Exhaustion of Industrial Property Rights

Introduction

Much has happened in the UK and the rest of Europe since AIPPI last considered the question of parallel imports (Question 101 which related to patented products only). There have been at least five further EC Directives each allowing for EU-wide exhaustion of IP rights. The European Court of Justice has also since clarified that the usual form of wording for those provisions make it contrary to EC law for Member States to have national rules applying principles of international exhaustion. Further ECJ decisions have helped answer some of the issues that had to be left unanswered in the response to Question 101.

There has recently been a somewhat popularist reaction to this on the consumer, political and diplomatic fronts. One English IP judge in particular, Laddie J, has been openly critical in his judgments of the judicial policy behind the Silhouette judgment (see below).

Our answers are principally confined to the position under the law of England and Wales and applicable EC law. The term "international exhaustion" is taken to refer to worldwide exhaustion of IP rights, as distinct from "EEA-wide exhaustion". Whilst the latter is clearly international in that it relates to more than one country, it is confined to rights exhausted essentially as a result of first marketing with consent only within the EEA (being the 15 EU Member States plus the EFTA states of Norway, Iceland and Liechtenstein).

I. Is there international exhaustion of (i) patents, (ii) trade marks and (iii) other industrial property rights? That is, can an industrial property right owner use patent rights against parallel imports from another country, when the imported products have been put on the market in that country by the industrial property right owner or with his consent?

A. Patents

1. No, we do not have a doctrine of international exhaustion but we do have a principle of EEA-wide exhaustion. UK patent rights are exhausted if a patented product is put
on the market by or with the consent of the patentee anywhere within the EEA. This applies even when the patentee does not have an equivalent patent in the country of first marketing, when there is no patent protection available there or where the local legislation fixes an artificially low sales price for the products there.

2. EC legislation (whether in force or in proposal form) confirms the general principle but with some changes in emphasis:

- Article 10 of the Biotechnology Directive (98/44/EC) establishes that there will be EEA-wide exhaustion for biological material obtained from the propagation or multiplication of biological material placed on the market in one Member State. It adopts wording similar to that used in harmonising directives for other IPR, e.g. trade marks and copyright (see below).

- Article 28 of the Community Patent Convention adopts similar wording but, in addition, makes it clear that consent must be expressly given. (Although signed in 1975 to introduce a single community-wide patent, the Convention has not been implemented and looks set to be superseded by the Regulation referred to below.)

- The last recital and Article 21 of the proposed Utility Model Directive (for "petty patents") go further than any current EU legislation by specifically precluding the application of a doctrine of international exhaustion.

- More recently, Article 10 of the Commission's August 2000 proposed Council Regulation on the Community Patent (COM (2000) 412 Final) provides for Community-wide exhaustion following marketing by consent. Unlike in the Convention, it does not specifically require express consent.

3. If a UK patentee (either directly or indirectly) puts his patented product on the market outside the EEA, then whether or not he can enforce his UK patent rights to prevent the product being imported into the UK will depend on the circumstances of that sale.

   a) **First sale by patentee:** if the owner of the UK patents sells his product overseas without imposing any limitations on its resale, the purchaser is presumed free to use and sell it wherever he chooses. This amounts to an implied licence of unrestricted use and sale that runs with the patented product. The UK patentee is presumed to have consented to the products being imported into the UK.

