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COMPARITIVE ANALYSIS: DOCTRINE OF EXHAUSTION IN THE CONTEXT OF PARALLEL TRADE.

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PREFACE

Myself being an LLM student who specializes in international trade law doing my postgraduate studies in the National University of Advanced Legal Studies, it has been always a directional path of thought process in international law for me. I was always fascinated by the knowledge of international affairs and how countries operate in the international sphere. But one subject which grabbed my heart entirely was the intellectual property rights especially in relation to the world trade and import-export policies.

The ability of any nation to retain a competitive edge in the world rests on its ability to innovate as well as create & maintain an environment which aims to nurture, protect & sustain innovation. Innovation drives growth and positive social change particularly so in countries such as India which are reaping and will continue to reap the windfall of a younger demographic in the coming decades. Therefore countries like India require dynamic policies to boost research and development and further economic growth. India needs innovation to not only ensure it remains competitive on the world stage but also to deliver to its various sections the benefits of innovation ranging from hardier crop varieties and weather information to advanced Medicare and drugs. In order to reconcile, develop & sustain a national effort at bolstering innovation, and ensuring the protection of Intellectual Property Rights there needs to be a comprehensive framework in line with the other world countries and conventions free from flexibilities and interpretation.

The issue of parallel trade in the context of exhaustion is what drove me for research and to suggest a solution to the problem. Parallel Imports basically constitute import of Non-Counterfeit or Genuine Goods from one country to another without the permission of the IP owner. The products are indeed legal, but are unauthorized because they are imported without the permission of the Proprietor. The consequences of Parallel importation of an IP good typically exhausted by the IPR holder is such that it adversely affects the economic rights of the IPR holder followed by reduced inventions/ FDI influx . This thesis underlies great concern for the developing nations like India if this practice escalates under the current legal regime. Hence through the columns of this humble study on the Doctrine of Exhaustion in the legal context, I tried to arrive at a practical solution to mitigate the problems of Parallel importation.

K.M.MRITHUNJAYAN

ABBREVIATIONS

AIPPI	The International Association for the Protection of Intellectual Property
BREXIT	British Exit
CDPA	Copyright Designs Patent Act
CPC	Community Patent Convention
EC	European Community
ECJ	European Court of Justice
EEA	European Economic Area
EPC	European Patent Convention
EU	European Union
EWHC	England and Wales High Court of Justice
GATT	General Agreement on Tariffs and Trade
MFN	Most-favoured Nation Treatment
NERA	National Economic Research Associates
PRC	People's Republic of China
RAM	Random Access Memory
RPM	Resale Price Maintenance
TM	Trade mark
TRIPs	Trade Related Aspects of Intellectual Property Rights
U.S	United States
U.S.C	United States Code
U.K	United Kingdom
UNCTAD	United Nations Convention on Trade and Development

WCT	World Copyright Treaty
WHO	World Health Organization
WIPO	The World Intellectual Property Organization
WPPT	World Phonograms and Performances Treaty
WTO	The World Trade Organisation

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CHAPTER I

BACKGROUND & INTRODUCTION

CHAPTER I

BACKGROUND & INTRODUCTION

1.1 BACKGROUND

Towards the beginning of the 18th Century marked the widespread transformation of world economies from Agrarian economies to Industrial economies. This process was first kick-started in Britain in 1760 and later spread across various countries in Europe and America. With the advent of the then-latest technologies like iron, steel, petroleum, steam engine, electricity etc., the desire to produce more goods at a large scale at a lower cost to make higher profits led to the Industrial Revolution. The era of Industrialization is also called the Machine Age. The factors for production were owned and managed by Capitalists, who had invested in their capital for production.

Under the Industrial Revolution era, Capitalism began to grow as a result of industrial developments. The discovery of new lands and establishment of colonies had resulted in an unprecedented expansion of trade and accumulation of wealth by Merchants. Simultaneously the theories of international trade, i.e. Mercantilist theory, Absolute Advantage Theory, Comparative advantage theory and Hecksher –Ohlin theory, gained momentum amongst the economists. Mercantilists approach held that the objective of trade is to achieve surplus through exports. However, Adam Smith opposed the Mercantilist Theory in his work '***Wealth of Nations'***[1] and highlighted the significance of free trade without the state's intervention in increasing the opulence of the nations. David Ricardo and others criticized Smith's theory. According to Ricardo, each country should focus on the production of those goods that yield the most. Heckscher - Ohlin explained the basis of trading with respect to factor endowments[2].

In consonance with the economist’s approach, the principle of laissez faire (Let you do) originated under the Regime of King Louis XVI of France and later gained prominence in Britain under the tutelage of Adam Smith. According to this principle, the key objective to a welfare state lies on minimal interference/ control of the state in industrial affairs to achieve profits[3]. In other words, the approach moots for the government's minimal intervention in

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1 Smith, A., 1981. The wealth of nations. London: Dent.

2 Schweinberger, A., 1972. *The Heckscher Ohlin model and traded intermediate products*. [Norwich]: University of East Anglia.

3 Cunningham, W., 1903. *Laissez faire*. Cambridge: Univ. Press.

matters of regulations, subsidies, employment or other incidental affairs of the capitalist. The Industrial Revolution and Laissez-faire doctrine backdrop paved the way for many novel inventions and innovations to enhance the manufacturing sector. Therefore in conjunction with the new creations, productivity and manufacturing gained prominence amongst the industrialised nations.

As the industrialised countries began expanding their production, the need for international markets for the produced goods arose, consequent to which cross border trade started flourishing. The rise in cross border transactions highlighted the importance of intellectual property rights and free trade agreements amongst the Capitalists. Intellectual property rights (IPR) can be defined as the exclusive right given to the creator to use their minds. It can also be stated as a product of human intellect and the rights associated with it. To protect viable inventions and goods, the merchants fielded for universal protection of Intellectual Property rights. As a result, multilateral agreements relating to various aspects of trade were entered into and adopted by the member nations under the WTO regime. The multilateral agreement dealing exclusively with the trade aspects of *intellectual property rights* [IPR] is the *Agreement on Trade-Related Aspects of Intellectual Property Rights* [TRIPs][4].

A concoction of various Free Trade Agreements and IP related conventions led to the establishment of the World Trade Organisation in 1995. The WTO set the development ball rolling in many Developing Nations, including India, with its policies and objectives. Manufacturing strengthened in India following liberalisation, globalisation and privatisation policies adopted by it. Many foreign direct investments were pooled into India to set up manufacturing Hubs in line with its LPG policy. Several latest technologies and worldly goods, and brands emerged significantly amongst the manufacturers. Branding played a vital role in capturing market attention and establishing a consumer base across the globe with its quality and performance. The branded goods gave expected results and trusted solutions to the consumers. The concept of branding was not new to the capitalists; however, with novel marketing techniques, branding emerged as a source of recognition in the markets[5].

On the other hand, the widening gap of poverty and income inequality on account of globalisation led to massive counterfeiting and parallel importation of branded goods. The

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[4] TRIPs Agreement- Annexure 1c of WTO Agreements available at, https: //www.wto.org/English/docs/legal/27-TRIPs.pdf. Accessed on 05.04.2021.

[5] Bastos, W., 2021. *(PDF) A history of the concept of branding: Practice and theory*. [online] Research Gate. Available at: <https://www.researchgate .net/publication/235265310_A_history of the concept of branding Practice and theory> [Accessed 27.04 2021]

malaise of inflation, wealth inequality and rising unemployment provided a perfect breeding ground for consumers to adopt alternative routes for gaining access to branded goods. As a result, there's a steady decline in Globalisation, Foreign investments and indigenisation in India. At the behest of the above, the ideals and commitments offered by India should be revisited to envision a holistic solution.

1.2 INTRODUCTION:

The specific aim and objectives of the TRIPs Agreement are to promote international trade by encouraging competition, dissemination of knowledge and technology transfer. In concordance with its aims and objectives, the agreement harmonises intellectual property rights protection and their enforcement by laying the minimum standards such that they do not impede international trade. However, the agreement deliberately left out to harmonise the principle of exhaustion. It allowed the member nations to adopt any suitable policy for the exhaustion of IPR according to their market and economic conditions. The principle of Exhaustion, also referred to as the first sale doctrine, precisely means the limitation to which the patent holders can control a patented product after a so-called authorised sale. In other words, the patent holder's right to control his/her patented invention exhausts on further disposition[6].

Through the columns of this Dissertation, emphasis is laid on the principle of Exhaustion as contemplated under the TRIPs Agreement and its impact on parallel importation, global competition and transfer of technology. The concept of Exhaustion is not defined in any agreement or conventions. However, under the TRIPS Agreement, Exhaustion is given an exclusive provision without being expressed.

Article 6 of the TRIPS Agreement provides as follows-

> "*For the purposes of dispute settlement under this Agreement, subject to the provisions of Articles 3 and 4 nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights*[7]*"*.

On a strict interpretation of the above proviso, each member country to the agreement is given the leeway to adopt a suitable Exhaustion policy to its whims and fancies. Exhaustion

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[6] Heath, C., "*Parallel imports and international trade*" IIC, 28(5), (1997), available at, http://www.wipo.int/edocs /mdocs/sme/en/atrip_gva_99/atrip_gva_99_6.pdf, accessed on 31.05.2021.

[7] http://www.wipo.int/treaties/en/text.jsp?file_id=305907#part1, accessed on 31.05.2021.

is a limitation on the IP holder, where his right over the protected invention stands repudiated post-sale. Therefore, it can also be termed as the '**First Sale Doctrine**[8]. The principle of *territoriality* allows the creator of an invention to have IP rights protected all over the globe. However, in business, worldwide exhaustion of an intellectual property right affects the IPR holder's economic right in other countries when the same is put to resale in the land of origin. Thus, differential treatment of the Exhaustion principle has remained a matter of debate.

Thus, the exhaustion principle is one of the checks and balances measure propounded under the TRIPs Agreement to facilitate the free movement of IP goods in international trade[9]. However, the deliberate move to keep the geographical scope of exhaustion flexible in the light of the member country's economic or market conditions led to the rise of parallel markets for such goods. Parallel importation of an IP good typically exhausted by the IPR holder is likely to affect his economic rights. For example, in the case of national exhaustion of the IP good (based on the territoriality principle), the IPR holder's right in other territories remains intact and enables control over the movement of the IP goods in parallel markets.

Therefore, in this scenario, a harmonised principle of exhaustion along the lines of promoting free and competitive parallel trade would be imperative to facilitate international trade and technology transfer instead of acting as an impediment.

1.3 NEED & SIGNIFICANCE

On a deeper understanding of the Factor Endowment theory/ Hecksher –Ohlin theory, each nation has a relatively different distributional ratio of resources. In simple terms, the critical factors for production like raw material, labour, land, capital etc., are not equally distributed to all nations, giving one over the other. Example: China is Labour intensive, with its Labour index reaching 811.04 million in 2019[10]. Countries with large or diverse factor endowments can produce more goods and are relatively wealthier than those with small factor endowments. As per the factor endowment theory, the differences and variation in a country's

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[8] Papadopoulos, Theo, "*The First-Sale Doctrine in International Intellectual Property Law: Trade in Copyright Related Entertainment Products*." Ent. L. 2 (2003): 40, available at, https://www.Entsportslawjournal.com /articles/10.16997/eslj.138/galley/108/Download. accessed on 02.06.2021.

[9] Subha Ghosh, "*Incentives, Contracts and Intellectual Property Exhaustion*", Research Handbook on Intellectual Property Exhaustion and Parallel Imports, Edward Elgar Publishing, 2016.

[10] Statista. 2021. *China: labor force | Statista*. [online] Available at: https://www.statista.com/statistics /282134/china-labor-force.[Accessed 9 June 2021].

endowments determine a country's advantage and specialisation in manufacturing. It is also called the comparative advantage theory[11].

Neo economic policies and the advancement in technology, the factor endowments have significantly changed in proportion to many other varied factors like state's interference, policies, intellectual property protection, tariff and non-tariff barriers, subsidies, quotas, licensing, compliances etc. However, with the directive of the WTO, each of the above factor endowments has been harmonised to promote free trade. As a result, the nation has reformed its economic policies to favour employment and manufacturing in their countries. India is not an exception to the same. Considering the mass population of India, several MNC's have come forward to set up labour-intensive manufacturing sites in India, eyeing cheaper cost of production and market availability.

With the advent of manufacturing and market integration, branded and quality goods/services are made available worldwide. The IPR holder enjoys the economic returns on the goods/services in line with the "incentive theory"[12]. However, the incentive theory is put to limitation by the exhaustion policy practised by the nation. In practice, the IP goods have free movement to the scattered consumers wherein after the first sale, any subsequent distribution, resale, or circulation would not tantamount to infringement. The choice of Exhaustion policy and its geographical limits adopted by the nation thus play a crucial role in controlling the movement of such goods. The different exhaustion methods adopted by the member nations under TRIPs flexibility thus creates markets for parallel imports. Therefore, the choice of exhaustion also seems to be at a crossroads with the incentive theory justification for intellectual property protection. In this scenario, a harmonised principle of exhaustion in promoting free and competitive parallel trade would promote international trade and transfer of technology instead of acting as an impediment to it[13].

Hence, the study on harmonising the principle of exhaustion in parallel trade is of paramount importance.

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[11] Mediawiki.middlebury.edu. 2021. *Factor Endowment Theory - International Political Economy*. [online] Available at: https://mediawiki.middlebury.edu/IPE/Factor_Endowment_Theory [Accessed 9 June 2021].

[12] Wilkof, N., 2014. Theories of intellectual property: Is it worth the effort?. Journal of Intellectual Property Law & Practice, 9(4), pp.257-257.

[13] Bonadio,E: ‘Parallel Imports in a Global Market: Should a Generalised International Exhaustion be the Next Step?’, European Intellectual Property Review, (2011).

The doctrine of exhaustion, deals with the exhaustion of some of these exclusive rights such as right to use, dispose and resale upon ‘first sale’ by the right holders and this principle of exhaustion applies across the globe in some form or the other for all different types of IPRs including for patents, copyrights, trademarks and several other types of IPRs. The present research is however curtailed to the Socio-economic dimension of developing nations.

1.4 OBJECTIVE OF THE STUDY

The objective of the research is as follows:

- To study the doctrine of exhaustion in intellectual property rights under the TRIPs Agreement.
- To understand the geographical scope of exhaustion in selected TRIPs member nations.
- To compare and analyse the principle of exhaustion in relation to parallel trade causing parallel importation and approach of selected TRIPs member nations towards exhaustion in parallel trade regime.
- To analyse legal provisions and judicial decisions in India relating to the principle of exhaustion.
- To critically analyse the need for harmonising the principle of exhaustion and identifying the legitimate choice of exhaustion for the purpose of harmonisation.

1.5 RESEARCH QUESTIONS

1. Whether Indian IP laws follow the regime of TRIPs in relation to the Doctrine of Exhaustion?
2. Whether the approach of other TRIPs member is on par with its objectives enshrined in the Agreement?
3. Whether the current choice of exhaustion principle adopted and practised by courts adequate to cope up with the competition?
4. Whether there is a need for harmonising the principle of exhaustion?
5. Whether international exhaustion is required for effective IP protection?

1.6 HYPOTHESIS OF THE STUDY

- Harmonising the Doctrine of exhaustion of intellectual property rights is of paramount importance in promoting competition and technology transfer.
- International exhaustion results in legality of parallel imports and parallel trade.

1.7 METHODOLOGY

Since the study is doctrinal base, reliance is placed on primary and secondary sources like international instruments, law, books, journal, and web source. Analytical method is used for the critical analysis of legal provisions and judicial decisions pertaining to the principle of exhaustion of various intellectual property rights. Further an analysis of the exhaustion principle in selected TRIPs member nations is done by employing comparative method.

1.8 SCOPE AND LIMITATIONS OF THE STUDY

The study deals with the principle of exhaustion followed in different countries as per the requirements under the TRIPs Agreement. For the purpose of the study, a comparative analysis on the principle of exhaustion is made of selected TRIPS member nations. The selected countries are a representation of developed, developing and least-developed countries.

1.9 CHAPTERS

Chapter I – Background & Introduction

Chapter 2 – Understanding the concepts of exhaustion, parallel imports and grey market

Chapter 3 - Analysing principles of parallel exports and exhaustion with nexus to trademark, copyright and patent laws.

Chapter 4 - A comparative analysis of the principles of exhaustion

Chapter 5 – Suggestions & Conclusions

1.10 LITERATURE REVIEW

- Shamnad Basheer, Mrinalini Kochupillai, "*TRIPs, Patents and Parallel Imports in India: A Proposal for Amendment*", revised version of Exhausting‟ Patent Rights in

India: Parallel Imports and TRIPs Compliance", 13 Journal Of Intellectual Property Rights.

- Arathi Ashok, "*Economic Rights of the authors under Copyright Law: Some Emerging Judicial Trends*", JIPR [2010], Vol.15.
- Prof. N.S. Gopalakrishnan, "*Note on section 2 (m) of the Copyright (Amendment) Bill 2010", in Appendix III to The Impact of Parallel Imports of Books, Films / Music and Software on the Indian Economy with Special Reference to Students"*, NCAER, (2014).
- Pranesh Prakash, "*Exhaustion: Imports, Exports, and the doctrine of the first sale in Indian Copyright Law*", NUJS L. rev. [2012], Volume 5, Issue 4.
- Yogesh Pai, "*The Hermeneutics of Patent Exhaustion Doctrine In India*", in Irene Calboli and Edward Lee, Research Handbook on Intellectual Property Exhaustion and Parallel Imports, Edward Elgar Publishing, Cheltenham, (2016).
- J. Sai Deepak, "*Section 107 A (B) Of The Patents Act: Why It May Not Refer To Or Endorse Doctrine Of International Exhaustion*?" Indian J. Intell. Prop. L., 2011, Vol.4, 121.
- Bonadio,E: '*Parallel Imports in a Global Market: Should a Generalised International Exhaustion be the Next Step?*', European Intellectual Property Review, (2011).
- Mittal, Raman: '*Whether Indian Law Allows Parallel Imports Of copyrighted Works: An Investigation*', Journal of the Indian Law Institute, December (2013).

All the studies mentioned above focus on understanding the principle of exhaustion, its economics on parallel trade and the possible outcomes on IPR holder's enforcement rights on infringement. These works of literature discuss the exhaustion principle in Article 6 of the TRIPs Agreement and the negotiations during the establishment of the WTO Regime. Several judicial pronouncements have also been discussed and aid in the comparative study of the exhaustion principle. However, the available literature still keeps the debate on harmonising the exhaustion principle unsettled, and many legislative changes and judicial pronouncements have come in since these works. Hence, this thesis aims to continue the study on exhaustion with the available literature and compares the legislative changes cum judicial pronouncements that determine the exhaustion principle in different countries. Towards the end, the research aims to identify the need for harmonisation and a comparative analysis of

the exhaustion principle in other nations to determine their trade practices and identify the legitimate choice for harmonising the exhaustion principle.

1.11 REFERENCES:

1. Longdin: ‘Parallel Importing Post TRIPS: Convergence and Divergence in Australia and New Zealand’, *International and Comparative Law Quarterly*, (2001).
2. Sonia Baldia, "*Exhaustion and Parallel imports in India*", in C. Heath, (ed.), Parallel imports in Asia, Max Plank Series on Asian Intellectual Property Law, Vol. 9, Kluwer Law International, Netherlands, (2004).
3. Lawrence Liang," *Exceptions and Limitations in Indian Copyright Law for Education: An Assessment*", The Law and Development Review, Special Issue (2010): New Voices From Emerging Powers - Brazil And India, Volume 3, Issue 2 2010.
4. Gervais.D: ‘*The TRIPS Agreement-Drafting History and Analysis*’, London Sweet & Maxwell review, (2005).
5. Bronckers: ‘The Exhaustion of Patent Rights under WTO Law‘, Journal of Word Trade, (1998).
6. Cisco Technologies v Shrikanth 2006 (31) PTC 538.
7. M/s General Electric Company v Altamas Khan General Electric CS (OS) No.1283/2006.
8. Philip Morris Products SA v Sameer 209 (2014) DLT 1.
9. Samsung Electronics Company Ltd &Anr.v. Kapil Wadhwa & Ors 2013 (53) PTC 112 (Del.) (DB).

CHAPTER II

UNDERSTANDING THE CONCEPTS OF EXHAUTION, PARALLEL IMPORTS AND GREY MARKET

CHAPTER II

UNDERSTANDING THE CONCEPTS OF EXHAUTION, PARALLEL IMPORTS AND GREY MARKET

The concepts of parallel imports, grey market and Exhaustion have an interconnected relation in the current IPR regime. Being bound together has deeper impacts in the global economy which necessitates an in-depth study on laws governing and protecting trade, economics and intellectual property rights. Trade between the countries is attributed on two key classifications[14]. First, the receiving country is insufficient to produce goods or services corresponding to the demand. The second, being the receiving country despite having the capabilities of producing the goods or supplying the services, imports them owing to production cost which lays the foundation for parallel trade.

"Globalisation" is a term with no precise definition[15] yet, it is responsible for shaping today's world trade. Trade across the globe was once restricted and limited due to the monopolistic approach of traders and unilateral trade policies of industrialized countries. From the dawn of the globalisation era, the market became free and expansive to buy and sell any goods worldwide to create a single market and promote competition. Hence this necessitated a strong institutional backup for trade regulation and dispute settlements in the course of trade. The GATT framework, which was prevalent during the period, was falling short in regulating international trade. The emergence of the World Trade Organisation [W.T.O.] as a permanent body to control international trade had a multilateral approach. Several multilateral agreements were entered under the W.T.O. regime, and exclusive attention was provided to various aspects of the business. The Agreement on Trade-Related Aspects of Intellectual Property Rights [TRIPs], annexed to the W.T.O. agreements, deals exclusively with the intellectual property rights [I.P.R.][16]. The protection of intellectual property has become compelling in an international trade regime. However, on the other hand, the consumers of I.P. protected goods, expects the I.P. goods to be more accessible and affordable. In this

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[14] Jim Sherlock and Jonathan Reuvid, "The Handbook of International Trade A Guide to the Principles and Practice of Export", The Institute of Export, Second Edition, available at http://www.sze.hu/~gjudit/Exportszerzodesek/Handbook%20of%20international%20trade.pdf. (Accessed on 20-05-2021).

[15] Al-Rodhan, N.R. and Stoudmann, G., Definitions of globalisation: A comprehensive overview and proposed definition. Program on the Geopolitical Implications of Globalization and Transnational Security, (2006) 6, pp.1, 21.

[16] Annexure 1c of W.T.O. Agreements available at, https://www.wto.org/english/docs_e/legal_e/27- TRIPs.pdf. (hereinafter TRIPs Agreement), accessed on 20-05-2021.

context, the exhaustion principle plays a significant role and facilitates the practise of parallel trade of such I.P. protected goods to ensure more accessibility.

