

All-Party Parliamentary Group for Intellectual Property Note for Virtual Meeting on the UK's Exhaustion Regime

Date: Tuesday 16th March 2021

Time: 18:00-19:00

Attendees: Pete Wishart MP, Kevin Brennan MP, Ruth Jones MP, Baroness Neville-Rolfe, Lord Clement-Jones, Lord Foster of Bath and The Earl of Devon.

Issues covered:

- Meaning of exhaustion and the different regimes
- The current situation following the UK's departure from the EU and its regional exhaustion regime
- The negative impact of an international exhaustion regime on publishing and other IP-rich industries
- The need for the UK Government to adopt a national exhaustion regime now that we have left the EU

What is exhaustion?

The exhaustion of intellectual property rights relates to when IP rights owners lose the right to control the geographical resale of their protected goods. Once a good is put on sale by the intellectual property right (IPR) owner they maintain control over the subsequent re-sale of the product. The geographical limit of that control, or where they lose those rights, is known as the 'exhaustion' of those rights. In other words, exhaustion refers to the **moment** and **geographical boundary where the IPR owner loses the resale right on their product**.

How does it work?

Parallel trade is the cross-border sale of goods by traders (outside of the rights holder's distribution system), **without the rights holder's consent**. Therefore, parallel trade provides importers with the ability, to buy goods in one country at a relatively low price and subsequently resell them in another country where the price is higher. However, IPR owners need to set different prices in different markets for many reasons, including the cost of production and distribution in different geographic areas, for marketing reasons, and to reflect different consumer spending capacity in different countries.

Exhaustion regimes provide IPR owners with the ability to maintain **some control over pricing** in different territories. This means companies have some certainty of the returns they are likely to recoup on a global basis and can ensure they are able to **recover their investment**.

If there is **unrestricted parallel trade**, producers have no certainty on the income they are likely to receive from the sale of their products in different markets because parallel imports could undermine the sales they're trying to make in higher price point markets. Without the certainty of income, budgeting forecasts are much more difficult to make, meaning they are less likely to reinvest in their business, which would have a significant impact on innovation.

For example, if a product is priced at a lower price in India, to reflect the lower spending power of the Indian public, that product could then be exported anywhere in the world, undermining pricing in other territories and ultimately driving down the income that can be recouped on a global basis for

that product. It also means that the Indian public don't have access to that lower priced product because it is simply re-exported to other higher income per capita countries.

Types of exhaustion regime

There are three types of exhaustion regime that countries can choose to adopt, and this has a **considerable impact on the international trade of goods**.

Regional

The UK was part of a regional regime through its membership of the European Economic Area (EEA). A regional exhaustion regime (EEA-wide exhaustion) allows parallel imports between the countries which are member of the regional agreement, but not the parallel trade coming from other states. Therefore, once a product had been exported from the UK to France, it could then be circulated freely within the EEA area, without the permission of the rightsholder. However, a product could not be exported from the UK to India and then be re-imported into the EEA area.

National

Under a national exhaustion regime, once a product is first sold in the UK with approval from the IPR holder, the rights holder cannot stop the product being resold within the UK. However, IPR holders are able to prevent the resale of any goods that are placed on the market outside of the UK, thus restricting parallel imports of products from another country.

International

Contrastingly, under international exhaustion, once the IPR owner (or another with approval from the IPR holder) puts the goods on the market outside of the UK, the rights holder loses any right to control how and where those products are subsequently resold, meaning they cannot prevent parallel imports from abroad.

The current situation

Following the UK's departure from the EU, the UK Government now has control over its exhaustion regime. The Government is currently maintaining a regional exhaustion regime, which the EU has refused to reciprocate.

Now the UK has left the EU, and the EU has **refused to reciprocate a regional exhaustion regime**, the Government will need to choose between a national or international exhaustion regime or develop a new form of regional regime. The Government has said that it intends to publish a consultation on the UK's future regime in the first half of 2021, with a decision to be made during the summer.

