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Study on Parallel Importation in International Trade

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Abstract

In essence, parallel importation is the product of integrating international trade and intellectual property, with the rapid development of economic globalization, the problem of parallel importation is particularly prominent, due to the differences in legislation and judicial practice of various countries, coupled with the different economic development levels and trade policy orientations of various countries, there are larger differences on the issue of parallel importation. First, this paper introduced the concept and features of parallel importation, then analyzed the legal principles and economic causes of parallel importation, then analyzed the attitudes of different countries towards parallel importation, finally, discussed the typical judicial cases of parallel importation in China and the perfection of legal regulations.

Keywords

Parallel Importation; Exhaustion of Rights; Implied License; Unfair Competition.

1. Concept and Features of Parallel Importation

Parallel importation is an act when an importer in a country is not authorized by the obligee of the intellectual property in this country, imports products that have been legally launched in other countries or regions by the obligee or with the consent of the obligee to this country. It is called parallel importation because parallel importation is generally divided into advance importation and parallel importation. What is parallel importation? We generally call the legal import of the intellectual property owner who has the import right as the advance importation, and call the import of the unauthorized third party as the parallel importation. Taking the parallel importation of trademark as an example, we can divide parallel importation into three models:

First, a trademark obligee in country A manufactures products and sells them at home, and company A in country B obtains the import right. However, a third party in country B imports the trademarked goods circulating in country A into country B without authorization;

Second, a trademark obligee in country A manufactures products and sells them at home, and at the same time, company A in country B is authorized to produce, import and sell them, but a third party in country B imports the trademarked goods circulating in country A into country B without authorization;

Third, it is also called reverse sales, a trademark obligee in country A authorizes company A in country B to produce, import, and sell product in country B, the product of company A in country B is not only sold in country B, but also exported to country A. Because the selling price in country A is lower than that in country B, a parallel importer in country B imports a product that is made locally but sold abroad for domestic sales.

Parallel importation has the following features: (1) the object of parallel importation is intellectual property products, not the intellectual property itself, including parallel importation of trademarked products, patented products, and copyrighted products; (2) the imported products have legal sources, therefore, such goods are also called "genuine article", not counterfeit goods; (3) the parallel imported products compete with the original products of

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the same intellectual property in the market of the importing country or region at low prices; (4) there are relevant obligees who oppose parallel importation in the importing country or region.

2. Legal Principles and Economic Causes of Parallel Importation

The parallel importation problem arises from international trade, involving both intellectual property issues and economic issues in international trade, therefore, parallel importation issues are affected by economics and laws.

(1) Causes of Legal Principles

There are two main causes of legal principles of parallel importation: one is the principle of exhaustion of rights; the other is the theory of implied license.

The principle of exhaustion of rights is also called as the principle of right exhaust and the principle of first sale, which is a typical system of restricting the exclusive rights of intellectual property, it is that after intellectual property products made by the owner of the intellectual property or authorized person is launched for the first time, the obligee loses further control over it within a certain geographical scope, and the obligee's rights are considered to be expanded and exhausted. Anyone who legally acquires the intellectual property product can freely treat the intellectual property product. The principle of exhaustion of rights is divided into the principle of domestic exhaustion and the principle of international exhaustion. The principle of domestic exhaustion is that the obligee sells the product in one country, and the buyer uses, promises to sell, and sells it in this country without infringement; obviously, this principle does not support parallel importation. The principle of international exhaustion is that if the obligee sells the product outside our country, and the buyer imports it into our country and uses, sells, or promises to sell it in our country without infringement. This principle supports parallel importation.

Countries around the world generally agree that the force of intellectual property should not extend to the following use of legally sold products, but different countries have different theories and ways to reach this conclusion. UK believes that, theoretically, the intellectual property obligee's control over a product is not limited to the right to manufacture and sell the product for the first time, but also extends to any following use and sale act of the product after the first sale. Therefore, UK law allows intellectual property obligee or licensee to attach restrictive conditions on the use and resale of products after they have been sold. However, when the UK adopts the above position, there is also an important legal presumption, namely, when the product is first sold, if the obligee or the licensee does not explicitly attach restrictive conditions, it means that the purchaser has an "implied license" to use or resell the product at will, if such an implied license exists, the obligee can no longer exercise the rights to the legally sold products. This is the implied license theory.

In the early days when Germany built patent system, whether the patentee could exercise the right to use or resell the patented product sold by himself or by the licensee, it was solved by the implied license theory. Germany believes that the patentee or licensee may can attach restrictive conditions to hinder the free circulation of legally sold patented products, therefore, it is necessary to build a more thorough system.

