

Exhausting Copyrights and Promoting Access to Education: An Empirical Take*

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In what must rate as a momentous occasion in Indian copyright history, the Copyright Amendment Bill, 2012 cleared both Houses of Parliament after 12 years of intense debate, discussion and politicking. These set of amendments were particularly celebrated for fostering social justice through provisions that included a special copyright exception for the disabled and a mandatory royalty sharing arrangement for hitherto exploited Bollywood artists.

However, despite the general euphoria surrounding the passage of these highly progressive provisions, there are causes for concern. In particular, the abrupt deletion of a clause legalising parallel imports, contrary to the suggestion of an expert Parliamentary Committee, raised many an eyebrow. It would appear that publisher lobbies prevailed upon the government to effect this last minute volte-face. The main claim advanced by publishers to effectuate this change of heart was that the Indian market was well served with the latest books at affordable prices, rendering redundant the very need for a provision legalising parallel imports.

In this paper, the authors limit themselves to empirically testing this claim. The data from three different libraries demonstrate that the Indian versions sold by international publishing houses are often old and outdated editions. The latest versions are available only through imports via websites (or through mainstream distributors) and costs as much, or more than their western counterparts. Further, the legality of such imports is uncertain under the present copyright regime.

Based on this evidence, the authors argue in favour of retaining Section 2(m) of the Indian Copyright Act, 1957. They also argue that legal policy ought to favour free market competition, unless the evidence suggests that the gains from such competition are outweighed by the harm to the copyright owner and the growth of the indigenous publishing sector. As of today, no such countervailing evidence has been proffered.

Keywords: Parallel import, copyright, doctrine of exhaustion, publishing industry

Historical Perspective

The very notion of ‘copyright’ owes its existence to the publishing industry, which first advocated for and procured these exclusive rights through the ‘Statute of Anne’, an eighteenth century British enactment.¹ Little wonder then that this powerful lobby continues to have a significant say in the shape and size of copyright regimes the world over. India is no exception, and publisher groups managed to secure a victory in the run up to the passage of India’s controversial Copyright Amendment Bill by ensuring that a proposed parallel imports provision was dropped from the final version of the Bill.

When the first version of the Copyright Amendment Bill was tabled in Parliament on

19 April 2010 (ref. 2), it included a provision that endorsed the doctrine of international exhaustion and legalised parallel imports i.e. the imports of copyrighted works into India by a third party who legitimately purchased copies of such works abroad would be exempt from charges of infringement.

To elucidate further, Section 2(m) of the Copyright Act 1957 defines an ‘infringing’ copy as:

- (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

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performance, if such reproduction, copy or sound recording is made or imported in contravention of the provisions of this Act.

The Bill proposed to add a proviso to Section 2 (m) in order to exempt 'parallel imports' from the definition of infringing copy, as below:

'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 into India shall not be deemed to be an infringing copy.'

As evident from the above, this new provision would have permitted third parties to import and sell copies of copyrighted works that had been purchased legitimately in any part of the world, without running the risk of copyright infringement. Illustratively, if X were to purchase a copy of Harry Potter from a London bookstore, X would have been well within her rights to bring this to India and sell it within the local market. Commonly referred to as the 'parallel imports' or 'international exhaustion' exception, this provision is found in the intellectual property regimes of several countries worldwide including Australia, New Zealand and Japan.³

A department-related Parliamentary Standing Committee on Human Resource Development that reviewed the bill strongly endorsed this provision noting that:

'... availability of low priced books under the present regime is invariably confined to old editions. Nobody can deny the fact that the interests of students will be best protected if they have access to latest editions of the books...The Committee would...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.'⁴

The introduction of this provision spurred vehement protests from publishers who claimed that the provision would sound the death knell of the nascent publishing industry in India and be detrimental to India's national interest.⁵ They also claimed that there was no accessibility and affordability issue, as would warrant such a provision in India.^{6,7}

Owing to this vigorous opposition and lobbying, the Government dropped this clause from the final version of the Bill. When queried as to the reasons for this sudden volte face, particularly when the provision had been strongly endorsed by the Standing Committee, the government asserted on the floor of

Parliament that it had referred the matter to the National Council of Applied Economic Research (NCAER) and would seek to reintroduce Section 2(m), should the NCAER be found in favour of it.⁸

In this paper, the authors argue that legal policy ought to favour principles of free market competition, unless evidence suggests that the gains from such competition are outweighed by the harm to the copyright owner and the growth of the national publishing industry. As of today, no such countervailing evidence has been proffered.

