, and the consequences can be disastrous for the knowledge environment in case of books.

Customs laws are more flexible because they are imposed by the executive, and unlike copyright law, can be more easily changed as per requirements. So even if copyright law allows for parallel importation of copyrighted works, a special case can be made out by publishers in case of trade publishing, for instance, and that can be targetted specifically by imposing duties. However, the inverse cannot happen, since we are not aware of any mechanism whereby libraries, consumers and others can get to 'override' the provision in the Copyright Act.

Additionally, these duties can be made to operate only if the book is already being sold in India; these duties can be made to operate only on new books. A ban on parallel importation, on the other hand will apply equally to books that are out of print, to books that the original copyright owner has not even granted an exclusive Indian distributorship and are not even being sold in India. It goes right to the heart of freedom of speech, which the Supreme Court has held includes the right to receive information.

4. Non-printing of low-priced editions for India because of "unsecure" market won't happen

Parallel importation, which is what the amendment to s.2(m) allows for, affects only importation. It does not in any way affect publication in India

or exports. Exporting low-priced Indian editions to countries which allow for parallel importation of books, is currently of doubtful legality. [Update: Earlier an incorrect claim was made in this post that such export was legal. The legal status is not that clear. While there is a Delhi High Court case that makes exports of low-priced editions illegal in the context of sale to the United States, it specifically states that the decision does not depend on whether India allows for parallel importation or not.] The amendment does not change that position, for reasons explained at greater length in a separate post. The incentives to print low-priced editions hence does not decrease. If anything it will increase because currently books that are not available as low-priced editions cannot be imported without exclusive licensing, and with a change in this position, the incentive to compete in the form of low-priced editions will increase.

Indeed, even before that 2009 Delhi High Court judgment prohibiting exports to the United States, many low-priced editions were being printed in India. And even before the 2005 Bombay High Court judgment prohibiting parallel imports, many low-priced editions were being printed in India. This won't change, regardless of the law, because India is an increasingly profitable and expanding market, and low-priced editions are a necessity in this market due to lower average income.

5. Rhetoric flourish and the law: Open and closed markets

Mr. Abraham asks how many authors one can name from open markets like Malaysia, Singapore, and Hong Kong, as a sign of the 'history of creativity' in each of these countries and territories. It might be just as well to ask how many authors he can name from closed markets like Bhutan, Kazakhstan, Cambodia, Papua New Guinea, Indonesia, Jordan, and Ukraine. One's ability to name authors from a country has less to do with the open/closed nature of its market and more to do with one's general knowledge.

Additionally, the 'mature' markets which he wishes India to emulate—United States, the United Kingdom, and Australia—are more ambiguous on parallel importation than he would have us believe. In the United States, the legality of a segment of parallel importation of copyrighted goods reached the United States Supreme Court in *Quality King v. L'anza* in 1998, in which the court held in favour of the importer.

The question reached the US Supreme Court again last year in *Costco v. Omega*, but the court split on it 4-4, and did not deliver a binding precedent on parallel importation. Thus, for all intents and purposes, under copyright law, the United States is an open market.

In the United Kingdom, as per European Union law, parallel importation is permitted from anywhere within the EU. And in Australia, parallel importation of parallel goods is largely allowed, with some conditions to encourage faster publishing in Australia of foreign books.

Most importantly, none of the markets held up as role models are developing countries. India is. This makes all the difference, as the Consumers International report underscores.

Standing Committee consultations

Lack of wide consultation

On one point we are in complete agreement with Mr. Abraham, which is his point regarding lack of adequate consultation. While there was a good amount of consultation during the drafting stage, when a wide-ranging public consultation was held in 2006, this was not repeated in 2010 by the Standing Committee. Further, the Standing Committee only gave fifteen days for responses to its call for comments.

Publishers were represented

While Mr. Abraham states that only the Authors Guild was represented before the Standing Committee, by going through the report prepared by it, we see that the Federation of Indian Publishers and the Association of Publishers in India were also called to testify before the Standing Committee.