(2) Economic Causes

With the development of economic globalization, the international trade between countries continues to grow, however, different countries have different economic levels, causing price differences between countries. The price difference is mainly caused by the following reasons: (1) The levels of economic and technological development are different in different countries. Due to the different levels of economic development in developed and developing countries, consumers have different incomes, which makes the demand quantity and elasticity for

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different commodities different, for example, the consumption of luxuries in developed countries is greater than that in developing countries. Of course, this will lead to a lot of parallel importation issues. (2) Labor costs are different. Countries with a large population base have low labor costs, low production costs, and the prices of the products manufactured are lower, therefore, in order to open up market sales, manufacturers often sell the products they manufacture to foreign countries. (3) Price discrimination of multinational companies. In order to maximize their global income, multinational companies often implement price differentiation strategies in different markets in a planned way. For example, the price of the Apple mobile phone that we are most familiar with varies greatly in different countries. (4) Tariff difference. The difference in import tariffs between countries will also lead to differences in the price of goods.

3. Attitudes of Different Countries towards Parallel Importation

1. The United States. Except with the written consent of the USA trademark owner or the foreign are associated with domestic trademark owners, the importation of other trademarked products is illegal. The United States International Trade Commission once decided that parallel importation of trademarked products is prohibited by Section 337 of the United States Tariff Act. The obligee of the exclusive implementation can ask to stop the parallel importation act based on the exclusive implementation right, and when the patentee licenses others to implement or sell the patented product abroad, if the resale of the patented product is not restricted in the licensing contract or the sales contract, the patentee has no right to exercise the patent right to prohibit parallel importation.

2. The European Union. The European Union has built a unified large market with the free flow of goods, personnel, capital and services within the community without any restrictions. Therefore, the European Union implements the principle of internal exhaustion of rights, parallel importation is allowed within the European Union, and the obligee cannot prevent the parallel importation of products with his import rights. This is also often called as the regional exhaustion principle of intellectual property.

3. Japan. Japan implements the principle of international exhaustion of patent rights in the field of patent rights. Japanese Trademark Law allows parallel importation, but has additional conditions: namely when the trademark obligee or exclusive user of the trademark in Japan and the trademark obligee in foreign countries are not the same person economically and legally, or when the quality of a single product is different, parallel importation is not explicitly allowed nor opposed.

4. China. Article 11 of China's "Patent Law" stipulates that, after a patent applicant has been granted a patent, except as otherwise provided by law, the patentee has the right to prevent others from importing its patented products or products directly obtained according to the patented method for production and business without the permission of the patentee. This provision gives the patentee the import right and excludes parallel importation. However, China's trademark law and copyright law do not grant the obligee the import right, so parallel importation in this field does not constitute infringement. However, some scholars believe that the "Patent Law" does not point out whether domestic exhaustion or international exhaustion, and in fact, it does not make clear provisions on the issue of parallel importation.

5. International Convention: Article 6 of the Trips Agreement

Article 6 of the Trips Agreement provides that, as far as the dispute settlement of this agreement, assuming the provisions of Article 3 (Principle of National Treatment) and Article 4 (Principle of Most-Favored-Nation-Treatment), any rules in this agreement are allowed to deal with intellectual property exhaustion. This shows that the Trips agreement has adopted an escaping

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attitude towards parallel importation. This is mainly due to the different positions of developing countries and developed countries.

4. Analysis of Typical Judicial Cases of Parallel Importation in China

(1) LUX case

The Dutch Unilever Company enjoys the exclusive rights to the trademarks "LUX" and "LUX Lishi", Shanghai Lever Co., Ltd. enjoys the exclusive right to use the "LUX" and "LUX Lishi" trademarks in China through the contract with Dutch Unilever, produces and sells "LUX" brand series products. However, since the financial crisis in Southeast Asia, "LUX" products of China's neighboring countries have flooded into the Chinese market through various channels due to their low cost and low price.

On June 7, 1999, China's Foshan Customs detained a batch of Thai-made "LUX" soaps declared by Guangzhou Import and Export Trading Company (the defendant) in accordance with the " Customs' Conservation Regulations of Intellectual Property of the People's Republic of China". In the same month, Shanghai Unilever filed suit against Guangzhou Import & Export Trading Company to the Guangzhou Intermediate People's Court for infringing the company's exclusive license rights of "LUX" and "LUX Lishi" trademarks, Guangzhou Import & Export Trading Company imported and sold Thai-made "LUX" soap without the permission of the trademark holder. After court investigation, the Dutch Unilever Ltd. (licensor) and the plaintiff (licensee) signed the exclusive licensing contract, it stipulated that "if any infringement of the rights granted by this agreement is found, if any infringement of the rights granted by this agreement is found, the recipient have the right to take legal action (including lawsuit) or other actions other recipients think appropriate, the period of validity of agreement is two years and is effective from signing contract." The court feels the plaintiff was the exclusive licensee of the "LUX" trademark and the "LUX Lishi" trademark in China (excluding Hong Kong, Macau and Taiwan), and its exclusive use right to the above trademarks was protected by law, and the "LUX" soap imported by the defendant infringed the plaintiff's exclusive right of use.