The authors also empirically tested the assertions of publishers that there is no accessibility and affordability issue in India. The data demonstrates that, at least as far as educational titles are concerned, the claim is false. A brief conceptual overview of the doctrine of exhaustion and parallel imports is provided below:

Parallel Imports and Exhaustion: A Primer

Distilled to its bare essence, a copyright is a bundle of exclusive rights granted to the author of an 'original' work.⁹ Such exclusive rights include the right to *inter-alia* publish, sell and distribute the copyrighted good in question within the territory of the country which grants the right.¹⁰

The doctrine of exhaustion or the doctrine of first sale imposes certain limits on IP owners' exclusive rights, wherein the owner is prevented from controlling the resale or re-distribution of a work that has already been sold by or with her consent.¹¹ Consequently, a purchaser of a copyrighted book is free to do what she wishes with her copy, including reselling it without fear of being sued for copyright infringement.¹¹

The rationale underlying the theory of 'exhaustion' and the doctrine of first sale is that a copyright holder has been adequately rewarded through the first sale of an IP good and ought not to be permitted to repeatedly profit by controlling the resale and distribution of that very good.¹²

The doctrine of exhaustion is circumscribed by the following factors:

- (i) 'Exhaustion' kicks in only if the 'first sale' is made by or with the authorisation of the copyright owner.
- (ii) 'Exhaustion' in relation to a particular copyrighted article does not impact the copyright owner's other exclusive rights. Nor does it affect the copyright owner's rights with

respect to 'other' copyrighted articles. In other words, the purchaser of a copyrighted article, in respect of which the copyright has been exhausted, does not acquire the right to 'sell' or 'distribute' other copyrighted articles that she has not purchased.¹³

Depending on the territory in question, exhaustion can either be national (confined to a single state) or international (applicable to all countries around the world). Parallel imports are a natural corollary of the doctrine of international exhaustion and envisage the following:

- (i) An export of a copyrighted work from country X (such as Bangladesh)
- (ii) Import of such copyrighted good into country Y (such as India)

A parallel importer essentially engages in price arbitrage and exploits the price difference between the exporting country (Bangladesh) and the importing country (India). Parallel importers may also bring in IP goods that are not otherwise available in the importing country. Several countries therefore encourage such imports to ensure access to lower priced copyrighted works for their consumers.

It is important to bear in mind that the scope of 'exhaustion' depends upon the kind of intellectual property right in question i.e. the rules relating to patent exhaustion are quite distinct from those relating to copyrights and trademarks. Illustratively, while Indian patent law expressly endorses the doctrine of international exhaustion¹⁴, a recent court ruling casts some doubt about whether or not Indian trademark law so permits.¹⁵ Further, even with the same IP regime, the rules of exhaustion could differ depending upon the nature of the IP good. Consider the Indian copyright regime, whereunder, a purchaser of a literary work (such as a book) is free to sell or distribute her copy within India, while a purchaser of a computer program cannot do so.¹⁶

In order to appreciate the difference between national, regional and international exhaustion regimes, consider the following hypothetical. Assume that 'P', a multinational publishing corporation, is the copyright owner of a certain book, for which it charges different prices in different territories, with the highest price being charged in New Zealand and the lowest in Bangladesh.

Assume that 'R', an unrelated third party, purchases copies of the book from Bangladesh (that have been sold by or with the authorisation of P) and

does the following acts without P's permission:

- (i) Resells the books within Bangladesh
- (ii) Imports the books to New Zealand and resells them
- (iii) Imports the books to Pakistan and resells them within Pakistani territory

The following questions arise:

- (i) Can R resell copies within Bangladesh?
- (ii) Can R import copies of the book from Bangladesh to New Zealand and resell them?
- (iii) Can 'R' import copies of the book from Bangladesh to Pakistan and resell them?

The answers to the above questions depend upon the kind of 'exhaustion' regime prevalent in Bangladesh, New Zealand and Pakistan. Assume that Bangladesh and Pakistan follow the doctrine of national exhaustion, while New Zealand follows international exhaustion. It is also assumed that Pakistan and Bangladesh are part of a regional bloc and follow the principles of 'regional exhaustion'. It may be noted that neither Bangladesh nor Pakistan follows the doctrine of international exhaustion.

National Exhaustion: Bangladesh

The answer to the first query is clear. Since Bangladesh follows principles of national exhaustion, R can buy copies of the book in Bangladesh from P or P's authorised agent and resell them within Bangladesh. The key limitation is that the resale or redistribution of the book ought to be confined to the territorial limits of Bangladesh.

