



Exhaustion – phew!

The UK’s future regime for the exhaustion of intellectual property rights

It is an old joke, and a truism, in the IP community that thinking through the exhaustion of intellectual property rights (IPRs) is, well, exhausting. This is because the subject itself is so complex, the implications so far-reaching, and perspectives so diverse, that analysis and discussion can too easily descend down a metaphorical rabbit hole. It is unsurprising, then, that considering and responding in August 2021 to the UK government’s consultation on the UK’s future regime for the exhaustion of IPRs took up a great deal of time, thought and energy.

For new readers, who might be wondering what “exhaustion of IPRs” even means, the government’s consultation document¹ explains it in the following terms:

“The right to take legal action against infringement is constrained by a system known as exhaustion of IP rights. Once a good has been placed on the market in a specific territory by, or with the consent of, the rights holder, the IP rights that protect this good are considered to be “exhausted”. This means that the right to take legal action against infringement has been lost.”

Once the IPRs protecting good have been exhausted, they can legitimately be moved across territorial borders, in what is known as “parallel trade”. So far, so much jargon, you might think. But the regime that any nation implements to regulate this parallel trade can have huge impacts, positive or negative, for business and commerce of all sorts, for consumers, and for national economies as a whole. It’s a big deal, which is why getting it right is so important.

The consultation document invited views on four possible exhaustion regimes. It is worth being clear that they only relate to the UK’s own exhaustion regime: none of them has any impact on the regimes which the UK’s trading partners choose to apply to parallel imports from the UK into their territories. Taking each in turn in the order they were presented in the consultation:

- **“Unilateral EEA or UK+ exhaustion”**

This is the “do nothing” option and would maintain the current regime, which came into force on 1 January 2021. This means that parallel imports from the European Economic Area (EEA) into the UK would continue to be

¹ <https://www.gov.uk/government/consultations/uks-future-exhaustion-of-intellectual-property-rights-regime/the-uks-future-regime-for-the-exhaustion-of-ip-rights>

allowed, while parallel exports from the UK to the EEA could be prohibited. In discussion, IP Federation members noted that the UK+ system, by maintaining the *status quo*, entails the least disruption for business. We also recognised that under a UK+ regime, UK consumers and businesses would retain certain benefits they had while the UK was part of the EU. For example, UK consumers could benefit from prices that are as competitive as any in Europe. And UK manufacturers could take comfort that, should they need to, they could achieve supply chain resilience by sourcing their IP-protected input materials (e.g. IP-protected components) from parallel import channels around Europe. On the other hand, it was questioned whether, given the short time since the UK left the EU, the current position can truly be regarded as a *status quo*. On that view, if there is divergence in IP laws between the UK and the EU, there might be problems for rights owners in the future if a UK+ system is adopted.

- **“National exhaustion”**

Under this regime, the IPRs in goods would be exhausted in the UK only if they were first put on the market in the UK. This means businesses would not be able to parallel import goods from outside the UK. IP Federation members saw how this could incentivise innovative and creative business in the UK. This is because national exhaustion is closely consistent with a strong IP system, which in turn provides the best incentive for value-adding, innovative and creative businesses, which in turn benefits consumers and the economy. This may be particularly true for “home grown” UK businesses, often SMEs, which must be permitted to protect and benefit from sales in their home market. A national exhaustion system would also enable IP rights owners to continue to ensure that only high-quality, genuine products are supplied to UK consumers. Members acknowledged, however, that any adoption of a national exhaustion regime would be subject to a potential issue under the Northern Ireland Protocol issue.

- **“International exhaustion”**

In this case, the IPRs in goods would be exhausted in the UK once they had been legitimately put on the market anywhere in the world. Although the IP Federation has historically opposed international exhaustion, in discussion it was recognised that for companies that develop complex products with component parts that are subject to IP licensing arrangements, not all of which are owned by the manufacturers of the component parts, an international exhaustion regime may greatly simplify the ability to secure a supply chain to provide goods to consumers in the UK. An alternative view was that supply chain management can be addressed through contractual arrangements, and that supply chain management should not prevail over the importance of strong IPRs for the UK. Further, there was an argument that any limitations on international supply chains (if that arises) would have the effect of stimulating domestic supply from within the UK, which would be to the benefit of the UK economy. It can also be argued that an international exhaustion regime would be damaging to the UK economy, in particular to UK-based businesses seeking to expand into or retain sales in foreign markets.

- **“Mixed regime”**

This option would see different exhaustion regimes applied to different goods, sectors or IPRs. The IP Federation’s members generally felt this would not be a desirable approach, in view of the additional complexity it would entail.

In its response to the consultation, the IP Federation noted that, given the very different options for exhaustion being considered by the government, the outcome of the consultation is extremely important to the IP landscape in the UK, and hence to the future health and prosperity of the UK economy. The response also made clear that there was a degree of divergence of view among IP Federation members. This might have militated against making a response at all. But one of the strengths of the IP Federation lies in its cross-sectoral membership, which can bring a wide range of perspectives; another is its ability to engage in open, evidence-based discussion, and agree constructive ways forward, even when members’ views do differ. We also hope that by making a response, we will have helped the UK government make proposals which take better account of the needs of innovative British industry. And of course the IP Federation looks forward to commenting on those proposals in due course.

Sean Dennehey, Consultant to the IP Federation