



International Chamber of Commerce

The world business organization

Exhaustion of intellectual property rights - [Appendix](#)

Commission on Intellectual and Industrial Property, 7 January 2000

[French version](#)

ICC survey of members' views on exhaustion of international intellectual property rights

ICC conducted a survey in July 1999 to obtain the views of its membership on the issue of the international exhaustion of intellectual property rights.

Methodology

A questionnaire ([annex 1](#)) was prepared requesting respondents to state if they were against, in support of, or were neutral with respect to, international exhaustion in the areas of patents, trademarks and copyrights. This was sent to members of the ICC Commission on Intellectual and Industrial Property and to ICC national committees in 70 countries, which in turn sent this to their national members.

The replies to the questionnaire were analyzed according to business sector and region. 13 broad business sectors were identified (Pharmaceuticals, Chemicals, Cosmetic Industry, Engineering, Information Computer Software and Entertainment, Telecommunications and Information Technology, Household Equipment and Electronics, Domestic Consumer Goods, Automobile and Transport, Retail, Legal and Intellectual Property Consultants, Pan-industry Organizations, and Miscellaneous) and 4 regions (Europe, USA, South America and Asia).

The replies were broken down into percentages of those taking position for and against international exhaustion. These percentages were further refined according to sectors and regions ([annex 2](#)).

The reasons provided by members justifying their positions were also summarized according to sector ([annex 3](#)).

Summary of results

In all, 87 ICC members replied to the survey: 64 from Europe; 11 from the USA; 9 from South America and 3 from Asia (India). Responses from the various sectors were as follows: Pharmaceuticals (15); Chemicals (7); Cosmetics (2); Engineering (7); Information, Computer Software and Entertainment (4); Telecommunications and Information Technology (6); Household Equipment and Electronics (4); Domestic Consumer Goods (2); Automobile and Transport (6); Retail (4); Legal and Intellectual Property Consultants (18), Pan-industry Organizations (2) and Miscellaneous (10).

Globally, 67,8% took a position against international exhaustion of patents and trademarks, and 54% took a position against international exhaustion of copyrights. 20,7% responded in support of international exhaustion for patents, 23% for trademarks and 17,3% for copyrights. 11,5% did not respond or did not feel strongly either way regarding patents, 9,2% regarding trademarks and 28,7% regarding copyrights.

Annex 1.

Survey on position of ICC members re the exhaustion of intellectual property rights

Please return to Daphn Yong-d'Herv : fax +33-1 49 53 28 59

Name and position
Company name
Sector
Country

Please indicate below if your company supports, is against, or does not feel strongly about having a regime of international exhaustion for the different intellectual property rights indicated, and the reasons for your position:

Patents:

Supports •	Is against •	Does not feel strongly either way •
Reason	

Trademarks:

Supports •	Is against •	Does not feel strongly either way •
Reason	

Copyright:

Supports •	Is against •	Does not feel strongly either way •
Reason	

Other comments:.....
.....
.....

Annex 2.

Result in percentages

 Globally (Responses: 87)	Against international exhaustion	In support of international exhaustion	Neutral/ No answer
Patents	67.8%	20.7%	11.5%
Trademarks	67.8%	23%	9.2%
Copyrights	54%	17.3%	28.7%

BY REGION (Responses: 87)	Against international exhaustion	In support of international exhaustion	Neutral/ No answer
Europe (Responses: 64)			
Patents	76.6%	12.5%	10.9%
Trademarks	70.3%	18.8%	10.9%
Copyrights	48.4%	14.1%	37.5%
USA (Responses: 11)			
Patents	63.6%	18.2%	18.2%
Trademarks	90.9%	9.1%	0%
Copyrights	90.9%	9.1%	0%
South America (Responses: 9)			
Patents	33.3%	55.6%	11.1%
Trademarks	33.3%	55.6%	11.1%
Copyrights	56.6%	33.3%	11.1%
Asia (Responses: 3)			
Patents	0%	100%	0%
Trademarks	33.3%	66.7%	0%
Copyrights	33.3%	66.7%	0%