International Exhaustion: New Zealand

According to the hypothetical, New Zealand copyright law follows the principle of international exhaustion^{3,17} i.e. once P sells the book in Bangladesh, either through itself or an authorised representative (first sale), its rights stand 'exhausted' *vis-à-vis* that book. Therefore, R is free to bring copies of the very same book into New Zealand and resell them.

Regional Exhaustion: Pakistan and Bangladesh

Certain countries permit parallel import of goods within a specific regional bloc, so long as the first sale is legitimately made by the IP owner or her authorised representative within one of the countries that are part of the bloc. Illustratively, the laws of the European Community (EC) provide that copyrighted goods that have been subjected to a first sale anywhere in the community (e.g. France) can be imported and sold in

any other EU country (e.g. UK) without the permission of the copyright holder.¹⁸ In the current hypothetical, since Bangladesh and Pakistan are members of a regional bloc, a sale in Bangladesh would exhaust the copyright holder's rights across the entire regional bloc. Therefore, R is free to purchase the goods in Bangladesh and import/resell them within Pakistan.

Indian Law on Exhaustion

The Indian Copyright Act, 1957 endorses the principle of exhaustion in Section 14(a)(ii), which vests the copyright owner with the right 'to issue copies of the work to the public, not being copies already in circulation.'

It is very clear that this provision covers national exhaustion. However, as to whether or not it covers international exhaustion is debatable. One might argue that the term 'copies already in circulation' could be taken to mean copies in circulation anywhere in the world. However, one might equally well argue that since the Indian Copyright Act extends only within the four corners of India [Section 1(2)], a copy 'already in circulation' necessarily has to mean a copy that is in circulation within the territory of India. This counter position could be fortified by the argument that the Government and the Parliamentary Standing Committee thought it fit to amend Section 2(m), and implement the doctrine of international exhaustion, signifying therefore that the current provision does not support a reading of international exhaustion.

In *John Wiley & Sons v Prabhat Kumar Jain*¹⁹, Justice Manmohan Singh rejected the application of international exhaustion in India, noting that in the absence of a clear provision stating so, the Act could only be taken to support national exhaustion.²⁰

As for regional exhaustion, it is pertinent to note that although India is a member of a number of associations and trading blocs (such as SAARC and Commonwealth);²¹ none of these blocs require regional exhaustion to be built into the respective domestic intellectual property regimes. Consequently, India does not have any such provision in its copyright regime.

The Rationale behind Parallel Imports

The debate surrounding the legitimacy of parallel imports is part of the larger debate about the optimal scope and ambit of intellectual property rights. For the most part, intellectual property regimes attempt to

strike a balance between private and public interest, supporting as it does a limited monopoly in exchange for what it believes will be an enhanced creative yield. The balancing equation necessarily involves placing legitimate fetters on the scope of the copyright monopoly, such that consumers are able to access the latest creations at affordable prices.²²

IP maximalists oppose parallel imports on the ground that they harm the interests of IP owners by *inter alia* reducing the incentives to create new works.²³ They argue that an IP owner ought to have maximal control over markets in order to enter into territory based distribution agreements premised on international price discrimination without worrying about the entry of third parties into these neatly divided territories.²⁴

They also argue that parallel imports cause free riding, in that, unlike the IP owner, parallel importers do not invest in the production and promotion of an IP good, but nonetheless reap the benefits from sales of that good.²⁵ This is especially true for products such as pharmaceuticals and biotechnology, which are characterised by high R&D costs, but low marginal costs of production and distribution.²⁶

However, supporters of parallel imports argue that such control over markets ought not to extend to goods that have already been sold once and for which a monopoly price has been extracted.²⁷

They argue that parallel imports lead to increased consumer welfare by enhancing competition, fostering access to more IP goods and lowering prices.²⁸ The Australian Digital Alliance tellingly notes:

'[...] dismantling of the restrictions upon parallel importation should be supported where the benefits of wider range, access, and cost differentials of books are of value to the community. In our submission, the benefits flowing from greater competition in the form of increased access to book outweigh any benefit obtained in continuing protectionism.'²⁹

To conclude the above discussion: the optimality or otherwise of parallel imports rests upon an empirical question: do the harms from parallel imports in the form of reduced incentives to IP owners outweigh the benefits in terms of free market competition and increased access to IP goods? This issue depends in large part upon the nature of the IP good and the country in question.