In this chapter, the researcher deals with the doctrine of Exhaustion under intellectual property rights via the TRIPs Agreement and the concept of parallel importation in trade and the system of grey market goods. Understanding these concepts requires studying all three individually, as given below.

2.1 DOCTRINE OF EXHAUSTION

Intellectual property rights (IPR) empowers and guarantees the creators of their products from duplication and tampering without their prior permission or authorization through state sanctions. In other words, on distribution of a commodity under the authorisation of the IP owner the rental, resale, lending and other contractual uses of IP-protected products shall be regulated by the owner in both domestic and international markets. In this way, an IPR holder can prevent every other person from selling an item insured by the nation where the security exists[17].

Exemption to the general norm is the principle of Exhaustion. It is implied that when a product is legitimately available on the market, the privileges/rights attached with the same is depleted or exhausted, meaning the I.P.R. proprietor has lost his entitlement to practice the I.P.R. protection of that product. The Intellectual Property rights over that specific product get relinquished as it reaches the market. Illustration - An inventor obtains a patent & design rights on a new kind of automobile, having done the same, the patent holder (or anyone else to whom he sells his patent) stands privileged and empowered to legally prohibit other companies from manufacturing and selling the same kind of Automobile. However, the consumers having obtained the Automobile from the patent holder cannot be forbidden from reselling the same to the third parties. Exhaustion, in this manner, is an expected outcome of the impalpable idea of the advantages secured by protected innovation, for example, articulations, information, reputation, quality, origin. This is otherwise called the 'First Sale Doctrine, particularly in America, as it kicks in on the primary and initial approved sale.

"*The doctrine was created, nurtured and nourished by the judiciary and the earliest case which dealt with the concept was Bloomer v. McQuewan where the court found that property*

[17] Lex Orbis, India: Intellectual Property Rights, Mondaq.Com (May. 25, 2021, 9:29 PM), https://www.mondaq.com/india/trademark/901982/intellectual-property-rights.

sold by the patentee becomes the individual private property of the purchaser and that the patent holder loses his right over that property."[18]

The hypothesis behind the regulation is that it empowers the I.P. owner to get a reasonable price for forgoing entitlement to retain an item from the market yet granting free disposition and development of assets. It is thought that I.P. rights won't unduly disorganise an advanced and effective circulation arrangement, and products won't be burdened with a labyrinth of authoritative limitations and restrictions on estrangement[19].

"The doctrine of Exhaustion of copyright enables free trade in material objects on which copies of protected works have been fixed and put into circulation with the right holder's consent. The "exhaustion" principle, in a sense, arbitrates the conflict between the right to own a copy of a work and the author's right to control the distribution of copies. Exhaustion is decisive concerning ownership and the freedom to trade in material carriers because a copy is legally brought into trading. Transfer of ownership of a carrier with a copy of a work fixed on it makes it impossible for the owner to derive further benefits from the exploitation of a copy that was traded with his consent.[20]"

Recently in India, in the case of ***Kapil Wadhwa and Ors. Vs. Samsung Electronics Co. Ltd*[21]. The Hon’ble High court of Delhi recognised the principle of exhaustion through the interpretation of Section 30 (3), Trademarks Act, 1999. The court opined that, the goods once legally acquired by the consumer cannot be forbidden from further sale of the goods in any market. Simultaneously, the question of whether “**market**” applies to Indian Market or International Market was analysed by the Court. In other words, the question that was to be determined was whether the Indian law recognized the international doctrine of exhaustion or the national exhaustion of rights.

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[18] 55 U.S. 539 (1852)
[19] Doctrine of Exhaustion as per the Intellectual Property Laws in India | LawLex.Org accessed on 21.05.2021
[20] Warner Brothers Entertainment Inc. v. Santosh V.G., CS (OS) No. 1682/2006, pg.57.
[21] Samsung Electronics Company Ltd &Anr.v. Kapil Wadhwa&Ors 2013 (53) PTC 112 (Del.) (DB).

2.2 CATEGORIES BASED ON THE TERRITORIAL EXTENT

Intellectual property rights are territorial, i.e., the requests can be granted or taken away only by the nation's law and are independent of laws in other countries[22].

2.2.1National Exhaustion: Here, the creator loses control of the country's re-sale item where the underlying approved sale occurred. Under a severe regional utilisation of the precept, a deal in nation X under a nation X patent or copyright or trademark would debilitate or exhaust the I.P. Owner's privileges just in nation X. The I.P. Owner could depend on its different patents in different nations to enjoin sales, look for harms or conceivably even require customs authorities to stop infringing imports at the border. This standard would hold although the I.P. rights in all the nations are equivalent.

2.2.2 Regional Exhaustion: The standard of Exhaustion where the owner loses control of the re-sale item in a specific region where the underlying first approved sale occurred. It must be noticed that the rights and privileges get depleted within the region, and the proprietor is entitled to practice all rights concerning even that specific good outside that area. The most widely recognised case of the activity of this mechanism is inside the European Community[23].

2.2.3 International Exhaustion: Here, the re-sale of the specific item is independent of where the initially approved deal occurred. A sale by or under the authority of an I.P. Owner anyplace debilitates its rights and privileges under all counterpart I.P. protection anywhere in the world. This precept has consistently appeared to be hard to accommodate with the fundamental frameworks of national I.P. rights but keeps away from the regional principle's practical issues and trade hindrances[24].

2.3 EXHAUSTION UNDER TRIPS AGREEMENT

The TRIPS agreement aims to promote international trade such that the protection and enforcement of intellectual property rights do not impede the trade and promote and protect competition, transfer of technology, and dissemination of knowledge to the mutual advantage

[22] John A. Rothchild, "Exhaustion of Intellectual Property Rights and Principle of Territoriality in the United States", Wayne State University Law School Legal Studies Research Paper Series No. 2016-11, available at http://www.ssrn.com/link/Wayne-State-U-LEG.html. (Accessed on 21-05-2021).

[23] See Supra Note 7.

[24] See Supra Note 7 & 9.

of the producers and users of intellectual property[25].The owner of I.P.R. enjoys economic benefits, and this "Incentive Theory" postulates one of the theoretical justifications or rationale for granting intellectual property rights. According to this theory, exclusive rights are necessary to promote creativity and invention and their effective dissemination[26].

2.4 ARTICLE 6 OF TRIPS AGREEMENT

"Exhaustion of intellectual property rights" is one of the basic principles introduced under the TRIPS Agreement and is has not been addressed in the earlier conventions and treatises[27]. The exhaustion principle is addressed in Article 6 of the TRIPs Agreement. "For the purposes of dispute settlement under this Agreement, subject to the provisions of Articles 3 and 4, nothing in this Agreement shall be used to address the issue of the Exhaustion of intellectual property rights[28]. The term "exhaustion" is not defined in the clause. Hence, the negotiating history or the travaux preparatory is to be read to understand the true intent behind the clause[29].

Other multilateral dimensions where exhaustion is expressly canvassed are:

- The United Nations Set of Principles and Rules on Competition, 1980
- The Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement), 1994
- The WIPO Copyright Treaty, 1996 and the
- WIPO Performances and Phonograms Treaty, 1996.

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[25] The preamble and article 7 of the trips agreement/ WTO | intellectual property - overview of TRIPS Agreement (accessed on 21.05.2021)

[26] Subha Ghosh, “Incentives, Contracts and Intellectual Property Exhaustion”, Research Handbook on Intellectual Property Exhaustion and Parallel Imports, Edward Elgar Publishing, 2016.

[27] The Paris Convention for the Protection of Industrial Property, 1883 and the Berne Convention for the Protection of Literary and Artistic Works, 1886. See, “International Treaties and Conventions on Intellectual Property”, available at, http://www.wipo.int/export/sites/www/about-ip/en/iprm/pdf/ch5.pdf. (accessed on 21-05-2021).

[28] TRIPS Agreement, Article 6. / WTO | intellectual property - overview of TRIPS Agreement accessed on 21.05.2021

[29] M. BLAKENEY, Trade Related Aspects of Intellectual Property Rights: A Concise Guide to the TRIPS Agreement (London: Sweet and Maxwell, 1996); J. WATAL, Intellectual Property Rights in the WTO and Developing Countries (The Hague: Kluwer Law International); D. GERVAIS, The TRIPS Agreement: Drafting History and Analysis, 3rd ed. (London: Sweet & Maxwell 2008); C. CORREA, Trade Related Aspects of Intellectual Property Rights (New York: Oxford University Press 2007).

However, TRIPS has proved to be the most significant text due to its inferable compulsory nature. To understanding the meaning of Exhaustion, there are two condition precedents for 'exhaustion[30].'

(i) Exhaustion occurs if the 'first sale' is made by or with the authorisation of the I.P. holder;
(ii) On such an authorised first sale, the I.P. holder gets economic returns on placing them in the market.

Hence it is safe to conclude that Exhaustion is not supreme and that not all rights will deplete. Only the rights on re-sale and dispersion that are accessible to a specific cooperative attitude get exhausted. Different rights, including the privilege to produce an item, will stay with the proprietor itself. The standard of Exhaustion for work has made it obligatory to have a first approved sale by the patent holder or his licensee and acts as a barrier in cases of I.P. infringement.

2.5 PARALLEL IMPORTATION

Parallel importation refers to the importation of goods whose I.P.R. has been exhausted in the importing country[31].

"Parallel imports" describes a situation where the importer imports articles made and sold in the country of manufacture without the owner's consent or licensee of the intellectual property rights in the land of importation[32].

"Parallel imports generally are a method whereby an unapproved outsider endeavours the doctrine of exhaustion and imports goods which are more affordable in one nation to be sold in parallel with progressively costly products which are non-imported or imported from a source constrained by a trademark proprietor[33]."

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30 Resource Book on TRIPS and Development: An authoritative and practical guide to the TRIPS Agreement, Cambridge University Press, available at, https://www.iprsonline.or g/unctadictsd/d ocs/RB_Part1 _Nov_1.4 update.pdf. Accessedon 21-05-2021.

31 Ibid.

32 Wei, Sze Shun, George, Parallel Imports and the Intellectual Property Rights in Singapore, Singapore Academy of Law Journal.2 (2), 286. Research Collection School of Law, 1990, available at, http://ink.library.smu.edu.sg/sol_research/548.

33 Chard,JS & Mellor,CJ: 'Intellectual property rights and parallel imports in World Economy', available at *http://www.jstor.org*. (1989) (Accessed on 21.05.2021).

Under parallel importation, the I.P.R. holder does not authorise the importation of an I.P. protected good to a concerned region and limits the importation by virtue of intellectual property laws from such areas. Thus, the legality of parallel importation is a corollary to the degree of Exhaustion of I.P.R. in respect of such goods.

2.6 CATEGORIES OF PARALLEL IMPORTS

Two categories of parallel imports are recognised. They are "passive parallel imports" and "active parallel imports.[34]" Passive parallel imports are more common and occur where third parties purchase I.P. goods from the manufacturer country and then resell them in another country[35]. The reason mainly being to take advantage of the price difference in respect of such I.P. goods. Active parallel imports take place when a foreign distributor or licensee of the I.P.R. holder sells the relevant goods in the right holder's country or another licensee or distributor's country, directly competing with them. In other terms, the I.P. good circulates outside the official distribution channels chosen by the right owner. The active parallel imports derive from a breach of contract committed by the licensee or distributor of the I.P.R. holder. It is a common practice to insert an ad-hoc clause in international licensing and distribution agreements, which

(i) Segregate global markets and
(ii) Set a ban on "invasions" of the licensed products in other licensees' areas of competence. The parallel trade breaks such contractual agreements[36].

2.7 PROCEDURE OF PARALLEL IMPORTS

There is no closure to the ingenious ways used to parallel import items for sale to the public. Four major possible trends are observed in the market imports and are pivotal to the financial and legal considerations. The first would be to determine whether the goods are made abroad, for instance, in American firms (see Figure 1).

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[34] Supra 17

[35] Bonadio, E., Parallel Imports in a Global Market: Should a Generalised International Exhaustion be the Next Step? European Intellectual Property Review, 33(3), (2011), pp. 153-161.

[36] A similar situation arose in the case of John Wiley and Sons Inc., & Ors, v. Prabhat Chander Kumar Jain & Ors. (Hereinafter, John Wiley case), MIPR 2010 (2) 24.7

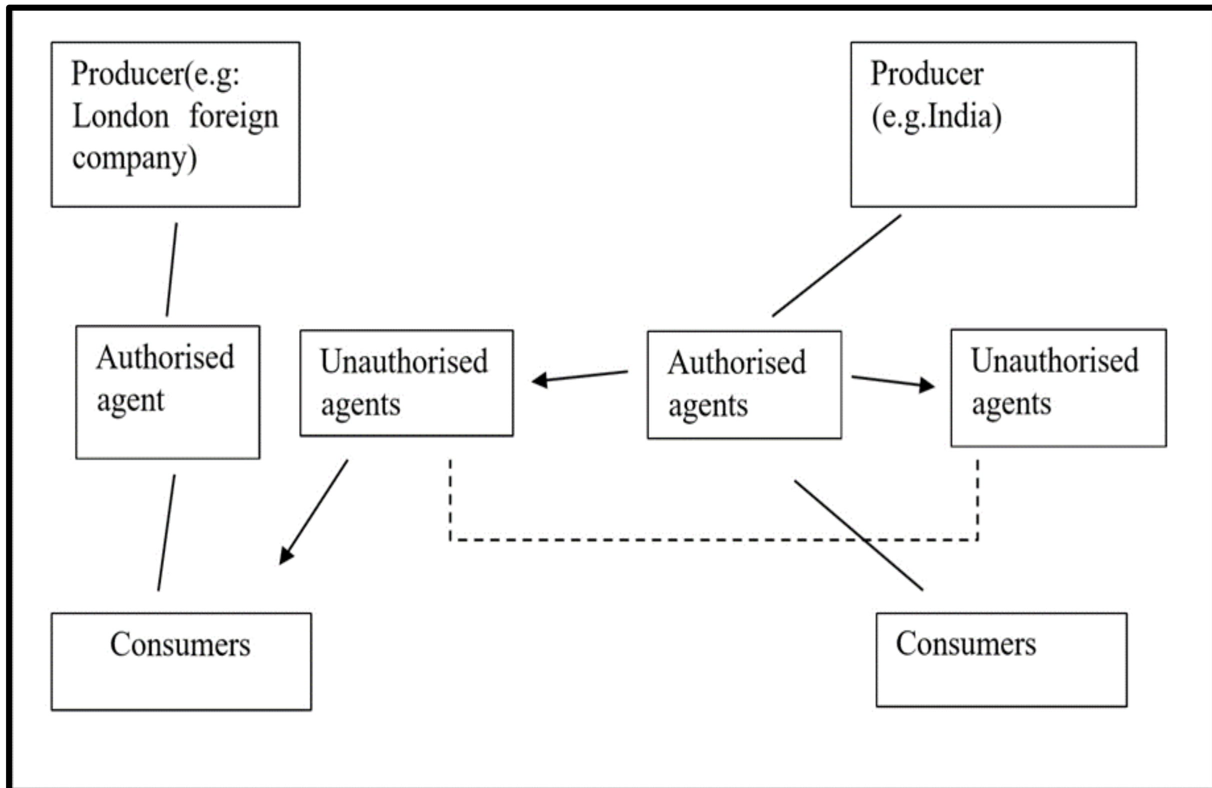

Figure1. First case of parallel imports

The remote units might be backups, joint venture companies, or another medium that have a similar characteristic of interests with that of the American organisation. This small subsidiary pitches to yet adjacent approved merchants, for instance, a French firm. Sometimes the control over distribution is lost, and the item gets into an unapproved channel, and some of it is traded back to the United States by someplace in the approved channel.

The second method, as depicted by Figure 2 of parallel importation, where a manufacturer (e.g., India) gives license to a company to be the primary importer of the goods bearing a foreign title trademark. The company that enrols the outsider's name and turns it into a legal brand which is made proprietor in their own market consents to pay royalties. Presently, assuming that an outsider dealer buys this identical item which was planned for a third market. They, at that point, deliver the item to the licensee's market as parallel imports.

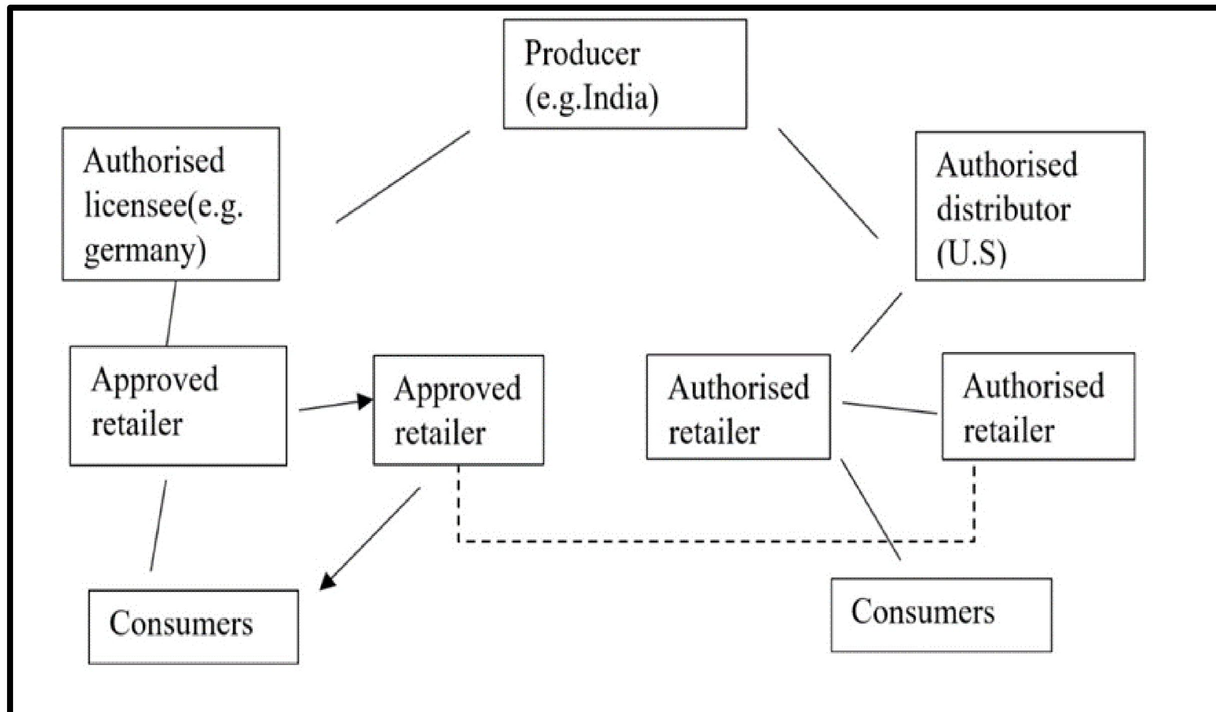

Figure 2. Second case of parallel import process

The Third plausibility of parallel importing emerges when the proprietor trades from its delivering plant just to have the fares redirected to the home market. This parallel importing procedure is referred to as the official import measurements as re-importation. Re-importation is appealing when the producer's technique is to sell into the small market at a considerably lower cost than in the home market, either due to the market being more unpropitious or there being responsive revamping scale contrasts, and the outside market is geographically near the home market, invariably reducing return transport costs. It is safe to say parallel import can't exist without differential value between worldwide markets. Figure: 3 demonstrate a two-nation item stream along with a maker/ merchant /retailer-customer channel. When parallel importation happens, items brim from each plausible store network and an unstudied conveyance stream takes form. Deals, income and profits may be re-designated, tilting over to supply chains in various nations, badgering the maker and numerous merchants, influencing the producer's overall profitability.

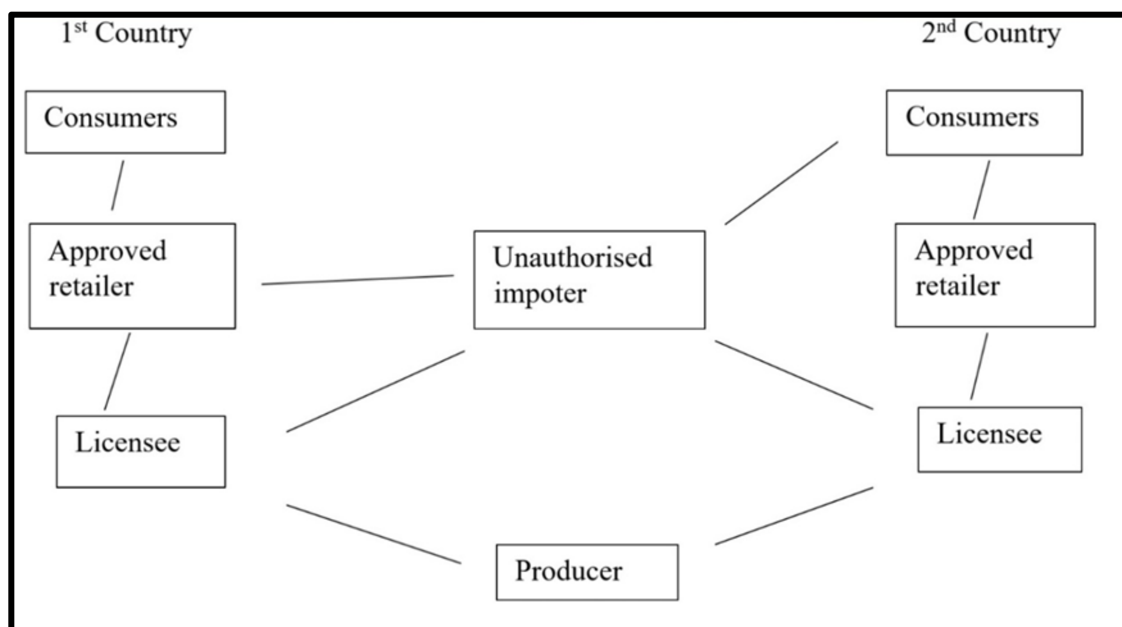

Figure 3. Third possibility of parallel importing

The parallel imports are on account of pricing differences. Due to a big difference in price, a parallel importer can enter the market and contend with approved items. Interestingly, if parallel imports are not permitted, purchasers have no other option than to buy items evaluated well over the marginal expense in non-portioned markets.

The fourth method for parallel imports is the utilisation of online orders. This kind of unapproved channel is on the rise with the advancement of the Internet and is a significant wellspring of parallel exchange. Retailers and buyers can, as of now, buy items either from nearby retailers or going legitimately to websites of various markets. Customer, Authorised retailer, Licensee, Unauthorised retailer - parallel merchant Manufacturer, anyone with a credit card and access to an Internet-linked computer can arrange C.D.s, software, books and whatever from abroad providers. In the age of globalisation and international trade, technologies are a deciding factor of economic, social and innovative development at both regional and global levels. Hence the concept of transfer of technology has gained importance. "Technology transfer" has been defined as "the transfer of new technology from

the originator to a secondary user, especially from developed to developing countries is an attempt to boost their economies.[37]"

Parallel importation has both legitimate and monetary consequences. Financially, it advances the accessibility of trademarked products at various costs, which forestalls the foundation of an exchange restraining infrastructure. A monopolistic methodology, in an equal without import market, would prompt expanded costs of the merchandise sold by the trademark proprietor or approved seller. Without less expensive other options, buyers would be obliged to buy merchandise at the value set by the monopolist. This could adversely affect the general market as well as supply and demand. Developing countries, in particular, see technology transfer as part of the bargain in which they have agreed to protect intellectual property rights[38].

