DOCTRINE OF FIRST SALE IN COPYRIGHT LAW

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# Introduction

The social and economic progress of a nation depends on the constant generation of imaginative ideas and access to those from around the globe. Such ideas originate from the hard work of various authors such as- artists, writers, dramatists, designers, musicians, scientists, architects and producers of films, sound recordings and software. To reward creativity, authors must be rewarded adequately. Professional ethics and Copyright rulesprovide minimum protective safeguards to the rights of authors over their intellectual property.

While authors are justified for this protection, an extremely inflexible and rigid protection regime may fail to give the fullest social benefits expected from authors’ works. Therefore, a balance needs to be created in cases when there is conflict in interests of creators and of society. Certain exclusions may be needed to protect the greater benefits of society, of which authors, of course, are a part.

First sale doctrine is example of one such exception, where, a legal/legitimate purchaser of a copyright may re-sell or use the product without any fear of being caught in an infringement lawsuit. The owner of the intellectual property rights gets his rights “exhausted” to the work after first sale and generally cannot put restrictions in further use or sale of the work.

The project has discussed the territoriality principle of this doctrine in detail, judicial decisions related to it, amendments proposed by the legislature and reasons why these amendments are not being implemented.

## International Exhaustion and Parallel Importation

There are three mainrules of exhaustion of copyrights, once an IP protected good is sold for the first time, i.e., doctrine of first sale . Under ‘national exhaustion’ rule the IP holder loses exclusive right once the first sale is made within the national boundary.[[1]](#footnote-2)Under ‘regional exhaustion’, once the first sale is made within the particular region, the IP holder loses his exclusive right. Imports into this area from other countries may be banned[[2]](#footnote-3). Under ‘International exhaustion’ the IP holder loses exclusive right once the first sale is made anywhere in the world.[[3]](#footnote-4)

### What is Doctrine Of First Sale In Copyright Law?

The doctrine of first sale is a limitation on the rights of copyright owners’ with regard to distribution.[[4]](#footnote-5) This doctrine comes from the difference between ‘property rights’ and ‘intellectual monopoly rights' like copyright and patents.[[5]](#footnote-6)When a person has property right in an article she ‘owns’ she has the freedom to deal with that as she deems fit.[[6]](#footnote-7) It is based on the rational that “*when an owner of copyright parts with title to a particular copy representing his work, following possessors of the copy should not be put into difficulty of having to negotiate with the owner every time they intend to further sale or transfer*”.[[7]](#footnote-8)

For instance, whena copyright owner sells a ‘copy’ of his book, the property that is sold is not his copyright in the book, but just the property rights in that specific physical copy.[[8]](#footnote-9) Hence, the buyer is not permitted to reproduce the copy, but can re-sell it, as sale is avitalfacet of his ownership right. The first sale doctrine promises the copyright owner achance to appreciate the full value of every copy and at the same time guarantees that he doesn’t realize the value of each copy more than once.[[9]](#footnote-10)

Hence, according to first sale doctrine a person is enabled to sell his copy of copyrighted work to any person without any conditions attached by him to such sale.[[10]](#footnote-11) In this way, ownership in copyrighted work is and should be likened to ownership in any other goods.[[11]](#footnote-12)

This principle can be applied at national and international level depending on the laws of respective countries.[[12]](#footnote-13) Hence, if a book is sold in Country X, it can be considered as sale in Country Y (i.e as resale in Country Y) or the laws of Country Y can see it as a sale only in Country X. Former is the case of ‘international exhaustion’ i.e. parallel importation, and latter is the case of following ‘national exhaustion’.

An important point to note here is that laws of Country X are immaterial on this issue, and it only depends on Country Y whether it follows national exhaustion or international exhaustion.

While international exhaustion allows for greater freedom of trade and weaker territorial control, national exhaustion allows for stronger territorial control.[[13]](#footnote-14)

If doctrine of first sale is not followed issue of double-payment comes in as the copyright owner has already obtained his reward by first sale anywhere in the world and asking for a permission, if he won’t be rewarded every time he sells a copy in a new territory, is like receiving payment more than once, given that full value was already obtained on first sale elsewhere[[14]](#footnote-15).

### What is parallel importation?

Before dwelling into discussion of whether parallel importation is good or bad, we should first examine what parallel importation really means.

