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CONSENT, CONDITION AND CONVEYANCE: RETHINKING EXHAUSTION AND PARALLEL IMPORTATION IN INTELLECTUAL PROPERTY LAW

A Comparative Analysis of India, the United States and the European Union/EEA

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Abstract

Exhaustion is a concept that helps determine how long an intellectual property owner can exercise control over their creation after it has been sold, legally or otherwise. Parallel importation seeks to identify how far territorial rights extend across legal boundaries. In scholarly literature, the issue has been presented as a conflict between national, regional and international exhaustion, with the issues of consent, state of the good, and ownership being considered separately. However, limitations of this approach make it impossible to comprehend the reason why countries with the same territorial label reach different conclusions regarding the issue of post-sale control. The purpose of this article is to determine the extent of post-sale control that the USA, the EU and the EEA, and India allow to the copyright holders. To achieve this goal, I will conduct a doctrinal and functional comparison of the treaties, WTO materials, laws, and court cases in trademarks, patents, and copyright. Article 6 of the TRIPS Agreement, together with the Doha Declaration and the India-UK trade agreement, creates lack of clarity over these four questions in favour of domestic law. The United States accepts international exhaustion for patents and copyrights but retains a high degree of segmentation through licensing and contractual arrangements, whereas the European Union erects its external walls but ensures free movement through evidence and repackaging. India is territorially the laxest country, although its standing is based on interlocutory rulings, unclear Section 107A(b) of the Patents Act, and unresolved Section 30(4) of the Trademarks Act of India, as well as its

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territorial copyright rule. The contribution of the framework is minimal but useful because it presents an explanation for the outcomes the labels cannot reflect and suggests the specific remedy. It proposes a draft of a consent-based Section 107A(b) and a different approach to compulsory licensing and structured Section 30(4), which puts the onus on the rights of holders, and promotes attribution.

Keywords: exhaustion of rights; parallel importation; article 6 TRIPS agreement; section 107A(b) patents act 1970; sections 30(4) trademarks act, 1999; legitimate reasons; digital exhaustion; pharmaceutical parallel trade.

I. Introduction

A graduate student has cheaper foreign editions of American textbooks bought in Thailand and resells them in the United States. A Delhi trader imports hard disk drives pulled from decommissioned foreign servers, wipes them and sells them under its own label. A distributor buys a patented medicine where its price is low and ships it to a market where the price is high. Each scenario asks whether the intellectual property owner's authority over a particular article survives an authorised sale of that article. Inside one legal system, the doctrine of exhaustion answers that question. Parallel importation asks it again at the border, because the goods are genuine and were sold with the owner's authority, yet the owner holds a separate right in the country of import that does not depend on what happened abroad.[2]

All three scenarios have reached courts in the last fifteen years, and the answers have moved. The United States Supreme Court held in 2013 that the copyright first-sale rule covers copies made abroad and in 2017 that an authorised sale anywhere exhausts a United States patent.[3] The Court of Justice of the European Union (CJEU) has allowed the resale of downloaded software while refusing it for e-books.[4] In India, the Delhi High Court read Section 30(3) of the Trade Marks Act, 1999 as adopting international exhaustion in 2012, and between 2024 and 2026 it applied that reading to used and refurbished hard drives. Every one of those Indian rulings was made at the interlocutory stage, and the Supreme Court has not decided the appeal

[2] Paris Convention for the Protection of Industrial Property arts. 4bis, 6(3), Mar. 20, 1883, as revised at Stockholm July 14, 1967, 21 U.S.T. 1583, 828 U.N.T.S. 305; *see* World Intell. Prop. Org. [WIPO] Secretariat, *Interface Between Exhaustion of Intellectual Property Rights and Competition Law*, ¶¶ 10–12, WIPO Doc. CDIP/4/4 Rev./Study/INF/2 (June 1, 2011) [hereinafter WIPO Exhaustion Study].

[3] *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519 (2013); *Impression Prods., Inc. v. Lexmark Int'l, Inc.*, 581 U.S. 360, 137 S. Ct. 1523 (2017).