Parallel import goods are otherwise known as "Grey-market goods". The goods are considered "Grey" not because they are illegal or black-marketed. Grey markets involve selling I.P. protected goods in those markets where the official distribution chain is not established by the I.P.R. holder[39]. However, Parallel imports are not counterfeit goods[40].

2.8 GREY MARKET

Manufacturers who produce products like computer, telecom, and technological equipment utilise distributors to sell their products. These distribution contracts mandate strict distribution to final users only. Sometimes the distributors resell such products in the market to other resellers. During the late 1980s, manufacturers titled those resold goods "grey market goods[41]."The term "grey market" also refers to the import and sale of goods by unauthorised dealers; in this instance as well, such activity is unofficial but not illegal[42]. A situation that consists of unauthorised traders buying and selling a company's product in different

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[37] UNCTAD Series on issues in international investment agreements, available at, http://unctad. org/en/docs/ psi teiitd28.en.pdf. Accessed on 21-05-2021.

[38] https://www.wto.org/english/tratop_e/TRIPs_e/techtransfer_e.htm. accessed on 21-05-2021.

[39] Dale F. Duhan and Mary Jane Sheffet, "Grey Markets and the Legal Status of Parallel Importation", Journal of Marketing, Vol. 52, No. 3 (Jul., 1988), pp. 75-83, available at http://www.jstor.org/stable/1251451. accessed on 19-05-2021

[40] Frederick M. Abbott, "Parallel Importation: Economic and social welfare dimensions", International Institute for Sustainable Development (IISD), Prepared for the Swiss Agency for Development and Cooperation (SDC), 2007.

[41] Cespedes,VF, Corey,ER & Rangan,VK: 'Gray markets: Causes and cures', *Harvard Business Review,* July-August (1998).

[42] Grey Market Definition (investopedia.com) accessed on 21.05.2021

countries. Companies confronted with a grey situation can react in many ways. They may decide to ignore the problem, take legal action or modify elements of their marketing mix[43].

"Grey marketing involves the selling of trademarked products through channels of distribution that are not authorised by the trademark holder. It can involve the unauthorised distribution of goods either within a market or across markets. Grey marketing occurs within a market when manufacturer authorised channel members sell trademarked goods to unauthorised channel members who then distribute the goods to consumers within the same market. This practice is labelled "channel flow diversion" by Lowe and Rubin (1986). When Grey marketing occurs across markets, it is typically in an international setting, hence the term "parallel importing"[44].

The word "grey market" was being chosen because it's very similar to the old expression "black market", which refers to a market that has products that were stolen and illegal produced. Generally, it is not illegal to buy "grey market" products. Even the Supreme Court of the U.S. has upheld the ideology that the products from the grey market have legality for re-sale in the United States irrespective of where they were made or sold initially.

Grey market goods have legality; those are non-counterfeit goods that are sold outside usual distribution channels through the dealers who don't have any relationship with the manufacturer of the goods. This is the form of parallel importation that frequently takes place when the price of a good is notably higher in one country than in another. This usually happens with electronic goods such as cameras, smartphones etc. Dealers get the goods from where it is available in cheap rates, usually in a retail manner but sometimes at wholesale and import it in a legal method to the target market. It is sold at a high price that gives a profit but also lesser than the usual market price. International measures in the promotion of free trade include reduced tariffs and equalised national standards, facilitating this kind of arbitrage when producers try to maintain very high disparate prices.

Due to the nature of grey markets, it becomes impossible to trace the average number of sales. The goods available in the Grey market are often new, but sometimes used goods. A market that has used goods is named 'Green Market'. There are two significant types of grey markets that are of imported manufactured goods which would be unavailable or much more

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[43] What is Grey market? Definition and meaning (globalnegotiator.com)(Accessed on 21.05.2021)

[44] See Supra Note 26

expensive in specific countries, and unissued securities, which have not been traded in authorised official markets. The importation of illegal or prohibited goods like drugs or firearms, on the other hand, is considered to be a black market and smuggling of such goods to a target country for avoiding import duties.

A concept relating to this is bootlegging, the illegal transport of highly regulated goods, like alcoholic beverages. The word "bootlegging" is also applied to the manufacturing or distribution process of counterfeit or infringed goods. In Grey markets, there are also situations where there arises a need to develop products like video game consoles and titles where the demand for them temporarily exceeds their supply that causes authorised local retailers to become out of stock of such goods. Some of the other popular products, like toys, contraceptives and magnets, also face such situation. In those situations, the price in the grey market may also be considerably high than the manufacturers quoted retail price, with corrupt sellers who buy items in bulk quantity for the purpose of inflating the prices during its re-sale, it is a practice called scalping. Online auction sites like eBay also have become a reason for the evolution of the grey market for video-games consoles.

2.9 EFFECTS OF THE EXHAUSTION PRINCIPLE

The legality of parallel imports is determined by choice of Exhaustion. National Exhaustion is subjected to territorial principle but, if the I.P.R. is held by other countries where rights are not exhausted, parallel importation is plausible. In such instances, I.P.R. protection is simultaneously made available with respect to economic control over such protected product. This creates liability on unauthorised dealers for infringement of intellectual property rights.

Regional Exhaustion being restricted to a specific territory, parallel importation to countries falling outside the concerned region is controlled by virtue of intellectual property laws explicitly pertaining to such land. Parallel importation of such protected goods to any other region/country would be categorised as infringed. When Exhaustion of Goods is wider, the liability on parallel importation is higher.

The scenario is slightly similar to international Exhaustion as the intellectual property rights holder tries to control the movement of the good universally on the first sale itself. Hence parallel importation to any other region of the world becomes legal. The theory of comparative advantage is paramount in such exchange.

According to this theory of comparative advantage, any framework avoiding parallel import is fractious as countries will not be in a position to spend significant time on what they excel in. Therefore, worldwide Exhaustion is open to the financial analytical contention or framework on the grounds of national weariness strife with the principle of free exchange. The establishment of the theory of comparative advantage lies upon two basic presumptions. The market works just under two states of

(1) Free entry and

(2) Perfect competition.

Only with those presumptions will competition power cost down to minimal expenses in free trading markets[45].

Prohibiting every single parallel import has been observed as the most significant arrangement for national depletion. This is because the aggressive advantages of grey market trading and the focus impacts of market isolation are neglected. The only way to ensure regulation is if parallel imports are inquired from an antitrust perspective. Second, it must be followed by legitimate delivery of items with respect to the given industry provided following all the conditions imposed along with authoritative confinements. Finally, as national territories are not bound to legal limitations, it is safe to presume that it is wiser to opt for global Exhaustion when compared to national Exhaustion and to create a point of view from a monetary perspective. The material differences approach is similar to the international exhaustion system but prohibits the sale of parallel imports if they are materially differentiable from products that an owner has given the authorisation to be on the market of a country. What is considered "material" may differ from jurisdiction to jurisdiction. Therefore, the rule that international Exhaustion should not be applied to parallel imports in the absence of proof that the owner has expressly consented to such imports, and the burden of proof falls on the party seeking to prove such consent.

International exhaustion principles that are being followed, in which political and other conditions make it highly difficult for national Exhaustion, material differences standard should be advocated in order to exclude parallel imports that are materially different from those products which are authorised for sale by the owner in the domestic market.

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[45] See Supra Note 22.

The parallel importation of an I.P. good has both economic and trade-related effects on the producers and users of I.P. goods, which can be categorised as follows:

(i) Consumer price arbitrage:

Importing goods directly from the country of the holder increases the cost of import. So, the goods will have a higher sale value on the commercial transaction if the economic rights are not entirely exhausted. However, such goods on Exhaustion can be resold at a lower cost than that of the first sale. The importer is thus benefited from such cost arbitrage[46].From the consumer point of view, the price differentiation allows the consumer to choose the price he wants to pay and benefit from the price arbitrage position. From the producer point of view, the price difference could motivate them to make the I.P. good more accessible and affordable by stabilising the price for such goods in different regions. Thus, price stabilisation would ultimately benefit the consumers as well as allow the I.P.R. holders to maintain the demand for their goods.

(ii) Market segmentation to market integration:

International trade operates in a competitive environment. The I.P.R. holders respond to such competitive pressures by abandoning some markets and focussing only on such needs where they enjoy a premium or higher market value for their I.P. goods[47]. This invariably leads to market segmentation and price discrimination. An illustration clearly explains that students of a particular geological market have different willingness in purchasing a textbook. To suit the needs of that region, the publisher practises price differentiation. So a student who can afford to buy expensive books will end up paying the low cost for such a textbook[48].

Market segmentation is a market-winning strategy adopted by I.P.R. holders to efficiently market their I.P. goods. However, the dispersion of consumers across the world for the I.P. goods makes such goods in-accessible and non-affordable to such wide users. Though segmentation helps in reaching out to the targeted consumers, yet the benefits of I.P. goods

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[46] Douglas A. Irwin, "The GATT in Historical Perspective", The American Economic Review, Vol. 85, No. 2, Papers and Proceedings of the Hundredth and Seventh Annual Meeting of the American Economic Association Washington, DC, January 6-8, 1995 (May 1995), pp. 323-328. TRIPs Agreement- Annexure 1c of W.T.O. Agreements available at, https://www.wto.org/english/docs_e/legal_e/27-TRIPs.pdf. (Accessed on 22-05-2021).

[47] William W. Fisher III, "When Should We Permit Differential Pricing of Information?", 55 UCLA L. REV., 1, 3 (2007), available at, https://www.uclalawreview.org/pdf/55-1-1.pdf. (Accessed on 22-05-2021).

[48] Ariel Katz, "The economic rationale for exhaustion: distribution and post-sale restraints", Research Hand book on I.P. Exhaustion and Parallel Imports, Edward Elgar Publishing, 2016.

are not ultimately passed on to them evenly. The Exhaustion of I.P.R. in such goods is necessary to facilitate parallel importation by the wide-spread consumers. The problems of non-affordability and in-accessibility are solved by parallel importation of such goods. Hence there is a shift from market segmentation to market integration for such I.P. goods.

(iii) Competition and innovation promotion:

India's position was that "the high production cost of scientific and technical books standing in the way of their dissemination in developing countries could be substantially reduced if the advanced countries would freely allow their books to be reprinted and translated by under-developed countries." The exclusivity and the monopolistic approach provide the I.P.R. holder with the power to price intellectual goods above the competitive level[49]. Copyright owners discontinue a large number of books and recordings each year. Of the more than ten thousand books published in the United States in 1930, only 174 were still in print in 2001. In 1999 alone, Barnes and Noble stated that ninety thousand books went out of print. Many of these books are shelved in public libraries and private domiciles, but few remain in publishers' warehouses. While the first sale doctrine cannot be relied on for printing or reprinting works that are out of print, it plays a vital role in mitigating the potential cultural loss associated with works that go out of print. Exhaustion rules open up the possibility of a secondary market and assure that the artefacts embedding protected works remain available to the public over time. Finally, the first sale doctrine contributes directly to the survival of copies of works or patented goods over time by discouraging abandonment and waste: instead of discarding an item when keeping or preserving it is costly, and the thing is no longer helpful, convenient, or economical to maintain, the first sale doctrine makes it legal to sell or donate a used copy of an intellectual good. In short, the first sale doctrine enshrines preference for the garage sale over the garbage bin and for the library over the landfill. In addition to these static benefits, the first sale doctrine contributes to dynamic efficiency by permitting secondary market channels that enable works and the ideas they carry, or goods and the technologies embedded therein, to remain accessible to the public even if the copyright holder ceases production or distribution of the work. Recognising that users are consumers and actual or potential innovators implies that granting I.P. owners an extended

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[49] Lawrence Liang," Exceptions and Limitations in Indian Copyright Law for Education: An Assessment", The Law and Development Review, Special Issue (2010): New Voices From Emerging Powers - Brazil And India, Volume 3, Issue 2 2010, available at https://cisindia.org/a2k/publications/exceptions-limitations-education. (accessed on 12-05-2021)

power (over time and distance) to restrain the use of goods embodying their innovation will impede users' ability to innovate or transfer the goods to others who might innovate. A sticky first sale doctrine prevents such impedance and preserves freer grounds for future innovation[50].

(iv) Technological transfer

In the age of globalisation and international trade, technologies are a deciding factor of economic, social and innovative development at both regional and global levels. Hence the concept of transfer of technology has gained importance. "Technology transfer" has been defined as "the transfer of new technology from the originator to a secondary user, especially from developed to developing countries is an attempt to boost their economies[51]".Developed countries during the Uruguay round have argued that strengthening and expanding of I.P.R. protection is an essential condition for the flow of technology from developed nations to the least-developed and developing country[52].Developing countries, in particular, see technology transfer as part of the bargain in which they have agreed to protect intellectual property rights[53].Thus parallel importation of I.P. goods acts as a tool for promoting technology transfer.

(v) Post-sale restraints:

Vertical trade restraints are mainly restrictions imposed in the distribution channel of a product. It is broadly classified as "intra-brand" or "inter-brand." An intra-brand restraint limits the way a seller's creation can be distributed or used. The classic example is re-sale price maintenance (R.P.M.), in which the seller of a product stipulates its re-sale price[54].

By contrast, an inter-brand restraint limits either the purchaser's ability to use the product with things produced by other suppliers or a reseller's ability to sell the goods of other sellers. The most common inter-brand restraints are tying and exclusive dealing. A tying arrangement

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[50] Ariel Katz, "The First Sale Doctrine and the Economics of Post-Sale Restraints", B.Y.U. L. Rev .55 2014), available at http://digitalcommons.law.byu.edu/lawreview/vol2014/iss1/4, accessed on 17-05-2021

[51] UNCTAD Series on issues in international investment agreements, available at, http://unctad .org / en / docs /psiteiitd28.en.pdf, accessed on 17-05-2021

[52] Frederick M. Abbot, 'Parallel Importation Economic and Social Welfare Dimensions' (June 2007) IISD, p.4, available at http://www.iisd.org/pdf/2007/parallel_importation.pdf, (accessed on 16-05-2021).

[53] https://www.wto.org/english/tratop_e/TRIPs_e/techtransfer_e.htm. (Accessed on 16-05-2021).

[54] Herbert Hovenkamp, "Post-Sale Restraints and Competitive Harm: The First Sale Doctrine in Perspective", 66 N.Y.U. ANN. SURV. AM. L. 487, 541 (2010), available at, http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2817&context=faculty_scholarship. accessed on18-05-2021

requires that the purchaser of a "tying" product (say, a printer) use it exclusively with that seller's own "tied" product (ink)[55].

In modern times, the competition laws are sensitive to such trade restraints, whether imposed through contractual agreements or exclusivity attained by intellectual property protection. The vertical trade restraints imposed by the producers affect the distribution chain of I.P. goods. The first sale doctrine limits the exclusive rights of I.P. owners to impose post-sale constraints on the distribution or use of items embodying their I.P[56].

Even though post-sale restraints are beneficial to the producers of I.P. goods, the exhaustion principle adopted should promote free trade to make the I.P. goods far accessible and affordable.

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55 Erik Hovenkamp& Herbert Hovenkamp, "Tying Arrangements and Antitrust Harm", 52 ARIZ. L.REV . available at https://pdfs.semanticscholar.org /8777/eaa6e2e8812402944bc32 32fc2837a849821. pdf. Accessed on 18- 05-2021.

56 Bobbs-Merrill Co. v. Straus, 210 U.S. 339, 349–51 (1908).

CHAPTER III

ANALYZING PRINCIPLES OF PARALLEL EXPORTS AND EXHAUSTION WITH NEXUS TO TRADEMARK, COPYRIGHT AND PATENT LAWS.

CHAPTER III

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India is one of the front-runners who advocated for international exhaustion to facilitate parallel imports for access and affordability of cheap products[57]. The TRIPS agreement has always been criticized for being extremely purposive towards developed countries. But somehow, the developing nations have incorporated flexibility despite all the pressure from developed nations. The exhaustion principle can be stated as the most flexible principle where countries utilize the maximum. This is because of the economic conditions deem for it. However, the Indian legislations do not unambiguously provide for the exhaustion principle. Instead, it has implied and recognized international exhaustion as the Indian policy. The laws in India have tried to acknowledge categorically international exhaustion under separate intellectual property legislation immediately upon the onset of TRIPs. This is because India is putative that parallel imports enhance public welfare.

Now the question as to why laws legitimating parallel imports have not been made yet? Why is there reluctance to express the same in clear terms? This is because of the lobbying efforts of the interested groups[58].Adding to this uncertainty, the judiciary has made a bigger mess of the baffling situation, especially while delivering judgments without adhering to the public interest, defeating the legislature's efforts. Unfortunately, there has been only one judgment supporting the government policy of international exhaustion.

India has always been an advocate of international exhaustion. It pushed for it on all platforms of international negotiations, specifically in the TRIPs negotiation and in all forms of the IP regimes. It is in the light of this global position that one must view the Indian law on exhaustion.

3.1 LEGISLATIVE FRAMEWORK AND JUDICIAL APPROACH UNDER VARIOUS INTELLECTUAL PROPERTY LAWS

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[57] MTN.GNG/NG11/W/37, Submission of India in the Second phase of TRIPs negotiation, (1988-1989).

[58] This is evident from the rejection of the proposed amendment to Sec. 2 (m) of the Indian Copyright Act which would have expressly made parallel imports legal doing away with all the confusions in the language of the law.

3.1.1 COPYRIGHT LAW – INDIAN COPY RIGHT ACT:

The Indian Copyright Act does not recognise the right to import to the copyright owner[59].This is evident from the rejection of the proposed amendment to Sec. 2 (m) of the Indian Copyright Act, which would have expressly made parallel imports legal, doing away with all the confusions in the language of the law. The provisions in the Copyright Act are devoid of provisions in which the copyright owner is granted the exclusive right to import a copyrighted work into India. The Act only prohibits the importation of infringing copies[60] and infringing copies are, in simple words, documents published without the author's permission[61].But in the case of parallel imports, they are copies that are lawfully produced by the owner or his licensee, which is legally procured without the author's permission. Immediately the question, whether the author's license is required to import a legally acquired lawful copy of work arises? The answer would be NO on a reading of the copyright statute.

However, the judiciary felt otherwise. The failure of the courts to understand the need for international exhaustion is evident from the judicial pronouncements delivered, which will be dealt with. For a country like India, where goods are not so affordable and accessible, keeping in view the consumer welfare of the country, international exhaustion would be the most desirable ones. Even though local publication and distribution of books have increased in India, 75% of books are still imported into India, the bulk of which includes educational books[62].India's imports of books exceed its exports[63]. The price of the books available in India is more when compared to the cost of the books in other countries[64]. In its November 2010 Report, the Parliamentary Standing Committee, which was supervised by India's Ministry of Human Resource Development, made several observations on the need to amend the copyright provisions for textbooks in the Indian Copyright Act, 1957. The Committee urged the government to ensure that the purpose for which the copyright amendment was

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59 Sec. 14 of the Act guarantees the rights available to a copyright owner and it does not recognise importation right

60 Sec. 51(b) (iv) of the Indian Copyright Act, 1957.

61 Sec. 2 (m) of the Indian Copyright Act, 1957, defines an infringing copy of a work.

62 "Appendix - I, Indian Copyright Law Amendments 2012 Publishers' Presentation to NCAER", in The Impact of Parallel Imports of Books, Films / Music and Software on the Indian Economy with Special Reference to Students, NCAER, 2014, p.6, executive summary, available at http://copyright.gov.in/documents/parallel_imports_report.pdf (accessed on 02/06/2021)

63 The Impact of Parallel Imports of Books, Films / Music and Software on the Indian Economy with Special Reference to Students, NCAER, 2014, p. 32, available at http://copyright.gov.in/documents/parallel_imports_report.pdf (accessed on 02/06/2021)

64 Ibid, Pg 43,

proposed, i.e., to protect the interests of students in India, should be kept in mind while moving forward[65]. Even the committee requested for adoption of international exhaustion.

3.1.2 JUDICIAL INTERPRETATION AND LEGISLATIVE RESPONSES TOWARDS PARALLEL IMPORTS UNDER COPYRIGHT LAW

In ***Penguin Books Ltd. v. India Books Distributors and Ors***[66], the court was called upon to decide whether import by a third party without the express authority of the copyright owner constitutes infringement. It held that such import constitutes an infringement of the right of the owner to publish. Court opined:

"While publishing generally refers to issue to the public, importation for the specified purpose may be a necessary step in the process of issuing to public and therefore of publishing. The exclusive right of the copyright owner to print, publish, and sell these titles in India would extend to the exclusive right to import copies into India for the purpose of selling or by way of trade offering or exposing for sale the books in question. It is also an infringement of copyright knowingly to import into India for sale or hire infringing copies of a work without the consent of the owner of the copyright. However, they may have been made by or with the consent of the owner of copyright in place; they are made."[67] (Emphasis added.)

Thus the court held that it was illegal to import a lawfully produced work in one country to another country merely because the right to publish that work in that country vested with some other person[68].And as a result, the court went to the extent of expanding the author's rights to create an individual right to import, which the Act had never envisaged[69]. The court seems to follow the mandate followed in the Australian case and unconvincingly gave a farfetched interpretation to the right to publish under the Indian Act. The court appears to follow the mandate followed in the Australian case and unconvincingly gave a farfetched

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[65] 227th Report on The Copyright Amendment 2010, The Standing Committee on Human Resource Development, Department - Related Parliamentary Standing Committee On Human Resource Development, 2010, available at http://164.100.47.5/newcommittee/reports/EnglishCommittees/Committee%20on%20HRD/227.pdf,

[66] AIR 1985 Delhi 29.

[67] Penguin Books Ltd. v. India Book Distributors and Ors, AIR 1985 Delhi 29

[68] Arathi Ashok, "Economic Rights of the authors under Copyright Law: Some Emerging Judicial Trends", JIPR [2010], Vol.15, p.50, available at http://docs.manupatra.in/newsline/articles/Upload/1EC850DF-EAA0-4E86-BD9B99E2B16F12BB.pdf

[69] Ibid.,

interpretation to the right to publish under the Indian Act[70]. The court, thus, was unmindful of the interest of the Indian consumers. It also propounded an 'acid test' to determine whether a copy imported is an infringing copy or not using section 2 (m) and sections 51 and 53[71]. The court held that the essence of these sections was to prevent unauthorized use or appropriation of others property. The courts finding highlighted the importance of territorial division and geographical area. It took the position that the sale of a copyrighted work constituted a sale of an "infringing copy" outside a defined territory[72].

