

BCC response to the UK's future regime for the exhaustion of IP rights (31 August 2021)

1. The British Copyright Council (BCC) is a not-for-profit organisation that provides a forum for discussion on copyright law and related issues within the creative industries. We have 31 member organisations that span the creative industries from creators of literature, music, tv and film, photography, illustrations and other visual art - to publishers and producers. Our members represent over 500,000 individual creators and those who manage their rights.
2. In 2019, the value of goods exported by sector was: £20.1bn for the Creative Industries (49.9% higher than 2018; 33.0% higher than 2015) and £17.4bn for the Cultural Sector (63.2% higher than 2018; 41.4% higher than 2015).¹ These numbers are driven by music, performing and visual arts, publishing, film, tv, radio, museums, galleries and libraries. Any changes to the exhaustion regime must not undermine the value of exports from the creative and cultural sectors.
3. Changes to the exhaustion regime would have an impact on our members spanning the creative industry from literature including authors, illustrators, photographers who create artistic works for books and publishers to the music industry including recording artists, composers of sheet music and performers who record their performances.

Section A: Parallel trade from to and from the UK

Q. Is there parallel trade in your sector?

4. There is parallel trade in a number of sectors in the creative industry, but of particular concern is the book sector. European parallel trade into the UK already exists, but it has not undermined the UK market for authors, illustrators and publishers because prices do not differ significantly, and many copies are developed through foreign language rights deals. The book sector is concerned that a move towards global (non-EEA) parallel trade would be devastating for the publishing sector, authors and illustrators.
5. In the music industry, parallel trade is evident for sheet music and physical copies of sound recordings which include musical works (CDs, DVDs, Vinyl). In the audio-visual market for sales of physical DVD's parallel trade took place although different video formats often drove local market demand. This is problematic and should be addressed as part of any reforms to the exhaustion regime.

Q. If so, how do parallel imports from the EEA impact on your organisation in terms of (a) choice, (b) availability of supply and (c) competition in your marketplace?

6. In the book sector EU parallel trade is limited and so it has minimal impact on choice, availability of competition.
7. UK music publishers have been experiencing challenges in preventing unlicensed parallel imports of sheet music into the UK market. Clear and defined exhaustion rules provide the legal framework for UK music publishers to obtain remuneration commensurate for the market. Furthermore, distinguishing legitimate parallel imports from counterfeit goods is also an ongoing challenge. Trade in counterfeit sheet music in particular is virtually impossible to police in the music sector because there is no effective way to identify unauthorised transcriptions of songs on the printed stave at the point of entry.

¹ <https://www.gov.uk/government/statistics/dcms-economic-estimates-2019-trade-report/dcms-sectors-economic-estimates-2019-trade>

8. This is happening because operators obtain goods sold by UK music publishers in international markets and reimport them into the UK market. Given that UK music publishers determine pricing structures according to the relevant market, such re-importers benefit from buying the goods in a market that has lower prices and re-importing them into the UK market at a higher price (but still lower than the price set by the industry to sell the goods in the UK). This practice is being used by big online retailers that buy sheet music through subsidiaries in the relevant market and then re-import them into the UK market. To make things worse this whole process is automated: these online retailers utilise their automated purchasing system which essentially trawls all available stock internationally for the best price and is (or was) territorially blind. We would expect big online retailers such as [amazon.com](https://www.amazon.com) to extend this practice as far as they are able under law. This causes massive concern to legitimate retail customers in the UK market. Ultimately, this will be to the detriment of the consumer because music publishers will not be able to offer differentiated pricing that caters for different market structures.

Q: If you are able to, please provide the current volume or value of total imports to your organisation in the UK. If possible, please estimate the percentage of the total imports accounted for by parallel imports?

9. Many BCC members will be responding directly to the call for views. Please refer to these for more detail. Their responses are of paramount importance given their contribution to the UK's economy. For example, the UK is the largest exporter of books globally and the UK recorded the third largest music industry revenues in the world.
10. As mentioned above, parallel trade from countries within the EEA is limited as prices are similar and there are different languages across the EEA.

