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17 MAR, 2011, 01.52AM IST, SHAMNAD BASHEER,

Govt for legalising parallel import of copyright works; publishers oppose

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The notion of copyright owes its existence to the publishing industry, which first advocated and procured these exclusive rights through the Statute of Anne, an 18th Century British enactment. 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 the industry is now up in arms against a government proposal to legalise the 'parallel import' of copyright works through Copyright Amendment Bill, 2010.

If enacted, a proviso to section 2(m) of the Indian Copyright Act would permit the import of legitimate copies of copyright works that have been sold once anywhere in the world.

This amendment aims to foster enhanced competition amongst distributors and thereby enable Indian consumers and students to access a wider range of

books at lower prices in a timely manner.

However, publishers vehemently oppose this provision, claiming that there is no 'access' issue in the country since most foreign titles boast equivalent low-priced Indian editions.

This is simply not true. Promoting Public Interest Lawyering (P-PIL), a public interest association of which I am part, unearthed data relating to the acquisition of foreign titles by leading law libraries in the country, and concluded in their representation to the HRD ministry, as follows:

Of the total 1,554 foreign titles acquired by two leading law libraries during 2009-11, there were hardly any titles with equivalent low-priced Indian editions. Even in rare cases where such editions were available, they were never the latest ones. The librarians that P-PIL spoke to categorically stated that they were not interested in purchasing outdated editions of foreign titles.

Almost all foreign titles were available for prices equal to or higher than rates prevailing in the West. These had to be imported through websites such as Amazon or procured through leading local distributors who would place orders directly with publishers abroad. The shipping charges escalated the costs for India, and in one case, the price differential between India and the US was as high as 165%.

Given this stark pricing scenario, the section 2(m) amendment is the need of the hour. For, it will foster a

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more diverse set of distributors keen on picking up cheaper copies from any part of the world, without seeking copyright owners' permission.

If the country's leading law schools (national law schools) are faced with this severe pricing and access issue, the vast majority of the other 913 law colleges can only be expected to be worse off, given that many of them are much poorer and do not have the necessary wherewithal to procure titles online or be serviced by the leading distributors.

Lastly, if this dismal state of affairs applies to legal titles, there is no reason to suspect that the situation is vastly different for other areas of higher education, such as medicine and engineering.

The above line of thought was endorsed by a parliamentary standing committee tasked to review the Copyright Amendment Bill that noted in pertinent part the "availability of low-priced books under the present regime is invariably confined to old editions. Nobody can deny the fact that the interest of students will be best protected if they have access to latest editions of the books."

The government ought to, therefore, exercise great caution before disregarding the observations of the standing committee and acting on the empirically-flawed assertions of publishers.

Publishers also argue that section 2(m) enables export of low-priced editions from India, and that this would destroy their high-priced Western markets. 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 export from India.

It is pertinent to note that the Delhi High Court endorsed an explicit right to export last year in a case involving noted publisher John Wiley & Sons. However, this judgment is suspect, as it literally conjures up such an exclusive export out of thin air.

The Indian copyright scheme is clear in that any book copy that has been sold once by the copyright owner can be freely circulated thereafter by the buyer; this circulation would ordinarily include an export as well. In fact, the copyright Act expressly states that only those books that are issued under 'compulsory licences' are prevented from being exported.

This could be taken to mean that, in so far as all other books are concerned, there is no separate right to prevent export.

Publishers perhaps fear that it is only a matter of time before the incorrectly-reasoned John Wiley judgment is overturned. If that is their angst, they must advocate for a separate statutory right to prevent export, albeit one that is separate and distinct from the issue of section 2(m) and imports.

The key issue then would be: ought India to grant such a separate right and bear the costs associated with its enforcement, particularly when publishers are free to prevent export by bringing legal action in the countries of import, such as the US or in the EU, that boast more sophisticated enforcement machineries?

Shoehorning the export concern into the 'parallel imports' framework will engender more confusion than clarity and derail the introduction of a socially-progressive parallel imports clause.

(The author is Ministry of HRD Professor of IP Law at WB NUJS)

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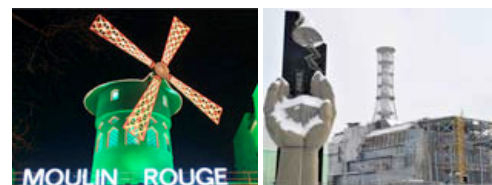
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