Under the Copyright Act, 1957, as it then existed, infringing copies were made or imported in contravention of the provisions of the Act[73]. The court should have addressed whether the copies made in America were infringing or contravening the requirements of the Indian Copyright Act when imported to India[74]. The judiciary has made a mess of the Indian copyright law creating an undue monopoly that ultra-vires the Act by extending the scope of 'right to publish in India' to the copyright owner or his licensee.

Therefore to overcome this chaos made by the High Court, the legislature removed the words "publishing" through the amendment of the Copyright Act in 1994 and introduced a right to "to issue copies of the work to the public not being copies already in circulation"[75]. The section clarifies that a copy that has been sold once shall be deemed to be a copy already in circulation. The copyright Act confers on the copyright owner only the right to issue copies of the work which are not sold. This is the first step to recognize the doctrine of exhaustion in the Indian copyright Act in India. When the words of the section "copies already in circulation" are construed because it is first sold anywhere in the world, and the word 'public' as international public, it could be said that it provides for international exhaustion. Hence it is clear from the above that the copyright owner has no control over the copies once they are put into circulation. In addition to the same, the copies can move freely to any territory following the principles of international exhaustion, permitting legal import copies of the same book from any other domain and sell it in India. It is interesting to note that the 1994 Amendment also introduced rental rights, including resale rights for the computer programme, cinematograph film and sound recording. The phrase used in the legal provision

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[70] K. Ponnuswami, "Performing Right if the Intellectual Worker: Judicial Annihilation" J.I.L.I., *1986+ Vol. 28, Issue 4, p.354

[71] Ibid.,3

[72] Penguin Books Ltd. v. India Book Distributors and Ors, A.I.R. 1985 Delhi 29.

[73] Sec. 2(1)(m)(i) of the Indian Copyright Act, 1957

[74] K. Ponnuswami, "Performing Right if the Intellectual Worker: Judicial Annihilation" J.I.L.I., *1986+ Vol. 28, Issue 4, p.353.

[75] Ss. 14 (a) (ii), 14 (b)(i) , 14 (c) (iii) of the Indian Copyright Act, 1957

is "to sell or give on hire or offer for sale or hire regardless of whether such copy has been sold or given on hire on earlier occasions"[76]. The background seems that the parliament wanted to introduce rental rights for these works but mistakenly added resale rights also within[77]. Exhaustion of rights at least within the territory of a country is a well-accepted international norm of copyright law followed globally[78]. The provision was amended in the 1999 amendment. The right in the case of a computer programme as it stands in the current provision is "to sell or give on commercial rental or offer for sale or commercial rental any copy of computer programme"[79]. Thus international exhaustion was recognized for computer programme too. But the situation remained the same for cinematograph film and sound recording.

Eurokids International Pvt. Ltd. v. India Book Distributors Egmont[80]. In this case, the Bombay High Court also refused to recognize international exhaustion. The court never looked into the concept of exhaustion and decided against the defendant merely by interpreting sections 14, 16 and 51 and concluding that it is the exclusive licensee's right to import as per the law and importation by anyone other than him violated the Indian copyright Act[81]. Even the amendment made to Section 14 of the Copyright Act in 1999 was not noted by the court. It concluded that it is in the public interest to protect the copyright owner's interest as any violation of copyright hampered public interest[82].

In ***Warner Bros. v. Santhosh V.G***[83]., the Bombay High Court had to decide on exhaustion in cinematograph films. The decision lays down an interpretation of section 2(m), section 14 (d), and section 51 of the Copyright Act in light of the principle of international exhaustion. Plaintiffs carry on the business of film production and are the owners and licensees of the copyrights in the films produced by them. The defendants distribute through rental DVD'S of films in which plaintiffs have copyright. The plaintiffs claim infringement under section 14

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[76] See Ss. 14 (1) (b) (ii), 14 (d) (ii) and 14 (e) (ii) Indian Copyright Act, 1957.
[77] Prof. N.S. Gopalakrishnan, "Note on section 2 (m) of the Copyright (Amendment) Bill 2010", in Appendix III to The Impact of Parallel Imports of Books, Films / Music and Software on the Indian Economy with Special Reference to Students, NCAER, (2014), p. 3
[78] Ibid.,
[79] Sec. 14(b) (ii) of the Indian Copyright Act, 1957 reads: "to sell or give on hire or offer for sale or hire, any copy of the computer programme, regardless of whether such copy has been sold or given on hire on earlier occasions."
[80] 2005 (6) Bom.CR 198.
[81] The defendants bought books published in the U.S. from authorized licensees and imported the same to India. Plaintiffs were the exclusive licensee in India. Plaintiffs alleged that the books sold in the U.S. were under territorial restrictions and cannot be sold in India.
[82] Eurokids International Pvt. Ltd. v. India Book Distributors Egmont 2005 (6) Bom.CR 198
[83] C.S. (O.S.) No. 1682/2006, available at https://indiankanoon.org/doc/67850614.

(d) (ii)[84]and section 51[85]. The court had to address the issue of whether the sale of DVD'S in India which is authorized to be distributed outside India is in violation to the right of the plaintiffs. The court in this case differentiated the rights guaranteed for the literary, dramatic and musical work with that of the rights for the cinematograph films and sound recording. The words "copies in circulation" and the explanation attached thereto are applicable only for literary, musical and dramatic works and not to cinematograph films, which clarifies that the legislature never intended to provide international exhaustion for the cinematograph films[86]. The court cannot be blamed for such an interpretation because the court merely applied the wordings of section 14 (d)(ii). The section mandates that the copyright owner over the cinematograph film has the right to sell or give on hire or offer for sale any copy of the film "regardless of whether such copy has been sold or given on hire on earlier occasions". Thus, it expressly states that the owner has the right to copy a film that is once sold or given on hire, which is an explicit negation of the first sale doctrine.

However, the court could have pointed out that such a differentiation made regarding cinematograph film was absurd. The court had the leeway of questioning the differentiation. The casual way the court applied the literal rule of interpretation could be due to the lack of understanding of the importance of international exhaustion and its implication on social life. The court could have criticized the legislature for making such an absurd distinction between rights in different works. The court also failed to address or highlight the problem of access or affordability resulting from the negation of exhaustion. This may be due to the incomplete understanding of the impact of international exhaustion. The courts should have highlighted the implication of the words "regardless of whether the copies are in circulation or not", which meant that not even national exhaustion is permissible in India, completely negating the application of the exhaustion concept in cinematograph films. The fact that the decision was rendered years after TRIPs negotiation was concluded, where India strongly propounded for international exhaustion, adds to the injury caused by the judiciary as it brings out the fallacies in comprehending the global scenario by the Indian judiciary. Subsequently, the

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[84] Sec.14 (d) (ii) of the Indian Copyright Act: "In the case of cinematograph film ... to sell or give on hire, or offer for sale or hire, any copy of the film, regardless of whether such copy has been sold or given on hire on earlier occasions."

[85] Sec. 51 of the Indian Copyright Act deals with circumstances in which copyright is infringed.

[86] Karishma D Dodeja, "The Sheer 'Film' of Protection- An Exercise in Exhaustion", JIPR, *2013+, Vol.18, pp. 7-14, available at http://nopr.niscair.res.in/bitstream/123456789/15741/1/JIPR%2018%281%29%207-14.pdf

2012 amendment to the Copyright Act deleted the words ‘regardless of whether such copy has been sold or given for hire’[87].

In ***John Wiley & Sons v. PrabhatChander Kumar Jain***[88], The court interestingly applied an absurd principle regarding international exhaustion. Delhi High Court held that the first sale doctrine was applicable only against the exclusive licensees and not against the owners who will continue to have a cause of action against the defendants. The court differentiated the right of the owners and that of licensees through an analysis of the provisions of the Copyright Act. It held that the purchaser, having purchased from the exclusive licensee, cannot defeat the owner's rights by claiming the principle of exhaustion or extinguishment of rights. This is the only harmonious interpretation possible by invocation of first sales doctrine in the present case[89].

The court opined that when the first sale of the work takes place, the licensee's rights will only get extinguished but not the rights of the owner[90]. The court relied on the principle that the rights conferred through section 14 of the Copyright Act cannot be limited by territorial limitations and can be made available to any part of the world, and when this right is licensed to another person and when he sells the goods the rights of the licensee gets exhausted but not that of the copyright owner.

During the draft proposal for the 2012 amendments, a proposal was tabled to amend section 2(m) of the Copyright Act, which dealt with infringing copies. The amendment aimed at adding a proviso to the section, which was as follows: "provided that a copy of a work published in any country outside India with the permission of the author of the work and imported from that country into India shall not be deemed to be an infringing copy"[91]. This provision would have directly allowed third parties to sell and import copyrighted works that had been purchased from anywhere in the world and thus would have instantly recognised the principle of international exhaustion[92]. However, this amendment never came into effect as it

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[87] The Current Sec. 14 (d) (ii) reads as: “to sell or give on commercial rental or offer for sale or for such rental, any copy of the film.”

[88] CS (OS) No. 1960/2008, May 17, 2010, available at https://indiankanoon.org/doc/777762/, (accessed on 18/12/2018)

[89] John Wiley & Sons v.PrabhatChander Kumar Jain, CS (OS) No. 1960/2008, May 17, 2010

[90] Pranesh Prakash, "Exhaustion: Imports, Exports, and the doctrine of the first sale in Indian Copyright Law", NUJS L. rev. [2012], Volume 5, Issue 4, p.651, available at http://nujslawreview.org/wp-content/uploads/2016/12/06_pranesh.pdf.,

[91] Ibid pp.652-653,

[92] Shamnad Basheer, et al., "Exhausting Copyrights and promoting access to Education: An Empirical Stake", JIPR, [2012], Vol 17, p.336, available at http://nopr.niscair.res.in/bitstream/123456789/14461/1/JIPR%2017%284%29%20335-347.pdf,

was opposed to the greatest extent by the publishers' lobby supported by the current ministry[93]. A further modification was also made to section 52 (z) (c) to allow the importation of literary or artistic works such as labels or logos, which are incidental to the copies which are imported lawfully[94]. The clause supports Section 30 (3) of the Indian Trademark Act, which provides parallel imports of trademark goods[95].

There are no direct cases in India that deals with digital context. However, the court did make observations relating to the software containing C.D.'s in cases where it dealt mainly with taxation matters. The court tried to differentiate the copyright inside the C.D. and the copyright containing C.D. to determine whether the tax law applies to the supplier of such C.D.'s. The court held that the ownership of C.D. and the ownership of the software is different[96]. 3 Based on such an observation, the court held that the transfer of the C.D. containing software for use would automatically amount to a sale as the owner in the C.D. is completely transferred. To tax, the court has held the C.D. containing software is a tangible medium as soon as the software is copied to the C.D[97]. The court also observed that the C.D. containing software becomes good once it exhibits qualities such as (a) its utility; (b) capable of being bought and sold; and (c) capable of transmitted, transferred, delivered, stored and possessed[98]. It becomes an article of value[99]. The moment the article becomes a marketable object, it becomes good. This can imply that the court was trying to restrict the rights of the intellectual property holder. However, the court's findings had a patent error that the sale of a copy of the film endorses along with it a part of the owner's copyright, and the copyright owner can therefore limit it. The court differentiated between computer software and other copyright works such as literary works of books or music C.D.

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93 Ibid.

94 Sec.52 (z) (c) of the Indian Copyright Act, 1957.

95 Zakir Thomas, "Overview of the Changes to the Changes to the Indian Copyright Act", JIPR, *2012+, Vol.17, pp.324-334, available at http://nopr.niscair.res.in/bitstream/123456789/14460/1/JIPR %2017% 284 %29%20324- 334.pdf.

96 Eurokids International Pvt. Ltd. v. India Book Distributors Egmont, 2005 (6) Bom. CR 198.

97 Tata Consultancy Services v. State of Andhra Pradesh AIR 2005 SC 371.

98 Samsung Electronics Company v.Assessee, ITA No.299/Bang/2011 decided on March 2012, available at https://indiankanoon.org/doc/147187654.

99 Ibid.

3.2 EXHAUSTION UNDER INDIAN PATENT LAW

The Indian Patent Act of 1970 was the first Act made by the Indian legislature in Patents. However, it had two essential predecessors during the British rule viz., the British- Patent Act of 1856 and the Indian Patent and Designs Act of 1911. Both the laws did not contain any express provisions on exhaustion. They were indeed based on England's Patent Act of 1852. However, they also did not confer on the patentee any right to import. This indicates that importation from outside India by persons other than the patent holder himself, who has acquired a legal title to those goods, was not intended to be prohibited by the Patent Act of 1856 and Indian Patent and Designs Act of 1911. After independence, it was felt that a major restructuring was needed in Patent law to suit national interests and economic policies[100]. Therefore, a committee was formed with Justice N. Rajagopala *Ayyangar*, Chairman. The committee report raised many specific questions about the existing patent system, and one of the major worries about it was the misuse of the patent right to import[101]. The report suggested:

"The existence of Patent prevents the importation of the product manufactured by the same or similar process from a country which might offer the article at a lower price. In this connection, it might be pointed out that where the same patentee manufactures the same article in different countries, the price of the product might not be the same in each country."

This explains that the Committee was very much aware of differential pricing mechanisms and the misuse due to importation rights. The Committee also justified differential pricing terming it as a market mechanism, but failed to visualize how it can be utilized to benefit the Indian consumers. The report further stated that process patent should be the mode of protection under the Indian Patent law in the context of medicine and food because a patent for a process conferred merely an exclusive right to use the patented process and not an exclusive right to sell the product made by the process[102]. The Committee might have contemplated that the importation of the product made abroad by the patented process and its sale would not constitute an infringement of the process patent. The result would be that anyone could import any article made abroad and sell it in India. This would lead to an increase in competition between products leading to a reduction in price. The competition in

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[100] Shri Justice N. Rajagopala Ayyangar, Report on the revision of the patents law, The Minister for Commerce and Industry, Government of India, 1959, pg. 3, available at https://spicyip.com/wp-content/uploads/2013/10/ayyangar_committee_report.pdf.,

[101] Ibid, pg. 17.

[102] Ibid pg.161,

the market between low priced imported products and products produced in India would lead to a decrease in price. This would be particularly so when the article was produced in countries where the invention patented in India does not enjoy patent protection. Therefore, the Committee desired competition between low-priced products made outside India and those made within India. It is also pertinent to mention that, the right to import was not included as the patent holder's right in the recommendations[103].

This could have been avoided to curb the misuse of the importation right. Since no right to import was recognized, any person was in a position to import a patented product placed in the market once by the patentee or his agents in any part of the world. The logic for this reasoning is that since no right to import was granted to the patent holder, there was no need for any express mentioning of international exhaustion. This means that Committee might have thought that the patent holder could not have prohibited the importation of patented products into India from elsewhere unless they were infringing products. However, the Committee recommended for distribution right to the patent holder. This could be without understanding the impact of such a provision on imports of goods made outside India. However, the observations made by the Committee regarding the availability of cheap products outside India and the intention of not granting product patents to pharmaceutical and food products to further competition from affordable products made outside India is a clear intention of the Committee to have had favour towards international exhaustion even though they were not quite fully aware of the same when they granted the right to distribute to the Patent holder. Further, the right to be given under the ***Ayyangar Committee*** Report was to sell the patented product and not resale.

The Indian Patent Act, 1970, was enacted based on the recommendations of the ***Ayyangar Committee*** Report. The Act was born with several layers of public interest provisions ensuring access to patented products[104]. It did not contain any provisions regarding exhaustion, probably because of Shri. Ayyangar never mentioned the same, as there was no importation right under the Act. Later, during the TRIPs negotiations in the Uruguay Round of GATT, the right to import and exhaustion were subjects of heated debates. The negotiation ended up with the so-called "flexibility" under TRIPs of providing parties with the freedom to

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[103] See Supra Note 44.

[104] Yogesh Pai, "The Hermeneutics of Patent Exhaustion Doctrine In India", in Irene Calboli and Edward Lee, Research Handbook on Intellectual Property Exhaustion and Parallel Imports, Edward Elgar Publishing, Cheltenham, (2016),p.324.

adopt any exhaustion mode.The developing and the least developed countries demanded the recognition of international exhaustion in the TRIPs negotiation. Even though the TRIPS Agreement conferred on the patent holder a right to import, the said right is subject to Article 6[105]. This was highly necessary since when an exclusive license to import was granted, it would have otherwise meant that any act of distribution without the patent holder's permission amounted to infringement[106]. The implication of footnote 6 to Article 28 becomes essential in this context. As per footnote 6, exhaustion extends to imports and I.P. goods' use, sale, or distribution. This means that the right to use a patented product also gets narrowed down without the exhaustion of the same right. This, coupled with the access and market problems that India could face due to granting importation rights, could be why India demanded the recognition of international exhaustion[107]. Further in the Doha declaration on the TRIPS Agreement and Public Health[108], it was clarified that the effect of the provisions in the TRIPS Agreement that are relevant to the exhaustion of intellectual property rights is to leave each Member free to establish its regime for such exhaustion without challenge, subject to the MFN and national treatment provisions of Articles 3 and 4[109].

With the onset of the TRIPs regime, India was on the path of revising the I.P. laws to make it in compliance with the TRIPs standards. The flexibility provided under the TRIPs regime, which was further clarified by the Doha declaration, granted India the right to recognize international exhaustion in its Patent law. The first attempt to introduce the right to import and to include a provision permitting international exhaustion was made in the Patents (Second Amendment) Bill 1999. The Indian Patent law had two major revisions in the years 2002 and 2005. It was in the 2002 amendment that both the right to import[110] and the provision regarding exhaustion were incorporated into the Indian Patents Act. Section 107 Patents inserted a (Amendments Act) 2002which contained a clause (b) recognizing international exhaustion. In the Second Amendment Bill introduced in the Parliament in 1999, the Statement of Objects and Reasons stated that Bill's salient feature was to provide

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[105] See Supra Note 6 .Art. 28 of TRIPs, 1994, says,"This right, like all other rights conferred under this Agreement in respect of the use, sale, importation or further distribution of goods, is subject to the provisions of Article 6".

[106] See Supra Note 48.

[107] MTN.GNG/NG11/W/37.

[108] Doha Ministerial –Declaration on the TRIPS Agreement and Public Health adopted on 14 November 2001, WT/MIN(01)/DEC/2.

[109] Para 5 (d) of the Doha Ministerial –Declaration on the TRIPS Agreement and Public Health adopted on 14 November 2001, WT/MIN (01)/DEC/2.

[110] Sec. 48 Indian Patents Act, 1970

for provisions relating to the parallel import of patented products[111]. Clause 51[112] of the Bill recommended the inclusion of the provision of parallel imports. Thus, it is clear that market accessibility and public interest was a significant aim for bringing parallel import provision. Also, it made clear that the amendment aims at international exhaustion rather than national exhaustion. Section 107 A (b) read as *"importation of patented products by any person from a person who is duly authorized by the patentee to sell or distribute the product, shall not be considered as an infringement of patent rights[113]."*

Thus, the amendment enabled any third person to import a 'patented' product provided that he purchases the product from a person who is authorized by the 'patentee to sell or distribute the product.' The section, however, was said to have specific problems. The main and obvious problem was the condition attached for the provision to kick in, i.e. that the importer should have purchased the product from the patentee himself or any person who is authorized by the patentee to sell or distribute the product. This could restrict the scope of the provision and really could hamper the real public interest aimed at by the provision. Another problem raised was about the word Patented and patentee. Section 2(1)(m) defines ―patent‖ as a patent for any invention granted under this Act. Thus, the patentee and patented product refer to any patent granted under Indian law, reiterating the territorial nature of the Patent whereby exhaustion is also restricted[114].

However, in the 2005 amendment to the Patent Act, the issue of authorization from the patentee was removed. The new section reads as *"importation of patented products by any person from a person who is duly authorized under the law to produce and sell or distribute the product"[115].*

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[111] Shamnad Basheer and Mrinalini Kochupillai, "Trips, Patents And Parallel Imports In India: A Proposal For Amendment", Indian J. Intell. Prop. L., [2009], Vol. 2, p.73, available at SSRN: https://ssrn.com/abstract=1286823, (accessed on 5/1/2018). Also, see; Dr N.S. Gopalakrishnan, The Patents (Second Amendment) Bill, 1999 – An Analysis, 1 SCC (Jour), [2001], Vol. 14, available at http://www.supremecourtcases.com/index2.php?option=com_content&itemid=54&do_pdf=1&id=103.

[112] Clause 51 of the Patents (Second Amendment) Bill, 1999, states: "This clause seeks to insert a new section 107A in the Act, relating to certain acts which are not to be considered infringement. It is also proposed that the importation of patented products from the person who the patent holder duly authorizes shall not constitute an infringement. This provision is proposed to ensure availability of the patented product in the Indian market at minimum international market price." See Supra Note 55.

[113] Sec.107 A (b) of the Indian Patent Act

[114] J. Sai Deepak, "Section 107 A (B) Of The Patents Act: Why It May Not Refer To Or Endorse Doctrine Of International Exhaustion?", Indian J. Intell. Prop. L., 2011, Vol.4, 121, at p.125, available at http://www.commonlii.org/in/journals/INJlIPLaw/2011/8.html,

[115] Sec.107 A (b) of the Indian Patent Act, 1970.

Therefore, the new amendment replaced patent holders' consent with the consent of the law. Any person who buys the patented product from an authorized person under the law to produce and sell or distribute can legally import the product to India. Amendment was also made regarding the activities for which authorization was to be granted. Earlier it was authorized to sell or distribute ', which was amended to be authorized under the law to produce and sell or distribute'.

Even the current provisions are not without ambiguities. What does "***under the law***" in Section 107 A (b) refers to? Is it the Patent law, or does it simply imply that the product should be a legal good? Does the law refer to the Indian law? What does ***authorize under the law to distribute*** refers to? Should the authorization be to produce and sell or produce and distribute? There are different methods to do away with these confusions. The first obvious way would be to find out the legislative intent behind introducing these provisions. During the debates in the Rajya Sabha, the Minister of State for Commerce and Industry stated, *"... the relevant sections are Section 47, Sections 82-84 and Section107 (a) and (b) which deals with parallel imports. .... The sharp point that I want to make is that, on the issue of prices, on the issue of availability of patented medicine, on the issue of the ability of the Government to retain the right of ensuring that the Patent is translated into a product, there are enough safeguards in the existing legislation both in the 1970 legislation, but more importantly in the revised Patents Act of 1970 reflecting the new provisions for compulsory licensing, reflecting the new provisions for parallel import particularly; and also reflecting the new provisions for enabling the Government to import; and use and distribute for its use either through itself or through the third party*[116]."

The statement gets all the more important because it explains (a) Section 107 A (b) aims at facilitating parallel imports (b) it also differentiates the reservation of the right of the Government to import and use and distribute from parallel imports[117]. Therefore, the section talks about importing goods from outside the territory of India[118]. Therefore, necessarily it

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[116] See Rajya Sabha Debates, available at http://rajyasabha.nic.in/rsdebate/deb_ndx/204.