The concern

There is a concern that the Government might see the UK's sovereignty over its exhaustion regime as an opportunity to switch to an **international regime**. The Group heard how this might impact on high exporting sectors and businesses who would have less control over the income they would receive for their investment in the products they sell in different international markets.

It was also suggested that there was a lack of clarity on the basis by which the IPO will draw its conclusions - impact on investment, employment, pricing, productivity, government costs etc - and the weighting given to these different criteria.

Case Study: Impact of an international exhaustion regime to the publishing industry

Background

- The publishing industry is built on the ability to distribute books, academic publications and other published content around the world and the control of pricing of those products. As a sector that receives the majority of its income from overseas sales, it is therefore significantly impacted by exhaustion regimes.
- The UK publishing industry is the largest exporter of books in the world.¹
- The global market is largely English language and therefore the UK is in direct competition with the US.
- It was referenced in the meeting, that one of the largest publishers in the UK has warned that up to 25% of revenue is at stake if the Government opts for an international regime, as this effectively weakens the copyright laws that authors and publishers rely upon to maintain predictability of pricing.
- With the publishing industry contributing more than £10bn to UK economy² and employing 29,000 people³, this could have a significant impact as we seek to recover from the pandemic.

How it works

- Publishers will identify specific territories and advise authors on the best market for their books. Publishers are able to buy the rights to sell books into those different territories. Those rights can be global, or they can specialise and buy rights for a particular area, such as South East Asia or Europe.
- When selling books into a particular territory, publishers ensure that they are meeting that territory's market conditions and will set different prices in different markets. For example, a consumer in a developing country will not be able to afford to pay the same price as a UK consumer who buys a book sold in the UK. Therefore, to enter the developing country's market, the publisher will often need to sell books at a lower price.
- The amount of money an author receives is therefore directly related to the market and the territory their books are sold into. For example, on average a UK author will receive 50% less from a US sale than they will from a UK edition. They will also receive less from the export sales that come out of the UK to reflect the fact that there are increased costs involved with distribution.

¹ <https://www.publishers.org.uk/about-publishing/>

² https://www.gov.uk/government/statistics/dcms-sectors-economic-estimates-2018-gva?utm_source=4d1d950b-f05a-4033-9094-248f4e917a00&utm_medium=email&utm_campaign=govuk-notifications&utm_content=daily

³ <https://www.publishers.org.uk/about-publishing/>

- Publishers therefore need to be able to protect themselves and authors from those cheaper editions of books sold abroad, from being re-imported back into the UK (parallel imports), as this would undermine the sales the publisher is going to make in the UK.
- The current regional exhaustion regime which came from the UK's membership with the EU allows publishers to prevent those books from re-entering the UK at a lower price point, however the adoption of an **international regime will weaken those rights**.
- Although cheaper books sound better for consumers, it is potentially detrimental to an author's income. Without sufficient income, UK authors will be less inclined to publish on the UK market, thus having a knock-on effect, not just for the publishing industry, but the UK economy.

Conclusion

Overall an international exhaustion regime would encourage parallel imports. The Group heard that IPRs owners tend to set different prices depending on the specific market. It follows that prices in developing and least developed countries are lower than in rich countries. This practice is common among a variety of businesses owning IPRs around the world and is not limited to the publishing industry.

The practise of parallel imports would instead prompt right owners - who fear aggressive competition and speculative practices by importers - not to distinguish prices across national markets. On the contrary they would be forced to impose uniform prices across countries or even decide not to supply those areas with higher risk of re-export, with the result that many consumers in developing and least developed countries could have no access to IPR-protected products and technologies.

Recommendation

- Ensure that the Government understands the significant damage that would be done by adopting an international regime and look to consider other alternatives.

Next Steps

- Encourage colleagues to contribute to the IPO's consultation on the [UK's future exhaustion of intellectual property rights regime](#).
- Table questions to seek clarification from the Government on the impact of exhaustion to the Northern Ireland Protocol within the Withdrawal Agreement Bill.

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