BY SECTOR (Responses: 87)	Against international exhaustion	In support of international exhaustion	Neutral/ No answer
Pharmaceuticals (Responses: 15)			

Patents	93.3%	6.7%	0%
Trademarks	86.6%	6.7%	6.7%
Copyrights	60%	6.7%	33.3%
Chemicals (Responses: 7)			
Patents	100%	0%	0%
Trademarks	100%	0%	0%
Copyrights	71.4%	0%	28.6%
Cosmetics (Responses: 2)			
Patents	100%	0%	0%
Trademarks	100%	0%	0%
Copyrights	0%	0%	100%
Engineering (Responses: 7)			
Patents	85.7%	0%	14.3%
Trademarks	85.7%	0%	14.3%
Copyrights	85.7%	0%	14.3%
Information, Software, Entertainment (Responses: 4)			
Patents	50%	0%	50%
Trademarks	75%	0%	25%
Copyrights	100%	0%	0%
Telecoms & IT (Responses: 6)			
Patents	66.7%	33.3%	0%
Trademarks	83.3%	16.7%	0%
Copyrights	83.3%	16.7%	0%
Household Equipment and Electronics (Responses: 4)			
Patents	100%	0%	0%
Trademarks	100%	0%	0%
Copyrights	75%	0%	25%
Domestic Consumer Goods (Responses: 2)			
Patents	100%	0%	0%
Trademarks	100%	0%	0%
Copyrights	50%	0%	50%
Automobile and Transport (Responses: 6)			
Patents	100%	0%	0%
Trademarks	83.3%	0%	16.7%
Copyrights	83.3%	0%	16.7%
Retail (Responses: 4)			
Patents	0%	75%	25%

Trademarks	25%	75%	0%
Copyrights	25%	75%	0%
Legal and Intellectual Property Consultants (Responses: 18)			
Patents	55.6%	27.8%	16.6%
Trademarks	44.4%	44.4%	11.2%
Copyrights	50%	22.2%	27.8%
Pan Industry Organizations (Responses: 2)			
Patents	100%	0%	0%
Trademarks	100%	0%	0%
Copyrights	50%	0%	50%
Miscellaneous (Responses: 10)			
Patents	30%	40%	30%
Trademarks	50%	30%	20%
Copyrights	20%	30%	50%

Annex 3.

Summary by sector of reasons given by respondents supporting their positions

PHARMACEUTICALS

NUMBER OF RESPONSES: 15

Only one of the responses from the sector favored international exhaustion in all intellectual property areas. All other respondents were against international exhaustion in the area of patents, and most in the area of trademarks and copyright (1 response for trademarks and 5 for copyrights were neutral/gave no answer) citing the following reasons:

- Differential pricing is imposed by regulated pricing regimes and is essential to recuperate high R&D investments, and to allow producers to serve low price markets. International exhaustion will allow traders to take unfair advantage of these necessary price differences and siphon off returns needed to fund research and development.
- The pharmaceutical industry has to be able to keep track of product flow for safety reasons and in case of product recall; lack of quality control in an extended supply chain and counterfeits are potentially life threatening.
- International exhaustion will have an adverse effect on developing countries because it will discourage technology transfer and will lead to the withdrawal or increase in prices of products in low price markets.

The one response from the pharmaceutical sector in favor of international exhaustion stated that this system ensures easy access for consumers to lowest prices for consumers, and prevents monopolistic and abusive pricing practices by manufacturers.