Q: In your business, how do you exert control over supply chains?

11. Copyright, together with a robust regional exhaustion framework, gives rightsholders exclusive rights to distribute their works and it enables authors and publishers to uphold territorial rights when addressing how, when and where to put new physical goods onto the market around the world.
12. Specifically, publishers across the creative industries depend on a competitive supply chain, i.e. one in which not one dominant online retailer can undermine targeted pricing models. Introducing an international exhaustion regime will remove any control for UK music publishers.

Q: For your business or organisation, how do right holders become aware and seek to stop their products being parallel imported from outside the EEA without permission?

13. Illegal parallel imports appear in legitimate retail channels, in particular being sold through promotion on digital marketplaces. In the music industry individual retail customers will inform music publishers about the availability of goods exported from the UK intended only for overseas markets, but which are brought back into the UK, sidestepping and breaching the contractual rules agreed for copies intended for the UK market (including agreed remuneration of contributors against prices secured). In the book sector these are often identified by publishers and right holders who generally use similar takedown processes as they use for pirated content and issue takedown notices identifying themselves as the UK rightsowner and requesting removal of the illegal parallel import.
14. In the book sector foreign editions listed for sale in the UK can take primacy in search results, diverting sales from UK publishers. Serious damage can occur when titles are released in one territory ahead of others as consumers grab early sales from overseas rather than waiting for the UK edition.

Q: Do you have any views on the government's assessment of UK legislation and international treaties that are relevant to the UK's choice and implementation of an exhaustion regime?

15. We note that the government has stated that the Northern Ireland Protocol prevents it from providing for the option of a national regime, although the full explanation of this is not clear from the call for views. Without seeing the government's legal advice on this issue, it is difficult to make any further assessment.
16. Free trade agreements, bilateral (amongst many: UK and Japan Economic Partnership Agreement) and multilateral (TRIPS agreement) leave the decision on which exhaustion regime to individual countries.
17. It is important to note that international exhaustion generally benefits net importers of cultural goods such as Australia; it discriminates against net exporters of cultural goods such as the UK with its internationally successful creative industries, including publishing, film and music.
18. The BCC believes that the UK can choose the UK+ regime for copyright and related rights within its existing international treaty obligations.

Q: Are there international price differentials for goods in your sector?

If yes, what are the factors that influence differences in prices between countries?

19. In the book and music sectors prices differ significantly between countries reflecting the economies of local markets, benefits from promoting culture and knowledge in new markets, and the local distribution options and challenges. International pricing strategies benefit global consumers ensuring parity based on the local economy. By way of example international pricing strategies underpin exporting strategies for UK musicians, authors and publishers and ensure British books and music reach international markets. Beyond economic gains these exports also strengthen the UK's soft power by sharing our culture and creativity globally.

Q: Are you or your business/organisation aware of the change to the UK's exhaustion regime that came into effect on 1 January 2021 following the end of the transition period?

20. Yes.

Q: What are the costs and benefits of the current regime to your organisation? For example, in terms of choice and availability of suppliers, prices paid and regulatory standards.

Q: If possible, please provide examples if your business:

a) has prohibited or has considered prohibiting parallel exports or

b) has been prevented from parallel exporting from the UK to the EEA since 1 January 2021.

Q: Do you have any views on the government's assessment that the Northern Ireland Protocol will mean that the regime ultimately selected by the UK government will need to allow parallel imports into Northern Ireland from the Republic of Ireland and other EEA countries?

Q: If the government was able to change from the current unilateral regional regime (UK+ regime), would your business or organisation prefer a model which either allowed parallel imports from anywhere in the world (without the rights holder's permission) or prohibited parallel imports into the UK (unless the rights holder's permission is obtained)? Please outline the regime your business or organisation would prefer and explain the benefits, costs of change and risks of that change.

