

WIPO Standing Committee on Patents: Exhaustion update (April 2022)

The concept of exhaustion has built up over many decades. When the UK was a member state of the European Union (EU), the UK was part of the EU's regional exhaustion regime where IP rights are considered exhausted for goods first sold in the European Economic Area (EEA) and no exhaustion of rights can occur for goods placed on the market in a third country (i.e. not a member state). The principle of exhaustion of rights is derived from the provisions concerning the prohibition of qualitative restrictions in the Treaty on the Functioning of the EU (and the EEA Agreement) as interpreted by EU case law and was specifically recognised in various EU Directives as implemented into domestic legislation. As a result of domestic legislation concerning EU exit this principle continues to have the same effect in domestic law as it had before the end of the implementation period (the UK's unilateral application of the EEA regional regime). In particular, the principle of exhaustion is relevant to section 7A of the Registered Designs Act 1949, sections 18 and 27 of the Copyright, Designs and Patents Act 1988 and section 12 of the Trade Marks Act 1994.

Case law relating to exhaustion includes *Silhouette v Hartlauer*. In this case, the European Court of Justice held that EU member states were not free to have an international exhaustion regime (in which parallel goods can be moved into a country from any other country) and that they must have the regional EEA regime only. As a result, EU member states need to maintain a regional EEA exhaustion regime. Although *Silhouette* related to trade marks the principle set in this case applies to other IP rights, including patents.

Following the UK's exit from the European Union, the UK unilaterally applied the EEA regional IP exhaustion regime. The UK therefore presently has what it has termed a "UK+ regime" where parallel imports from the EEA into the UK are allowed to continue.

The unliteral application of the EEA regional regime (UK+) derives from UK statutory instruments *The Intellectual Property (Exhaustion of Rights) (EU Exit) Regulations 2019* (as amended by *The Intellectual Property (Amendment etc.) (EU Exit) Regulations 2020*). These statutory instruments were implemented following the UK Withdrawal Agreement from the EU.

The UK is currently considering its future exhaustion regime, considering how the principle of exhaustion should work for the UK as a sovereign standalone nation.

The UK Government held a consultation over summer 2021 to seek views on what the UK's future exhaustion of IP rights regime should be. Following that consultation, the UK Government published the summary of consultation responses and an update on GOV.UK in January this year.

As of April 2022, the UK has completed an initial analysis of the consultation submissions and continues to explore the possibility of changes to the current regime and hopes to make a decision on the UK's future exhaustion regime during 2022.