[117] J. Sai Deepak, "Section 107 A (B) Of The Patents Act: Why It May Not Refer To Or Endorse Doctrine Of International Exhaustion?" Indian J. Intell. Prop. L., [2011], Vol.4, 121, at p.134, available at ttp://www.commonlii.org/in/journals/INJlIPLaw/2011/8.html, arguing for the recognition of national exhaustion in section 107 A (b) has relied on a statement made by Shri Kamal Nath in the combined discussion held in the Lok Sabha, in which he stated, "On import of patented commodity from anywhere in the world, the Government reserves the right." This could be a mistake made by the minister since he was not aware of the separate provisions on parallel imports and the government right to import, both for protecting the public interest and facilitating cheaper access of goods.

[118] Ibid , pp.121-138.

must refer to any good, which has been legally produced under foreign law and not Indian law. As to whether the word law in section 107 A (b) means patent law, the words used in the section are authorized under the law and does not specify patent law. This must only imply legal goods since there could be nations where no patent law exists or where even if patent law exists, no patent exists.

So if a product is manufactured in a country where no patent exists and is imported into India, does S.107 A (b) makes it illegal? Does that mean the production of goods there with the permission of the Government makes the product illegal? It is the law, which has authorized the production of the goods. It can also include patent law. Turning to the next question, how can one read the last portion of the section? Should the authorization under the law be to produce and sell or produce and distribute? Alternatively, can it be read as authorized to produce and sell or authorized to distribute? The logical interpretation and the aim of the provision suggest that the authorization to distribute can be seen separately. The words produce and sell have been used together, while distribution has been used separately. Further, reading otherwise would only narrow the scope of the provision since purchasing and importing from a person authorized to distribute would otherwise become illegal.

Having said all these, it could be safely said that Section 107 A (b) enables a third party to import patented products, including covered price control measures or compulsory license provisions and products from places where no patent law exists[119].

3.2.1 Section 107 A(b) and Article 6 of the TRIPs

A strong argument has been raised saying that Section 107 A (b) goes beyond TRIPs because it allows to import of products even from a nation that does not contain Patents, but the law allows the production of the product which is patented in other countries. It falls under the category of legal goods[120]. Such a situation, it is argued, goes beyond what is envisioned in Article 6 as no first sale takes place with the consent of the patent holder[121]. Here when the first sale takes place in a place where there is no patent, it is not the patent owner who gets the incentive and thus, Article 6 does not come in. To answer this challenging question, one can take many approaches. However, the very first task is to understand the true ambit of

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[119] See Yogesh Pai, "The Hermeneutics of Patent Exhaustion Doctrine In India", in Irene Calboli and Edward Lee, Research Handbook on Intellectual Property Exhaustion and Parallel Imports, Edward Elgar Publishing, Cheltenham, (2016), p.324

[120] Supra Note 55.

[121] Ibid Vol. 2, pp.491-492, available at SSRN: https://ssrn.com/abstract=1286823.

Section 107 A (b). The section has never mentioned any word such as exhaustion. Nor does the legislative history of the provision mention Article 6 as the flexibility in TRIPs used to result in the section[122]. It merely has been enacted to encourage parallel imports, i.e. import of genuine, cheap, foreign goods to promote consumer welfare[123]. Article 7 of the TRIPs provision allows the countries to adopt measures conducive to their economic conditions considering the nation's public interest and consumer welfare. Therefore, one can safely argue that Section 107 A (b) relies on Article 7 to promote consumer welfare and provide parallel imports of cheaper goods rather than clinging to Article 6[124].

Another way of looking into it is to analyze the section from a property jurisprudence angle and WTO jurisprudence. The philosophy underlying exhaustion is that every subsequent purchaser of a genuine patented product must enjoy the fruits of ownership that he possesses over the product[125]. The right to alienate or sell a product is an inherent right of the owner of the product. This implies that when a person owns a genuine product, he has the right to sell that product anywhere in the world. The WTO jurisprudence on the free movement of goods also is aimed at the same[126]. The Overall philosophy of Article 6 must be viewed from this perspective. Whether Patent law exists or not in the country from where the goods were purchased is immaterial. Therefore, the argument that importation of goods from a nation, which does not contain any patent law, overdoes Article 6 cannot sustain since the underlying principle of exhaustion enables the purchaser of real property to enjoy the full rights attached to it. Irrespective of India's patent law or its rights under Article 48 providing for importation rights, it cannot prohibit a legal purchaser from enjoying his right over the property. This would be an aggrandizement of the rights envisioned under the Indian Patent law. It would directly contradict with the WTO jurisprudence on the free movement of goods. Under the WTO philosophy, goods across borders cannot be restricted unless justified through express exceptions provided therein[127]. The banning of parallel imports thus contravenes WTO jurisprudence.

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[122] http://rajyasabha.nic.in/rsdebate/deb_ndx/204.

[123] It merely has been enacted to encourage parallel imports, i.e. import of genuine, cheap, foreign goods to promote consumer welfare.

[124] Art. 7 of the TRIPs Agreement, 1994, states: "The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations."

[125] Vishnu Shankar P., "Hegelian and Kantian Analysis of the Concept of Exhaustion", CULR, [2014], Vol. xxxviii, January-June, Number 1 & 2, pp.96-109.

[126] The preamble of the WTO agreement, 1994.

[127] Art. XI of WTO agreement, 1994.

Thus, S.107 A (b)must be viewed from the angle of the purchaser and, of course, with the public interest in mind. Therefore when a product is imported from a country where the good has been legally produced, it cannot be prohibited since protecting the purchaser's interest is the aim of Article 6. Section 107 A(b) will not only facilitate imports from countries having patent law but also from countries with no patent law compelling the Patent owner to take patents in most countries, including under developed countries facilitating technology transfer to these nations while ensuring products at low prices to the Indian consumers[128]. Express right of import has been granted under the Indian Patent Act to the Patent holder. Does Section 107 A(b) makes this right useless?[129] The answer is negative. Importation right is granted to enable the Patent holder to stop importing infringing goods. Neither TRIPs nor the Indian Patent Act prohibits the importation of lawfully made products. TRIPs allow the seizure of counterfeit or pirated products at the borders and do not obligate any member country to seize legal products[130]. In light of this aspect, one should view the right to import under Indian Patent law. Thus, parallel imports do not hamper the right to import of patent holders.

3.3 LEGISLATIVE FRAMEWORK AND JUDICIAL INTERPRETATIONS REGARDING PARALLEL IMPORTS IN PATENT LAW

The only reported case[131]in the patent regime concerning parallel imports in the Indian Jurisdiction is Strix Limited vs Maharaja Appliances Limited[132]. Plaintiff holds a product patent in respect of Liquid Heating Vessels. The Defendant is an Indian company engaged in manufacturing and selling electrical appliances, including electric kettles. According to

[128] N.S. Gopalakrishnan and T.G.Agitha, "The Indian Patent System: The Road Ahead," in Ryo Shimanami, The Future Of Patent System, Edward Elgar, [2012], p.229.

[129] Supra Note 55.

[130] Art. 51 of the TRIPs Agreement, 1994.

[131] Public interest litigation was filed before the Hon. Supreme Court of India by a person named J.Sai Deepak claiming the underlying philosophy of Sec. 107 A (b) is national exhaustion. However, the Supreme Court dismissed the case on finding a lack of locus standi. The arguments raised by the petitioner relied on various erroneous interpretations of the patent Act relying on compulsory provisions under the Patent Act, such as Section 84 (7) and 90. The author finds no merit in the arguments of the petitioner, hence not discussing it in detail. For a detailed reference of the arguments read; J. Sai Deepak, “Section 107 A (B) Of The Patents Act: Why It May Not Refer To Or Endorse Doctrine Of International Exhaustion?”Indian J. Intell. Prop. L., 2011, Vol.4, 121, at pp.121-138, available at http://www.commonlii.org/in/journals/INJlIPLaw/2011/8.html. (Accessed on 24.06.2021)

[132] I.A. No.7441 of 2008 in C.S. (O.S.) No.1206 of 2008

Defendant, electric kettles were earlier being supplied by Plaintiff to Defendant in 2005-2006. Defendant states that the Plaintiff's products were of inferior quality and, therefore, the Defendant commenced importing electric kettles containing the impugned heating element from China. The Defendant states that it did not manufacture the said heating element installed in the kettles at any point in time. The Defendant states that they are traders and have not undertaken any manufacturing activity. Defendant claims to have imported the product bona fide from China and states that the supplier in China from whom the Defendant imported the product in question held a patent inclusive of the heating element installed in the kettle. The Defendant, in the instant case has argued that they have purchased the product from the patent holder in China and hence they are protected under Section 107 A (b), making the imported goods legal goods. The court demanded evidence from the defendants regarding the existence of a patent in China.

However, the court refused to discuss more the issue since the defendants could not bring about any document proving that the person from whom the Defendant purchased had valid patents. The court opined that unless any proof of the same could be produced, the court would assume that there exists no patent in China making the imported goods illegal. The implication would be that if there had been a valid patent in china from whom the defendants purchased the goods, then Section 107 A(b) would kick in, which supports the international exhaustion notion of Section 107 A (b). However, the error which the court construed seems to be that the court failed to understand the pith and substance of the words under the law "in section 107 A (b). The demand of the court to produce evidence about the existence patent in China shows that the court has wrongly construed the law to mean patent law rather than simply meaning legal goods". The court failed to understand the amendment made to the section and to understand the word law correctly. Thus, the Indian stand on exhaustion regime has been cleared to recognise international exhaustion from the beginning after getting Independence. This is clear from the ***Ayyangar Committee*** reports demining the right to import. India introduced exhaustion provisions when the right to import was granted under its law through Indian Patent Amendments made in 2002.

3.4 LEGISLATIVE FRAMEWORK REGARDING PARALLEL IMPORTS IN TRADEMARK LAW

The Indian trademark law, too, did not contain any express provisions regarding exhaustion. The first enactment in the field of trademark law was the Indian Merchandise Marks Act

1889, which later gave way to the Trademarks Act 1940, the Trade and Merchandise Marks Act 1958 and finally, the Trademarks Act 1999. But before the final legislation in 1999, no express provisions regarding exhaustion were present in the Indian trademark law. However, specific other laws supplemented the trademark law, which impacted exhaustion rules regarding trademark goods. The first among them was the Customs Act 1962, under which the prohibition on importation was confined only to those goods that were having false trademarks or showed the wrong place of origin of goods[133]. In simple words, there was no prohibition on legitimate interests, which meant that international exhaustion was the norm. Further, a notification by the Department of Revenue dated 18th January 1964[134] empowered the Government of India to permit the importation of goods having similar trademarks as that of the trademark owner, but as a condition only that the name of the country of origin of the goods is printed in large visible letters.

The Notes on Clauses under the Trademarks Bill, 1999, (Bill No. XXXIII of 1999) has explained Clause 30 as under:

"Sub clause (3) and (4) recognize the principle of "exhaustion of rights" by preventing the trademark owner from prohibiting on the ground of trademark rights, the marketing of goods in any geographical area, once a person lawfully acquires the goods under the registered trademark. However, when the conditions of goods are changed or impaired after they have been put on the market, the provision will not apply"[135].

Department - Related Parliamentary Standing Committee on Human Resource Development has also stated in its 227threport on Copyright Amendment Bill, 2010[136]. that international exhaustion is followed in the Indian Trademarks law[137], which means that the general rule was that once trademarked goods were released anywhere in the market by or with the consent of the trademark proprietor. However, the proprietor cannot assert his trademarks rights to prevent imports of such goods into India unless such goods are not materially altered. This statement reflects the position of the legislature regarding exhaustion. Moreover, under the current system, the Intellectual Property Rights (Imported Goods) Enforcement Rules, 2007, the definition of "goods infringing intellectual property rights" covers only "any

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[133] Sec. 11 of The Customs Act, 1962.
[134] For further information see, https://www.seair.co.in/custom-notifications/notifications-issued-before-the-year-2000-notification-no-011964-dated-18th-jan-1964-145.
[135] Notes on clause 30under the Trademarks Bill, 1999, (Bill No. XXXIII of 1999). Also, see; Supra Note 55 p. 69.
[136] Supra Note 9.
[137] Ibid.,

goods which are made, reproduced, put into circulation or otherwise used in breach of the intellectual property laws in India or outside India and without the consent of the right holder or a person duly authorized to do so by the right holder"[138] Further section 52 (z) (c) of the Indian Copyright Act, 2012, allows the importation of copies of literary or artistic works containing logos or labels which are incidental to other goods or a lawfully imported copy. This reaffirms the stand that the trademarks law recognizes international exhaustion since the provision included in the Indian copyright Act ensures that there should not be any conflict with the international exhaustion provision under the trademarks Act.

However, Section 29 of the Indian Trademark Act, 1999 dealing with trademarks infringement says that using a registered trademark by any person other than the owner can amount to breach[139] and explains the word 'use 'by stating imports and exports amount to use[140]. Therefore, parallel imports may prima facie appear to be blocked by the above sections. However, Section 30 (3) of the Act clarifies the position by stating that whena person lawfully acquired a product, the sale of that product in a market or any other dealing in those goods by that person or person claiming under him will not constitute infringement[141].

The only limitation provided for opposing the release of these goods is the change or impairment of the condition of the goods after they have been placed in the market[142]. A careful reading of the Clauses 30(3) and section 30 (4) makes it evident that goods that are lawfully placed in the market once cannot be considered as use of a trademark and thus cannot be banned from importing. The judicial decisions pertaining to parallel imports of trademark goods have a better standing than the copyright decisions. Even though early judicial decisions failed to recognize the importance of international exhaustion, at least a few decisions came out well in support of parallel imports.

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[138] Rule 2 (a) of Intellectual Property Rights (Imported Goods) Enforcement Rules, 2007, available at http://www.cbic.gov.in/htdocs-cbec/customs/cs-act/formatted-htmls/ipr-enforcementrules.

[139] Sec. 29 (1) of the Trademarks Act, 1999, reads: "A registered trademark is infringed by a person who, not being a registered proprietor or a person using by way of permitted use, uses in the course of trade, a mark which is identical with, or deceptively similar to the trademark concerning goods or services in respect of which the trademark is registered and, in such manner, as to render the use of the mark likely to be taken as being used as a trademark."

[140] Sec. 29(6) of the Trademarks Act, 1999.

[141] Sec. 30(3) of the Trademarks Act, 1999 reads as: “Where a person lawfully acquires the goods bearing a registered trademark, the sale of the goods in the market or otherwise dealing in those goods by that person or by a person claiming under or through him is not an infringement of a trade by reason only of----(a) the registered trademark having been assigned by the registered proprietor to some other person, after the acquisition of those goods: or (b) the goods having been put on the market under the registered trademark - by the proprietor or with his consent”.

[142] Sec. 30 (4) of the Indian Trademarks Act, 1958.

3.4.1 Judicial interpretations Regarding Parallel Imports in Trademark Law

The initial case laws were not in support of international exhaustion. For example, in ***Hindustan Lever Ltd. v. BrijuChhabra***[143], when genuine parallel imported products were banned from entering into commerce merely because the plaintiffs had geographical restriction agreements that restrained defendants from selling in India[144], the Court accepted the argument of the plaintiffs that statutory rights of the plaintiffs were violated by the defendants through selling these products. It appears that the Court was either unaware of or unmindful of the concept of international exhaustion as no discussion of the exhaustion concept appeared in the judgement. The reason for the same may also be that the law at that time never contained any express provision on exhaustion of trademark rights.

In ***CISCO Technologies v. Shrikanth***[145], the plaintiff CISCO was selling its products used in computer hardware since the year 1984 under the trademark 'CISCO‗. Defendants imported goods sold outside India into India. Court held the importation illegal since the trademark law provided the right to import to the trademark owner[146]. The Court stated:

"For persons who hold the benefit of registered trademarks, Section 140 of the Trade Mark Act, 1999 makes statutory provisions were under the Collector of Customs could prohibit the importation of goods if the import thereof would infringe Section 29(6)(c) of the Trade Marks Act. The statutory authorities could prohibit the import of such products; import of which would result or abet in the violation of the proprietary interest of a person in a trademark/trade name"[147]

Here the courts have equated the imported goods to counterfeit goods/infringing goods without bothering to understand the meaning of the word "infringe or the nature of the goods". The Court failed to address exhaustion at all and never cared to look into S.30 of the Trademark Act, 1999. Therefore, this judgment may be considered as *per in curiam.*

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[143] Suit No. 2345 of 2000, High Court of Delhi, available at https: //Indian case laws word press.com /2013 /10/19/hindustan-lever-ltd-v-briju-chhabra.

[144] The plaintiff HLL was the registered proprietor of the trademark LUX and LUX label regarding toilet soaps within India. The defendant imported into India LUX soaps manufactured in Indonesia without any license, permission or authorization from HLL. The product so imported had the express indication that they were meant for sale only in Indonesia.

[145] 2005 (31) PTC 538 (Del).

[146] The Court devised such a right from interpreting the Sec. 29 (6) (c) of the Indian Trademarks Act, 1958.

[147] CISACO Technologies v. Shrikanth 2005 (31) PTC 538 (Del) para 8.

In ***Wipro Cyprus Pvt. Ltd. v. Zeetel Electronics***[148], the Madras High Court stated that the plain reading of section 28 relating to the trademark holder's rights reveals that the assignee of the trademark has the exclusive right to use it in India. Any other reading of it would make the section nugatory. The Court further explained that a harmonious reading of section 28, 29 and Section 30 would render Section 30 a proviso to Section 29 and interpreting Sec. 30 in such a way to allow imports by the defendant would render trademark registration as meaningless since it will amount to use under Section 29 (6) (c). Allowing the import by defendants was held to be also violative of section 29 (6) (c). In addition to giving such an erroneous interpretation, the Court stated that competition was not the aim of trademark law when monopoly certainly was. This brings out the inexperience and the incompetence of the Indian courts when it comes to IP cases. The real balance between IP and consumer welfare can be achieved only by bringing competition principles into the IP framework. The provision for international exhaustion has been built into IP laws to promote competition through the law and limit the undue monopoly of the IP holder[149]. It is one of the main aims of the IP law to prohibit anti-competitive practices of the IP holder. The lack of social sensitiveness of the courts is a severe issue that India faces when it comes to the interpretation of IP laws. However, certain positive signs began to come out in the later cases which came up before courts.

In ***Samsung Electronics Company Ltd. v. Mr G. Choudhary***[150], the plaintiff wanted to stop the parallel importation of products manufactured in China into India. They contended that although the products were genuine, they were not meant for the Indian market. The Court looked into sections 29 (1) sec. 29(6) (c), sec. 30 (3) and also Article 50 of TRIPs. On a detailed analysis of these provisions, the Court concluded that Section 30 of the Indian Trademark Act, 1999 expressly addressed the question of exhaustion. Section 30 (3) clearly states that when the goods bearing a registered trademark are lawfully acquired, further any consequent sale or any other dealings in such goods by the buyer or by any person claiming to represent the buyer does not amount to infringement if the goods have been circulated on the market under the consent or such mark of the proprietor[151].However, the Court held that the onus was upon the defendants to prove that the goods were sold initially in a market by

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[148] 2005 (31) PTC 538 (Del).
[149] The FTC report of 2003 by the U.S. is an illuminating document that brings out the importance of competition in the intellectual property framework. Even under the TRIPs provision, there is express provision on competition and cautions intellectual property holders from anti-competitive practices
[150] 2006 (33) PTC 425 Del.
[151] Ibid

the trademark owner. Therefore, the goods were suspended from releasing. The Court granted an injunction in favour of the plaintiff, stating that any other decision would cause irreparable damage and appointed a commissioner to verify the parties' claims[152]. The only solace, in this case, is that the Court has at least referred to the implication of Section 30 (3).

In the same year in ***Xerox Corporation v. PuneetSuri***[153], the Court held that the importation into and selling of Xerox machines, which are lawfully acquired in another country, in India is not a violation of the Trademark rights and that section 30 (3) of the Act provided for international exhaustion. This is the first case in which the Court specifically mentioned and recognized international exhaustion.

Another critical case that came up before the Commissioner of customs, in which the Court allowed resale of parallel imported Dell laptops in the Indian market, is commonly known as the Dell case[154].The Customs Commissioner, in that case, passed an order based on Section 30(3) (b) of Trade Marks Act, 1999, stating that when the trademark goods are 'lawfully acquired', their sale of it by the purchaser is not considered an infringement since the goods are put on the market under the registered trademark by the proprietor or with his consent[155]. However, the subject goods must not be impaired or materially altered after being put on the market. Section 11 of Customs Act 1962, read along with the Intellectual Property Rights (Imported Goods) Enforcement Rules, 2007[156], also only prohibits those goods with false or infringing trademarks[157]. Another landmark judgment ***KapilWadhwa v. Samsung Electronics***[158], the division bench of Delhi High Court, overruling the single bench decision, held that the section recognized international exhaustion. The respondents, in this case, were companies that manufacture and trade in electronic goods. Respondents alleged that the appellants were purchasing their printers from foreign markets and selling them in India under the Trade Mark of the respondents at a price lower than that of the respondents, which

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[152] Ibid

[153] CS (OS) No. 2285/2006.

[154] F.NO.SIIB/IPR-3, 4 &5/ 2012 ACC(1) available at https:// indiancase laws.files.wordpress.com/2013/ 09 / dellcase.pdf,

[155] Dell laptops were imported into India from China by defendants, and customs captured them, and it was subsequently referred for confirmation to Dell company on whether they are genuine goods. The plaintiffs complained of infringement. Defendants sought the defence under Sec. 30(3)

[156] Rule 6 of the Intellectual Property Rights (Imported Goods) Enforcement Rules, 2007: Prohibition for importing goods infringing intellectual property rights.- After the grant of the registration of the notice by the Commissioner on due examination, the import of allegedly infringing goods into India shall be deemed as prohibited within the meaning of Section 11 of the Customs Act, 1962.

[157] F.NO.SIIB/IPR-3, 4 &5/ 2012 ACC(1), p.9, available at https://indiancaselaws.files.wordpress.com /2013/ 09/dell-case.pdf.

[158] 2013 (53) PTC 112 (Del.).

amounted to infringement. The single bench had earlier held that section 29(1)[159] read with section 29(6)[160] prohibited importation of genuine products without the permission of the owner. The court came to the interesting conclusion that section 30(3) embodied national exhaustion. However, the division bench overruled this decision and held that section 30(3) recognizes the principle of international exhaustion.

Nevertheless, it upheld the interpretation of the use of the mark under section 29(1) and section 29(6) and referred to the import of goods under the trademark. The single bench had erroneously held that the market referred to in the section referred to the domestic market and that the good with the mark should be lawfully acquired for the domestic market itself. However, the division bench concluded that the market. Referred in the section was an international market, and a person can lawfully acquire a genuine good with the mark from the global market. The court rejected the finding of the Single Bench that interpreting section 30 in the context of international exhaustion would make the section redundant. The court went on to hold that section 30 talks about goods with registered marks being put on the market which is lawfully acquired by any person rather than interests placed on the market under any specific trademark law and that the section aimed to enable the further sale of goods which were lawfully acquired and preventing the TM owner from controlling the same would not create any havoc as feared by the single learned judge and that international or national market was an irrelevant consideration for interpreting section 30 (3). Court also held that section 30 is an exception to section 29, and the single bench overlooked this.