21. An international regime could have devastating consequences for the book sector. It would significantly weaken copyright protection for the distribution of goods globally. This is a significant concern to all sectors who export physical IP protected products around the world. In book publishing authors and publishers rely heavily on global exports under a territorial rights system.

Export sales are worth £3.5bn per annum and account for 60% of UK publisher sales of books alone. A functioning exhaustion regime underpins the viability of the publishing industry and supports the thousands of UK authors who rely on global sales.

22. The publishing industry has estimated that a significant proportion of its revenue, approximately £2bn, could be put at risk in an international exhaustion scenario. This would be crippling to one of the UK's major creative industries and force job relocations to other major international creative industries hubs. It would heavily impact author incomes in this country.
23. The BCC is opposed to the adoption of an international regime, but in the unfortunate event that it is the government's recommended route forward, then it should also consider specific arrangements for the book sector to protect the UK book market.
24. Our view is that copyright concerns would be best addressed by returning to the long-standing exclusion of international copyright exhaustion in UK legislation.
25. However, despite the UK's exit from the EU creating an imbalance in the current regime, the consequences have so far been manageable for rightsholders and so the government may prefer to maintain the status quo.

Q: Of the 4 options that the government is assessing, which exhaustion regime would you be most opposed to for your business or organisation? Please explain the reasons and set out the costs to your business or organisation and risks of that change.

26. The BCC opposes the introduction of an international exhaustion regime as it would:
 - a. Destroy the contribution that the book sector brings to UK exports.
 - b. Impact authors' livelihoods.
 - c. Impact visual artists and other rightsholders in the value chain.
 - d. Reduce publishers' appetite to invest in new voices.
 - e. Even greater pressure would be placed on UK high streets and sellers by major global online marketplaces that would benefit from facilitating and promoting parallel trade.

Q: Is there clear and verifiable evidence in favour of different treatment for specific sectors, goods or IP rights to the UK economy?

27. The educational, cultural and linguistic drivers behind the global success of the UK creative industries make it important that the approach recommended in this response is considered for these sectors even if the government takes a different approach overall. Without sector specific consideration the government risks long-term damage to the UK's success as an exporter of creative and cultural goods.

Q: What new activities would your business have to undertake if the government changed the current exhaustion regime? What would be the costs and benefits of such activities?

Q: Please outline any other issues that the government should consider when deciding on what exhaustion regime to implement, including economic, trade, consumer or societal impacts.

28. An international regime would result in a perverse incentive for exporters of physical goods in the creative industries to limit exporting to low price markets in order to avoid these goods undermining UK markets through parallel trade. It is our view that granting unreciprocated parallel export rights internationally will not benefit the UK's creative industries.

Q: If the government were to change its exhaustion regime, what factors would affect the amount of time your business or organisation would need to implement a change? This may

include but is not limited to changes to supply chains, contracts, product development, manufacturing processes or investment decisions. Please provide information to support your comments.

29. Any change to an international exhaustion regime would be far from just a “technical” issue for the application of the copyright distribution right. It would have a knock-on effect on distribution chains and business models around the world. Many businesses rely on establishing long-term contracts to recoup investments in major new products, whether feature films, new recorded music or books and wider magazine publications. Challenges to these long-term agreements due to uncertainties of the effect of an international exhaustion regime on local market operations would be damaging and create reluctance to invest in future innovation (and therefore growth).

Q: If the government were to change its exhaustion regime, what length of time would your business or organisation need to implement the change (for example, 1 year or 3 years)? Please provide information to support your answer.

30. This would depend on the change being proposed. By way of example, If the government decides to move to an international regime, then the publishing sector is asking for a minimum of 5 years for implementation. It would be worthwhile to discuss this question with stakeholders once the government has a firmer idea of which approach it is going to take.

31. The potential implications of changes to the exhaustion regime for the creative industries must not be under-estimated or over-looked. The BCC is keen to work with the IPO as its approach to the UK’s future exhaustion regime develops.

For further information regarding this response contact director@britishcopyright.org.uk.