   The authority for this is the 1871 English Appeal Court case of *Betts v Wilmott*. This old case was recently applied by the English courts in the 1999 *Davidoff* trade mark case (see 1.2.5 below) lending credence to its continued authority. The judge in *Davidoff*, Laddie J, emphasised that he was not, thereby, introducing by the back door a rule of international exhaustion. Nevertheless, the effect of his judgment is not far removed from such a rule although he did leave room for patent cases to be treated differently.
b) **First sale by licensee under a foreign patent:** if the licence is stated to relate to, say, the US without referring to other countries, then the licensee may be free to sell in those other countries. However, he would not be free to do so in the UK if the patentee had parallel patent rights there. Hence, the grant of a licence in one country does not thereby imply a licence to sell elsewhere. Authority for this is another 19th century English case, Tilghman's Patent. However, the law is unclear on whether anyone buying from such a licensee, or further below them in a chain of sales, is necessarily likewise restricted from selling in the UK. On the one hand *Badische Analin v Isler* (1906) (at first instance) said that they are. The judge considered that the vendor, not being the patentee or his agent, had only a limited title and so he could not confer a greater title than he enjoys himself (hence the restriction runs with the licensed product). On the other hand, the Court of Appeal in *Gillette v Bernstein* (1942) held that, for any restriction on a patented product sold under licence to bite, it must have been brought to the notice of the purchaser prior to purchase. Despite the apparent conflict, *Badische Analin* has not been overruled yet (it was not even cited in *Gillette*).

c) **First sale by someone else:** the case law does not seem to make a clear distinction between this scenario and (ii) except that the Tilghman/ Badische Analin line of authority does not apply. In *Roussel Uclaf v Hockley* (1996) a UK patentee sold his patented products to a non-licensee in China (the UK patentee had no parallel patent there) and sought to impose a restriction against further sales of them outside China. Jacob J held that a subsequent purchaser was free to import and sell the products in the UK because he had not had notice of the restriction before buying the products. On this basis, Jacob J refused the claimant's application for summary judgment. Somewhat controversially, he further held that not only did the Chinese first purchaser and the defendant need to have notice of the restriction but so too did everyone in the intervening chain of supply.

B. **Trade Marks**

1. No. EEA-exhaustion applies under section 12(1) Trade Marks Act 1994 (implementing Article 7(1) of the Trade Marks Directive). The landmark 1998 decision of the ECJ in *Silhouette v Hautlauer*, subsequently reaffirmed in the Sebago case, clarified that Article 7(1) precluded Member States from applying a doctrine of international exhaustion.

2. There has been some debate about whether *Silhouette* still leaves room for courts to imply that a right holder has consented to importation into the EEA. The ECJ gave little guidance on the point, leaving it instead for the domestic court. However, many UK practitioners believe that only express consent will do.

3. Since the *Silhouette* decision there has been a build up of consumer, diplomatic, political and (as seen below) some judicial opinion in favour of international exhaustion of trade mark rights. Despite this, Commissioner Bolkestein announced to the Council of Ministers on 25 May 2000 that the Commission does not intend to propose, at this stage, a change to the current regime of EEA-wide exhaustion.
4. Between Silhouette and Sebago, Laddie J gave his judgment in Zino Davidoff v A&G Imports (1999). He applied English contract law to avoid what he clearly considered to be the inappropriate application of trade mark law in Silhouette. In his view, the Silhouette judgment had lost sight of the proper function of trade marks, namely to serve as a guarantee of trade origin.

5. The facts and decision of Davidoff are important to Question 156 as a whole. It was a summary judgment application (i.e. not a full trial) for trade mark infringement arising out of parallel imports from Singapore. Davidoff's Singaporean distributor was contractually bound not to export the products outside his territory. He was also required to impose similar restrictions on his "sub-distributors, sub-agents and retailers". It was not contested that the applicable law for the agreement was English law or similar. As a result, Laddie J applied Betts v Wilmott to conclude that arguably at least (which was enough for the summary judgment application to fail) Davidoff had impliedly consented to A&G importing the products into the UK. This was because it had failed to place on all purchasers down the distribution chain a self-perpetuating restriction limiting where the goods may be sold. There was no evidence to prove that A&G had notice of the restriction.

6. Laddie J referred a number of questions to the ECJ. In particular, the ECJ is being asked whether "consent", as used in the Directive, is to be interpreted as meaning consent given "expressly or implicitly and directly or indirectly". Another English judge has subsequently put two other parallel import cases on hold pending a referral of similar questions to the ECJ (Levi v Tesco, Levi v Costco).

