Parliamentary brief – IP exhaustion regime

14 November 2023

Draft Intellectual Property (Exhaustion of Rights) (Amendment) Regulations 2023

Overview

The UK's IP exhaustion regime reflects policy on the rights afforded to brand owners in relation to the distribution of their products in different territories. It affects parallel trade and the ability to export products and has important implications for consumers, innovation and the economy.

Under current UK policy, brand owners cannot influence the distribution of their products once placed on the UK or any EU market. However, they can influence further distribution of products placed on a market outside the EU. This regime has been in place for fifty years, works well and would continue under the provisions of the SI.

This area of IP policy was the subject of an IPO consultation in 2021 which concluded there to be insufficient evidence to warrant any change in regime. We consider this conclusion correct.

The SI and recommendation

The current exhaustion regime is based on EU legislation which, due to the REUL Act, will fall away. The SI will ensure the UK's existing regime is maintained, at least for the time being.

The Government however has not made a final decision on what exhaustion regime to implement, something that is expected in the coming months. We believe official advice to be that the current approach is made permanent.

The SI parliamentary debate is an important, relevant opportunity to support the current regime and to resist calls for any change that could reduce brand owners' ability to influence the distribution of their products in markets outside the EU and weaken their IP rights.

The policy options

The three main policy options are:

National exhaustion: trade mark rights are 'exhausted' once goods are placed on the UK market but can be used to prevent the distribution of goods placed on markets outside the UK. This is arguably the friendliest for brand owners as it would give them strongest control.

Regional exhaustion: rights are exhausted once goods are placed on the UK or EU market, though can be used to prevent distribution of goods placed on markets outside such countries. This status quo operates well and strikes us as proportionate, hence our support.

International exhaustion: rights are exhausted once goods are placed on any market in the world. Brand owners could not prevent parallel imports of their products from abroad. This approach carries the strongest consumer and economic risks as well as weakening brand owners' IP rights .

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International exhaustion – the risks

Branded products are attractive targets for parallel traders who buy products cheaply in overseas markets and import them into the UK. The brand owner has invested to ensure there is strong demand in the UK and that their products are trusted. Parallel traders free ride on and exploit that investment.

The implications of an international exhaustion regime are….

- consumer prices overall would not fall. Any import price advantage would tend to be swallowed by importers, wholesalers and retailers, never reaching the end consumer;
- consumers would lose out where the imported product does not deliver the expected performance, guarantees, experience or features. Brand trust would be undermined;
- UK exporters would become uncompetitive internationally, unable to develop new markets through low introductory pricing often needed to build demand in a new market (a parallel trader will spot the cheaper price and import the product into the UK, not necessarily to the end consumer);
- non-compliant products in the UK, including fakes, increase, further stretching public regulatory organisations such as Trading Standards;
- The focus of competition would shift from an inter-brand model (which stimulates investment in innovation, reputation, quality and range) to an intra-brand model (the brand competes with itself so there is less incentive to invest and innovate to be different and better).

A change in the UK's trade mark exhaustion regime would be a significant policy shift negatively affecting consumers, brand owners, UK exporters and public enforcement agencies while not reducing inflation. It would also signal a shift in economic policy away from innovation and growth and would weaken competition. The major winners would be individual parallel traders and importers who may well not be based in the UK and who do not innovate or manufacture products. Other winners would be large retailers, whether operating online or bricks-and-mortar (or both) formats.

For any questions or discussions relating to this brief, please contact John Noble (jn@britishbrandsgroup.org.uk).