"Parallel import incopyright means when an “original” copyright product (i.e. produced by or with the approval of the copyright owner in the manufacturing State) which is placed in the market of one country, is subsequently imported into another country without the permission of the copyright owner in the second country.[[15]](#footnote-16)

For an example, a book is placed in the Indian market by the copyright owner.100 books are bought by a trader from India and imported to china without approval of copyright owner in China. This act of bringing books into China by the trader is called parallel import,[[16]](#footnote-17) the validity of which depends on the laws of copyright of the importing country (i.e. China in thegiven example)." [[17]](#footnote-18)

For parallel importation to happen, the sale itself must be lawful.  Ifan illegally sold copy (for instance, a pirated copy) is imported, then it will be considered as a black market import and not parallel import.[[18]](#footnote-19)  Allowing for parallel imports only dismantles monopoly rights over importation, and in no way encourages importation of infringing copies.[[19]](#footnote-20)

### can a parallel importer raise the first sale doctrine as a defense to an infringement action?

As per Section 2(m) of the Copyright Act,1957- reproduction of dramatic, literary, musical, artistic work, sound recording or a copy of film is an ‘infringing copy’, “if such copy, reproduction or sound recording is made or imported in contravention of provisions of the copyright Act,1957 ”.[[20]](#footnote-21)

But, we don’t get concluding answer by reading section 2(m) as it applies only to that cases of importation in which provisions of the Copyright Act is violated.[[21]](#footnote-22)Copyright is defined under section 14 and is read together with Section 51 to define what ‘infringement’ is. In no way, Section 14 grants a right to import the work of copyright owner. [[22]](#footnote-23)

But, as far as dramatic, literary, or musical works go, Section 14 clearly says that it is copyright owners’ absolute right “to issue copy of work to the public provided copies are not already in circulation”.[[23]](#footnote-24) The explanation under the Section makes it clear that “a copy which is sold once is deemed to be a copy in circulation already.” [[24]](#footnote-25)

Then again, the court’s interpretation is dissimilar and is discussed in next chapter. Section 51(b) (iv) of the Copyright Act clearly states that importation of infringing copies of work constitute infringement[[25]](#footnote-26). It is known that infringing copies are those which are published without permission of copyright owner.[[26]](#footnote-27) But is the situation same in cases where legally published copies are imported from outside India, does this also amount to ‘infringing copies’ and is prohibited by Section 51 or not is to be seen.

But before discussing the judicial position, it is necessary to differentiate between two situations at this stage. The first relates to scenario where parallel importation takes place inexistence of an exclusive distributor, which creates conflict between parallel importer and exclusive distributor.[[27]](#footnote-28) The second case is when parallel importation takes place in the absence of exclusive distributors, i.e., no person has license to distribute a foreign work. Parallel imports are prohibited in this case. Except through compulsory licensing, the latter situation forecloses all avenues of legal access to foreign works for the Indian people.[[28]](#footnote-29) Publishers and courtshave till now concentrated only on parallel importation where exclusive distributors exist, the proposed amendment to Section 2(m) addresses both the situations.[[29]](#footnote-30)

## Judicial position in india with regard to parallel importation and whether indian courts are right in reaching to such a conclusion

### Is parallel importation disallowed in Indian law?

It is clear that copies which are published without the permission of the copyright owner become infringing copies, and cannot be thus imported.[[30]](#footnote-31) But, copies purchased outside India, even though they legally published copies of India, also amount to ‘infringing copies’[[31]](#footnote-32) and that kind of import will also be prohibited by Section 51. The following cases underline the manner in which this has been construed by various courts in India.

### **The Penguin Books case**

The first time the issue of parallel importation reached the courts wasin 1984. The matter went Delhi High Court, in *Penguin Books Ltd. v. India Book Distributors*, [[32]](#footnote-33) (‘Penguin Books’) and the Court had to decide whether importwithout the express authorization of the copyright owner, by a third party amounts to infringement. The courtheld that it constituted infringement because it was in violation of the right of owner to publish.[[33]](#footnote-34)

It should be taken into consideration that prior to the 1994 amendment of the Copyright Act, the first two clauses of § 14 read as, “(i) to reproduce the work in any material form; (ii) to publish the work”. Thus, with the interpretation give according to this judgment the meaning of the phrase/terms, right to “publish the work” (or as according to the Judge, “to print, publish and sell”) extended to bring within the purview, right of importation, but this situation came into picture without a strong jurisprudential basis.

The lack of certainty with regard to the meaning of the word ‘publication’ hasgiven way to criticisms.[[34]](#footnote-35) Though the judgment was careful to pinpoint that ‘publication’ under the Copyright Act (in 1984) was defined as meaning “the issue of copies of the work, either in whole or in part, to the public in a manner sufficient to satisfy the reasonable requirements of the public having regard to the nature of the work”,[[35]](#footnote-36) the judgment does not explain how the aspect of importation is placed under that definition which is in contravention to the bare reading of the law.[[36]](#footnote-37) The Judgment also notes that even though the India Distributors were not printing the books and hence were not guilty of primary infringement,[[37]](#footnote-38) they were still guilty of secondary infringement when they issued copies for public distribution of those titles under contention[[38]](#footnote-39). The categories are demarcated, but were neither explained nor explored for proper use further in the judgment.

