**IPO Consultation on IP Rights Exhaustion**

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**Comments from the BRC**

**(British Retail Consortium)**

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**IPO consultation on UK’s future regime for exhaustion of IP Rights**

**BRC Response**

***Nature of response***

*The BRC is keen to provide a response to this consultation. Unfortunately given the timing of the consultation over the summer period and the number of other Government consultations during the same period, combined with the need to deal with the effects of the pandemic and changing regulations, we have been unable to examine the issue in detail or to provide the detailed evidence that is requested. This has also resulted in limitations on the participation of members in helping to develop a response. However, we are happy to provide this short narrative response.*

**The BRC**

The BRC is the trade association for UK retailers and our membership comprises over 170 major retailers - whether operating physical stores, multichannel or pureplay online - plus thousands of smaller, independent retailers through a number of smaller retail Trade Associations that are themselves members of BRC. Our members deliver an estimated £180bn of retail sales and employ just over 1.5 million colleagues. Our purpose is to make a positive difference to the retail industry and the customers it serves, today and in the future.

BRC positions are based on structured discussions with members. While it is often possible to come to a consensus position in spite of a high degree of competition and differentiation, that is not always the case where interests diverge completely. It is not the role of the BRC to determine the best interests of consumers and the UK as a whole in relation to the balance of interests among its members where these diverge: that is a matter for Government.

**Overview**

1. Our natural inclination as BRC is always to prefer solutions that open up markets, boost competition and provide greater choice for consumers both in terms of products and prices at any given price level. On that basis we would opt on balance for International exhaustion. Overall we believe that on balance a move to International Exhaustion of IP Rights would be in the best interests of consumers by opening up new opportunities to source goods at competitive prices.
2. However, before deciding to embark on this approach there are concerns among some of our members that the Government needs to address either through reassurance they are unfounded or through mitigation. In particular some retailers who are also brand owners of high end products believe such an extension could undermine the overall services they offer in retailing their goods; and booksellers are concerned about the impact on publishers and authors and the consequences that would have for bookshops.

**The changing face of retail**

1. Retail is constantly evolving and changing and adapting to new opportunities and new challenges. It is not afraid of change but rejects change for the sake of change. It seeks a regulatory environment that provides a stable context for decision making and planning – but welcomes changes to that environment where they can be shown to improve the opportunity for innovation and customer service.
2. The retail sector has changed dramatically over the last few years with the growth of online selling to consumers both directly by retailers but also by brand owners selling direct to consumers, through the growth of Platforms and through Marketplaces where independent retailers can sell their products. Some non food retailers now estimate that over 60% of their sales will soon be online. With the pandemic, many small retailers have also developed their own online capability. In other words, retail has already been through a dramatic realignment and adapted to changing circumstances, with some who have failed to adapt no longer trading.
3. Retail is a highly competitive sector. Fair competition is the best way to ensure consumers have a wide choice of products and services at competitive prices. To provide the widest possible choice for consumers many retailers are accustomed to scouring the world to source products. Others may provide high end products to UK consumers under their own brand exclusively from the UK because they believe those products are best sold under certain conditions which they can control – i.e. where traders have specialist knowledge of their product and provide specialist follow up advice and services.

**Background**

1. It is our understanding that the matter under consideration does not change the actual IP Rights per se but only the circumstances in which they become exhausted.
2. We do, however, recognise that changing the exhaustion regime may have some implications for rights holders in respect of such things as the value of a licence, and the import and export and reimport of spare parts in certain sectors. However, in this submission we are viewing the issue as retailers providing consumers with the widest possible range of products at competitive prices rather than as rights holders or brand owners, even though some retailers may also be rights holders.
3. As far as we can tell, there was no real campaign for change when we were members of the EU although it seems there were various question marks prior to the ECJ ruling on the matter of whether Member states could allow International exhaustion. EEA exhaustion was seen as exhaustion in the home market – the single market. Retailers had grown accustomed to the rules and simply exercised their options for sourcing products accordingly.
4. In truth probably not many had even considered whether an alternative could be better or not. They just got on with living with the system. For that reason many, especially smaller retailers, have not been able to assess the impact of any change. It is only our exit from the EU that has necessitated and indeed enabled a reconsideration of the future UK regime.

**The Choices**

1. From the consultation, it would seem that while there are in theory 4 choices, in fact the Government is only really giving consideration to 2 or maybe, just, 3.
2. The UK only exhaustion option is clearly ruled out because in fact the UK is no longer a single market in reality and this would breach the Northern Ireland protocol. In any case, for whatever reason no members have suggested that this option would be desirable. It would be seen as a backwards restriction on options for sourcing legal parallel imports.
3. The other option that seems to have been ruled out is a hybrid – on the grounds it would confuse consumers and be complicated to administer and ensure the rules were being followed. There would be too much opportunity for questionable parallel imports at the margins of the definitions, and too much need for excessive interpretation.
4. We have doubts about consumer confusion – simply because we doubt consumers are in the least aware of whether a product is a parallel import or not – and probably do not care either as long as it is of the same quality, is as described and expected, and is legal.
5. On the issue of complications we would prefer a single regime for all – though we note that customs formalities are in themselves extremely complicated, so we are not sure that the addition of a hybrid rights regime would necessarily add much complication to the overall process.
6. However, we wonder whether this is something the Government should reconsider as to whether it would be possible to limit the hybrid to some very well defined products. This would be on the basis that there is clear evidence that a change would be detrimental to consumers and competition with regard to those very specific and limited products - and that adapting to a new regime would be so difficult for some sellers of those products that they could potentially go out of business.