CHEMICALS

NUMBER OF RESPONSES: 7

None of the responses from the sector favored international exhaustion in any intellectual property area. All respondents were against international exhaustion in the areas of patents and trademarks, and most in the area of copyright (2 responses were neutral/gave no answer) citing the following reasons:

- Parallel imports lead to health and safety risks for consumers as there are strict requirements to use, store and transport chemicals, and they are formulated differently for different climates to ensure stability and efficiency.
- International exhaustion would prevent companies from granting territorial licenses, possibly reducing technology transfer to developing countries, and reduce producers' freedom in using their intellectual property rights.
- International exhaustion erodes intellectual property protection, which is a necessary incentive to innovation and investment in R&D, and leads to counterfeiting and unfair competition.

COSMETIC INDUSTRY

NUMBER OF RESPONSES: 2

None of the responses from the sector favored international exhaustion in any intellectual property area. All respondents were against international exhaustion in the areas of patents and trademarks, (all respondents were neutral/gave no answer regarding copyrights) citing the following reasons:

- International exhaustion would undermine innovation and result in an increase in counterfeits.
- The only winner in a system of international exhaustion would be the parallel trader, not the consumer.
- Regional exhaustion ensures fair competition between distributors.

ENGINEERING

NUMBER OF RESPONSES: 7

None of the responses from the sector favored international exhaustion in any intellectual property area. 6 of the respondents were against international exhaustion in all areas of intellectual property (1 response was neutral/gave no answer) citing the following reasons:

- International exhaustion would undermine adequate and effective intellectual property protection and not be consistent with the economic realities of international trade.
- International exhaustion brings little advantage to the consumer and is a great dis-incentive to innovators, especially SMEs, and inhibits technology transfer.
- Lack of global market makes differences in prices a necessity in order to achieve return on investment on R&D costs and to supply low price markets.
- International exhaustion could result in piracy and the producer stopping supplies to low priced countries, which could lead to higher prices in the home country to achieve return on investment on R&D costs.

- Businesses in countries/regions which have an international exhaustion regime are at a competitive disadvantage vis-à-vis other countries which do not have this regime.

INFORMATION, COMPUTER SOFTWARE AND ENTERTAINMENT

NUMBER OF RESPONSES: 4

None of the responses from the sector favored international exhaustion in any intellectual property area. 2 of the respondents were against international exhaustion in the areas of patents, 3 in the area of trademarks (2 responses were neutral/gave no answer for patents, 1 for trademarks) and all in the area of copyrights, citing the following reasons:

- Such a system will lead to an increase of piracy and therefore undermine the resources for important creative elements.
- International exhaustion would be contrary to the territorial nature of intellectual property rights.
- International exhaustion would not allow works to be made available in various countries at times and with promotional programs determined by the intellectual property owner.
- Competition from parallel trading of special low cost editions destined for developing countries may force publishers of copyrights works to stop production of local editions in the importing market and also to withdraw special low cost editions which are subject to parallel trading.

TELECOMMUNICATIONS AND INFORMATION TECHNOLOGY

NUMBER OF RESPONSES: 6

A majority of respondents in this sector were against an international exhaustion regime, in all three areas of intellectual property. The main arguments cited against a regime of international exhaustion were that international exhaustion

- would cause intellectual property holders to lose control of distribution channels and create difficulties with enforcement of territorial restrictions in license agreements.
- would allow sales, in territories where the intellectual property holder had no or weaker intellectual property protection, to be imported back into territories where he had strong intellectual property protection, thereby preventing him from receiving fair value in the country with stronger protection.

However, 2 telecommunication companies supported international exhaustion for patents, and one company for trademarks and copyrights, as a legitimate means of supporting the free flow of goods as long as it originates from the legal right holder.

HOUSEHOLD EQUIPMENT AND ELECTRONICS

NUMBER OF RESPONSES: 4

None of the responses from the sector favored international exhaustion in any intellectual property area. All respondents were against international exhaustion in the areas of patents and trademarks, and most in the area of copyrights (1 response was neutral/gave no answer) citing the following reasons:

- There are too many differences in countries worldwide for international exhaustion to work.