#### Criticism of the case

##### *Privity of Contract*

The judgment does notexplain how a contract for exclusive distribution between two parties will affect a third party who is in violation of the principle of privity of contract.[[39]](#footnote-40) This issue is essential because, while giving effect, the judgment enables a third party to be bound to a contract entered into by two other private parties.[[40]](#footnote-41)

For example if the parties agree inter se to take care that the sale of the books doesn’t happen in India by the Indian distributors and that the copyright owner will not give up his right to sell to any other personin India.[[41]](#footnote-42) In this scenario, the question that will arise is how the contract entered by two parties would come in way of a third party purchasing the book from a foreign market and thenbrings (imports) it into India.[[42]](#footnote-43)

A third party who purchases as a result of a transactions in commerce cannot be held liable by the contracts between to other parties, because he becomes the owner of the book and not a licensee.[[43]](#footnote-44) Thus, the judgment makes a contract between two private parties, which is a right in personam, applicable to everyone by expanding the meaning.[[44]](#footnote-45) By doing it this way, it allows for a contract to create a *right in rem* when there is no express provision to do so is being given in the law. This very issue was looked at by the U.S. Supreme Court in Bobbs-Merrill Co. v. Straus,in 1908 [[45]](#footnote-46) through which the doctrine of first sale judicially evolved.

##### *Section 10 and 11 of Transfer of Copyright Act*

The Judge does not bother to elaborate on the details of the intersection between the sale of a book (with final conditions laid down) and the Copyright Act in the judgment. For example, if a person sells a bicycle by laying down a condition that the buyer cannot re-sell it to anyone, such a condition cannot be valid in the court because that will lead to divestment of all the saleable interest the person has in the bicycle upon sale.[[46]](#footnote-47) This principle can be found in Section 10 and Section11 of the Transfer of Property Act, 1882 (‘TOPA’).

Thus, in the illustration highlights, that by selling of a copy of a book (in contravention to a licensing it), the person divests all the interests of sale in that particular copy of the book (however, not the copyright itself). One cannot hold back the buyer from re-selling that particular book. However, the provisions of copyright law provides that one can only re-sell a copy of a book without the owner’s permission, but the person cannot sell it without the owner’s consent/ permission.[[47]](#footnote-48) This forms the doctrine of first sale, which first evolved as a via media between copyright law, which gives the owner copyright right in a book, and property law, which gives the buyer of a book, rights in that particular copy of the book.[[48]](#footnote-49)

##### *1994 Amendment to the Copyright Act*

In an interesting observation, Penguin Books was to be overturned through an amendment to Section 14 in 1994.[[49]](#footnote-50) The amendment deleted the right to ‘publish’, and instead replaced and introduced a right to “to issue copies of the work to the public not being copies already in circulation”. [[50]](#footnote-51)It stands to good reason that this change not only ensures the focus on the centrality of the doctrine of first sale in India, but also enables for international exhaustion, and this in turn allows for parallel import. It is very clear as Section 40 states that “all or any provisions of this Act shall apply to work first published in any class territory outside India to which the order relates in like manner as if they were first published within India”. [[51]](#footnote-52)

Thus by doing this, the provision applies to books published worldwide and are, under the legal fiction of Section40, equivalent to books published in India. Since the Act works for granting protection for foreign works as if they had been publishedby Indian authors in India, it is only appropriate that they should be subject to the same regulations and limitations as well, and phrase “copies not being already in circulation”[[52]](#footnote-53) shall be applicable as well.

More importantly, as one commentator states it, “Tthe decision of the Penguin case is currently not the law since it has been subject to amendments. Our country has accepted the principle of international exhaustion, like most other nations.[[53]](#footnote-54) This happened after taking into consideration the public interest angle”.[[54]](#footnote-55) Unfortunately, legal commentators have paid greater attention to changes in the legislative than did the courts.[[55]](#footnote-56)

### **The Eurokids case**

The issue of parallel importation regarding literary works arose in 2005 before the Bombay High Court in the case*Eurokids International Pvt. Ltd. v. India Book Distributors Egmont* (‘Eurokids case’)[[56]](#footnote-57).

However, the decision given by the Bombay High Court was ill-reasoned than that given by the Delhi High Court in Penguin Books case. Even cursorily the judgment did not discuss the issue of parallel importation in connection with the issue of the first sale doctrine. Even the amendment made to Section 14 of the Copyright Act is not acknowledged. Section14 is mentioned only to establish the meaning of ‘copyright’ in Indian law.