[4] Case C-128/11, *UsedSoft GmbH v. Oracle Int'l Corp.*, ECLI:EU:C:2012:407 (July 3, 2012); Case C-263/18, *Nederlands Uitgeversverbond v. Tom Kabinet Internet BV*, ECLI:EU:C:2019:1111 (Dec. 19, 2019).

against the 2012 judgment, which has been pending since 2013.[5] Section 107A(b) of the Patents Act, 1970, usually described as India's parallel-import clause, has never been authoritatively construed.

This article is concerned with the question of the degree to which an intellectual property rights holder can exercise its control over products sold to the first buyer and subsequently imported by the latter without any further authorisation. India, the United States and the European Union as well as the European Economic Area (EEA) are compared. The paper also investigates what caused the disparity in the regulations adopted in the three jurisdictions, how their courts interpret the notion of consent, condition of goods and limitations imposed on goods sold, whether the rules regulating the distribution of physical goods can be applied to digital copies and what India needs to amend.

The argument states that the difference between national exhaustion, regional exhaustion, and international exhaustion is less significant than it seems. The issue in whether it is possible to stop the person who imports certain articles relies on the answers to three crucial questions: what constitutes an initial disposal by or with the consent of the right holder (consent); when does the ownership of the goods allow for bringing an objection to the right holder despite exhaustion (condition); and whether the transfer did actually take place or simply related to the licence granted (conveyance). Applying these questions to the three jurisdictions shows that the United States, despite moving to international exhaustion for patents and copyright, leaves owners substantial control through licensing and contract; that the European Union, despite its regional fence, uses evidential and repackaging rules to make internal movement real; and that India has the most open geographical position of the three in trademarks and, on the usual reading, patents, but has left all three questions largely unanswered. Thus, reform in India does not require any new geographical concept, rather it needs legal solutions to threefold questions together with a precise demarcation between IP exhaustion and a license to trade.

Part II is focused on the literature review and identifying the gap. Part III discusses the method and the framework used. Part IV deals with the WTO and treaties. Part V provides an examination of the three jurisdictions. Part VI brings comparisons together. Part VII puts the theory to the test in terms of medicines and digital products. Part VIII includes the recommendations for reforms along with the drafts. Finally, part IX gives conclusions.

[5] *Samsung Elecs. Co. v. Kapil Wadhwa*, Civil Appeal No. 8600 of 2013 (India) (pending; last listed Aug. 20, 2025, according to the Supreme Court's case-status record).

II. The WTO And Treaty Frame

A. Article 6 and the Structure of TRIPS

TRIPS leaves Members free to choose how to implement its obligations within their own legal systems, but it also sets minimum rights that each Member must grant.[6] For a patented product, those rights include preventing third parties from "not having the owner's consent" from importing it.[7] Exhaustion is handled in a single provision. Article 6 states that, "[f]or 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."[8] The text records a failure to agree rather than a rule.[9]

Read narrowly, Article 6 is procedural: it keeps exhaustion out of dispute settlement without confirming any substantive freedom. Two features of the Agreement point to broader reading. Footnote 6 makes the patent importation right expressly subject to Article 6, which would serve little purpose if Article 6 left the scope of that right untouched.[10] And in the Doha Declaration the Ministerial Conference stated that the effect of the TRIPS provisions relevant to exhaustion "is to leave each Member free to establish its own regime for such exhaustion without challenge," subject to most-favoured-nation and national treatment.[11] The Declaration was not adopted as an amendment, and its exact legal status is debated, but it is a consensus statement by every Member and carries real interpretive weight. No panel or Appellate Body report has interpreted Article 6; the WTO's own analytical index records paragraph 5(d) as the only relevant practice.[12]

Four limits remain, and each bearon the Indian proposals in Part VIII.