Thus, it rejected the conclusion of the single bench that the legislature intended to put barriers on importation as premature. The court observed that adopting the principle of national exhaustion would not encourage industry to be set up in India. In the instant case, a foreign manufacturer located abroad may get its trademark registered here and import goods manufactured in a foreign country. It felt that in such situations, dual pricing might cause injury to the consumer. Here one could witness the court's endeavour to address the issue of parallel imports not only from a public interest perspective. The learned judge pondered upon the industrial and social advantages that international exhaustion can facilitate. In a way, the

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[159] A registered trademark is infringed by a person who, not being a registered proprietor or a person using by way of permitted use, operates in the course of trade, a mark which is identical with, or deceptively similar to the trademark concerning goods or services in respect of which the trademark is registered and in such manner as to render the use of the mark likely to be taken as being used as a trademark.

[160] The section says importation or exportation of the trademarked goods comes under the purview of use of the mark.

judiciary has cast off all the feeble arguments by the industrial and interested sectors who oppose international exhaustion.

3.4.2 Indian Designs Act, 2001

In India, international exhaustion applies through an implied license to designs registered under the Indian Designs Act, 2000[161]. Section 22 (1) of the India Designs Act enumerates the rights available to a registered design owner[162]. It provides for importation rights to the registered owner. However, Section 42 talks about unlawful restrictive agreements[163]. Under Section 42 (1) (b), it is illegal to prohibit the purchaser from restricting the purchaser from *using an article* in any manner other than the article which is not sold by the manufacturer, licensor or IP holder or his nominee[164]. This points towards international exhaustion though Indian law has not fully captured the concept of international exhaustion.

3.4.3 The Semiconductor Integrated Circuits Layout-Design Act, 2000

As in the Patent and design laws, we do not find many case laws on exhaustion, even Semiconductor laws. Section 18 of the Act deals with the infringement of layout designs. The owner of designs of semiconductor chips has the right to import under S. 18[165]. However, it is provided under S. 18(7) that the rights under S. 18 (1) (b) shall not be considered to have been infringed if any of the acts mentioned under S.18 (1) (b) is performed using an article

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[161] Sonia Baldia, "Exhaustion and Parallel imports in India", in C. Heath, (ed.), Parallel imports in Asia, Max Plank Series on Asian Intellectual Property Law, Vol. 9, Kluwer Law International, Netherlands, (2004), pp.163-175.

[162] Sec. 22(1) of the Indian Plant Varieties Act, 2001, reads: "During the existence of copyright in any design it shall not be lawful for any person... (b) to import for sale, without the consent of the registered proprietor, any article belonging to the class in which the design has been registered, and having applied to it the design or any fraudulent or obvious imitation thereof."

[163] Indian Designs Act 2000, Sec. 42 (1) reads: It shall not be lawful to insert- (i) in any contract for or in relation to the sale or lease of an article in respect of which a design is registered; or (iii) (a) to require the purchaser, lessee, or licensee to acquire from the vendor, lessor, or licensor or his nominees, or to prohibit him from acquiring or to restrict in any manner or to any extent his right to receive from any person or to ban him from receiving except the vendor, lessor, or licensor or his nominees any article other than the article in respect of which a design is registered b) to prohibit the purchaser, lessee or licensee from using or to restrict in any manner or to any extent the right of the purchaser, lessee or licensee, to use an article other than the article in respect of which a design is registered which is not supplied by the vendor, lessor or licensor or his nominee and any such condition shall be void

[164] Sec 42 (1) of Indian Designs Act 2000.

[165] Sec 18 (1) (b) of The Semiconductor Integrated Circuits Layout-Design Act, 2000, reads: Infringement of layout design.—(1) A registered layout-design is infringed by a person who, not being the registered proprietor of the layout-design or a registered user thereof (b) "does any act of importing or selling or otherwise distributing for commercial purposes a registered layout-design or a semiconductor integrated circuit incorporating such registered layout-design or an article incorporating such a semiconductor integrated circuit containing such registered layout-design for the use of which such person is not entitled under this Act."

which has been put on the market once with the consent of the proprietor[166].The word used is market in the section. The market could be deemed a world market since no qualification or definition is attached to the word market. The reasoning gets more concrete support from the international stand that India has adopted in exhaustion, especially in TRIP's negotiations. Further, the Parliamentary debate on exhaustion in the Patent law has elaborated in the earlier part of this article solidifies the legislature's intention regarding the mode of exhaustion that India desires are international exhaustion. Thus, the word market in the Semiconductor Integrated Circuits Layout-Design Act, 2000, must imply an international market. Moreover, if the legislature intended to recognise national exhaustion, then the law could have used the word country. Thus, international exhaustion is clearly identified by the semiconductor law of India.

3.5 CONCLUSION

The position of India in the international negotiation was one supporting the adoption of international exhaustion as the global norm. Still, India has not made use of the freedom allowed under the TRIPS Agreement. Article 6 of the TRIPs agreement does not interfere with the freedom of each country to choose the mode of exhaustion best suited to their economic structure. India, being a developing country with the second largest population globally and growing demands for affordable goods in all sectors of life, should have necessarily followed international exhaustion. However, this freedom has not been effectively utilized either by the legislature or by the judiciary in most of the intellectual property laws in India. India was the major proponent of international exhaustion during the TRIPs negotiation. Therefore, it is unfortunate that the I.P. laws in India lack clarity on the nature of exhaustion that India follows. The impression one could gather from the legislative debates is that the legislature supported international exhaustion as the norm to be followed in all fields of I.P. However, the analysis of the IP Laws points to the contrary. There is no clarity in almost all I.P. laws on the mode of exhaustion. Further, the provisions providing for

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[166] Sec. 18 (7) of The Semiconductor Integrated Circuits Layout-Design Act, 2000 reads: "Nothing contained in clause (b) of sub-section (1) shall be construed as constituting an act of infringement where any person performs any of the acts specified in that clause with the written consent of the registered proprietor of a registered layout-design or within the control of the person obtaining such consent, or in respect of a registered layout-design or a semiconductor integrated circuit incorporating a registered layout-design or any article incorporating such a semiconductor integrated circuit, that has been put on the market by or with the consent of the registered proprietor of such registered layout-design."

exhaustion are loosely drafted in almost all the I.P. laws, leading to confusion about the nature of exhaustion followed by the Indian laws. A typical example is the case of copyright and trademarks, wherein the words "copies already in circulation" and the word "market", respectively, are left without being defined, giving scope for interpreting the same as providing for national exhaustion. This may give rise to serious apprehensions regarding the real interest of the legislature. The approach of the judiciary also appears to be disappointing on many occasions. It is disheartening that the courts had even failed, as we had seen in certain decisions, to look into the relevant precedents and law while deciding cases. The courts seem to have insufficient information regarding the concept of exhaustion. In the majority of cases, the judiciary seems to be labouring under the impression that intellectual property protection is the best solution for bringing in consumer welfare without realizing that the overprotection of intellectual property can harm a developing country like India. The courts have not given serious consideration to even the legislative changes that were taking place, especially in the field of copyright, to recognize international exhaustion. It should be kept in mind that even the U.S. Supreme Court has recognized the social importance of international exhaustion and has categorically agreed that parallel imports can increase America's consumer welfare[167].

However, in India, where the educational books are even more expensive than in America, there is much hesitancy in thinking in those lines. It is high time the Indian legislature and judiciary opens up to this reality. The issue of exhaustion must be understood both by the legislature and the judiciary as a mechanism to promote consumer welfare. The volume of amendments that went into the Indian Copyright Act is precisely due to the loose words inserted into Section 14 of the Indian Copyright Act, providing for the exhaustion of rights. However, after the amendments that have taken place, including that of the 2012 amendment, it is safe to say Indian Copyright Act recognizes international exhaustion except in the case of C.D.s where, as discussed above, the question of whether even exhaustion exists still remains. The amendment's attempt to recognize parallel imports under the Indian Copyright Act suggested that section 2 (m) recognized international exhaustion was thwarted. The amendment was omitted from the final text without any reason. The lobbying of the copyright owners and the industrial groups, including the publishing industry, would have

[167] Kirtsaengv. John Wiley & Sons, Inc. 568 U.S. 519 (2013).

been behind such exclusion. The study report by the National Council for Applied Economic Research, sponsored by the National Human Resource Development, in 2014, has concluded that the presence of parallel imports benefits Indian consumers and does not affect the incentives to the Printing industry or the copyright owners[168]. This clarifies that the Indian economic conditions favour international exhaustion in the copyright regime. In the patent law, international exhaustion has been clearly recognized. Regarding the Patent Act, one must appreciate the legislature for including the provision resembling international exhaustion as soon as the right to import was recognized. In fact, the provision encompasses the goods that are sold with the permission or consent of the patent holder and extends to even goods produced under compulsory licensing. It also covers goods manufactured in countries where patent protection for pharmaceutical goods was not mandated.

The Patent Act is a law having a substantial impact on crucial areas like food and health. For ensuring affordable access to pharmaceutical products in India, international exhaustion is very much necessary. International exhaustion is impliedly recognized in the Indian trademark Act. However, section 30(3) providing for exhaustion is loosely worded and does not clarify whether the first sale must take place within the Indian market or the international market. Fortunately, the judiciary has clarified that the market implies an international market and interprets section 30(3) to cover international exhaustion. In the Semiconductors and Plant Varieties Acts, international exhaustion has not been clearly articulated. Even though India has reiterated its support to the policy of international exhaustion in the international platforms, the legislative framework of Indian law remains ambiguous. Therefore, it could be concluded that the judiciary should be cognizant of the Indian position in the international forums and interpret all the intellectual property laws, namely Copyright, Patent and Trademark laws, as accepting international exhaustion.

[168] "The Impact of Parallel Imports of Books, Films / Music and Software on the Indian Economy with Special Reference to Students", NCAER, 2014, p.98, available at http://copyright.gov.in/ documents/parallel imports_report.pdf. (Accessed on 24.06.2021)

CHAPTER IV

A COMPARATIVE ANALYSIS OF THE PRINCIPLES OF EXHAUSTION

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4.1 INTRODUCTION

The Exhaustion doctrine embroils the full scope of defences for protected innovation, enabling the legitimate establishment of trading products and placing financial restraints. These rights serve to reasonable rents from the dispersion of products and services epitomizing the IP rights also sets restrain on how much the IP rights holder is permitted to suit from the commercialization of IP rights. On account of no Exhaustion, the rights holder will have a monetary benefit for each possible encroaching use of the ensured work after legal protection by a user. For instance, if the user has purchased a copyrighted book or a protected PC, the rights holder would reserve an option to any returns from the subsequent resale of that book or PC[169]. The owner can charge such resale if, injunctive help were conceded or, if a legal purchaser seeks to fix a licensed car motor that has been harmed, the rights holder could restrict the rights of the purchaser to fix by necessitating that just an authorized service person be used. From another perspective, the Exhaustion regulation frees up from the control of the IP owner in the auxiliary markets that arise from the essential market for misusing the IP rights. In custom-based law nations, the free alienability of products takes the underlying foundation of the exhaustion principle.

In common-law countries, the doctrine of exhaustion has its foundations in the suggested license that permits purchasers who have got the title to an asset to contract as for the unburdened property. Under standards of financial aspects that would apply crosswise over custom-based law and common law nations, the IP owner can value the immediate dissemination of the ensured work to mull over the rights of the acquirer to distance the work after the IP protection freely. This, in turn, puts descending weight on the cost by which exchanges are secured and managed by trade market powers. The market elements are more intricate than the straightforward end, coming from the advantages of competition. That is no concept of exhaustion doctrine; at that point, the IP owner will value disseminating the secured work as indicated by the purchaser's necessities. Contrasting the market and exhaustion and the one without does not prompt an unambiguous end. In any case, that contention overlooks the likelihood that the underlying cost of the protected work might be

[169] Bonadio,E: 'Parallel Imports in a Global Market: Should a Generalized International Exhaustion be the Next Step?', European Intellectual Property Review, (2011).

higher than in reality as we know it where Exhaustion isn't permitted. One level of multifaceted nature arises with the thought of the worldwide commercial centre. To the question of the exhaustion doctrine should reach out to users in different nations, the previous recommendations are that the appropriate response is the same regarding worldwide markets. Superficially, the main change is that the scope of potential buyers and IP owners has extended to incorporate those in the other nation. In any case, one country should profit its rights holders or customers at the expense of those in different nations. Thus, the government may confine the exhaustion regulation just to exchanges inside its outskirts. This decision represents the case of national Exhaustion. Then again, the decision may be to enable weariness to pay little heed to what nation is the spot of the exchange. This decision outlines universal Exhaustion.

The response to this question if exhaustion regulation should be universal relies on one's perspective on universal trade. In considering the Economic theory as a general issue, it promotes free trade because trade crosswise over nation's prompts gains from trade through specialization collecting to each country. But this glorified idea is promptly tested. It settles upon specific suspicions about relative preferred standpoint and market structure that won't significantly impact a universe of protected IP rights. Keeping in mind the monetary contention for protected IPR lays on settling an externality issue from the formation of another work. Every country state in an exchanging relationship can embrace its IP laws autonomously to determine the externality issues inside the nation's fringes. Be that as it may, these goals locally leave open the case of externalities crosswise over abroad. On the off chance that the IP rights cross outskirts under a free trade understanding, arises a question as to the prevention of infringement of the fundamental IP rights in the other nation, On the off chance that the IP rights holder ought to have the capacity to anticipate the trade in these secured works as an obstacle to free trade. Customary gains increases from trade contentions disregard externalities crosswise over nations. To understand the intensity of the principle, it is necessary to see them as advantages or positive overflows and enable them to occur. This view is frequently countered by IP owners worried about the allotment of financial esteem and information by different nations.

Another theory considers the gains from trade as emerging not from a relatively favourable position but the extended market that cross-border trade makes conceivable. Licensed innovation rights ought to be controlled by the policy consequences for the worldwide

market. Since individual country states will, in all likelihood, actualize strategies that support only national concerns, but not worldwide, markets, universal institutions are expected to make a worldwide standard for the Protection of IP rights. In any case, that arrangement presents the issue of how these worldwide norms are built up. This has to be studied by seeing the exhaustion laws and parallel import regulation of various countries, but considering India, U.S, Australia, and Singapore and their comparison might throw a little light on the global context.

4.2 CONCEPT AND LAWS OF PARALLEL IMPORTS AND INTERNATIONAL EXHAUSTION

4.2.1 U.S.A:

The US manages the exhaustion doctrine independently among its copyright, patent, and trademark laws giving diverse strategies for each sort of intellectual property. Although courts and laws govern exhaustion standards all in common, the doctrine of exhaustion is examined in different perspectives in different intellectual property routines. Even though the United States has perceived international exhaustion in the territory of trademark law since quite a while ago, the nation has customarily been viewed as one of the stauncher rivals of international exhaustion and parallel importation in the territories of copyright and patent law. Amid the TRIPS exchanges, the United States led the pack among developed nations in contending against acknowledgement of exhaustion in these zones. Moreover, it has propelled this situation in bilateral treaties. It has even ventured to such an extreme as to put weight on exchanging accomplices considering local laws that consolidate international exhaustion. However, an ongoing Supreme Court case held that international exhaustion is perceived under United States law in the region of copyright law. Subsequently, a copyright proprietor can't forestall the parallel importation of copyrighted items initially sold in a remote nation. This case has raised doubt about the proceeding with essentials of the non-exhaustion rule under United States patent law. Notwithstanding this, the Court of Appeals for the Federal Circuit (Federal Circuit) keeps embracing the position that there is no international exhaustion under United States Patent Law.

In ***Jazz Photo Corp. v. Int'l Trade Comm***[170]

In Jazz Photo, the respondents were blamed for importing refurbished, single-use cameras. Party Fuji made these cameras, yet some were first sold abroad, while others were first sold in the United States and sent abroad to be refurbished. After abroad renovating, the cameras were at that point brought into the United States for exchange. The International Trade Commission (ITC) observed all cameras to infringe, notwithstanding the area of the first sale. On the bid, the shippers contended, among other things, that there could be no infringement because the patent owner's rights had been exhausted. As for the cameras previously sold abroad, the Government Circuit dissented, expressing that "U.S. patent rights are not exhausted results of outside provenance." In holding that the primary deal regulation applies to deals that happen in the United States, the Federal Circuit inappropriately depended on the Supreme Court's choice in *Boesch's case*[171] help. Despite the Federal Circuit's dependence, the certainties of Boesch don't include the issue of international patent exhaustion. In Boesch, the owners of the United States and German patents covering oil lamp burners brought suit claiming that burners obtained in and imported from Germany by respondents infringed on the U.S. patents. Litigants contended that there could be no infringement since they legally received their burners from an outsider, Mr Hecht, who reserved a privilege to offer them in Germany. Although Hecht had the privilege to make and sell the licensed burners in Germany, his rights emerged under an arrangement of then-German law that gave a sort of earlier use rights to those "who, at the season of the patentee's application, has just started to utilize the innovation in the nation… "Hecht was not a licensee of or generally associated to the patent owners. Since he had no association with the patent owners, a buy from him can't be viewed as a first deal that exhausts the owners' rights. The basis behind the exhaustion teaching, regardless of whether household or international, is that the patent owner has benefited from the first deal.

Accordingly, an agreement by an irrelevant outsider, for example, Hecht, does not include the exhaustion issue by any stretch of the imagination. Since the Jazz Photo choice, the Federal Circuit had been somewhat conflicting in its decisions on international exhaustion. In one line of cases, the Court depended on Jazz Photo to deny acknowledgement of international exhaustion. In another, it twice connected international exhaustion to imported goods made

[170] *Jazz Photo Corp. v. Int'l Trade Comm* 264 F.3d 1094 (Fed. Cir. 2001)
[171] https://www.law.cornell.edu/supremecourt/text/133/697 accessed on 18.08.2021

and first sold abroad. Any uncertainty about the Federal Circuits' position on the issue, be that as it may, was settled against international exhaustion in its Ninestar decision. The actualities of Nine star are like Jazz Photo, in that both included the import of refurbished products. In Nine star, the Court repeated its help for the wrongly chosen Jazz Photo line of cases, holding that an outside first deal can't exhaust residential rights. In any case, the Supreme Court had additionally called this line of cases into inquiries with its on-going international copyright exhaustion choice. Patent exhaustion possibly applies when the patent proprietor acquired some advantage from the primary deal, either straightforwardly or by implication. An irrelevant outsider's deal with earlier client rights benefits the patent proprietor and quenches no right. Without a sound point of reference, at that point, the different reasons for perceiving international copyright exhaustion will have suggestions for whether to perceive international patent exhaustion.

Patent and copyright laws share much. In this manner, they frequently get legitimate ideas from each other and, all the more significantly, the two of them have a similar arrangement destination. Under the deal hypothesis, the motivation behind intellectual property is to boost the production of more and better things. However, to do as such for a definitive advantage of general society. As a result of these likenesses between the two zones of the law, it very well may be informational to break down international patent law exhaustion utilizing the thinking of the Court in Kirtsaeng. The U.S., however, has strong exhaustion laws, however a dilemma still persists in successfully implementing those laws.

4.2.2 AUSTRALIA:

The copyright act in Australia did not acknowledge the exhaustion of copyrighted work first and foremost. Australian residents make use and rely upon this legislation to ensure their restrictive economic benefit on a broad scope of rights, including the privilege to reproduction, the privilege to translation, the privilege to perform, and the privilege to distribution, etc. These rights are essential to give the impetus to inventive production and avoid the infringers exploiting with low even zero expense. Among every one of those articles recorded in the 1968 Copyright Act of Australia, to block any parallel importation of copyright secured works into Australia, the Australian copyright proprietors could depend on two sections in this Act, which are Section 37 and Section 102, separately on the infringement by importation available to be purchased or contract of books and the

Infringement by importation available to be purchased or contract of copyright in other topics like craftsmanship writing musical work and so forth. They state in the practically same words: The copyright in a literary, dramatic, musical, or artistic work stands infringed by a person who, without the permission of the proprietor of the copyright, imports an article into Australia with the end goal of

(a) Selling, letting for contract, or by method for trade offering or uncovering available to be purchased or procure, the article;

(b) Distribution of the article:

(c) With the end goal of trade or

(d) For some other reason to the degree that will influence the proprietor of the copyright; or preferentially

(e) By method for trade showing the article out in the open; If the shipper knew, or has reasonable learning that the creation of the article would if the article had been made in Australia by the merchant, have constituted an infringement of the copyright[172].[1] Given the 1968 copyright Act, the Australian copyright proprietor is approved by a wide scope of protection that to some expand was over the limit of ensured copyright works is the primary content of the article.

In ***RA and A Bailey and Co Ltd v Boccaccio Pty Ltd***[173], the case concerned the importation of authentic jugs of Baileys Original Irish Cream mixed drink alcohol manufactured in the Republic of Ireland and planned for the market in Holland. For this situation, the Court precluded the case from securing trademark infringement by the sale in Australia with names expected for the Australian market, as indicated by the doctrine of exhaustion of the Australian Copyright Act. The case of copyright infringement prevailing based on the copyright in the name, and therefore item bearing the name could be utilized as the ground on which the parallel trade had been anticipated. In any case, since advanced by the intrigue-related gatherings, the Government and policy creators chose to change the Australian copyright law to change the trade in copyright items.

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[172] Hongkai, Zhang: ‘Exhaustion Doctrine: Close to the Ultimate Aim of Copyright’, Thesis submitted to the Faculty Of Law, Lund University, (2009).

[173] RA and A Bailey and Co Ltd v Boccaccio Pty Ltd 4 NSWLR 701.

The change has advanced in a well ordered for individual item classes conducted far-reaching request by setting up the uncommon policy warning body to offer some kind of reparation to the copyright act The Act was revised in 1991 to facilities the Australian book shops to parallel import duplicates of copyright secured work if the approved copyright holder-more often than not the distributor in Australia neglects to meet the specific prerequisites. The standard, for example, 30 days no uncertainty, gives an impetus to the distributors in Australia to discharge titles expeditiously to ensure the copyrights on their titles. Otherwise, as before 1991, the distributers could seek after the Australian copyright on an outside book and defer the title's arrival. Therefore, in 1995, the Price Surveillance Authority (PSA) conducted a request on the impacts of the 1991 Amendment on the cost and accessibility of books. The 1991 Amendment has improved distribution efficiencies and the speed with which new discharges wound up accessible in Australia. It is mentioned in the report submitted to PSA by Australia Copyright Council (ACC), the ACC asserted that they had no unique learning about the cost of books in Australia or comparisons with cost abroad. In any case, numerous pundits noticed that from 1989 to 1999, "a steep decline 'in book cost' to a point where they are as of now by and large less expensive here than in the U.K. or somewhere else on the planet. In the report, PSA favoured a total repeal of importation limitation without the restriction on parallel trade. Copyright Amendment Act, the Australian Government, did not stop by only lifting the parallel bringing in restriction on the books. In 1998 Australia moved to revise the Copyright Act to bug the "non-infringing accessory" and permit parallel bringing in of sound recording.