It is argued that as a matter of first principle that the presumption ought to be in favour of free market

competition. Absent evidence of any real damage to IP owners or to the growth of local industry, regimes ought to favour free market competition and not protectionism. This presumption is particularly important in a digital economy, where the advent of online book sellers and the increasing rate of digitisation in books (by initiatives such as the Google Books Project) renders national borders more porous and less amenable to artificial territory based distributorship agreements and price discrimination.³⁰

In other words, the onus is on publishers to demonstrate that if Section 2(m) were amended, there will be a tangible detrimental impact to Indian industry and the incentives to create. Till date, publishers have been unable to drum up persuasive evidence in support of their claim. Rather, they merely assert that since there is no availability or accessibility issue in India (i.e. the country is served well by latest editions of books at affordable rates), there is no need for an amendment to Section 2(m).

Apart from the economic rationale discussed above, common law jurisprudence strongly suggests an 'aversion to restraints on alienation of property.'³¹ In other words, an owner of a good ought to be free to deal with the good in any manner as he/she deems fit, even if the good encapsulates an IP right of some sort. As far back as 1886, a US Court tellingly observed:

'[I]ncident to ownership in all property, — copyrighted articles, like any other, — is a thing that belongs alone to the owner of the copyright itself, and as to him only so long as and to the extent that he owns the particular copies involved. Whenever he parts with that ownership, the ordinary incident of alienation attaches to the particular copy parted with in favour of the transferee, and he cannot be deprived of it. This latter incident supersedes the other, — swallows it up, so to speak...'³²

In short, the foundational principles of property rights jurisprudence suggests that a common law country such as India ought to support the doctrine of international exhaustion, i.e. once the copyright owner transfers the title in a copy of her work, herself or through an authorised licensee, she loses the right to control future distribution of that copy by the transferee.

Accessibility and Availability of Educational Titles in India

As argued earlier, the onus is on publishers to demonstrate that the legalisation of parallel imports

will cause a palpable negative impact on the Indian industry and its incentives to create. Till date, publishers have not proffered any empirical evidence in support of their claim. They merely assert that in view of the fact that the latest books are available in India at affordable prices, there is no need for a separate parallel imports provision.

While reviewing the Copyright Amendment Bill, the Parliamentary Standing Committee captured the representations made by publishers³³ thus:

'It was pointed out that in higher education, especially in medical and engineering, a lot of foreign books were being made available in India at low prices in spite of their being priced at much higher rate in the country of their origin.'³⁴

Further, in an opinion editorial titled 'The death of books', Thomas Abraham, MD of Hachette India and one of the most vocal critics against Section 2(m) asserted:⁶

'The ministry mandarins also seem to have the absurd belief that publishers don't bring in current editions. Every single major book — whether a medical textbook or the latest blockbuster like a Harry Potter or Stephanie Meyer — is available the same day as its release worldwide and 35 per cent cheaper, with textbooks being 80-90 per cent cheaper.'

In another public forum,⁷ while criticising the allegedly mindless introduction of Section 2(m), Abraham asked pointedly — '[n]ame one single major book (college text or fiction/non-fiction blockbuster) that is not available in India at the same time and much cheaper. Also please demonstrate where low price editions are invariably the old ones.'

In this study, the authors considered a small basket of educational books, mainly centred on law and social sciences for empirically testing the above assertions.³⁵ Given that the consumers of such books are mainly students and libraries, the issue of accessibility and availability is discussed from their vantage point.

The data was procured by corresponding with various libraries, including the libraries of the National Law School of India University, Bangalore (NLS)³⁶, the National University of Juridical Sciences, Kolkata (NUJS)³⁷ and the Centre for Studies in Social Sciences (CSSS) at Kolkata.³⁸ The Accession Registers of NLS and NUJS were also inspected, which revealed that the total number of

foreign title acquisitions in the period from January 2009 to February 2011 (a period of 26 months) amounted to 1554.

The key finding is that each of these titles is available in India only at a price that is equal to or even higher than those prevalent in the US and the UK. From these 1554 titles, a representative sample of 53 foreign titles (12 books from NLS and 41 from NUJS) were selected.³⁹ This is a representative sample in that there are 41 unique publishers that are included in these 53 examples.

It bears noting that the assertions are true for each such publisher, and for the entire basket of 1554 foreign books that were acquired. Additionally, 21 distributors across the country and one senior official from Oxford University Press, India (OUP) were also contacted.

Both NLS and NUJS are amongst the top three leading law schools in the country and their libraries stock not only pure law text books but a significant number of social science titles (economics, sociology, history, etc.) as well.⁴⁰

The data collected helped address two claims made by publishers:

- (i) there is no 'availability' issue in India, as the latest editions of all foreign titles are available in India at the time of or close to the date of first publication and release of such title in the Western markets; and
- (ii) there is no 'accessibility' issue in India, since most titles have Indian editions that are sold at significant discounts compared to their US and EU counterparts.