The first is non-discrimination. Article 6 preserves Articles 3 and 4, so an exhaustion regime may not treat foreign right holders worse than nationals or favour the nationals of some Members over others. Russia's 2022 decision to legalise parallel imports only for goods and brands on a government list shows how far exhaustion can be used as an instrument of trade

[6] Agreement on Trade-Related Aspects of Intellectual Property Rights art. 1.1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 [hereinafter TRIPS Agreement].
[7] TRIPS Agreement, *supra* note 17, art. 28.1(a).
[8] *Id.* art. 6.
[9] Calboli, *supra* note 8, at 5–6 & n.15.
[10] TRIPS Agreement, *supra* note 17, art. 28.1(a) n.6.
[11] World Trade Organization, Ministerial Declaration of 14 November 2001 on the TRIPS Agreement and Public Health, ¶ 5(d), WTO Doc. WT/MIN(01)/DEC/2, 41 I.L.M. 755 (2002) [hereinafter Doha Declaration].
[12] World Trade Organization, *WTO Analytical Index: TRIPS Agreement – Article 6 (Practice)* (June 2024).

policy; whether a brand-selective regime of that kind is compatible with Articles 3 and 4 is, in the author's view, a real question that Article 6 does not answer.[13]

The second concerns what Article 6 covers. It protects measures addressing "exhaustion," and exhaustion is conventionally understood as the consequence of a sale by or with the consent of the right holder. Footnote 13 to Article 51 supports that understanding: Members need not apply border measures to goods "put on the market in another country by or with the consent of the right holder."[14] Some scholars argue that Article 6 also covers goods first sold abroad under a compulsory licence, because consent is not mentioned in it.[15] The point has never been tested. A measure that allows imports of goods made without any authority of the patentee is safer if it is grounded not only in Article 6 but also in the provisions on exceptions and compulsory licences: Article 30, whose three conditions are cumulative,[16] and Articles 31 and 31bis, which govern the supply of medicines made under compulsory licence.[17]

The third concerns other WTO agreements. Article 6 speaks of "this Agreement." Abbott argued that rules blocking parallel imports may themselves breach Article XI of the GATT and cannot be saved by Article XX(d), because they are not necessary to protect rights that owners can protect by contract.[18] The argument is respectable but untested, and many Members have maintained national exhaustion for at least some rights without challenge. It is best treated as a pressure in favour of open borders rather than a rule.

The fourth is bilateral. Members can give away their Article 6 freedom by treaty, as the United States–Australia agreement did for patents.[19] India's agreement with the United Kingdom, in force since 15 2026, takes the opposite course. Article 13.11 provides that "nothing in this Agreement prevents a Party from determining whether or under what conditions the exhaustion of intellectual property rights applies under its legal system," and the patent rights in Article

[13] G.P. Ivliev & B.A. Shakhnazarov, *Pravovoe regulirovanie otnosheniy v sfere parallel'nogo importa: Opyt gosudarstv evraziyskogo regiona* [*Legal Regulation of Relations in the Field of Parallel Import: The Experience of the States of the Eurasian Region*], 76 Lex Russica 56 (2023) (Russ.) (discussing Government Decree No. 506 of Mar. 29, 2022).
[14] TRIPS Agreement, *supra* note 17, art. 51 n.13.
[15] Calboli, *supra* note 8, at 13 & nn.72–73 (discussing Carlos Correa's argument).
[16] Panel Report, *Canada-Patent Protection of Pharmaceutical Products*, ¶ 7.20, WTO Doc. WT/DS114/R (adopted Apr. 7, 2000).
[17] TRIPS Agreement, *supra* note 17, arts. 31(f), 31bis.
[18] Abbott, *supra* note 5, at 632–33; *see also* WIPO Exhaustion Study, *supra* note 1, ¶ 13.
[19] Calboli, *supra* note 8, at 18 (discussing United States–Australia Free Trade Agreement art. 17.9.4, May 18, 2004).

13.46 are expressly made subject to it.[20] The phrase "or under what conditions" matters: it preserves not only the choice of territorial scope but also the conditions attached to exhaustion, which are the subject of this article. The same chapter reaffirms the Doha Declaration and confirms that it does not prevent measures to protect public health.[21] On its text, therefore, the agreement leaves India's reform options open.