- Legal jurisprudence (ECJ's "Silhouette Case") and international agreements like the WTO agreement, and the Paris, Berne and Rome Conventions do not support an international exhaustion regime.
- International exhaustion will mainly benefit trading companies.

DOMESTIC CONSUMER GOODS

NUMBER OF RESPONSES: 2

None of the respondents in this sector supported international exhaustion. All respondents were against international exhaustion in the areas of patents and trademarks, and most in the area of copyrights (1 response was neutral/gave no answer) citing the following reasons:

- International exhaustion will prejudice sovereignty of distribution.
- Products have to be prepared with different tastes and formulations for different markets.

AUTOMOBILE AND TRANSPORT

NUMBER OF RESPONSES: 6

None of the responses from the sector favored international exhaustion. All respondents were against international exhaustion in the areas of patents, and most in the area of trademarks and copyright (though 1 of the responses was neutral/gave no answer) citing the following reasons:

- Fears of loss of licensing opportunities, reduced quality control (as differentiation between licensed and non-licensed parts become more difficult with the growing number of parts and sources), and of increase in counterfeits and safety risks, which can all damage the companies' reputation.
- Need to secure control over markets and (selective) distribution of goods which are technically different in different markets.
- Risk of confusion with spare parts, catalogues etc.

RETAIL

NUMBER OF RESPONSES: 4

A majority of respondents in this sector were in favor of international exhaustion, arguing that:

- International exhaustion was consistent with free trade and fair, clear and simple rules.
- International exhaustion served consumer interests by putting pressure on prices.
- The growing Internet trade made international exhaustion the only possible regime.

However, one retail company felt that the same growing use of Internet for distribution makes control of distribution and sale of trademarked products even more important, and took a position against international exhaustion in the survey.

LEGAL AND INTELLECTUAL PROPERTY CONSULTANTS

NUMBER OF RESPONSES: 18

The majority (55.6%) was against a regime of international exhaustion for patents. Main arguments given in support of this position were that:

- International exhaustion would undermine the rewards for innovation and creativity provided by patents and copyrights, and the guarantees of originality and quality provided by trademarks.
- International exhaustion favors counterfeiting, and leads to consumer confusion and loss of confidence in the intellectual property protected product.
- Lack of reciprocity on an international level, coupled with worldwide diversity in e.g. production costs etc, will put businesses in high cost countries at a competitive disadvantage.

44.4% of the respondents supported a regime of international exhaustion for trademarks (44.4% were against, 11.2% were neutral), and a minority supported a regime of international exhaustion for patents and copyrights. These respondents argued that limiting exhaustion raised new trade barriers, segmented markets, and was an obstacle to world-wide integration of markets, and was therefore unjustified.

PAN-INDUSTRY ORGANIZATIONS

NUMBER OF RESPONSES: 2

None of the responses from the sector favored international exhaustion in any intellectual property area. All respondents were against international exhaustion in the areas of patents and trademarks, and most in the area of copyrights (1 response was neutral/gave no answer) citing the following reasons:

- International exhaustion will undermine intellectual property rights and have negative effects on investment and innovation.
- There are too many differences in countries worldwide for international exhaustion to work.
- International exhaustion may lead to loss of consumer confidence in the product.
- International exhaustion will increase problems with counterfeiting.
- ECJ "Silhouette Case" and the NERA report do not support move towards a regime of international exhaustion.

MISCELLANEOUS

NUMBER OF RESPONSES: 10

The group included companies from the shipping inspection, ceramic ware, oil industry, financial services, lock industry, steel trade, aluminum industry, packaging of liquid food, as well as law professors. The respondents were divided on the question of national/international exhaustion. Those against international exhaustion used the same arguments cited by respondents in other sectors as follows:

- Products are tailored differently to different markets, which would not be possible under a regime of international exhaustion.
- International exhaustion would lead to problems with guarantees and after sale service, and consumer confusion and dissatisfaction.

Those in support of international exhaustion argued that R&D expenditure was incurred keeping in view global opportunities.