The 1998 Amendment was gone for the copyright on the marking and bundling of imported products. The mark and a few types of bundles being an artistic work vested in one or other of the copyright proprietor are no disputes. Although the copyright was utilized as a course to confine the parallel bringing in similar merchandise, Due to the result of PSA request that the Australian sound account costs were higher than in other nations, including the United Kingdom, the United States, Canada, and New Zealand, Australia chose to permit parallel bringing in of sound chronicles subject only to certain negligible limitation. Although confronting the furious campaigning by the music business, Australia traded off with the possibility of, no uncertainty the repeal of parallel bringing in restriction control the distribution of the sound chronicle authentically delivered abroad has a noteworthy significance Copyright Amendment (Parallel Importation) Act 2003 Software program has been put ahead as next classifications in the Act change. In 2002, the parliament of Australia

introduced the Bill 2002 that went for correcting the Copyright Act 1968 to empower the lawful parallel importation and resulting business distribution of computer software items. This Bill broadened the application of the Amendment of the Act on sound account. Since 1998, with the quick improvement of digital innovation, the software items have multiplied, which is ensured by copyright concerning international instruments, for example, TRIPS. The provisions of the Copyright Act enabled a software holder to make a move for infringement of copyright that isn't in the exception list that includes, for example, book and sound chronicle, where a person imports or financially manages imported copyright material software holder. As per the Bill of 2002, the provisions adequately enable these organizations to charge more expensive rates for their items in the Australian market than in other real markets and perhaps to limit the scope of products entering the Australian market. By the conclusion to expel the provision to depleted distribution right, the Industry Commission prescribed that Australia ought to permit the international exhaustion of distribution directly on software.

Comparable discoveries as on books and sound chronicles, the Australian Competition and Consumer Commission found that Australian consumers had been paying more on the computer program than U.S. consumers had. Therefore, the Copyright Amendment (Parallel Importation) Act 2003 was developed after a long discussion. It evacuates the distribution directly on software after the first sale from the elite right of the copyright holder and empowers the parallel bringing in for business distribution in Australia. Furthermore, it utilizes regulation on the improved CD plug the proviso left by sound chronicle Amendment. Two-sided Agreement - AUSFTA Since the WTO rules give the exception from the non-discrimination policy, it permits the creation the facilitated commerce understanding when the individuals trade the broadest arrangement of positive inclinations that "is offered to one gathering is a compelling act of negotiation discrimination as to another, and visa versa". On February 8, 2004, the U.S., what's more, Australia have achieved the Australia-United States Free Trade Agreement (AUSFTA) that addressed the copyright issue in the point-by-point protected innovation. The U.S. will achieve a facilitated commerce concurrence with Australia, on the one hand, is its continuation of reciprocal trade, on the other hand, the Australian policy changes, for example, on copyright raises as the impact on U.S. trade, and the need to utilize trade and economic integration strengthen the military operation by Bush's administration. While Australia's motivation to advance the trade understanding is more from the weight, it feels the competition from Asia. Concerning the content of copyright in the

AUSFTA, other than that, the two gatherings are required to be liable to multilateral bargains. For example, WCT, the addition of the "Treks in addition to" and "WIPO arrangements in addition to" obligations are qualified to focus. Criminal punishments have been added concerning the distribution of encoded communication.

The accomplishment of the exhaustion from Australia copyright change is by all accounts unscratched so far as by this part. Be that as it may, AUSFTA shields the opportunity of contract. It necessitates those economic rights in copyright be "openly and independently" transferable by contract, and person-gaining copyright will appreciate full advantages from the right. From the viewpoint of the exhaustion rule, there is the probability that it leaves the opportunity of the copyright proprietor to draft the contract takes into account the vertical distribution of copyrighted works. Even though the United States Trade Representative (USTR) condemned that Australia's change that permits the parallel importation of copyrighted goods, and there was a strong voice against the continuation of this policy, If the real concern on the copyright change is about the absence of competition or maltreatment of the monopoly control on the worldwide value discrimination, the competition law rather than copyright law should deal with this issue. Such concern couldn't legitimize the change. The distribution right is entitled as restrictive right in the copyright that ensures the correct holder keep the favourable position in the trade or market[174].

Notwithstanding, the nature of the restrictive right is to profit with the goal that the copyright permits dissemination of the works through the entire society to receive the rewards. The Copyright Act we see today is trading off and preparing the centre way that isolates the capacity to control them after the first sale from the fundamental selective rights appreciated by the copyright holders, to give sort of parity rather than the limitation of competition. The parity here is between the different property interests of makers (counting the business protection of their work and the genuine enthusiasm for guaranteeing the value of access to this material.

4.2.3 SINGAPORE:

Parallel imports are prevalent quality savvy, and significant goods get mixed in the market by an exchange mark owner in a specific nation. In this way, obtained and conveyed to an

[174] Longdin: 'Parallel Importing Post TRIPS: Convergence and Divergence in Australia and New Zealand', International and Comparative Law Quarterly, (2001).

alternate government for resale by another gathering. Parallel imports are often sold more efficiently than products sold straightforwardly by the exchange mark owner since parallel imports don't have to acquire marketing and promotion costs. They ride on the generosity created from the exchange mark owner's promotion and marketing endeavours. In short, they are parasitic in choosing how to manage parallel imports; the genuine enthusiasm for the free development of merchandise must be adjusted against the private interests of exchange mark owners. Up to this point, Singapore has taken a great extent ideal position towards parallel shippers. This is demonstrated through sec 29 of the Trade Marks Act of Singapore, which gives parallel importers the "exhaustion of rights defence" against exchange mark owners looking to uphold their rights. This section provides that where products have been "put on the market" by or with the express or inferred consent (conditional or otherwise) of the exchange mark owner, whether in Singapore or abroad, then such exchange mark isn't infringed by the resulting resale of the merchandise in Singapore by another gathering.

In ***Samsonite IP Holdings Sarl v A Sheng Trading Pte Ltd***[175], the offended party, Samsonite IP Holdings Sarl ("Samsonite"), is the enrolled owner of different trademarks identifying with the Samsonite brand (the "Samsonite marks") in Singapore and China. The Samsonite marks are enlisted for various products, including packs, backpacks, baggage, and travel embellishments. The litigant, A Sheng Trading Pte Ltd ("A Sheng"), is a parallel shipper having imported 2,328 Samsonite mark backpacks into Singapore, which were along these lines kept by the Singapore Customs. The Backpacks were delivered by Samsonite's backup in China ("Samsonite China"), which had been allowed a permit to utilize the Samsonite checks only in China. Under a co-marking understanding between Samsonite China and Lenovo PC HK Ltd ("Lenovo"), each Backpack likewise bore the Lenovo exchange mark. The Backpacks were dispersed by Samsonite China to Lenovo to be given away for nothing by Lenovo or its approved sellers to clients exclusively in conjunction with the sale of specific Lenovo laptops in China. Lenovo and its authorized vendors were explicitly disallowed from selling or discarding the Backpacks freely of the Lenovo laptops. In any case, some approved vendors unpacked the Backpacks from the laptops and sold only the Backpacks to unapproved sellers. After that, the unapproved vendors sold the unpacked Backpacks to parallel merchants, including A Sheng, which thus brought them into Singapore. Samsonite started procedures against A Sheng and looked for an outline judgment for exchange mark infringement under section 27(1) of the TMA because A Sheng had

[175] Samsonite IP Holdings Sarl v A Sheng Trading Pte Ltd (2017) SGHC 18

utilized signs indistinguishable to the Samsonite stamps concerning products imperceptible to those for which the Samsonite marks are enrolled. Samsonite additionally looked for a rundown determination on the point of law, specifically, that the Backpacks, "which are structured and manufactured under permit from Samsonite for the sole motivation behind being given away free with the sale of explicit laptops to consumers, and which are disseminated to an approved merchant or retailer for those reasons, have not been 'put on the market for the motivations behinds 29(1) of the TMA" ("the Question"). The key protection was the exhaustion of rights resistance under section 29 of the TMA. It was held:

The HC chose the Question for Samsonite, holding that A Sheng had neglected to demonstrate any triable issues identifying with the exhaustion of rights protected under section 29 of the TMA. Firstly, the HC found an encroaching utilization of the Samsonite checks about the Backpacks by all appearances. Consequently, to decide if A Sheng's resistance under section 29 of the TMA connected to the facts, the HC considered two questions: as to if the goods were put to the market, and if it was done was it done by the owner of the trademark and with his consent or not on the first Question, the HC held that the Backpacks had not been "put on the market". The HC clarified that the expression 'put on the market' "must include the realization of the business and economic estimation of the exchange mark".

1. In specific, this alluded to "a situation where a free outsider has gained the privilege of transfer of the merchandise bearing the exchange mark".

2. The acting of putting the merchandise on the market "incorporates, however, isn't constrained to, a sale of the products by the owner by the outsider", yet does exclude "preliminary acts, for example, offers available to be purchased".

3. The fundamental rationale for this necessity was because the exhaustion of rights doctrine "is commenced on enabling the owner to get 'reasonable reward for the exploitation of his property right'".

4. In this case, the business esteem that Samsonite looked to acknowledge from the packaged Backpacks was the infiltration of the Chinese manufacturers and the same expanded familiarity with the Samsonite brand in China. This esteem would only be

acknowledged whether the buyer of a Lenovo workstation additionally got the Backpack with the Lenovo PC.

The Backpacks were unbundled from the respective laptops and sold along these lines by the unapproved sellers to A Sheng, this esteem was never acknowledged, and consequently, the Backpacks were not "put on the market". Furthermore, Samsonite couldn't be said to have gotten a reasonable reward from the sale of the unbundled Backpacks to or by the unapproved vendors since those profits were never passed on to Samsonite either straightforwardly or through its licensee Samsonite China.

As the HC found the merchandise was not "put on the market" by Samsonite, there was no compelling reason to address the second question. Nevertheless, as the Question impliedly raised issues regarding the owner's consent, the HC continued to give some valuable remarks on this issue. Firstly, on express consent, the HC saw this was commonly uncontroversial and must be "unequivocally, plainly and indisputably given, either verbally, recorded as a hard copy or by clear conduct, (for example, an unmistakable nod)". Secondly, the HC characterized suggested consent as "consent which the owner doesn't explicitly concede, yet rather derived from his actions or potentially the facts and conditions of a specific situation". The HC commented that while suggested consent for the motivations behind section 29(1) of the TMA must not be vague, adopting a minimal strategy to a finding of suggested consent (for example, by not enabling consent to be induced from the conduct of the enrolled owner) would be inconsistent with Parliament's ace parallel imports position. Lastly, the HC focused on that the expression "conditional or otherwise" in section 29(1) of the TMA implied that "regardless of whether the exchange mark owner's consent to the first putting on the market was conditional and not inadequate, it will at present be treated as legitimate consent under s 29(1) TMA". Taken together, these observations fortify the general position for parallel imports in Singapore. They underscore the fact that once an owner has consented to the first situation of products bearing his exchange mark on the market, he is kept from controlling consequent exploitation of his merchandise. Although there was no requirement for a determination on this point, the court saw no express consent from the Samsonite Company for unbundling and selling the Backpacks by parallel merchants, including Sheng. Samsonite had primarily consented to the manufacture of the Backpacks and the Backpacks being sold packaged with the Lenovo laptops in China only. Singapore has taken a to a great extent good position towards parallel merchants. While this case does not speak to a critical take-off from

this position, it demonstrates that in certain restricted situations dependent on how the parallel merchant has acquired the products, the exchange mark owner will most likely prevail regarding implementing his licensed innovation rights against parallel shippers. This case additionally gives more remarkable lucidity on section 29 of the TMA, a provision that has otherwise gotten genuinely little attention in the Singapore courts. The HC's remarks on when products are considered to be "put on the market" by the exchange mark owner and on express and suggested consent will without a doubt be helpful to resulting exchange mark owners trying to authorize their rights against parallel merchants. This case sums up the present position of parallel imports and exhaustion in Singapore and the laws available in the country, and how they are being regulated.

4.3 INDIA

India, the scenario is that the parallel importation is mainly linked to the doctrine of exhaustion of rights, mainly under the Trademarks Act, 1999. Article 6 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) also impacts the Indian exhaustion laws, which excludes addressing the issue of the exhaustion of intellectual property rights. Therefore, everyone has a right either to restrict or allow parallel imports inside its laws. Two significant issues are being discussed in this topic. In India, parallel imports are considered an infringement under Indian laws and if India allows the international exhaustion of rights doctrine.

4.3.1 The Copyright Act, 1957

The I.P. routine in India is part of multiple statutes, and an examination of every one of these rules is required to discover the strategy of exhaustion followed in India. We will initially investigate how the idea of exhaustion has been managed under the copyright status in India. The copyright status in India is managed under the Copyright Act, 1957. To look where parallel import is permitted, it is fundamental to investigate whether there is a privilege to importation under the texture of the Act. The Copyright Act explicitly gives that no individual will be deliberated with any rights under copyright than the rights expressly ensured under Section 16 of the Act and Section 14, which gives the rights; there are no rights as the right of importation. In any case, the inquiry is whether such a right can be surmised from perusing different sections of the Act.

In *Penguin Books Limited v India Book merchants and others*[176] The Delhi High Court held that if any individual without the permission of the copyright proprietor imports into India with the notion of trades any literary work, the copyright over the equivalent is infringed. Any importation of infringing duplicates is along these lines an infringement except if it is for the importers' possess use. The Court reached this resolution based on a consolidated perusing of Sections 2(m),47, 51,48, and 53,49. The Court additionally held that 'the restrictive ideal to import into India would stretch out to the select ideal to import duplicates into India to sell or by method for trade offering or to uncover clearance of the books being referred to.' The 'publishing' of works is likewise the elite right of the plaintiff by issuing duplicates for available appropriation. Based on this method of reasoning, the Court held that the parties were infringing the plaintiff's copyright and allowed an injunction to support them. Section 14 of the Copyright Act,1957, was revised in 1994 and reworded to incorporate ideal for issuing copies to the open, not the copies as of now available for use according to Section 14(a) (ii), which implies that when a copy of the work is accessible in the market, the creator loses the directly over such duplicate and the choice in Penguin is no more the law.

In Warner Bros. v. V.G. Santosh[177]*,* The Court expressly perceived that, under copyright law, the doctrine of international exhaustion may also apply towards musical, literary, or artistic/dramatic works, it doesn't have any significant bearing on cinematographic film and to sound recordings too. This depended on the distinction between the wordings of Sec. 14(1)(d) [and (e)] and 14(1)(a)/(b)/(c). The most recent amendment of copyright dealt with this twofold standard in copyright exhaustion by erasing "paying little heed to whether such copy has been sold or given on contract on before events" in Sec. 14(1)(d)(ii)53 and 14(1)(e)(ii). By the amendment to Sec. 14, the refinement in the wordings of Sec. 14(1)(d)/(e) and 14(1)(a)/(b)/(c) which framed the premise of Justice Bhat's thinking in Warner Bros., will move toward becoming non-existent. Copyright law will hereafter perceive the principle of international exhaustion consistently without making any qualifications between the different works. When we investigate the edge work of the trademark routine in India excessively, a comparative picture winds up unmistakable. The trademark routine is managed under the Trade Marks Act,1999. Sec. 30 (3)55 of the Trade Marks Act, 1999 perceives the principle of exhaustion. The situation in connection to this can be comprehended from the judgment of

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[176] Penguin Books Limited v India Book merchants and others AIR 1985 Delhi 29, 26 (1984) DLT 316.
[177] Warner Bros. v. V.G. Santosh C.S. (O.S.) No. 1682/2006

Kapil Wadhwa and Ors v. Samsung Electronics Co. Ltd[178]. In a similar case, the Single Bench held that trademark exhaustion under the Act is national and not international. While choosing the case, the Division Bench held that the Single Judge wrongly presumed that the articulation 'lawfully acquired' in Section 30(3) signified 'acquisition by assent for the motivations behind import' and opined that finish of the Single Judge that Section 30(3) gave no extra rights on clients prompted this inaccurate view. The Division Bench recognized a 'patent fallacy' in the Single Judge's view that the extent of the articulation of 'the market' in Section 30(3) is constrained to local markets, and import of items requires the consent of the enrolled owner. The Division Bench deciphered the administrative plan to have perceived the international exhaustion dependent on literary understanding and outer guides. Therefore it can be inferred that the Court unequivocally presumed that the administrative structure under the Trade Marks Act, 1999, likewise supports international exhaustion of rights. The image that rises when we investigate the statutory edge work of the patent routine in India included in the Patent Act, 1970, is the same.

The statutory system is as uncertain as to the copyright routine as there is no particular arrangement accommodating international exhaustion or that grants import. Then again, when we investigate the patent holder's rights, we can see an express right of importation. In dislike of this, a total perusing of the Act gives the feeling that the plan it means to pursue is that of international exhaustion. This is obvious from the arrangements which manage what won't establish infringement under the Act. The arrangement explicitly allows certain importations. It says that if the item has been obtained by somebody approved under the law to deliver and sell or disperse, such importation won't establish infringement. The term 'approved under the law' ought to be deciphered not to mean the law in the land where the patent is being imported, for example, India, yet the law approved to create and sell or appropriate, for example, it is the tradition that must be adhered to from where the item is being sent out. The term 'produce and sell or disperse' guarantees that there has been a first approved deal and that the patent has got his due in connection to that item either without anyone else's input or his agent. This fulfils the reason for allowing patents. Hence, we can securely infer that this statutory system likewise commands an international exhaustion routine.

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[178] 2006 (33) PTC 425

Consequently, we can see that all the significant types of Indian I.P. routine agree to international exhaustion of I.P. rights[179]. The acknowledgement of international exhaustion is a much-needed development. It acquires consistency in the licensed innovation routine of the nation. This consistency and similarity can result from the post TRIPS impact coupled with the development of the World Trade Organization (WTO). This has given a worldwide vibe that there must be free development of good and that there must be a rivalry to guarantee that there is more extensive open greatness. The Indian law additionally attempts to accomplish the equivalent by giving the most extreme challenge by assuring that the most significant number of items achieves the Indian market and the cost of those items would be insignificant. Along these lines, the clients will be in a vastly improved circumstance to settle on decisions and income sent on the items. In a nation like India where a significant number of the populace will fall under the classification of the lower working class and underneath the poverty line and where the rate of education is very low, it is our need that I.P. related items like books and prescriptions are made accessible at the least expensive rate conceivable. It isn't feasible for the legislature to finance them all or give them open to fundamental ones. The following best alternative is to guarantee a healthy competitive market to ensure that these items will be accessible in any event reasonable cost. It is the characteristic obligation of the I.P. apparatus to assure that this challenge exists in IP-related items. The headings in which the I.P. laws of our nation are organized demonstrate this way. It is currently up to the legal executive and the other market administrative instruments, including the government, to guarantee that these continue as before and accordingly ensure that the requests and needs of our populace are met.

4.3.2 The Trademark Act,1999

In India, parallel importation is unpredictably connected to the principle of exhaustion of rights under the Trademarks Act, 1999. Parallel importation is a complex and regularly questioned issue in the IP field. 'Parallel imports' are genuine products that are genuinely obtained from the rights holder and along these lines sold at lower prices through unapproved trade directs in the equivalent or an alternate market. As parallel importation is a trade practice, it is managed under both IP law and competition law. In the trademark law setting, parallel importation altogether influences the rights of a producer or trader, as trademarks

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[179] Mittal, Raman: 'Whether Indian Law Allows Parallel Imports Of copyrighted Works: An Investigation', Journal of the Indian Law Institute, December (2013:5).

help traders to win generosity in the market and to ensure their business notoriety. As regional rights, trademarks likewise show the wellspring of the trademarked items or administrations. A contention along these lines emerges when parallel importation results in a deception of the trademarked goods' source, notoriety, or nature. There is no debate that parallel importers are ready to go to profit. Parallel importation happens because of price differentials brought about by money rate variances and tax differentials in various markets. This enables merchandise to be exchanged at a benefit by an outsider in a progressively costly market. Activities to anticipate parallel imports under trademark law incorporate suits for going off or potential infringement. Parallel imports are additionally alluded to as 'grey market' merchandise because, even though the products might be certifiable, they are sold through unapproved trade channels[180].The Indian legal executive has as of late endeavoured to illuminate this 'grey' region.

Cisco Technologies v Shrikanth[181] This is one of the main cases concerning parallel importation and trademark law in India in which the Delhi High Court allowed an ex parte injunction for the Plaintiff and controlled the defendant from importing PC equipment and equipment segments under the trademark CISCO (which was enrolled in India). The Plaintiff contended that: CISCO items, for example, switches and switches are mission and human essential equipment parts utilized in system framework; that the result of the Plaintiff is utilized in basic systems, for example, railroads, air-traffic control, hospitals, air guards and so on.; that breaking down/disappointment of the result of the Plaintiff would result in colossal misfortunes because of dissatisfaction of these systems; that keeping in view the fundamental importance of the item being referred to, it ends up basic to guarantee that neither fake deals nor deals by deception happed and that open intrigue must be remembered while deciding the issue whether ex-pare temporary help should stream to the Plaintiff at this stage. The court held that: It is the commitment of all statutory and legislative experts to guarantee that any individual in this nation does not disregard laws. For people who have the advantage of enrolled trademarks, Section 140 of the Trade Mark Act, 1999 makes statutory arrangements where under the Collector of Customs could preclude the importation of merchandise if the import thereof would infringe Section 29(vi)(c) of the Trade Marks Act. There is no motivation behind why the statutory specialists ought not to forbid the import of such items, the importance of which would result or abet in the infringement of the exclusive

[180] ibid
[181] Cisco Technologies v Shrikanth 2006 (31) PTC 538.

enthusiasm of an individual in a trademark/trade name. The court likewise issued headings to Customs to advise at all ports that no relegations, other than those of the Plaintiff, ought to be allowed to be imported with switches, switches, or cards bearing the CISCO trademark as well as the scaffold gadget. The Indian courts will more often than not allow an injunction against parallel importers just if the nature or nature of the products has been changed or impaired after they have been put available. For example, in Samsung Electronics Co Ltd v Mr G Choudhary[182], Samsung contended that the clearance of parallel-imported ink cartridges and toners did not carefully fit in with Indian laws and guidelines (e.g., they were not joined by writing in English or the vernacular, as well as a name, demonstrating the most extreme retail price; a guarantee did not secure them, and utilization of the items would almost certainly break the guarantee of the printer in which they were utilized). The Delhi High Court limited the defendant from managing legitimately or by implication in those items.