B. Copyright Treaties and Digital Copies

The WIPO Copyright Treaty grants a distribution right "through sale or other transfer of ownership" and leaves exhaustion to the contracting parties.[22] An agreed statement limits "copies" in that right to fixed copies that can circulate as tangible objects.[23] The statement does not prohibit digital exhaustion, but it means that international law offers no positive support for it. The question falls to domestic law and, in practice, to the conveyance question.

Iii. The Three Jurisdictions

A. The United States: Three Rights, Three Rules

United States law has no single exhaustion rule. Copyright exhaustion is statutory, patent exhaustion is judge-made, and trademark law polices imports through the Lanham Act, the Tariff Act and customs regulations. *Kirtsaeng* and *Lexmark* moved copyright and patents in the same direction, but neither governs trademarks, and the reasons each gives are specific to its statute or doctrine.

1. Copyright

Section 109(a) of the Copyright Act lets "the owner of a particular copy or phonorecord lawfully made under this title" sell or otherwise dispose of that copy, while Section 602(a)(1) treats unauthorised importation of copies acquired abroad as infringing distribution.[24] *Quality King* held that Section 602 is subject to Section 109, so goods made in the United States and re-imported could not be blocked.[25] Copies made abroad divided an evenly split Court in

[20] Comprehensive Economic and Trade Agreement, India–U.K., arts. 13.11, 13.46 & n.15, July 24, 2025 (entered into force July 15, 2026); Press Release, Press Info. Bureau, Gov't of India (June 17, 2026) (announcing entry into force).
[21] Comprehensive Economic and Trade Agreement, *supra* note 31, arts. 13.5.1, 13.6.2.
[22] WIPO Copyright Treaty art. 6, Dec. 20, 1996, 2186 U.N.T.S. 121; *see also* WIPO Performances and Phonograms Treaty arts. 8(2), 12(2), Dec. 20, 1996, 2186 U.N.T.S. 203.
[23] WIPO Exhaustion Study, *supra* note 1, ¶ 9 n.6 (reproducing the agreed statement concerning WCT Articles 6 and 7).
[24] 17 U.S.C. §§ 106(3), 109(a), 602(a)(1).
[25] *Quality King Distribs., Inc. v. L'anza Rsch. Int'l, Inc.*, 523 U.S. 135 (1998).

Costco v. Omega[26] and were brought within Section 109 in *Kirtsaeng*, where the majority read "lawfully made under this title" as a standard of lawfulness rather than a place of manufacture, noting that the provision "says nothing about geography."[27] The rule protects owners, however, not licensees. Under *Vernor v. Autodesk*, a software user is a licensee where the copyright owner specifies a licence, significantly restricts transfer and imposes notable use restrictions.[28] And in *ReDigi* the Second Circuit held that moving a purchased music file to a buyer creates a new phonorecord, a reproduction that Section 109 does not excuse.[29] The court left any change to Congress, which has not acted on the Copyright Office's 2001 view that digital first sale should not be adopted.[30] California has since required sellers of digital goods to disclose clearly when a "purchase" conveys only a revocable licence.[31]

2. Patents

Quanta confirmed that the authorised sale of a patented item ends the patentee's rights in it.[32] The Federal Circuit had nonetheless held that restrictions communicated at sale could survive exhaustion and that foreign sales did not exhaust United States patents.[33] *Lexmark* rejected both positions. A sale exhausts patent rights whatever restrictions accompany it, and whatever rights the seller keeps are "a matter of the contracts with its purchasers, not the patent law."[34] An authorised sale abroad exhausts the same way as one at home, and the Court rejected the complaint about lost price differentials on the ground that the Patent Act guarantees no particular price.[35] Justice Ginsburg dissented on the foreign-sale point.[36]

The consent question survives in *Lexmark*. The Court preserved *General Talking Pictures*: a licensee that knowingly sells outside its licence makes no authorised sale, so nothing is exhausted.[37] A foreign sale with which the United States patentee had nothing to do also does not exhaust.[38] A patentee that manufactures abroad through licensees with territorial limits can