Issue 1: Availability of Book Titles in India

As noted earlier, the two national law school libraries (NLS and NUJS) acquired around 1554 foreign titles during the period between January 2009 and February 2011. Of these foreign titles, very few boasted equivalent low priced Indian editions. Moreover, the vast majority of these low priced editions were older editions that lagged an edition or two behind their Western counterparts.³⁵

Illustratively, consider a book titled 'Principles of Corporate Finance', published by McGraw-Hill. When compared with a tenth edition that was being sold in the US and UK at the time of collecting this data, the low priced Indian version was still in its eighth edition (an edition first introduced in the Western markets in 2007).⁴¹

It was also found that in rare instances where the Indian edition corresponded with the latest international edition, the Indian edition was introduced much later than the corresponding version in Western markets. An example is 'Microeconomics'⁴², the seventh edition of which was being sold in both India and internationally at the time of collecting the data. However, while this edition was first introduced in the Western markets in 2008, it took more than a year before this edition was introduced in India in 2009.

The above examples illustrate that foreign publishers routinely subject the Indian market to old and/or outdated editions. It is not surprising, therefore, that librarians of the National Law Universities (NLUs) that were interviewed categorically expressed their reluctance in purchasing these outdated editions, despite their low prices.

Importing Foreign Titles

Some of the law libraries informed that they acquired the latest titles by importing them through their local distributors. However, owing to transport charges, these editions often cost more in India than they did in the West. Upon receiving orders from the libraries, distributors placed orders directly with foreign publishers or their agents abroad or procured these books from websites such as Amazon and Abebooks. Given that these websites are often hosted in foreign countries, a foreign currency account and a credit card are needed to effectuate the purchase. While most leading distributors in the metro cities possess such foreign currency accounts, none of the libraries that were involved in this study had such an account, enabling them to import directly. They would necessarily have to route it through the distributors.

Several distributors that were interviewed (who did not wish to be named) alleged that publishers pursued a deliberate strategy of dumping outdated editions in India, in order to continue making money on the editions that were effectively out of circulation in the Western markets.

The two law schools interviewed (NLS, Bangalore and NUJS, Kolkata) are located in two prominent cities with access to leading distributors, who in turn are equipped to place online orders and/or procure directly from publishers abroad. The majority of the other 913 odd law schools⁴³ are not likely to have access to such distributors or online import facilities.

In fact, even within the major cities, lower ranked colleges (such as Hazra Law College in Kolkata) do not have access to online purchases or leading distributors. All such colleges are likely to face a stark ‘availability’ issue, in that they are unable to procure foreign titles in a timely fashion.

All of this effectively means that a multitude of students across the country are often disadvantaged owing to restrictions on parallel imports. In particular, many such textbooks are prescribed as essential readings and not many students are likely to possess resources sufficient to enable an import of latest editions at exorbitant prices. The authors therefore advocate an amendment to Section 2(m), noting that it is likely to serve the interests of students by fostering the emergence of a number of smaller distributors willing to scout for and enter hitherto unexplored markets, particularly in non urban areas.

Issue 2: Accessibility of Book Titles in India

In terms of the ‘accessibility’ and ‘pricing’, the results are again stark. As noted earlier, most of the titles acquired by the leading law schools in India were acquired at prices corresponding to or higher than those prevailing in the West.

The basket of titles for studying this issue consisted of 12 books from NLS and 41 from NUJS. The assertions are true for each one of these publishers including Routledge, Cambridge University Press and Hart Publishing. The NLS library buys an overwhelming majority of its foreign titles from websites such as www.amazon.com. For this, it uses the distributor’s foreign currency account and card, for which it is charged an additional 5 per cent on the bill. Further, the invoices suggest that a significant shipping charge was added to the bill, as a result of which the costs increased between 17 per cent and 165 per cent per book.^{44,45} Similarly for NUJS accessions, the prices were equivalent to, or higher than prices prevalent in the US and UK.⁴⁶ In the conversations with the CSSS librarian, the authors were informed that a similar situation prevailed for CSSS as well.

Purchasing Power

The issue of access to educational books in India often depends on the purchasing power of the average Indian student. The GNIPC Comparative Price Tables⁴⁷ indicate the relevant price of a book in direct proportion to the gross national income per capita

(GNIPC) of the country where it is sold, namely, India, the US, UK and Netherlands.