In M/S General Electric Company v Altamas Khan General Electric[183]

In addition to other things, it was contended that the defendants' import of its actual items into a domain for which they were not planned disregarded its trademark and caused its misfortune. It further argues that the illicit deal caused its loss of notoriety, to the extent that buyers that were unfit to guarantee or profit of an aftercare administration would probably accuse it or consider it answerable. The Delhi High Court found the defendants at risk for infringement.

In Philip Morris Products SA v Sameer[184]**,** The Delhi High Court held that in light of the legitimate position articulated by the Division Bench in Samsung, an importer of dark market merchandise, its agent or a resulting buyer wouldn't be obligated for infringement under Section 29 if the imports fall inside the domain of Section 30(3). In any case, the importer must demonstrate that the upbraided products were put on a market worldwide by the trade mark proprietor or with its consent, and from there on, it lawfully gained them. For Instance: where an outsider gets products authentically from the trademark proprietor in nation X, which pursues the principle of international exhaustion of rights, and hence offers them at a higher or lower price in nation Y, which additionally has a global routine, the trademark

[182] 2006 (33) PTC 425
[183] M/S General Electric Company v Altamas Khan General Electric CS(OS) No.1283/2006.
[184] Philip Morris Products SA v Sameer 209 (2014) DLT 1.

proprietor can't restrict the deal since its select right has just been exhausted by the tenet of exhaustion in nation X. An international exhaustion routine is in this manner predictable with TRIPs in advancing organized commerce.

In India, the main conditions in which a trademark proprietor can restrict or forbid unapproved parallel imports and argue infringement under the Trademarks Act are the place where the goods either were not lawfully obtained or were changed or physically adjusted after their securing. Subsequently, given the international exhaustion of rights routine, a parallel importer need not demonstrate that the trademark proprietor has assented to the parallel imports, either explicitly or verifiably. Maybe the main weight on the parallel importer identifies with the quality and wellbeing consistency of the items. This is the situation now persisting in India concerning the trademark.

4.3.3 Customs law and Parallel Imports

Indian customs law likewise incorporates arrangements on parallel importation. As indicated by the 2012 Central Board of Excise and Customs Circular on Enforcement of Intellectual Property Rights on Imported Goods, parallel importation isn't restricted except if the merchandise bear a bogus trademark as determined in Section 102 of the Trademarks Act; or the merchandise bear a faux trade description inside the significance of Section 2(1)(i), in connection to any of the issues associated with the description, proclamation or different signs of the item, barring those predetermined in Sections 2(1)(ii) and (iii). This denoted a detailed takeoff from the Intellectual Property Rights (Imported Goods) Enforcement Rules 2007, which gave that was a trademark proprietor advised the customs experts in the endorsed configuration mentioning that freedom of products associated with encroaching its rights be suspended, and this notice was appropriately enrolled by the customs specialists, the import of all products bearing the encroaching trademark would be suspended, and procedures for seizure of the merchandise would be started under Section 111(d) of the Customs Act.The confiscated products were at the end required to be wrecked or discarded outside typical channels of business with the trademark proprietor's assent.

4.3.4 CONSEQUENCES OF PARALLEL IMPORTATION

Under Indian trademark law, trademark proprietors can make a lawful move just against traders managing merchandise that bargain the goodwill, notoriety, or nature of the

trademark. Parallel importation in this way goes about as a sensible restriction to the trademark proprietor's elite rights to utilize the imprint in connection to the merchandise and enterprises for which it has been enrolled. The choice on whether to permit parallel importation is, at last, a decision between quality control and price control, between the financial rights of trademark proprietors and shopper access, between restraining trade infrastructures and facilitating commerce. In the trademark setting, parallel importation not the slightest bit bargains the trademark proprietor's right to sue for infringement, going off, or falsification of its imprints. In this sense, by following the principle of international exhaustion of rights, Indian law shields the reputational resources of a trademark and guarantees organized commerce, as ordered by TRIPs, by disposing of the monopolistic propensities profit-driven trademark proprietors.

4.4 INFERENCE FROM THE COMPARISON

Comparing the parallel import and exhaustion laws of the four countries makes it clear. It can be inferred that all the countries have rules regarding parallel imports and exhaustion despite Article 6 of TRIPS. In contrast, there are implementation flaws in it that require regulation in the international perspective governing the national laws. Hence, it is essential to study the basics of the international instruments that deal with parallel imports and exhaustion in detail for a proper and thorough understanding that will be reviewed in the next chapter.

CHAPTER V:

SUGGESTION & CONCLUSION

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SUGGESTION & CONCLUSION

5.1 INTRODUCTION:

Parallel Importation under the TRIPS Agreement has two essential considerations steered as the formulation of the TRIPS Agreement known as Trade-Related Aspects of Intellectual Property Rights Agreement. The primary was the fizzled endeavour of the United States (U.S.) and other developed countries to increase normative standards for security through the World Intellectual Property Office (WIPO). Secondly, both the Paris and the Berne Conventions left the usage of intellectual property through judicial and administrative remedies to nearby decisions. This hampered the effective policing and insurance of I.P.R.s inside a globalized economy[185]. With globalization, there is a requisite to make higher intellectual property security benchmarks and serve international requirements, as the imposition of intellectual property is generally restricted to national territories. There is no global implementation of I.P.R.s, whereas their national legislation ensures these rights in various countries inside a structure established by international customs. The TRIPS Agreement had resulted in a significant alteration in international standards identifying with intellectual property rights. In accordance with the TRIPS Agreement, most countries have developed normal basic standards of I.P. assurance[186].

Notwithstanding the assurance of I.P.R.s concurred by the TRIPS Agreement, the TRIPS Agreement remains a profoundly discussed part of the W.T.O. system. This is due to its vast implications, especially on the developing countries. Opinions were divergent on what the scope and substance of the TRIPS Agreement should be amongst worldwide north and south countries and amongst the worldwide north nations themselves at the Uruguay Round Negotiations. The dispute of the developed countries (particularly the United States of America (U.S.)) was that uplifted security standards for intellectual property rights (I.P.R.s), which will strengthen the value of I.P.R.s, encourage mechanical innovation notwithstanding Foreign direct investment (FDI) while encouraging technology transfer to worldwide south countries. Then again, many developing countries.

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[185] Gervais, D: 'The TRIPS Agreement-Drafting History and Analysis', London Sweet & Maxwell review, (2005).

[186] Example: The Paris Convention for the Protection of Industrial Property, 20 March 1883, The Berne Convention for the Protection of Literary and Artistic Works.

Guarantee that notwithstanding the endeavour in the TRIPS Agreement to make an equalization in some provisions. It primarily benefits rich or developed countries. Plenty of reasons brought about these concerns. The essential problem was that in contrast to what was being canvassed by the developed countries, the evidence gathered did not establish that making improved security for I.P.R.s stimulated increased Foreign Direct Investments or technology transfer in any meaningful structure. Further, Article 1.1 of the TRIPS Agreement acknowledges the argument concerning the adaptability of exhaustion regimes for member countries. Article 51 of TRIPS gives W.T.O. Members the discretion to choose the legality of parallel trade and prevents the parallel exchange of protected goods[187].

In Kodak SA v Jumbo-Mark[188], The Swiss Federal Supreme Court held as follows, as per Article 28 of the TRIPS Agreement, the inventor is given the privilege to prevent outsiders from selling and importing licensed products"[189].

The "Doha Declaration on the TRIPS Agreement and Public Health" affirms that the TRIPS Agreement is relied upon to unbridle and connected to safeguard public wellbeing and stimulate access to drugs for everyone. This was a trademark achievement in international trade, as it signified a harmonization of a rule-based exchanging scheme with public wellbeing interests. The Doha Declaration reaffirms that Members can make good use of the safeguard requirements of the TRIPS Agreement to shield general wellbeing and improve access to drugs were the guidelines which the "World Health Organization" (WHO) has straightforwardly endorsed late. Furthermore, the presentation affirms the capacity of W.T.O. members to actualize the stipulations of the TRIPS Agreement, which manage the cost of adaptability for this purpose. As per Paragraph 5(d) of the "Doha Declaration," the adaptability includes the opportunity to actualize an exhaustion teaching and the opportunity to choose the issue of parallel trade in pharmaceuticals. The ramifications of Paragraph 5(d) of the "Doha Declaration" is that it affords developing countries the sought after illumination on the validation of parallel imports under an international rule of exhaustion.

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[187] Brokers: 'The Exhaustion of Patent Rights Under W.T.O. Law ', *Journal of Word Trade*, (1998).
[188] A.G. 4C.24(1999) MD
[189]https://www.researchgate.net/publication/233653649_The_Doctrine_of_Exhaustion_in_the_Swiss_Patent_Law accessed on 25.08.2021

With these provisions, the Doha Declaration is viewed as a turning point in intellectual property. The safeguard of intellectual property should work as a social strategy instrument for the advantage of the whole community rather than as a means to ensure restricted business interests. With the end goal for countries to profit by this and further flexibilities allowed by the "TRIPS Agreement" and insisted by the "Doha Declaration", national laws must embrace the relevant provisions[190].

Suppose there are no such provisions in the national laws. In that case, the government or private parties can't shield themselves from legitimate actions founded on laws and regulations that don't fuse the relevant provisions of the TRIPS Agreement. These flexibilities are not automatically translated into national regimes. Although, it is argued that an international routine of exhaustion might be progressively suitable for developing countries. A developing country will be more inclined to apply a national exhaustion routine instead of a routine of international exhaustion based on its socio-financial needs and relevant development policies. Also, a developing country may use a pattern of international exhaustion to just specific categories of I.P.R.s. Thus, due to the adaptability conceded through the "TRIPS Agreement" and avowed in the "Doha Declaration", the regulation of parallel trade in products varies among developing countries. The exhaustion of rights principles is country-specific. That is, it's anything but a case of one measure fits all. This is one of the rationales behind the adaptability of the TRIPS Agreement. It allows governments in various countries to use parallel importation to meet specific purposes.

5.2 UNDERSTANDING ARTICLE 6 OF THE TRIPS AGREEMENT & It's IMPLICATION:

With a large amount of trade business from the Copyright and whole intellectual property industry, and the requirement "to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to balance rights and obligation[191]" TRIPS agreement was formulated as a part of a package agreement under W.T.O. because of the different interests on the I.P. issue between the developed and developing countries, A single good international I.P. convention was too hard to reach, and so the developed countries left some interesting under textile industry or agriculture in exchange to the trade-off of developing countries in some I.P. issues, for

[190] Ellen, Hoen: 'The Global Politics of Pharmaceutical Monopoly Power: Drug Patents, Access, Innovation and the Application of W.T.O. Declaration on TRIPS and Public Health, Journal of International Trade, (2009).
[191] D, Gervais: 'The TRIPS Agreement-Drafting History and Analysis', London Sweet&Maxwell review, (2005).

extending the membership in international intellectual property right convention. After the debate, Article 6 of TRIPS is finally reaching to deal with the exhaustion issue. According to this Article, except for blocking turn to D.S.M. in accordance TRIPS, it is hard to find the limitation to the Member's freedom to govern the exhaustion issue according to every kind of intellectual property right, including Copyright.

According to the history of Article 6, the Pre-TRIPS Situation had not only to the exhaustion on the patent and trademark but also the copyrights. Exhaustion doctrines have come a long way from being harmonized in the international scenario before the birth of TRIPS. It is nice to see through the negotiating procedure of the TRIPS Article 6, by doing, we can observe the conflict of agreement parties on this issue, and on the other side, reflects the complexity of this issue. The concern on the copyrights and parallel importation varies from nation to nation. Some of the analytical investigations and surveys have been done on the potential influence of the variety of levels of exhaustion rule on international trade and economic progress before the TRIPS. Negotiating parties did never reach the unanimity on which par the Copyright should be exhausted. In the U.S., some conclusions had been bought upon the issue of the national or international exhaustion of copyrights. In E.U., the Member States subsisted the different approaches to international exhaustion on copyrighted works. (Though E.U. was a party under TRIPs) and contracting parties like Australia have taken the issue of international exhaustion on the copyrighted. Early Proposals were the first step before the TRIPS to monitor the parallel imported goods by granting the goods' legitimate status.

In 1988, according to the combined work of Written and Oral statements issued by the GATT Secretariat, the parallel imports were not counterfeit goods. A multilateral framework should not oblige parties to provide means of action against such interests. Similar observations were laid concerning the necessity to protect the right of parallel importation instead of border measures and guidelines to protect legitimate trade. In 1989, Canada made the initiative to reach the international exhaustion to the specific intellectual property goods. Then in 1990, The U.S. proposed to claim that the exhaustion of the right in one territory would not exhaust right elsewhere. The parties from the small nations voiced their concern about the right of importation. Such a right could result in trade distortion, which is against the objectives of the TRIPS.

The copyright regulations of the nations may have a similar effect where it can become a barrier to the legitimate copyrighted works themselves. It becomes achievable to a Member to

demand that the exhaustion in the national regime that supports the copyright owner to restrain the parallel imports which are not inconsistent with the GATT rule, and even the GATT panel can be brought into the issue where there can arise a situation that the point of exhaustion might also be a subject to dispute settlement under rules of W.T.O. It becomes necessary to retain the implying of the dispute resolution mechanism (DRM) about W.T.O. on the issue of exhaustion, on the reason that the DRM lacked the treaties of WIPO, and it shall give the measures for the utmost implementation of impositions against the breach of the provisions TRIPS for the protection of the interest of parties those who are involved in international trade[192].

5.3 UNDERSTANDING ARTICLE 5(D) OF DOHA DECLARATION AND ITS IMPLICATIONS ON THE CONCEPT OF PARALLEL IMPORTS AND EXHAUSTION

It is stated as per Paragraph 5 of the Doha Declaration on the TRIPS Agreement and Public Health and also in the light of paragraph 4 above, we recognize that these flexibilities while maintaining commitment towards TRIPS which includes

(d) The provisions of the TRIPS Agreement, which are in consonance with the principle of exhaustion, is to give liberty for each Member to establish its own regime for such exhaustion without challenge, subject to the M.F.N. and national treatment provisions; of Articles 3 and 4."

In 2001, W.T.O. Members adopted a unique Ministerial Declaration at the W.T.O. Ministerial Conference held at Doha to clarify lacunae between the requirement for the national governments to apply the principles of TRIPS agreement and public health terms. In particular, concerns had been developing that patent rules may restrict access to affordable medicines for populations in creating countries in their efforts to control diseases of public health importance, including H.I.V., malaria etc. The Declaration, however, corresponds to the concerns of the developing countries about the issues they faced when seeking to execute measures to elevate access to affordable generic medicines in the interest of the general public, without any limitation to certain diseases[193].While acknowledging the job of intellectual property security "for the advancement of new medicines", the Declaration

[192] Ibid.

[193] Joel, D'silva: 'TRIPs, Drugs and the Poor: How Trade Affecting Access to Medicines', Cochin University Law Review, September (2005:29).

recognizes concerns about its effects on prices explicitly. The Doha Declaration confirms that "the TRIPS Agreement does not and should not keep Members from taking measures to secure the interests of the general public". Therefore in this regard, the Doha Declaration enshrines the principles WHO has publicly advocated and advanced throughout the years, namely the re-affirmation of the privilege of W.T.O. Members to make full use of the exceptions offered in the TRIPS Agreement to secure public health and enhance access to life-saving drugs for developing nations. The Doha Declaration adopts and refers to several key principles of TRIPS, including the privilege to grant compulsory licenses and the opportunity to decide the grounds upon which permissions are given, the privilege to figure out what constitutes a national crisis and circumstances of extraordinary urgency, and the chance to establish the routine of exhaustion of intellectual property rights. The requirement for parallel import arises when the availability of patented products is not sufficient to satisfy the need.

This kind of possibility can arise similar to the situation in the U.S.A. about the availability of "Anthrax", availability of HIV/AIDS drugs in African countries, and the latest phenomena of SARS in China, Hong Kong certain different countries. There are no powerful drugs for SARS, so there was no drug to "parallel import"; notwithstanding if there were a drug, at that point, there would have been the need[194].

The national legislation must accommodate clear-cut provisions to raise no constraint when parallel imports are authorized to meet such a possibility. According to the Doha Declaration, part countries are allowed to establish their very own routine for such exhaustion of appropriate without challenge. Subject to the most favoured nation treatment and national treatment under provisions of the TRIPs agreement.It is necessary to stress that to take advantage of this and different flexibilities allowed by the TRIPs agreement and consequently confirmed by the Doha Declaration, national laws must incorporate appropriate rules as compulsory licenses, exceptions and other relevant provisions. Such flexibilities don't shield the government from legal actions based on national laws and regulations that fail to use the flexibilities stipulated in the TRIPs agreement. For instance, specific legal provisions allowing for parallel imports would generally be necessary to profit by the guideline of international exhaustion right. A survey of patent laws in creating countries shows that many countries have not or just partially used the flexibilities permitted by the TRIPs agreement.

[194] Ibid

The viable implementation of the Doha Declaration in those countries, in this manner, would call for an amendment to national laws to incorporate the exceptions and safeguards necessary to ensure public health. Parallel imports are vital as they can counteract market segmentation and value discrimination by patent holders on a regional or international scale. Parallel importation of a patented drug from a country sold at a lower cost will enable more patients to gain cheaper access to essential medicines. Allowing parallel imports is in no way, shape or form legally inconsistent. Parallel imports can play a critical role in ensuring value rivalry and that W.T.O. members obtain the lowest world market cost. The argument that there is no correlation between patents and observing imports is unrelated to the intellectual property issue.

5.4 ANALYSIS AND CONCLUSION

The doctrine of exhaustion in intellectual property rights is one of the limitations imposed upon the I.P.R. holder to deter economic control over the further disposition of the I.P. good after the first sale. The principle is left open as 'agreed to disagree', vide Article 6 of the Agreement on Trade-Related Aspects of Intellectual Property Rights [TRIPs]. The member nations to the W.T.O. annexed TRIPs agreement could apply any flexible method of exhaustion that suits their national and economic interests of I.P. holders. The exhaustion principle plays a crucial role in the international trading system as it determines how intellectual property affects the free movement of goods. Based on the geographical limits, the three recognized modes of exhaustion are national, regional, and international exhaustion. The countries favouring the domestic players in the market with a protectionist approach apply the national exhaustion principle. The countries are tending free movement of goods and allowing open competition adopts the international exhaustion principle. A hybrid of national and international exhaustion principle is the regional/ community exhaustion, which is mainly adopted by regions wanting a common market for a set of nations but not a wholesome common market.

Parallel importation is a trade phenomenon that naturally arises due to the exhaustion of I.P.R. in goods being placed in a concerned market by the I.P. holder, either by himself or by an authorized dealer with his consent. The buyer on legal purchase exports or imports the I.P. goods into regions where the I.P. holders have the exclusive rights to deal with similar goods. Parallel importation and infringement of I.P. are, thus, two sides of the same coin, which when changes sides affect the legality of parallel imports. Theory of comparative advantage,

price arbitrage, consumer welfare, technology transfer, promotion of competition, etc., are some of the identified outcomes of parallel importation. However, the increase of counterfeit products worldwide affects the exclusive economic rights of the I.P. holders. In this scenario, parallel importation requires legal regulation and legal channels for distribution. Different nations approached the concept of parallel importation differently, and uniformity could not be enjoyed in global trade. To overcome this difficulty in construing the legality of parallel imports, the exhaustion principle needs to be harmonized to recognize a uniform first sale principle that promotes free global trade. The rationale for shifting from the GATT regime to the W.T.O. regime is to achieve internationalization of trade and undisrupted trade. The TRIPs aim to provide a level playing field for the I.P. holders and the consumers of I.P. protected goods without causing any disruption to free trade. The debate over Article 6 is an ongoing one due to the different trade policies of countries. Some countries do not have specific laws on exhaustion of I.P. and are not fully compliant with the TRIPs mandate. In countries that have ambiguous legal systems on the issue of exhaustion, the judiciary and policymakers try to establish the rule of exhaustion.

Meanwhile, the Doha Declaration has recognized the flexibility of the exhaustion principle and aids in interpreting the TRIPs Agreement. The implementation of the exhaustion principle has to balance the economic interests of the I.P. holders on the one hand. It aims at establishing free trade, technology transfer and competition promotion on the other hand. The exhaustion principle is seen as a check and balance measure to limit the I.P. holder's monopoly power and prevent him from having the second bite at the apple. Once the I.P. holder is suitably rewarded, he shall not control the further disposition of the I.P. good whatsoever. This principle recognizes a one-time incentive theory to reward the I.P. holder for his efforts in creating an intellectual asset. The principle of territoriality of I.P. allows the I.P. holders to have independent I.P. rights in different nations. Whether an I.P. in one country could be used to control the movement of I.P. goods from another country is a matter of dispute. Exhaustion which is recognized to be a limitation on the economic and distribution rights of the I.P. holder has to be made at a global or international level to prevent applying the independent rights in different nations. Why international exhaustion is a legitimate choice for harmonization is discussed by the judiciary across the world. The decisions of the U.S. Supreme Court in Bobbs vs Merril, Kirtsaeng, Lexmark indicates the adoption of the international exhaustion principle. The Court in these cases recognized that first sale has its roots in the common law principle against restraints on alienation. Because

that principle makes no geographical distinctions, the Copyright or the patent law should not provide for such distinctions. The discussion in these cases reflects hostility towards restraints on alienation, which is reflected in the exhaustion doctrine.

Harmonizing the exhaustion principle is required to balance the interests of the I.P. holders and the consumers whose 'public interests' need to be fulfilled. Shifting to a singular principle of exhaustion is necessary to establish a uniform legal practice to limit the I.P. holder's exclusive rights. The choice of exhaustion is crucial for harmonization as it has more significant impacts on the trade and economics of nations. Countries such as China, Australia, etc., overlook their laws to promote free trade by recognizing the exhaustion principle. While the E.U. follows the regional/ community exhaustion principle to establish a single market within the European member States, the BREXIT has a critical impact on the U.K. to move out of the E.U. single market regime. Hence, policy decisions and legal changes are expected in the laws of the U.K. on the issue of exhaustion.

In countries like Japan, India, etc., there is a general tendency to protect the I.P. owners by the judiciary and mostly conform to national exhaustion. However, the legal provisions in India have a clear mandate of providing international exhaustion in the Copyright or patent regime, and the judiciary has not adequately interpreted the provisions. Sometimes, in cases like John Wiley, Kapil Wadhwa, the Court has not even recognized the principle of exhaustion or first sale as a defence to infringement.

The ultimate idea of the exhaustion principle is to reward the I.P. holder only once for the I.P. good placed in the market for sale. He shall not restrict its free movement, including its parallel importation. In light of W.T.O. goals in establishing free trade, TRIPs must be suitably amended to promote competition and technology transfer amongst I.P. goods by recognizing the harmonized principle of exhaustion. The ideal exhaustion principle could be "International exhaustion" as it aligns with free trade and competition promotion principles. Parallel trade is also essential to convey I.P. goods to users across the globe. Hence it cannot be barred to establish infringement actions by I.P. holders.