[26] *Costco Wholesale Corp. v. Omega, S.A.*, 562 U.S. 40 (2010) (per curiam) (affirming by an equally divided Court).
[27] *Kirtsaeng*, 568 U.S. at 530.
[28] *Vernor v. Autodesk, Inc.*, 621 F.3d 1102, 1111 (9th Cir. 2010).
[29] *Capitol Recs., LLC v. ReDigi Inc.*, 910 F.3d 649, 656–57 (2d Cir. 2018).
[30] *ReDigi*, 910 F.3d at 659–60, 664; U.S. Copyright Off., DMCA Section 104 Report (2001).
[31] Cal. Bus. & Prof. Code § 17500.6 (West 2025).
[32] *Quanta Comput., Inc. v. LG Elecs., Inc.*, 553 U.S. 617, 625 (2008).
[33] *Lexmark Int'l, Inc. v. Impression Prods., Inc.*, 816 F.3d 721 (Fed. Cir. 2016) (en banc); *Jazz Photo Corp. v. Int'l Trade Comm'n*, 264 F.3d 1094, 1105 (Fed. Cir. 2001).
[34] *Lexmark*, 137 S. Ct. at 1531–33.
[35] *Id.* at 1537–38.
[36] *Id.* at 1538–39 (Ginsburg, J., concurring in part and dissenting in part).
[37] *Lexmark*, 137 S. Ct. at 1535 (distinguishing *Gen. Talking Pictures Corp. v. W. Elec. Co.*, 304 U.S. 175 (1938)).
[38] *Lexmark*, 137 S. Ct. at 1537 (citing *Boesch v. Graff*, 133 U.S. 697 (1890)).

therefore keep foreign-made goods out, which is the outcome of Abbott's contractual model anticipated.[39] The condition of question also survives, in the form of the repair and reconstruction line. Exhaustion permits a purchaser to repair the article, including replacing worn unpatented parts, but not making a new one.[40] The cartridges in *Lexmark* had been refilled and resold by remanufacturers, and the decision proceeded on the basis that such refurbishment of exhausted articles did not itself infringe.

3. Trademarks

Neither Kirtsaeng nor Lexmark governs trademarks. The import of genuine goods is controlled by Section 42 of the Lanham Act and Section 526 of the Tariff Act. *K Mart v. Cartier* upheld, in substantial part, customs regulations that admit genuine goods where foreign and domestic owners are under common control.[41] Under the *Lever* rule, however, even goods from an affiliated source may be excluded if they are physically and materially different from those authorised for the United States, unless they carry a conspicuous label disclosing the difference.[42] Courts set the threshold of materiality low.[43] American trademark law is thus best described as conditional international exhaustion, with a strong condition test and a disclosure cure.

4. The Regulatory Gate

Medicines show that exhaustion is not the only barrier. Federal law allows only the manufacturer to re-import prescription drugs made in the United States, and wider importation depends on programmes authorised under Section 804 of the Federal Food, Drug, and Cosmetic Act.[44] Florida's programme was authorised in January 2024, yet no drugs had been imported under it by mid-2025.[45] After *Lexmark* the binding constraint is regulatory, not patent law.

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[39] Kim, *supra* note 10, at 963–65; Abbott, *supra* note 5, at 614.
[40] *Aro*, 365 U.S. at 346.
[41] *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281 (1988); 15 U.S.C. § 1124; 19 U.S.C. § 1526.
[42] *Lever Bros. Co. v. United States*, 981 F.2d 1330 (D.C. Cir. 1993); 19 C.F.R. § 133.23 (2024).
[43] *Société des Produits Nestlé, S.A. v. Casa Helvetia, Inc.*, 982 F.2d 633 (1st Cir. 1992).
[44] 21 U.S.C. §§ 381(d)(1), 384.
[45] Jones Day, *Canadian Drug Importation May Undermine Intellectual Property Protection* (May 2024), https://www.jonesday.com/en/insights/2024/05/canadian-drug-importation-may-undermine-ip-protection; Hyman, Phelps & McNamara, *Will FDA's Section 804 "Enhancements" Really Speed Up Drug Imports from Canada?*, FDA L. Blog (May 2025), https://www.thefdalawblog.com/2025/05/will-fdas-section-804-enhancements-really-speed-up-drug-imports-from-canada/.