7. More recently, in April 2000, a Scottish court faced with very similar facts in Davidoff v M&S Toiletries (jointly heard with Joop! v M&S Toiletries) came to a different conclusion. The defendants did not seek to run exactly the same defence arguments as in the English case. The Scottish judge, Lord Kingarth, refused to accept that the necessary consent could, in the circumstances, be implied. He held that Betts v Wilmott either did not apply in Scots law and/or was irrelevant anyway since the first sale contract was, in fact, governed by German law. Although he distinguished the English Davidoff decision, he clearly disapproved of the approach that equated consent with "a failure to take steps to prevent". He felt that, contrary to the goal of harmonisation, this was likely to give rise to conflicting results in different EU jurisdictions depending on which law was taken to govern the contract of first sale.

8. The UK group concurs with the observations made by Lord Kingarth and considers that consent should either be express (as per the Community Patent Convention drafting) or, at least, unambiguously implied. We refer to our answer to Question 101, in particular to the Appendix, where we similarly concluded that consent should be real, i.e. express or very clearly implied.

C. Other industrial property rights
1. There is no rule of international exhaustion of copyright, or of registered or unregistered designs. EEA-wide exhaustion applies.


Copyright: Section 18(2) Copyright Designs and Patents Act 1988 ("CDPA") provides for exhaustion of copyright when a work is first put into circulation in the EEA by or with the copyright owner's consent. Further, under section 27(5) CDPA, works legally imported into the UK under a Community right (e.g. by virtue of the free movement of goods principle) are expressly carved out of the acts of secondary infringement (importing, dealing in or possessing infringing copies).

Designs: Section 228(5) CDPA uses similar wording for the unregistered design right to that in section 27(5). There is presently no equivalent statutory provision for registered designs. However, the 1998 Design Directive (to be implemented by October 2001) and the proposed Community Design Regulation both adopt wording equivalent to that for trade marks. Hence, EEA-wide exhaustion applies or will apply as a minimum.

2. What amounts to consent (e.g. implied or express) for goods or works first sold outside the EEA raises similar issues to those raised above for patents and trade marks with the exception that Laddie J in Davidoff left room for a subsequent court to treat other IP rights in a different manner to that which he applied to branded goods.

3. The nature of the protected material will impact on how the rules apply. In particular, the first sale of a copyright-protected work does not exhaust other copyright-based rights, e.g. the right to adapt a work. Performance-related rights are treated differently again with first showings, even in one EC Member State, not exhausting such rights in another Member State.

II. (a) Can contractual restrictions imposed by an industrial property right owner be used to limit the effect of international exhaustion?

A. All industrial property rights

1. Yes, contractual restrictions will be subject to national and EC competition law and the applicable law of the agreement. Where territorial restrictions have as their object or effect the prevention, restriction or distortion of competition within the UK or EC, the agreement will be void under Chapter 1 of the UK Competition Act 1998 or Article 81(1) of the Treaty of Rome. This clearly applies to agreements about trade in the UK or between Member States of the EEA but can equally apply to agreements ostensibly only about trade in non-EU countries but which have an effect in the UK or EU. The latter occurs if the trade in the same products is oligopolistic, with limited competition, and there are appreciable price differences between products sold inside and outside the Community.

2. For patent-protected products, block exemptions, specific exemptions or the new vertical restraint rules may permit certain limited territorial restrictions in manufacturing licences. These are enforceable against the licensee to prevent him directly selling into other territories. Goods manufactured in the EC and sold in compliance with that licence are free to circulate pursuant to the free movement of goods principle. However, the patentee’s rights are not exhausted if the licensee directly sells to outside his territory in breach of those enforceable restrictions (this is not a first sale with consent). There are no block exemptions available for trade
mark, copyright or non-manufacturing patent licences. This means that territorial restrictions in such licences are all potentially unenforceable if in breach of relevant competition law and not specifically exempted.

3. For products sold outside the EEA, pending the ECJ decision in the Davidoff and Levi cases, rights holders to be safe need to take "sufficient and effective" steps to impose geographical restrictions in their sales agreements if they are to rebut the presumption that the purchasers take free of all restrictions. To qualify, the restrictions must be clear and explicit, must have been brought to the attention of the purchasers prior to purchase, must be enforceable under the local law of the agreement and EC and/or national competition law and must require the purchasers to impose the same restrictions perpetually down the chain.