Illustratively, consider a book⁴⁸ by Tsepon Wangchuk Deden Shakabpa, which costs € 269 (or US\$ 371) on the publisher’s website. If buyers in the US had to pay the same percentage of their income on this book as an average Indian, the book would cost approximately US\$ 5236, a ludicrously high price by any standard! Even a comparatively more ‘affordable’ book such as ‘The Politics of Global Governance: International Organizations in an Interdependent World’ by Diehl and Frederking⁴⁹, which costs US\$ 26.50, ends up costing US\$ 373.93 on this relative GNIPC based metric; more than 14 times its original price! It is obvious that Indian purchasers have to spend a significantly higher percentage of their income to purchase international editions of books, in comparison to buyers in the West.

An amendment to Section 2(m) to legitimise parallel imports is likely to force foreign publishers to make the latest editions available in India at affordable prices and serve the interests of the Indian consumers in a more meaningful way.

Flipkart and Other Online Options

During conversations with publishers and their advocates, the authors were informed that law school libraries were not scouting around for cheaper versions. In particular, the allegation was that these law librarians failed to access websites such as Flipkart, which invariably sold at prices lower than that available through distributors (who either use Amazon or procure directly from publishers or agents abroad).

While empirically testing this assertion, it was found to be not wholly true. There were 26 instances where Flipkart sells at a higher price when compared with direct purchases by distributors who procure books directly from publishers or their agents. In some cases, the price differentials were as high as 30 per cent.

Even if the Flipkart prices were low in some cases, it was found that the books were not always available.⁵⁰ In particular, it was seen that:

- (i) Five books on Flipkart did not correspond with the latest editions;
- (ii) Some books were out of stock i.e. they were not readily available and the website would only notify once they were available;
- (iii) One book was not available at all in paperback.

More importantly, it must be borne in mind that the vast majority of Indian educational institutions and students may not have the resources to transact online and make such purchases.

Legality of Imports

In addition to the issues relating to 'availability' and 'accessibility' of foreign educational book titles in India, there are serious concerns regarding the legality of the purchases made by Indian educational institutions using distributors or online stores.

If parallel imports are illegal under the current Indian copyright regime, it effectively means that any copy purchased from a source other than the copyright owner or the authorised licensee for the Indian Territory is in violation of current law.

In other words, if a book on Amazon or Flipkart is made available by a third party other than the Indian copyright owner or her authorised licensee/agent, a distributor who purchases such copy and sells it to the libraries or other consumers in India is in violation of the current copyright regime. However what of libraries and consumers that purchase such books from the website directly or from distributors?

The proviso to Section 51(a)(iv) exempts from infringement the import of a copy for personal use. Therefore, an individual who purchases a copy from a distributor or an online store is exempt from infringement. As for libraries, the position is unclear.

One might argue that 'imports' by libraries fall outside this exemption, since the import is not strictly speaking for the 'private and domestic use' of the libraries.⁵¹ Further, even assuming that libraries can avail of this exemption, the fact that they knowingly import books from distributors or online channels that are not strictly speaking authorized by the Indian copyright owner might make them amenable to a charge of aiding and abetting the said infringement.⁵² An amendment to Section 2(m) would remove this legal uncertainty and enable libraries to import copies without fear of copyright infringement.

Remaindered Copies

While opposing the legalisation of parallel imports, publishers point to the threat of 'remaindering', a phenomenon triggered upon the accumulation of excess copies of a certain title, forcing publishers to sell copies at dirt-cheap prices in the main Western markets. Should parallel imports into India be permissible, publishers fear that such remaindered copies would flood the Indian market and destroy the

business of the Indian distributor/agent authorised to sell in India.

This fear of flooding argument was dispelled in two newspaper editorials.⁵³

One of them⁵⁴ notes that:

'The key objection stems from a fear of 'remaindering', a phenomenon triggered by excess stocks of book titles, which forces publishers in Western markets to sell copies at dirt-cheap prices. Indian publishers worry that these remaindered copies will flood the domestic market and kill their business.

However, even in countries that permit parallel imports, such as Australia, there is little real evidence of such flooding. Therefore, the Indian government ought to insist on empirical proof substantiating the magnitude of this alleged remaindering threat.

Assuming that remaindering is a danger potent enough to hurt booksellers here, the solution is rather simple. Given that Western publishers have effective control over 'remaindered' copies before they are released into a 'parallel' market, a contractual safeguard would redress this issue. In other words, the Western publisher can be contractually bound by the copyright owner to ensure that surplus copies of books that are of interest to India are returned by bookstores and shipped to the Indian publisher. This will cut out third party 'remaindering' profiteers who wish to plunder the Indian market. Further, it will yield extra profits for publishers and authors.

