

BOOK REVIEW

PARALLEL TRADE IN EUROPE: INTELLECTUAL PROPERTY, COMPETITION AND REGULATORY LAW

By Christopher Stothers

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Parallel trade is a complex topic. It is fair to say that it is not well understood except by specialists in the field. This is because it involves consideration of intellectual property, competition and regulatory law. There have been disputes, both legal and political, over it for many years. While a well-developed body of literature on the subject exists, much of it is difficult to comprehend. The usual highly-specialised approach to the subject means that general principles are overlaid with detail to such an extent that they are not easily identified.

Mr Stothers (a practising solicitor) has, in this well-written book, set out the history and development of parallel trade from a European Community (EC) perspective. He provides the reader with a clear explanation of the legal and policy issues involved in parallel trade.¹ It can be used by specialist and non-specialist alike to provide an introduction (or refresher) on parallel trade in the context of the EC.

In the EC, the legal foundation of parallel trade is found in articles 30 and 36 of the Treaty of Rome. There is an inherent tension between the concept of free movement of goods and the intellectual property (IP) rights involved in the control of the importation of goods. This has resulted in significant litigation and the development of a comprehensive jurisprudence on the subject. The book provides a thorough review of how the current state of the law has come about. This was not an easy task considering the large body of case law and European Commission (EC) decisions involved. If this was all the author had managed to achieve in this book, he would have produced a very worthwhile contribution to the literature on the subject. But it goes far beyond that and the result is a comprehensive overview of an extremely important area of law.

At its most basic, parallel trade is when products produced in one market are exported to a second market and sold without the authorisation of the local owner of the intellectual property rights. But parallel trade is not about trade in counterfeit products. Parallel imports are genuine – often branded – products. The product is obtained lawfully in the extraterritorial jurisdiction. Importing the product from one country to another is often not authorised by the holder of intellectual property rights

¹ For additional information on the subject, see “The Gray Blog”: “A Blog dedicated to news, laws and trends involving the parallel market” available at <http://espinosaiplaw.com/wordpress/> (accessed 26 March 2009).

in the product. There may be superficial differences such as packaging or the lack of the original manufacturer's warranty, but otherwise the product is identical to the official imported version.

A basic premise underlying parallel trade is that, by obtaining products in lower-priced markets and selling them to consumers in higher-priced markets, there are significant savings to consumers. By increasing the options for alternative supplies of products, parallel imports can allow consumers to gain access to the products from another market at lower prices.

IP right holders are generally opposed to parallel trade because they benefit from having an exclusive right to import protected products. Trademark owners oppose parallel trading for several significant reasons including the "free ride" argument, "confusion for consumers" and the right of trademark owners to manage the distribution channels of their product. Copyright owners can prevent parallel imports of copies of their works by imposing express restrictions.² The regulation of parallel trade involves balancing the interests of producers or rights holders and consumers. Consequently, it involves both policy and law. Mr Stothers carefully examines the merits and weaknesses of both types of argument in his overview.

The book is divided into five chapters:

1. Introduction
2. Intellectual Property Rights
3. Competition Law
4. Regulation
5. International Aspects

There are also tables of cases, EC and National Legislation, Treaties and Conventions and Competition Decisions.

In the introduction, the author provides a "big picture" overview of parallel trade. By carefully setting out the situation in the EC, he sets the stage for the far more detailed analysis in the subsequent chapters. The inclusion of public policy considerations completes the first portion of the book.

The next three chapters consider parallel trade in the EC. Chapter 2 is focused on the interface of IP rights and parallel trade. Chapter 3 looks at competition law in terms of articles 81 and 82 of the EC Treaty. Chapter 4 deals with the regulatory structure of the EC with regard to quotas, taxation, pharmaceuticals, pesticides, motor vehicles and the labelling of goods. Furthermore, it considers the topic of regulation with regard to both unfair competition and consumer protection laws. Parallel trade in the pharmaceutical industry is one of the most important and controversial aspects discussed. The book concludes with a detailed review of the international aspects of parallel trade outside the EC. This quick overview does not do justice to the detail set out in each of the chapters and merely sets out the framework of the book.

² For an interesting case extending copyright protection to prevent parallel importation of consumer goods see: *Euro-Excellence Inc v Kraft Canada Inc* [2007] 3 SCR 20, 2007 SCC 37 available at: <http://csc.lexum.umontreal.ca/en/2007/2007scc37/2007scc37.html> (accessed 26 March 2009).

Of particular interest in the IP section is Mr Stothers' review of the concept of exhaustion. This is significant as exhaustion is the cornerstone of the EC's approach to parallel trade. The EC recognises the principle of regional exhaustion which means that goods, once purchased, may be freely re-sold within its frontiers. Nevertheless, parallel imports from non-member countries are excluded. This "member" versus "non-member" dichotomy is unique to the EC.

The impact and importance of parallel trade is difficult to quantify. Parallel trade has evolved and continues to do so. The philosophical divide between those who support parallel trade and those opposed to it remains wide and it is unlikely to be resolved.

The intention of the author in writing this book was to:

[T]ease out the different legal strands which apply to the activity of parallel trade within Europe, seeking both to analyse the current state of the law within the European Community and to provide a reference point for potential problems and solutions as they arise elsewhere.

He succeeded. This book will be the standard work on the subject of parallel trade for the foreseeable future.

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