Libraries, students, consumers were not represented

However, while the authors supported it, and the publishers opposed it, no one got to hear the voice of the readers, the students, the libraries, the book buyers. For instance, not a single consumer rights organization or library association was called before the Standing Committee. Internationally, organizations like Consumers International, the International Federation of Library Associations, and EIFL (an international library organization) are invited to meetings of the World Intellectual Property Organization and their views are taken with seriousness as they are a very important part of the copyright environment.

Department's and Standing Committee's reasoning

We reproduce below four paragraphs from the Standing Committee's report, which elucidate many of the reasons for going in for this particular amendment.

7.10 All the reservations/objections raised by the various stakeholders [including the Federation of Indian Publishers and the Association of Publishers in India, whose objections are quoted in an earlier paragraph of the report -ed.] were taken up by the Committee with the Department with the intent of having full understanding of the background necessitating the proposed amendment and its exact impact on the various stakeholders. As clarified by the Department, the main purpose of this amendment was to allow for imports of copyright materials (e.g. books) from other countries. It was in accordance with Article 6 of the TRIPS Agreement relating to exhaustion of rights whereunder developing countries could facilitate access to copyright works at affordable cost. Exhaustion of rights (popularly called

as parallel import) was a legal mechanism used to regulate prices of IPR protected materials. This was viable only if the price of the same works in the Indian market was very high when compared to the price in other countries from where it was imported to India.

7.11 Committee's attention was drawn to the fact that majority of educational books used in India were imported from other countries particularly from US and EU. There was an increasing tendency by publishers to give territorial licence to publish the books at very high rates. The low price editions were invariably the old editions than the latest ones. This provision would compel the Indian publishers to price the works reasonably so that it would not be viable for a distributor to import same works to India from other countries. This would also save India foreign exchange on the payment of royalties (licence fee) by the Indian publishers to foreigners.

7.12 Committee was also given to understand by the representatives of the publishing industry that Scheme of the Copyright Law was entirely different from the Trade Marks Act, 1999 and the Patent Act, 1970. The application of the standards and principles of these two laws through the proposed amendment of section 2(m) would completely dismantle the business model currently employed, rendering several industries unviable. On a specific query in this regard the Department informed that the concept of international exhaustion provided in section 107 A of the Patent Act, 1971 and in section 30 (3) of the Trademarks Act, 1999 and in section 2 (m) of the copyright law were similar. This provision was in tune with the national policy on exhaustion of rights.

7.13 After analysing the viewpoints of all the stakeholders along with the clarifications given thereupon by the Department, the Committee is of the view that proposed inclusion of the proviso in the definition of the term 'infringing copy' seems to be a step in the right direction, specially in the prevailing situation at the ground level. **The present practice of publishers publishing books under a territorial license, resulting in sale of books at very high rates cannot be considered a healthy practice.** [Emphasis added.] The Committee also notes that availability of low priced books under the present regime is invariably confined to old editions. It has been clearly specified that only those works published outside India with the permission of the author and imported into India will not be considered an infringed copy. Nobody can deny the fact that the interests of students will be best protected if they have access to latest editions of the books. **Thus, apprehensions about the flooding of the primary market with low priced editions, may be mis-founded as such a situation would be tackled by that country's law.** [emphasis added.] The Committee would, however, like to put a note of caution to Government to ensure that the purpose for which the amendment is proposed, i.e., to protect the interest of the students is not lost sight of.

Conclusion

It is clear that allowing for parallel imports is not likely to hurt publishers, but will result in an expansion of the reading market. It is mainly foreign publishers' monopoly rights over distribution which will be harmed by this amendment, while Indian publishers, Indian authors, and Indian readers, especially students, will stand to gain. Furthermore, in the long run, even foreign publishers will stand to gain due to market expansion. Any legitimate worries that publishers may have are better dealt with under other laws (such as the Customs Act) and not the Copyright Act.