B. The European Union and the EEA

Territorial precision matters here because different instruments reach different areas. Free movement of goods within the European Union rests on Articles 34 and 36 of the Treaty on the Functioning of the European Union. For Iceland, Liechtenstein and Norway, the EEA Agreement contains parallel provisions, and its Protocol 28 requires the EEA states to provide for exhaustion of intellectual property rights as laid down in Union law.[46] The judge-made patent cases, the codified trademark rule and the copyright directives therefore operate, with differences explained below, across an area larger than the Union itself.

Patents. Patent exhaustion grew out of the free-movement case law. In *Centrafarm v. Sterling Drug,* a patentee could not use a national patent to block imports of goods it had marketed, or allowed to be marketed, in another Member State.[47] *Merck v. Stephar* applied the rule even where the goods had been marketed in a Member State where no patent was available, because the patentee chose to market there.[48] In European law, then, consent to marketing triggers exhaustion whether the patentee earned a monopoly price. For European patents with unitary effect and proceedings before the Unified Patent Court, exhaustion is now written into law, again with an exception for "legitimate grounds"; those instruments apply only in the participating Member States.[49] The accession of treaties since 2003 also contains a "Specific Mechanism" allowing patentees to block parallel imports of certain medicines from newer Member States in which protection had not been obtainable.[50]

Trademarks. A mark does not allow its proprietor to prohibit use for goods put on the market in the Union by the proprietor or with its consent, unless there are legitimate reasons to oppose further commercialisation, especially where the condition of the goods is changed or impaired.[51] Through the EEA Agreement the relevant market is the EEA. The rule is a ceiling as well as a floor: *Silhouette* held that states bound by the Directive may not adopt international exhaustion.[52] Consent must relate to each item placed on the EEA market,[53] and it must be unequivocally shown; silence or the absence of resale restrictions is not enough.[54] Removing

[46] Agreement on the European Economic Area, Protocol 28, art. 2, 1994 O.J. (L 1) 194.
[47] Case 15/74, *Centrafarm BV v. Sterling Drug Inc.*, 1974 E.C.R. 1147.
[48] Case 187/80, *Merck & Co. v. Stephar BV*, 1981 E.C.R. 2063.
[49] Agreement on a Unified Patent Court art. 29, Feb. 19, 2013, 2013 O.J. (C 175) 1; Regulation (EU) No 1257/2012, art. 6, 2012 O.J. (L 361) 1.
[50] Calboli, *supra* note 8, at 21–22; Case C-539/13, *Merck Canada Inc. v. Sigma Pharms. plc* (Feb. 12, 2015).
[51] Directive (EU) 2015/2436, art. 15, 2015 O.J. (L 336) 1; Regulation (EU) 2017/1001, art. 15, 2017 O.J. (L 154)
[52] Case C-355/96, *Silhouette Int'l Schmied GmbH & Co. KG v. Hartlauer Handelsgesellschaft mbH*, 1998 E.C.R. I-4799.
[53] Case C-173/98, *Sebago Inc. v. GB-Unic SA*, 1999 E.C.R. I-4103.
[54] Joined Cases C-414/99 to C-416/99, *Zino Davidoff SA v. A & G Imports Ltd.*, 2001 E.C.R. I-8691.

the proprietor's marks from goods in a customs warehouse and applying new ones before first EEA marketing infringes, because it denies the proprietor control of that first marketing.[55]

Inside the fence, the Court uses evidential rules to favour trade. Where the burden of proving consent would let a proprietor partition national markets, it shifts: *Van Doren* established the principle,[56] and *HP v. Senetic* requires a proprietor whose goods carry no market markings, and who refuses to verify them, first to prove that the particular items were initially marketed outside the EEA.[57] Consent can also be found where marks were split by assignment, but the separate owners coordinate their use or are economically linked.[58]

