

Kluwer Copyright Blog

The future of post-Brexit UK exhaustion and the implications for UK copyright and IP rights

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The UK government has run a [consultation](#) on the future of the UK's exhaustion of IP rights regime. This ran for 12 weeks, closing on 31 August 2021.

The consultation was open to responses from businesses, representative organisations, civil society organisations, legal practitioners, creators and consumers. The government is now considering the responses to the consultation and is due to publish a response document. It is expected this will steer the future of the UK's IP exhaustion regime.



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This blog post summarises the current regime and the three alternative regimes, and reviews the implications, advantages and disadvantages of each.

Exhaustion in summary

The principle of exhaustion is a limitation to intellectual property rights which is mainly relevant in the context of imported goods. Generally, once a particular item has been placed on the market with the IP rights holder's consent that IP rights holder's rights are exhausted, meaning they cannot prevent further dealings of that particular item. For example, the copyright subsisting in a specific single item (a book, say) would be exhausted once that specific copy of the book is sold in the UK by the rights holder.

The consultation essentially focusses on what geographical regions should be considered "the market" for the purposes of exhaustion.

The consultation does not cover the exhaustion of IP rights in purely digital goods. Nor does it

cover counterfeit goods, since exhaustion is concerned with the parallel trade of legitimate physical goods. The key sectors identified in the consultation are fast-moving consumer goods, luxury goods, print and publishing, pharmaceuticals and automotive.

It is worth noting that this applies to the UK only; exhaustion in other countries is a matter for them and regimes vary significantly between countries. Indeed, some of these variations are considered in the consultation document published by the government.

The current regime

Currently, the UK has continued to recognise a version of the pre-Brexit regime of “regional exhaustion” in the EEA. This is known as UK Plus.

The IP rights in goods put on the EEA market with the rights holder’s consent are considered exhausted in the UK (and the EEA); this means rights holders cannot prevent such goods being parallel imported into the UK. However, goods imported into the EEA from the UK are not exhausted and can be opposed. The effect of this is that rights holders can prevent goods first put on the market in the UK from being parallel imported into the EEA.

Continuity is an obvious benefit of this regime and it grants some useful exhaustion protection to rights holders. It would also be beneficial to consumers who would be provided with the same level of choice and lower costs as importers will exploit arbitrage opportunities available through price fluctuations in the EEA.

The potential alternatives

The consultation sets out four alternative regimes. These are: the status quo (UK Plus), national exhaustion, international exhaustion and a mixed regime. We have set out the current regime above so do not repeat it here.

1. National exhaustion regime

This option would restrict exhaustion of IP rights to apply only when goods are first marketed in the UK by the rights holder, or with his/her consent. Accordingly, rights holders could prevent all parallel imports into the UK.

The obvious beneficiaries would be rights holders, who would have greater control over the trade of their goods. In particular, they would be able to segment the UK market from the rest of the world. This could be at the cost of consumers who may face reduced supply and choice.

However, this regime is highly unlikely: the government does not consider it to be reconcilable with the Northern Ireland Protocol which requires that parallel imports are allowed from the Republic of Ireland and other EU member states without restriction. Indeed, the government describes this regime as only included in the consultation for completeness.

2. International exhaustion regime

The International regime would result in IP rights being exhausted in the UK once goods are put on the market in any country by or with the consent of the rights holder. Accordingly, rights holders would prima facie be unable to prevent any parallel imports.

Similarly to the current regime, this would be asymmetrical meaning marketing in the UK of goods would not necessarily mean the IP rights in those goods are exhausted in another country; this would depend on the exhaustion regime of the importing country.

This regime would remove rights holders' ability to segment the UK market from others around the world. Again, the alleged upside would be an increase in consumer choice and likely lower prices. These impacts would be augmented compared to the current regime, due to the wider geographical scope for exhaustion.

There could also be an increase in the trade of counterfeit goods; although parallel imports relate to legitimate goods, the increased flow of such legitimate goods into the UK could make it easier for counterfeits to slip through undetected.

There is also arguably an increased risk of consumer confusion and/or damage to the reputation of rights holders. Manufacturers will often tailor products to consumer tastes and/or regulatory needs in different countries. Therefore, although the goods will be from the same brand, they may be different from what a consumer expects from that brand.

3. Mixed regime

Under a mixed regime, the UK could apply different exhaustion rules for different goods, sectors or IP rights. For example, China and the USA have an international regime for copyright and patents. Switzerland has a national regime for patented goods (such as medicines) but for copyright it has an international regime with the exception of audio visual works for which its exhaustion regime is national.

While the mixed regime has the benefit of flexibility to suit a country's needs on a case-by-case basis in relation to each of goods, sectors and IP rights, it could end up becoming overly complicated. In particular, if different regimes are adopted between IP rights it could be that the intended results are not realised since many goods are protected by multiple IP rights.

Commentary

In the consultation, the government states that it does not currently have a preferred option between the current regime, the international regime and the mixed regime. The national regime is dismissed due to it being considered irreconcilable with the Northern Ireland Protocol as the risk is goods would not be able to be brought in from the Republic of Ireland which would create internal barriers in the Island of Ireland.

For the reasons set out above, and our discussions with industry, we understand that nearly universally UK rights holders are strongly opposed to international exhaustion and this has been reflected in the consultation responses. Consumers and consumer interest groups are expected to be more in favour of international exhaustion, but could be concerned about the potential risks to consumers due to regulatory differences between parallel exporting countries and the UK.

Regarding the mixed regime, the consultation document seems to suggest this is likely to be overly complicated. Indeed, the government states that for a good, sector or IP right to be treated differently to others, evidence would be needed to show why such treatment could benefit the UK and how it would align with legal obligations. The apparent concerns set out by the government in relation to this regime could suggest that this evidence would need to be of a high standard and particularly compelling.

On balance, we would expect the future regime to resemble what it appears most rights holders favour: a continuation of the current regime with a fall-back position of national exhaustion, potentially with bilateral extensions in the event the UK agrees trade deals with other countries. However, this government has not always acted in the interests of business, so we await with nervous anticipation what happens next.

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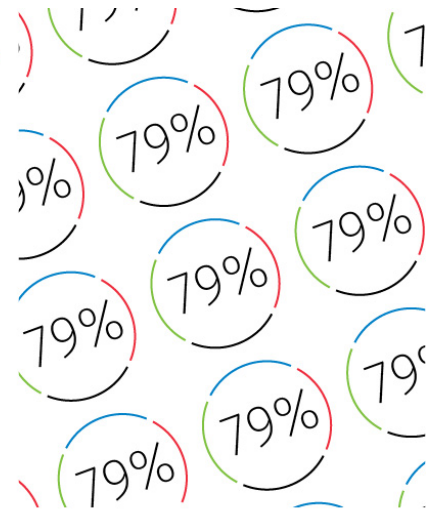
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