(2) Clothing Case of "AN'GE" Brand

On October 30, 2000, the plaintiff Beijing Fahua Yilin Trading Co., Ltd. (hereinafter referred to as the plaintiff) signed a commercial license contract with (France) AN'GE Co., Ltd., and obtained exclusive operation right in specific region like Beijing and Chongqing in China. The defendant, Beijing Century Hengyuan Science and Trade Co., Ltd. (hereinafter referred to as the Century Hengyuan Company), has opened counter in the defendant Chongqing Metropolitan Plaza Pacific Department Store Co., Ltd.(hereinafter referred to as Pacific Company) to sell "AN'GE" brand clothing since April 2001, the "AN'GE" brand clothing it sold was imported from Hong Kong Ruijin Company by Chongqing Machinery Equipment Import and Export Co., Ltd. Hong Kong Ruijin Company is a dealer of "AN'GE" brand clothing in Hong Kong.

The plaintiff believed that the defendant, Century Hengyuan Company, opened an exclusive store of "AN'GE" brand in the defendant Pacific Department Store without authorization, and sold the brand's clothing, the actions of the two defendants infringed the plaintiff's exclusive operation right and violated the business principle of good faith, therefore, it sued and required the defendant, Century Hengyuan Company, to stop the unfair competition and compensate for the economic losses; the two defendants publicly apologized. The defendant, Century Hengyuan Company, argued that the exclusive operation right obtained by the plaintiff could not fight against a third party outside the contract. The defendant has obtained legal authorization to sell the brand's clothing, which does not infringe any rights of the plaintiff, nor an act of unfair competition. The defendant, Pacific Department Store, argued that the case had nothing to do with our company, our company only provided a business place and conducted necessary

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reviews on the defendant, Century Hengyuan, and did not infringe the plaintiff's legitimate rights and interests, so it disagreed with the plaintiff's claims.

The court of first instance held that the plaintiff obtained the exclusive operation right of "AN'GE" brand clothing in Chongqing and other regions of mainland China by signing a contract with (France) AN'GE Co., Ltd. This operation right does not exclude other operators from legally operating "AN'GE" clothing in the same market. Other operators have the right to operate "AN'GE" brand clothing in the area authorized by the plaintiff, namely Century Hengyuan has the right to use the legally obtained "AN'GE" brand clothing for legal operation. Therefore, the court of first instance rejected the claim of Fahua Yilin Company. The plaintiff was not satisfied with the verdict and decided to make an appeal. The court of second instance held that Century Hengyuan Company entrusted the import of "AN'GE" brand clothing from Hong Kong Ruijin Company through legitimate transactions, and this batch of imported "AN'GE" brand clothing was indeed real things produced and sold by (France) AN'GE Co., Ltd., and this batch of "AN'GE" brand clothing has fulfilled the proper import customs formalities. On this basis, Century Hengyuan Company sold "AN'GE" brand clothing, which did not misunderstand and confuse consumers about the source of the "AN'GE" brand and the specific sellers of "AN'GE" brand clothing, therefore, we could not determine that the above-mentioned acts of Century Hengyuan Company violated the relevant provisions of China's Anti-Unfair Competition Law. The appellant claimed its rights in accordance with the "Anti-Unfair Competition Law of the People's Republic of China", it claimed that the actions of the two defendants constituted unfair competition lacked factual and legal basis, therefore, the court of second instance upheld the decision of the court of first instance.

5. Perfection of Legal Regulations on Import Issues of Parallel Importation in China

China's legal regulation of parallel importation should be based on our country's actual national conditions, refer to foreign legislative practices and the international development trend of parallel importation, and perfect relevant systems from the aspects of intellectual property law and competition law.

First, make different choices for different types of laws on the "principle of exhaustion of rights". For example, in patent law, we should adopt the principle of exhaustion of rights and allow parallel importation, but certain exceptions should be given in different fields. In addition, from the perspective of intellectual property, we should generally allow parallel importation, as a developing country with rapid economic development, China's economic growth rate has doubled after joining the WTO, benefiting from international trade, However, the rights of intellectual property owners should also be protected. In the field of trademarks, the international exhaustion principle should be adopted.

Second, regulate parallel importation in the competition law. Although China does not have too much practice accumulation, but can refer to the cases in the common law system, because developed countries in Europe and the United States have a higher level of economic development, there are often more cases of economic disputes than China, whether our country should define the issue of parallel importation as an act of unfair competition still needs game. First, according to the basis of the regulations of Anti-Monopoly Law, we will incorporate agreements and unilateral measures to restrict parallel importation into the regulatory model of the Anti-Monopoly Law. Second, the use of market competition means is to maintain the order of market competition, the act when parallel importers selling commodities at low prices in commodity importing countries dislocates the competition order in our country, damages the solution to the problem of the rights of intellectual property owners and related obliges, we

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must not only protect our country's economic development interests, but also take into account the legitimate interests of our country's intellectual property owners.

However, what kind of restrictive act on parallel importation is a reasonable restriction of competition, or what is an unreasonable restriction of competition, it needs to be determined based on the actual situation of our country.

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