4. In the case of sales by a licensee whose licence is restricted to a non-EEA territory, case law is divided on whether subsequent purchasers will always buy subject to that restriction (see 1.1.3(ii) above). To apply at all, the restriction would, in any event, have to be enforceable as against the licensee under both the locally applicable law of the licence and EC and/or national competition law.

(b) What is the effect of breach of contractual restriction by a purchaser - does exhaustion occur?

B. All industrial property rights

1. First sale in the EEA: exhaustion will not occur if the first sale was by a licensee in breach of a legally enforceable restriction. Exhaustion will also not occur if there exist legitimate reasons to prevent the further dealing (e.g. if the contents have been changed, per Article 7(2) Trade Marks Directive). Exhaustion will occur if the first sale was authorised (e.g. was by a licensee within his EU territory) but thereafter the purchaser seeks to sell outside that territory. Note that the rights holder may have a cause of action against the seller for breach of contract to the extent that the relevant restriction is enforceable against him under local and competition law.

2. First sale outside the EEA: applying the Betts v Wilmott principle, a purchaser from the rights holder or his agent will be deemed to buy free of all restrictions unless the rights holder takes the "effective and sufficient" steps discussed above to tie in all subsequent purchasers. If he does not, whilst this does not exhaust the rights holder's UK rights, it has the same effect. As noted above, the law is unclear what happens if the purchaser is buying directly or indirectly from the patentee's licensee where the licence contains an enforceable geographical restriction (see 1.1.3(ii)). It seems that the knowledge of the purchaser, at least, as to the existence of the restriction is significant to the question of exhaustion.

III. (a) If contractual restrictions can be used to limit importation, does it matter whether they are express or implied?

1. In Davidoff, Laddie J held that all the relevant circumstances of the purchase need to be considered when deciding whether a restriction applied to a third party. This includes the nature of the goods, the circumstances under which they were put on
the market, the terms of any contracts for sale and the provisions of any applicable law. An implied restriction is unlikely to qualify the rights holder as having taken the "sufficient and effective" steps discussed above or as having made the "clear and explicit" agreement (referred to in Betts v Wilmott) to rebut the presumption of unfettered ownership for the purchaser.

(b) If contractual limitations are express, are there any particular marking requirements?

B. All industrial property rights

1. The limitations should be clear and explicit. It seems there is no requirement for the goods themselves to be labelled with the restriction. In Roussel Uclaf v Hockley, Jacob J held that even though most of the products bore labels reading "For use in PRC only. Re-export forbidden", it was arguable that this was not enough to bind the exporters (and others down the sales chain). It seems that it may be sufficient if the restriction is in the applicable agreements.

2. Lord Kingarth in Joop! noted that such labelling often adds nothing to the terms of the supply agreement anyway and, in reality, was likely to be ineffective since, as was recognised by Laddie J in Davidoff, it could be too easily obliterated or removed.

(c) If protected products are marked to indicate some marketing restriction, what are the consequences of removal or loss of any marking?

C. All industrial property rights

1. There is no case law expressly on the point.

a) First Sale not under a restricted licence

For first sales other than under a restricted licence, the answer is likely to depend on whether the supply agreement included the restriction:

(1) Supply Agreement without Restriction
If the supply agreement did not contain a restriction and the restriction would only have been apparent to a purchaser from the label which has subsequently been removed/lost then, the purchaser is likely to buy free of the restriction because he had no reason to know of it. This is based on the principle that the rights holder has not taken the "sufficient and effective" steps necessary to rebut the presumption of unrestricted ownership for the purchaser (see 3.2.1 above).