The condition test is most developed for medicines. Under *Bristol-Myers Squibb v. Paranova*, a proprietor may oppose repackaging unless it is necessary to market the product, does not affect its original condition, identifies the repackager and maker, is not presented so as to damage the mark's reputation, and is preceded by notice.[59] Necessity concerns the fact of repackaging, not every feature of how it is done.[60] A proprietor may also rely on the mark to protect identification codes that serve legitimate purposes such as product recall, though not codes used to trace and obstruct parallel traders.[61] In 2022 the Court held that the safety features required by the Falsified Medicines Directive do not by themselves make re-boxing necessary, because new anti-tampering devices can usually be applied to the original pack, but that re-boxing may be justified where a significant share of patients strongly resists relabelled or visibly opened packs.[62] The test protects the integrity of the product while denying the proprietor a veto over trade.

Copyright. The Information Society Directive provides that the distribution right is exhausted within the Union only by a first sale or transfer of ownership there, and *Laserdisken* held that Member States may not adopt international exhaustion.[63] On conveyance, the CJEU has drawn a sharp line. In *UsedSoft*, interpreting the Software Directive, it held that making a program

[55] Case C-129/17, *Mitsubishi Shoji Kaisha Ltd. v. Duma Forklifts NV* (July 25, 2018).
[56] Case C-244/00, *Van Doren + Q. GmbH v. Lifestyle Sports + Sportswear Handelsgesellschaft mbH*, 2003 E.C.R. I-3051.
[57] Case C-367/21, *Hewlett Packard Dev. Co. v. Senetic S.A.* (Jan. 18, 2024).
[58] Case C-291/16, *Schweppes SA v. Red Paralela SL*, ECLI:EU:C:2017:990 (Dec. 20, 2017).
[59] Joined Cases C-427/93, C-429/93 & C-436/93, *Bristol-Myers Squibb v. Paranova A/S*, 1996 E.C.R. I-3457, ¶ 79.
[60] Case C-348/04, *Boehringer Ingelheim KG v. Swingward Ltd.*, 2007 E.C.R. I-3391.
[61] Case C-349/95, *Frits Loendersloot v. George Ballantine & Son Ltd.*, 1997 E.C.R. I-6227.
[62] Case C-147/20, *Novartis Pharma GmbH v. Abacus Medicine A/S* (Nov. 17, 2022); Case C-204/20, *Bayer Intell. Prop. GmbH v. kohlpharma GmbH* (Nov. 17, 2022); Case C-224/20, *Merck Sharp & Dohme BV v. Abacus Medicine A/S* (Nov. 17, 2022); Joined Cases C-253/20 & C-254/20, *Impexeco NV v. Novartis AG* (Nov. 17, 2022).
[63] Directive 2001/29/EC, art. 4(2) & recitals 28–29, 2001 O.J. (L 167) 10; Case C-479/04, *Laserdisken ApS v. Kulturministeriet*, 2006 E.C.R. I-8089.

available for download under a licence of unlimited duration for a fee matching the copy's economic value is a sale, so the distribution right in that copy is exhausted, provided the reseller makes its own copy unusable and does not split a multi-user licence.[64] In *Tom Kabinet*, interpreting the Information Society Directive, the Grand Chamber held that supplying an e-book by download for permanent use is communication to the public rather than distribution, treated the Software Directive as a special regime, and stressed that digital copies do not deteriorate and so substitute perfectly for new ones.[65] A back-up copy of software on a physical medium cannot be resold without consent.[66] European digital exhaustion is therefore confined to software sold outright.

C. India

1. Trademarks

Importing goods under a mark is a use capable of infringing.[67] Section 30(3) then provides that where goods bearing a registered mark are lawfully acquired, further dealing in them is not infringement merely because the goods were put on the market under the mark by the proprietor or with his consent. Section 30(4) disapplies that defence where there are legitimate reasons for the proprietor to oppose further dealings, where the condition of the goods has been changed or impaired after they were put on the market.[68] The wording of Section 30(4) follows the European provision closely, but India imported the words without the European case law that gives them content.