**The two ‘pure’ options**

1. The two ‘pure’ options that seem to remain are UK+ - which is effectively the current regime when viewed from the retail perspective as importers rather than those placing products on the EEA market - and International exhaustion.
2. It is clear that the current regime -UK+ - has operated satisfactorily and is reasonably well understood by those who might and do engage in parallel importing. As we have said had we not left the EEA, it is unlikely there would be a campaign for change. In that sense in general retailers could live with its continuation either permanently or for the time being. It is also perhaps seen as having less environmental impact in terms of the need to transport goods over greater distances. For some in specific sectors such as booksellers and certain high end products that is seen as the best option.
3. However, for most others that have engaged on the issue, not least the larger retailers who might have the greatest knowledge and resources to engage in parallel importing, the potential opportunities presented by a move to International exhaustion are more attractive not least because just as our home market was once the EEA, now the world is seen as our home market. They would regard sticking with UK+ as unambitious and a missed opportunity even if they could live with it as a no change situation.
4. Supporters of International Exhaustion particularly point to the potential to supply consumers with the same products at cheaper prices. They also note that a simple single regime leads to less opportunity for less reputable traders to play the system at the margins – or for that matter for reputable traders trying to comply with the rules to simply get it wrong. An International regime requiring fewer rules should produce a better regulatory regime which makes compliance easier; which decreases the costs of parallel importing by reducing the need to check if the import is legitimate; reduces the number of parallel take down notices; reduces the number of IP claims; and results in less legal actions with all the prohibitive costs that may be involved not least for SME retailers.
5. It is difficult to estimate the use to which expansion of the regime to International Exhaustion would in fact be used for parallel imports or in which sectors of retail.
6. One factor might be that such a regime would include countries hitherto locked out but where consumer preferences and tastes are more similar to British tastes than those in those EEA countries where the price of goods is lower. Indeed, because the EEA area is perceived to be to a reasonable extent homogeneous in respect of costs of living and prices of products (at least compared to much of the rest of the world), the opportunities for parallel importing being worthwhile are perceived as being limited. It is, therefore, not possible to base an assessment for the appetite to actually engage in parallel importing on an International scale on the take-up in the EEA area in the past.
7. Nor is it easy to estimate whether opening up the opportunities – and competitive pressures - would lead to retailers that have never engaged in parallel importing starting to do so with benefits for consumers. There would be limitations derived from other regulations or consumer preferences. For some products there would be questions over compliance with domestic standards – televisions for example need to be made for the UK market if they are to work while other products may have features that are required by consumers in some markets but not others even though they are essentially the same product.

**Conclusion**

1. Given some divergent views in the membership, the BRC cannot on this occasion provide a totally definitive consensus view.
2. The Government itself points to a lack of evidence on which to base a decision – and indeed given there has been no real debate on the issue for many years there is only ever going to be limited evidence of the impact of a change. Against that background we believe that the Government should publish a further thorough impact assessment based on evidence collected during this consultation. This could be the subject of further consultation before a final decision is made.
3. We can certainly rule out UK exhaustion as a retrograde step, quite apart from its potential impact on the NI Protocol and the consequent need to operate two regimes within the UK.
4. We can accept the status quo if the Government deems that is the right approach on the basis of the overall economy; the interests of business and consumers; and that credible evidence exists that any change would be so detrimental to certain sectors and that there is no way to mitigate that detriment that only the status quo can be contemplated.
5. However, our natural inclination is always to prefer solutions that open up markets, boost competition and provide greater choice for consumers both in terms of products and prices at any given price level. On that basis we would opt on balance for International exhaustion.
6. This is supported by many members who have participated in our consideration of the issue, especially the larger members but also including some, though not all, specialist sellers.
7. As with all legislation, the Government will no doubt review the implementation of any change in due course to ensure there are no unintended consequences and the change is working as expected.
8. We do not support protectionism or failure to adapt to change as a reason to maintain the status quo in any regulatory area. However, we are conscious that there are certain retailers such as many booksellers and some brand owning retailers of high end products that believe they would suffer a detrimental impact as a result of unintended consequences that they believe would also be detrimental to consumers and competition.
9. Booksellers clearly believe they are in that category not least because the extension to International Exhaustion would bring in a large number of English speaking countries but also because many are small and would not have the time or resources to identify opportunities for parallel imports. We believe the IPO should examine their concerns in detail and either reassure them that they are unfounded (based on real examination of their evidence) or propose solutions such as better contract law arrangements and assurances on competition law enforcement that could mitigate any detrimental effect both on the sellers and consumers.
10. Booksellers have already in the past few years had to adapt to huge changes in their market. While many consumers enjoy ordering online, most book buying consumers also enjoy the experience of going into a bookshop and thumbing through the offerings and would regard any further reduction in those opportunities as detrimental. It is this sector that we particularly have in mind as offering the potential for a simple well defined hybrid system given the relatively discrete nature of the definition of a book.