(2) Supply Agreement with Restriction
If the supply agreement did contain a restriction and the label (which bore that same restriction) was removed/lost then, assuming the restriction in the agreement is clear and explicit, it will continue to apply (see paragraph 3.2.1 above).
b) First Sale under a restricted licence

If the purchaser is buying, either directly or indirectly, under a restricted licence then, subject to the debate at 1.1.3(ii) above, the terms of the licence are likely to bind subsequent purchasers whether or not they had notice of them. Although there is no case law on point, it seems that this will apply even if the restriction was first imposed only by way of the label which has subsequently been removed/lost.

IV. Does international exhaustion of industrial property rights apply where a product has been put on the market under a compulsory licence (if applicable)?

A. Patents
1. No.

B. Trade Marks
1. Not applicable.

C. Other industrial property rights
1. Unregistered design rights are subject to limited Crown use without licence and licences of right are available for third parties in the last five years of the right's subsistence. Similarly there are a number of acts that third parties are permitted to do in respect of copyright works. These all effectively operate as compulsory licences. The law is likely to follow that for compulsory licences under patents in such circumstances, i.e. this does not amount to consent and the rights are not exhausted.

V. Is "consent which gives rise to exhaustion" limited to specific arrangements (for example a relationship with a subsidiary or affiliated company, or an agreement with a licensee), or a question of fact in each case?

A. All industrial property rights
1. Whether there is "consent" depends on the facts in each case.
2. No limitation is provided in our domestic law as to how that consent may be given and specifically there is no need or requirement for there to be any sort of special relationship whether by reason of an organised corporate structure or specific agreement. Consent may be express (either as part of a written contract or merely by the spoken word) or it may be implied from the circumstances then prevailing (for instance consent to sell marked goods to consumers must be implied by the bulk supply of goods to a person known to be a retailer by the right owner, his agent or other authorised representative).
3. The consent of a rights owner's subsidiary is most likely to amount to sufficient consent.
4. In the context of patents, the judge in Betts v Wilmott acknowledged that the necessary consent cannot be implied in circumstances where the patent in the
country of first sale is held by a third party unrelated to the owner of the patent in the country where the right is being asserted, e.g. following an assignment.

5. The 1994 *Ideal Standard* ECJ decision applied this principle to trade marks in circumstances where there had been a demerger of a European group of companies with a split in the ownership of the national trade marks amongst the subsequently demerged and independent entities. This will apply so long as the arrangement is not, in fact, a mechanism for artificially partitioning markets contrary to EC competition laws.

6. Article 81 of the unimplemented Community Patent Convention expressly includes first marketing in the EEA by someone with "economic connections" with the proprietor as exhausting the right. It is not clear whether the proposed Regulation for a Community patent (see 1.1.2 above) will provide for exhaustion by someone with "economic connections" with the proprietor.

VI. Can an industrial property right owner object to parallel importation where (a) goods, or (b) their packaging have been modified?

A. All industrial property rights

(a) Goods

1. Yes. Any unauthorised change to the goods themselves undermines the proper function of the trade mark in guaranteeing that quality control over the goods has, at all times, been exercised by the brand owner.

2. Section 12(2) TMA 1994 (implementing Article 7(2) of the Trade Marks Directive) provides that EEA-exhaustion does not occur where there exist legitimate reasons for the trade mark proprietor to oppose the further dealings. This is stated to cover, in particular, where the condition of the goods has been changed or impaired after they have been put on the market.

(b) Packaging

3. The position in the UK is largely determined by EC law. In particular, Articles 28 and 30 of the Treaty of Rome (formerly Articles 30 and 36) or Articles 7(1) and 7(2) of the Trade Marks Directive. There is a long history of litigation based in the ECJ on these Articles which has provided some guidelines.

4. The start point appears to be that where there has been repackaging, a trade mark owner is entitled to prevent an importer from putting the trade mark onto new packaging unless certain conditions set out by the ECJ in *Hoffman-La Roche v Centrafarm* are met. The conditions in this case have been developed in subsequent "repackaging" cases including Bristol-Myers v Paranova, *Upjohn v Paranova* and *Christian Dior v Evora*. The effect is that a trade mark owner can oppose further marketing of a product where the importer has repackaged and reaffixed the mark unless:

   a) it is shown that his reliance on trade mark rights would contribute to the artificial partitioning of the markets between Member States;
b) it is shown that the repackaging cannot affect the original condition of the product;

c) the new packaging states the manufacturer and who repackaged;

d) the presentation of any modified packaging is not liable to damage the reputation of the trade mark and of its owner (this would cover defective, poor quality or untidy packaging, depending on the sales channel and circumstances under which sales are made); and

e) the trade mark owner is given prior notice of the relabelling.