Alternatively, one can simply carve out an exception to Section 2(m) to prevent copies labeled as 'remaindered' from getting into India. This would be a far better solution than dispensing with the section altogether.'

Threat of Exports

Publishers also pointed to the threat of exports, a concern adequately represented by them to the Parliamentary Standing Committee. The Committee in turn expressed the publishers' concern thus in their report:

'With this amendment, the low priced editions meant for Indian sub-continent could be exported back to the country of their origin where they were priced at much higher rates. Consequently, the publishers would lose the incentive to sell books in India or in the Indian sub-continent at subsidized prices. Reason being that foreign publishers would not like to grant the reprint rights to Indian publishers fearing low priced Indian editions flooding and diluting their own markets.'⁵⁵

This is a serious and misguided conflation of the import and export issue. Section 2(m) deals only with parallel imports and not with the legality of exports outside India. If exports were their concern, publishers must articulate it separately and bring it on the 'policy' table for discussion.

The Delhi High Court endorsed an explicit right to prevent export last year in two cases involving the publisher John Wiley & Sons.⁵⁶ However, these decisions are suspect as they conjure up such an exclusive right to prevent exports out of thin air. The Indian Copyright Act, 1957 makes it permissible to circulate freely the copies of any book, which has been sold once by the owner of the copyright (explanation to Section 14). This circulation would ordinarily include an 'export' as well. In fact, the Indian Copyright Act, 1957 expressly states that only those books that are issued under compulsory licenses are prevented from being exported (Section 31). This seems to suggest that for all other books, there is no separate right to prevent exports.

Publishers perhaps fear that it is only a matter of time before the incorrectly reasoned *John Wiley* judgment is overturned.⁵⁷ This concern is however separate from the issue of parallel imports and if publishers fear exports, they must advocate for a separate statutory right to prevent exports. The key question then would be whether India should grant such a separate right and bear the costs associated with its enforcement, particularly when publishers are free to prevent exports by bringing legal action in the countries of import, such as the US or the EU, that boast more sophisticated enforcement machineries. It bears noting that a Second Circuit US Court recently restrained the import of John Wiley books into the US.^{15,58} It ruled against an international application of the first-sale doctrine in US copyright law, and denied a first-sale defence against copyright infringement to Supap Kirtsaeng, a Thai student in the US, who had imported international editions (editions marked for sale exclusively in certain territories) of Wiley books into the US and sold them online on eBay, taking advantage of the price differential. In the words of the Court:

'[...] we conclude that the District Court correctly decided that Kirtsaeng could not avail himself of the first sale doctrine codified by § 109(a) since all the books in question were manufactured outside of the United States. In sum, we hold that the phrase 'lawfully made under this Title' in § 109(a) refers

specifically and exclusively to copies that are made in territories in which the Copyright Act is law, and not to foreign-manufactured works.'⁵⁸

The US Supreme Court granted *certiorari* as petitioned for by Supap Kirtsaeng and will hear the appeal in October 2012 giving itself the opportunity to settle the debate around the precise scope of the first-sale doctrine in US copyright law.⁵⁹

In any case, shoehorning of the exports concern into the 'parallel imports' framework is argued against, as this would result in the needless conflation of what are essentially two distinct sets of issues.⁶⁰

Imports for the Differently Abled

A newly introduced provision in the Copyright Amendment Bill⁶¹, aims to foster access to the differently abled by exempting the conversions of copyrighted works to accessible formats from infringement.⁶² Given that a number of titles are not available in India, this copyright exemption for the differently abled would lose much of its potency, if one were not permitted to import copies for conversion or import copies that have already been so converted by disability organizations abroad. In other words, the absence of Section 2(m) and the lack of a right to import books from abroad, would severely affect persons with disabilities, who continue to face a rather stark book famine.⁶³

Conclusion

This paper attempts to shed some light on the optimality or otherwise of legalising parallel imports in India. Owing to time and space constraints, this study was limited to merely testing the validity of certain assertions made by publishers, wherein they claim that owing to the latest editions of all books being available in India at prices lower than those prevalent in the West, there is no need for amending Section 2(m) and legitimising parallel imports.

This assertion has been demonstrated to be empirically false. In terms of the availability of educational titles in India, the data shows that most of the latest editions are never made available in India by publishers. As seen in this study, only leading law schools with access to leading distributors are able to import latest editions from abroad at exorbitant prices.

