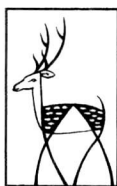


Parallel Trade in Europe

Intellectual Property, Competition and Regulatory Law

Christopher Stothers



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PARALLEL TRADE IN EUROPE

Are parallel importers the key to free trade, breaking down long-established national barriers for the benefit of all? Or do they instead just operate in a dubious 'grey market' for their own profit, free-loading on the investment of innovators and brand owners to the ultimate detriment of everyone? Parallel trade is in turn lionised and demonised, both in legal commentary and in the mainstream press. As one might expect, the truth lies somewhere between these extremes.

Once goods have been manufactured they are put onto the market in one country by the manufacturer. Parallel trade occurs when the goods are subsequently transferred to a second country by another party (the parallel trader, who may be the end consumer). The distinguishing feature of parallel trade is that the manufacturer did not intend those particular goods to end up in the second country. The goods are normally described in that country as 'parallel imports' or 'grey market goods'. The latter term is generally used to suggest that the trade, while not exactly 'black market', is not entirely lawful either.

Understanding how European Community law operates to permit or restrict parallel trade involves exploring a complex matrix of rules from the fields of free movement, intellectual property, competition and regulatory law, including both private and public enforcement regimes. Where goods are parallel imported from outside the Community these rules change and new considerations come into play, such as obligations arising from the European Economic Area, the World Trade Organization and bilateral free trade agreements. The experience of Europe, which has grappled with the issues on a regional basis for more than four decades, provides a fertile source for examination of parallel trade in other jurisdictions.

Christopher Stothers' comprehensive treatment successfully analyses this difficult topic, considering both Community and national decisions.

Foreword

The architects of the European Union were visionaries. They may also have been optimists. The objectives set out in Article 2 of the EC Treaty are ambitious and inevitably challenge the supremacy of many national interests. This has and will continue to generate friction. Perhaps nowhere is that friction more apparent than in the impact the Treaty has had on the ability of traders to service individual national markets in different ways. Most businessmen want the freedom to tailor their businesses to the peculiarities of each of the markets they operate in. If a particular market can afford and is willing to pay a higher price for goods than another, it is likely to make commercial sense to charge higher prices in one than the other. This may not simply be a matter of one market offering higher profits than another. It may be that higher prices are necessary in some markets because the costs of promotion, distribution and sale there are greater than in another. However this freedom will only work if the markets can be isolated from each other. If this is not possible arbitrageurs will be tempted to reap profits by obtaining goods in a low price market and selling them into a high priced one. This is the classic case of parallel trade. In many respects this type of activity has been facilitated within the European Union by the Treaty. Depending on your point of view, this is a good or a bad thing. Normally the public in expensive markets is more than happy to receive the same goods at a lower price. The public in cheaper markets who find themselves starved of products because most have been diverted to richer markets might well feel rather differently. The arbitrageur will rejoice that this allows him to make a profit. The business deprived of the ability to cater for individual national markets is likely to see his profits reduced and, in extreme cases, may be forced to ration the products he is prepared to supply to markets where the price he can charge is lower. The recent *Bayer Adalat* case is an example of this.

Not only does this aspect of the Treaty cause friction, but it is also something which touches the public. Not too long ago I was having dinner with a friend who was a senior executive in a company which sold sports goods under a number of famous brands. His hostility to parallel importation was sincere and strongly expressed. Yet he could see nothing wrong in travelling to the Continent to pick up a new motor car because it was cheaper to buy it in Germany than in England. Christopher records the public interest generated when major UK supermarkets fought for, and eventually lost, the right to import branded designer jeans from cheaper markets. As he says, a vast array of policy arguments have been raised in the course of legislative, administrative and judicial proceedings relating to parallel trade. Sometimes, as he points out, the arguments are in the nature of mud-slinging. I can testify to the fact that even

in the fairly rarified environment of the Chancery Division of the High Court in England, some of the passion generated by conflicting views as to the legal, moral and economic benefits and disadvantages of parallel trade was on display. I am told that sometimes even the judges joined in.

Someone who comes fresh to this topic could easily be overwhelmed by the large number of ECJ, CFI and National Court judgments and Commission decisions and the ample literature. Not all of it seems consistent. What is needed is a calm, thorough and dispassionate analysis of this material. At last that has been supplied in this book. Christopher has done a marvellous job in producing a lucid but thorough account of the development and current state of the law in this area. He has not avoided criticising decisions where he thinks they are wrong nor has he held back from expressing views as to where he thinks the law is likely to go. But what is particularly admirable is that one never gets the impression that he argues for the sake of arguing or is digging to find inconsistencies when they don't exist. Above all he is not partisan and, in this more than most areas of law, that is very refreshing.

This book is a major contribution to the learning in this area of law. I have no doubt that it will become a standard. It should be read by anyone who wants to understand what the European law on parallel trade is.

Hugh Laddie
University College London
February, 2007

Preface

In the course of writing this book, it was suggested to me that the debate over parallel trade is over and so I was wasting my time. I disagree.

Even within the European Community the debate is far from over, with fresh attempts to facilitate or block parallel trade continuing to test consumers, parallel traders, manufacturers, lawyers, policy-makers, regulators and the judiciary. At an international level the policy debate is even more open, as the consequences of the opening of global trade continue to filter through the system. Meanwhile, technological developments have increased awareness and reduced the cost of parallel trade, while at the same time introducing new methods of distribution and blurring traditional lines between products and services.

It is against this backdrop that this book aims to tease 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.

Various people have encouraged my research and writing over the years, and thanks must go particularly to Paul Stanley, Tim Eicke, Philippa Watson, Sandra Fredman, Peter Oliver, Dan Goyder and Philip Marsden. Equally thanks are due to Milbank, Tweed, Hadley & McCloy LLP, and especially David Perkins, for giving me the time to complete the book. Peter, Philip and David have all reviewed sections of the book and provided comments, as have Stefan Enchelmaier, Thomas Heide and Malcolm Jarvis, while various sections have been reworked following discussions with Lionel Bently, Anna Carboni, Oke Odudu, Brian Sher and Adrian Speck. Finally, I would like to thank Hugh Laddie for his generous Foreword and I have also appreciated greatly the patience and hard work of everyone at Hart.

Writing any book comes at a cost to those around the author and this book is no exception, as it would never have been completed without the patient love of Emily Cox.

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