5. In *Bristol-Myers v Paranova*, the ECJ, summarising the position on artificial partitioning, stated that trade mark owners’ powers to oppose repackaged goods should be limited only in so far as repackaging by the importer was "necessary" to market the product in the Member State of import.

6. Following a decision in February 2000 by Laddie J in *Glaxo v Dowelhurst* which has been referred to the ECJ, the position in the UK is now thrown into doubt on a number of critical matters. Laddie J said that, if a trade mark owner cannot show that there is significant damage (which has to be substantial) to the reputation of the trade mark (which is the specific subject-matter of the trade mark), importation cannot be prohibited. This applied irrespective of whether repackaging was necessary or not. This differs from the law set out many times by the ECJ which is that, in repackaging cases, damage to the specific subject-matter of the trade mark is presumed unless the *Hoffman-La Roche* criteria are established. Also, he said that "necessary" should comply with the principle that any hindrance to trade offended against the principle of free movement even if that hindrance was de minimis so it would be justifiable to show that repackaging and use of a mark was reasonably required to overcome any actual or potential hindrance to further commercialisation of the products.

VII. As well as stating the laws in their respective countries, the groups are also invited to (a) make any proposals for changes and (b) offer any observations of interest on the topics raised above.

A. The attention of politicians and economists has been drawn to the blocking of parallel imports through use of intellectual property rights which, in the popularist view, serves to maintain higher prices for consumer goods in some countries compared to other parts of the world.

B. Our summary of the UK legal position on international exhaustion of intellectual property rights shows that the problems are many and complex. One of the reasons for the complexity is that whilst trade marks, patents and other intellectual property rights are considered together for many purposes, the distinction between the different rights is very important in the context of international exhaustion. Hence the divergence in our answers for different types of rights.
C. International exhaustion of intellectual property rights is not merely a legal matter but one concerned with politics and economics. The UK group considers that unless and until a compelling case is presented to show a clear and overwhelming economic benefit in allowing for international exhaustion of any intellectual property rights, the limitations built into the current system continue to serve industry, business and consumers well.

D. The UK group accordingly does not propose any fundamental changes.

Summary

As a Member State of the EU, the UK applies a principle of EEA-wide exhaustion. ECJ legislation (both past and pending) all allow for exhaustion of rights after first marketing in the EEA by or with the consent of the rights holder. The ECJ in Silhouette confirmed that the standard legislative wording precludes Member States from applying a doctrine of international exhaustion.

The question of consent is key. Contractual restrictions can be imposed in some circumstances to limit the scope of any consent given. Whether they are enforceable and effective will depend on the application of UK and EC competition law. Further, it will also depend on whether the relevant purchaser(s) had sufficient notice of the restriction prior to purchase and may depend on whether the first sale overseas was to a licensee.

In two recent controversial UK summary judgment decisions (i.e. not fully argued), consent has been implied from the facts. The judges applied 19th century contract case law whereby, in the absence of any restrictions being imposed on him, a purchaser of a product is entitled to deal with it as he wishes. The two cases suggest that notice of the restriction is given not only to the first purchaser but also to the parallel importer (and anyone in the intervening chain of supply). Labels on the product are probably not, on their own, sufficient for this. One of these cases called into question the effect of Silhouette. Questions from that case have been referred to the ECJ for a ruling. The UK Group believes consent must be expressly or, at least, unambiguously implied.

The UK Group does not, at present, advocate any changes being made to the system as it is. There is currently no compelling economic evidence to justify a further derogation from national rights. Should any changes subsequently be appropriate, these should be effected on a global basis, through the auspices of the WTO and reflected in the TRIPS agreement.