The implications of Section14 have not been examined in terms of exhaustion of rights. Section 2(m) of the Copyright Act, essential to examine the phrase ‘infringing copy’ under Section51, was not mentioned. Going by the logic given in the judgment, any copy that is sold by a third party in India in contrary of an exclusive license contract automatically falls under infringement.[[57]](#footnote-58) Thus, without an explanation copyright law overrides the privity of contract.

Most importantly, since the case relies on the Penguin Books without acknowledging and accounting for the change in the provision because of the 1994 amendment, it can be held to be *per incuriam*, and cannot be given the status of a precedent.[[58]](#footnote-59)

### **The Warner Brothers case**

In 2009, another case turned up in Delhi High Court relating to parallel importation, i.e., the case of *Warner Brothers v. Santosh V.G*.[[59]](#footnote-60)This case was related to DVD’s and not books. The court correctly understood the meaning of the doctrine of first sale in terms of literary works (it acquired the status of being the first judgment to talk about this doctrine in detail).[[60]](#footnote-61) However it is open to discussion whether it was correct in its ruling in relation to cinematograph films and the doctrine’s inapplicability.

Section 14(1)(d) provides thatin case of cinematographic films, the copyright owner has the exclusive right tooffer for sale or hire or sell or give on hire, any copy of the film, irrespective of whether such copy, on earlier occasion has been sold or given on hire. The copyright owner is entitled to exercise rights in relation to a particular copy of the film in spite of whether it has been sold in earlier occasions or not- this is in stark contrast to works of literature, which are “already in circulation.” [[61]](#footnote-62)

However, the position has changed with the 2012 amendments.[[62]](#footnote-63) As mentioned earlier, the amendments replaced the phrases, ‘hire’ with ‘commercial rental’ in section 14(d)(ii) and 14(e)(ii) which correspond with cinematograph film and sound recording respectively.[[63]](#footnote-64) Furthermore, the words, ‘regardless of whether such copy has been sold or given on hire on earlier occasions’ as used under sections 14(d)(ii) and 14(e)(ii) prior to amendments are deleted by the 2012 amendments which makes the doctrine of exhaustion apply to cinematograph films and sound recordings.[[64]](#footnote-65)

## Amendment to Section 2(m) of the Copyright act

The Parliamentary Standing Committee, in its November 2010 Report, with consultation over India’s Ministry of Human Resource Development suggested certain observations on the need to amend the provisions relating to copyrights in textbooks in the Indian Copyright Act, 1957 .

The parallel international trade that happens in relation to books and other copyrighted materials is often construed to be a grey-market trade that happens in unofficial channels.[[65]](#footnote-66) Though the goods themselves are genuine, the trade channels are not the same as envisaged by the producers. In this context, the 2010 Report had suggested that there should be introduction of a new proviso in the proposed amendments to the effect, “a copy shall not be deemed to infringe if a copy of the work is published outside India, with the permission of the original author of the work and if that copy is imported from that country into India.”[[66]](#footnote-67)

The report was presented before the Rajya Sabha and then before Lok Sabha in November, 2010. [[67]](#footnote-68)The Bill was approved on May 17, 2012by the Rajya Sabha[[68]](#footnote-69) and by Lok Sabha on May 31, 2012. The President assented to it on June 7, 2012.[[69]](#footnote-70) The Committee aimed to insert a proviso to Clause 2 (m), Chapter-1 of the Indian Copyright Act, 1957: ‘provided a copy shall not be deemed to infringe if a copy of the work is published outside India, with the permission of the original author of the work and if that copy is imported from that country into India.’ (parallel imports).[[70]](#footnote-71)

However, by the pressure of industry representatives, the proviso suggested was not inserted into the Copyright (Amendment) Act, 2012. This led to a heated debate in Parliament. ShriKapilSibal, the Union Minister for Human Resource Development, informed the House that the National Council of Applied Economic Research would be requested to look into the issue of the insertion of the new proviso.[[71]](#footnote-72)

IP holders’ control over distribution channels strengthens with the parallel import restrictions (PIRs), thereby allowing market segmentation and resulting in price discrimination.[[72]](#footnote-73)An unauthorized third party has a reason to operate parallel imports due to the favour of price arbitrage. The producers put forth the argument that price discrimination, when compared with uniform price, provides benefits to consumers because it supports production in different segmented markets. [[73]](#footnote-74)But, restrictions on parallel imports oppose the spirit of free trade which is the essential principle of multilateral and regional trade treaties.[[74]](#footnote-75)Undesirable economic side effects are a result of trade restrictions.[[75]](#footnote-76) The principle of ‘international exhaustion’ brings up trade channels that benefit consumers.[[76]](#footnote-77)