A vast majority of the law schools in non-urban areas are unlikely to have resources sufficient to import such titles at prices equivalent to or more than that prevalent in the West. If at all low priced Indian

editions are available, they are older editions and the national law school libraries expressed strong reluctance to waste money on these outdated editions. The problem is particularly acute as many such textbooks are prescribed as essential reading and a number of students are unlikely to possess the resources sufficient to enable an import of the latest editions at exorbitant prices.

The authors therefore favour amending Section 2(m) and legalising imports, noting that it is likely to serve the interests of students by fostering the emergence of a number of smaller distributors willing to scout for and enter into hitherto unexplored markets, particularly in non-urban areas. The authors also argue that such an amendment is likely to force foreign publishers to make the latest editions available in India at affordable prices and serve the interests of Indian consumers in a more meaningful way. Lastly, the amendment will ensure legality of book imports by Flipkart and various Indian distributors, and provide more teeth to the recently introduced disability exemption.

As with other countries such as New Zealand and Japan, that have had parallel import provisions in their regimes for several years now without any debilitating impact on local publishers, an amendment to Section 2(m) will not destroy the publishing industry as claimed. Rather it will contribute to the availability and accessibility of educational books in India, an aspect that was foremost in the mind of the Parliamentary Standing Committee that reviewed the Copyright Amendment Bill and noted that ‘nobody can deny the fact that the interests of students will be best protected if they have access to latest editions of the books.’⁶⁴

The authors therefore argue that the Government ought to reconsider its position and effectuate the amendment to Section 2(m) as soon as it possibly can.

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- 13 *US v Moore*, 604 F. 2d 1228 as quoted in *Words and Phrases, Permanent Edition*, Vol 17 (West Publishing Company), First Sale.
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- 15 *Samsung Electronics Company v Kapil Wadhwa*, CS (OS) No. 1155/2011, decided on 17 February 2012, where Justice Manmohan Singh notes: 'if one reads Section 30 (3) and its sub clauses (a) and (b) contextually, it can be discerned that the nowhere it indicates any concept of international exhaustion stemming from the said section.'
- 16 Section 1(a), (b), Indian Copyright Act, 1957. Similarly, in relation to sound recordings, the author/owner has the exclusive right to 'sell or give on hire, or offer for sale or hire, any copy of the sound recording regardless of whether such copy has been sold or given on hire on earlier occasions' [Section 2(e)(ii)].
- 17 This is true factually as well. New Zealand copyright law endorses international exhaustion. Contrast this with the US, which does not provide for international exhaustion. *Omega S A v Costco Wholesale Corp*, 541 F.3d 982 (9th Cir. 2008), where the Court held that the 'first-sale' doctrine in US copyright law does not extend to foreign manufactured goods imported to the US. The Supreme Court, on appeal, arrived at a split decision thereby leaving the judgement of the Ninth Circuit Court intact, *Costco Wholesale Corp v Omega S A*, Supreme Court of the United States, No 08-1423, 13 December 2010 ('the judgment is affirmed by an equally divided Court'). The Second Circuit Court also endorsed the position of the Ninth Circuit Court in *Costco in John Wiley & Sons v Kirtsaeng*, No 09-4896-cv (2d Cir. 15 August 2011.)
- 18 *Deutsche Grammophon Gesellschaft mbH v Metro-SB-Großmärkte GmbH & Co KG* ('Deutsche Grammophon'), [1971] ECR 487 where the European Court of Justice (ECJ) held that the German law, which prohibited the re-importation into Germany, of records sold to France was invalid, since it violated the concept of free movement of goods. For a good summary of European case law in this regard, see Arghya Sengupta, Parallel Imports in the Pharmaceutical Sector: Must India be More Liberal? *Journal of Intellectual Property Rights*, 12 (4) (2007) 400-409.
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- 20 *John Wiley & Sons v Prabhat Kumar Jain*, CS (OS) No1960/2008, para 104, '[a]s per my opinion, as the express provision for international exhaustion is absent in our Indian law, it would be appropriate to confine the applicability of the same to regional exhaustion'. The judge appears to conflate the terms 'national' and 'regional' exhaustion. It is clear from a reading of the judgment that what he intended was 'national' exhaustion. The judge also seems to have misinterpreted the doctrine of first sale when he states that it applies to only sales by the exclusive licensee and not sales by the owner of copyright. The Indian Copyright Act, 1957 does not make any such distinction and the 'exhaustion' of rights following the first sale steps in regardless of whether the copy has been placed on the market by the licensee or the owner of copyright. In other words, the doctrine of first sale and exhaustion apply *qua* the 'work' in question and is independent of who the owner of the copyright is and whether or not the work has been licensed.
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