Résumé

En tant qu'État membre de l'Union Européenne, le Royaume Uni applique un principe d'épuisement des droits sur le territoire de l'EEE. La législation de la CJCE (passée et présente) permet l'épuisement des droits conférés par la marque après la première commercialisation dans l'EEE par le titulaire ou avec son consentement. La CJCE dans
l'arrêt Silhouette a confirmé que les dispositions législatives actuelles ne permettaient pas aux États membres d'appliquer la doctrine de l'épuisement international.

La question centrale est celle du consentement. Des restrictions contractuelles peuvent être imposées dans certaines circonstances pour limiter l'étendue du consentement donné. Leur applicabilité et leur effectivité dépendront de l'application du droit de la concurrence anglais et communautaire. Elles dépendront également du fait que le/les acheteurs concernés étaient ou non suffisamment informés de la restriction avant d'effectuer leur achat ainsi que du fait que la première vente à l'extérieur était ou non destinée à un licencié.

Récemment, dans deux Décisions en Référé anglais controversés, le consentement a été déduit des circonstances de l'espèce. Les juges ont appliqué une jurisprudence du 19ème siècle, relative au droit des contrats, aux termes de laquelle, en l'absence de restrictions qui lui auraient été imposées, l'acheteur d'un bien est autorisé à le commercialiser comme il l'entend. Les deux jugements suggèrent que l'annonce de la restriction soit faite non seulement au premier acheteur mais aussi à l'importateur parallèle (et à tout autre intervenant dans la chaîne de distribution). Les étiquettes apposées sur les produits ne sont probablement pas suffisantes en elles-mêmes. L'une de ces décisions remet en question les conséquences de l'arrêt Silhouette. Des questions relatives à cette décision ont été référées à la CJCE pour interprétation. Le groupe anglais considère que le consentement doit être exprès ou à tout le moins impliqué de manière non ambiguë.

Le groupe anglais ne préconise actuellement aucun changement du système présent. Il n'y a pour l'instant aucun argument économique irréfutable pour justifier une dérogation supplémentaire aux droits nationaux. Si des changements devaient s'avérer appropriés, ceux-ci devraient être effectués de façon globale, par l'intermédiaire de l'OMC et reflétés dans les Accords ADPIC.

**Zusammenfassung**


In zwei vor kurzem ergangenen umstrittenen summarischen Entscheidungen britischer Gerichte (verkürzte Entscheidungsfindung) ist aus den Umständen auf Zustimmung geschlossen worden. Das Gericht wandte Vertragsfallrecht aus dem 19. Jahrhundert an, wonach der Käufer einer Ware berechtigt ist, damit nach seinem Belieben zu verfahren, soweit ihm keine Beschränkungen auferlegt sind. Die beiden Fälle legen nahe, daß nicht nur der erste Käufer, sondern auch der Parallel-Importeur (und alle anderen eventuellen Glieder der Transaktionskette) von der Beschränkung in Kenntnis gesetzt werden müssen. Es ist davon auszugehen, daß bloße Beschriftung der Ware dazu nicht ausreicht. Einer dieser Fälle stellte die Anwendung der Entscheidung "Silhouette" in Frage. Daher sind diesen Fall betreffende Fragen dem EuGH zur Entscheidung vorgelegt worden. Die britische Gruppe ist der Auffassung, daß Zustimmung ausdrücklich erteilt werden muß oder zumindest unzweideutig zum Ausdruck gebracht werden muß.

Die britische Gruppe rät im Augenblick nicht dazu, das gegenwärtige System zu verändern. Es liegen zur Zeit keine überzeugenden wirtschaftlichen Befunde vor, die eine weitere Schmälerung nationaler Rechte rechtfertigen. Sollten Veränderungen zukünftig angezeigt sein, sollten diese auf globaler Ebene vorgenommen werden, unter der Schirmherrschaft der WTO und sie sollten in den TRIPS-Vertrag integriert werden.