### Arguments of opponents and proponents for Section 2(m)

The copyright material producers (books, films / music and software) contend that: [[77]](#footnote-78)

* + Parallel imports would decrease the ‘market potential of exploitation of a work’. [[78]](#footnote-79)
  + Economy benefits with national exhaustion. Exclusive distribution arrangements can be formed and respected. Prices remain low in the country and a strong domestic copyright industry can be built.[[79]](#footnote-80)
  + Parallel import may result in imbalance of trade. Activities involving counterfeiting may increase across border transactions. Authorised distribution channels would be totally disrupted. Apprehending the import of illegal copies will be impossible for customs and border police.

These arguments put forth by the producers of copyright materialhave been countered by some consumers and some of the IP law experts . They instead contend that:

* The principles of international exhaustion from the very inception have been recognized by Indian copyright law. [[80]](#footnote-81)
* The concepts of free trade the principle that ‘ownership’ of property are reinforced by parallel imports and by international exhaustion.[[81]](#footnote-82)
* By implementing an intelligent copyright regime, India would reap the benefits. The latest editions of books at affordable prices have to be made available to the students.[[82]](#footnote-83)
* ‘Market democracy should be the goal of the future rather than entrepreneurial dictatorship’[[83]](#footnote-84).

Publishers also contend that by enabling Section 2(m) their high-priced Western markets would be destroyed with the export of low-priced editions from India.[[84]](#footnote-85) The issue of 'import' and 'export' would then be seriously misguided conflation. [[85]](#footnote-86)The legality of export from India has not been dealt with in Section 2(m) but only with parallel imports. [[86]](#footnote-87)

It is not true that by trying to equate parallel importation with the ‘anarchy’ present in markets, and by confusedly claiming that this amendment would allow the permit of infringing copies of books.  In order for parallel importation to happen, the sale in itself should be legal. An illegally sold copy (a pirated copy) will amount to a black market import when it is imported and will not be a parallel import. Monopoly rights shall be dismantled by allowing for parallel imports over importation, and this is clear from the amendment.[[87]](#footnote-88)

## Is there a need to introduce a new proviso in section 2(m) of copyright act?

The two classes– producers and the consumers - hold low pragmatic views and opinions about whether India should expressly accept the principle of international exhaustion and as a result allow parallel importation of copyright material.[[88]](#footnote-89) There is a clear division between the two groups, with each side contesting that it holds the right position and that the views of the opposite side are absolutely incorrect. Hence, there is no common footing between the two sides.[[89]](#footnote-90)

Various sections of the Indian Copyright Act make clear the intention behind allowing parallel imports and going by the series of dubious interpretations cited by the Indian courts, the an amendment to Section 2(m) has been brought in by the legislature to bring clarity to the issue of parallel imports.

It was necessary to bring the amendment in the Copyright Act as the courts were interpreting the provisions of Copyright Act and the contractual provisions to prevent import and export of original works.[[90]](#footnote-91) Without considering the intent of the legislative, the high courts relied heavily on these provisions given in the Copyright Act and this resulted in preventing the importation of copies from other countries into India at a lower price or exporting of books printed in India to other countries.

To put an end to the distorted interpretations given by the courts in contravention to the intent of the legislative, the amendment was necessary. The courts were in fact trying to protect the interest of publishing houses which were deprived the freedom of movement of goods from cross territories and in order to facilitate and provide reasonable and affordable access to copyright works to the people.

# CONCLUSION

Having established beyond doubt that free trade is promoted by the concept of international exhaustion and parallel imports , adhering to the straightforward principle that ‘ownership’ of property doesn’t have conditions and benefits all the interested parties (consumers, libraries, publishers, galleries, museums, theaters, music enthusiast and second-hand stores), all that the Government needs to do is add the proviso to Sec. 2(m) in the Copyright Act so that India can benefit from an intelligent copyright regime. By criminalizing such imports there will be increase in absurdities, uncertainties and adverse effects coming into picture that in fact establishes that the need of the hour is to adopt this amendment in order to give clarity to the Indian stance on parallel imports. The needs and expectations of a society should be reflected by the law and taking into consideration the trouble created by the ‘license raj’ when the matter related to copyrighted works (including books and not merely limited to), the time is right for the parliament to rectify the mischief that has been created and cater to the Indian needs. The study that was analyzed emphasizes the glaring and evident gap that exists between the letter of the law and the needs of the society.

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