Two features of the text are easily overlooked. Section 30(3) protects only goods that were "lawfully acquired," so a reseller who obtained goods by theft, fraud or in breach of an import prohibition cannot invoke it, whatever the territorial scope of exhaustion. And it removes liability only "by reason only of" the goods having been put on the market with consent. The defence responds to the claim made on behalf of the owner that he no longer exercises possession over the goods; however, it does not respond to any other type of objections, such as those based on a false description of the goods or their modifications. Read this way, the two sub-sections are not a rule and an exception pulling in opposite directions. Section 30(3) states what the first authorised sale settles, and Section 30(4) identifies what it does not. That

[64] *UsedSoft*, ECLI:EU:C:2012:407; Directive 2009/24/EC, art. 4(2), 2009 O.J. (L 111) 16.
[65] *Tom Kabinet*, ECLI:EU:C:2019:1111; Court of Justice of the European Union, Press Release No. 162/19 (Dec. 19, 2019).
[66] Case C-166/15, *Ranks v. Microsoft Corp.* (Oct. 12, 2016).
[67] Trade Marks Act, 1999, § 29(6)(c) (India).
[68] Trade Marks Act, 1999, § 30(3)(b), (4) (India).

reading matters for the reform proposals in Part VIII, because it suggests that the legitimate reasons in Section 30(4) should be tied to interests the first sale could not have exhausted: the integrity of the goods and the accuracy of what the mark tells purchasers.

The Act does not say which "market" means. A single judge of the Delhi High Court read it as the Indian market.[69] On appeal from that interim injunction, a Division Bench held that "the market" in Section 30(3) is "the international market," relying on legislative history, including a draft statement of objects that had referred to international exhaustion.[70] It added that Section 30(4) "embraces all legitimate reasons to oppose further dealings," including differences in warranty, after-sales service and packaging.[71] Yet it set aside the injunction, allowing the imports on condition that the sellers prominently disclose that the goods were imported and were not covered by the Indian subsidiary's warranty or service.[72] Two qualifications follow. The Bench expressly described its opinion as prima facie, given for the purpose of the interim application.[73] And its broad description of Section 30(4) was not needed for the result, since the differences it listed did not stop the imports; it is better read as an observation than as a holding. The appeal against the judgment has been pending in the Supreme Court since 2013.[74] Meanwhile, the customs authorities told their officers not to treat genuine, trademarked imports as infringing unless the goods have been materially altered or impaired.[75]

The refurbishment cases took the doctrine further, but also at the interlocutory stage. In *Seagate v. Daichi*, deciding interim applications in a group of suits over end-of-life hard drives, Justice Anish Dayal treated international exhaustion as established by *Kapil Wadhwa*, said that "[t]he only caveat is in Section 30(4)," and allowed sales subject to detailed disclosure of the original manufacturer, the refurbished status of the goods and the absence of the manufacturer's warranty.[76] In *Western Digital v. Hansraj Dugar*, Justice Amit Bansal vacated an ex parte injunction against imports of used drives and released goods detained by customs, again on disclosure conditions.[77] In March 2026 a Division Bench dismissed the manufacturers' appeals

[69] *Samsung Elecs. Co. v. Kapil Wadhwa*, 2012 SCC OnLine Del 1004 (India); *see* Jhanwar, *supra* note 13, at 120–21.
[70] *Kapil Wadhwa v. Samsung Elecs. Co.*, FAO(OS) 93/2012, ¶¶ 53–62, 71 (Del. HC Oct. 3, 2012) (India), *reported at* 2012 SCC OnLine Del 5172.
[71] *Kapil Wadhwa*, FAO(OS) 93/2012, ¶ 68.
[72] *Id.* ¶ 75.
[73] *Id.* ¶ 76.
[74] *See supra* note 4.
[75] Central Board of Excise & Customs, Circular No. 13/2012-Customs, ¶ 4(ii) (May 8, 2012) (India).
[76] *Seagate Tech. LLC v. Daichi Int'l*, CS(COMM) 67/2024, ¶¶ 89–92, 112–16 (Del. HC May 21, 2024) (India) (common judgment on interlocutory applications in connected suits).
[77] *W. Digit. Techs. Inc. v. Hansraj Dugar*, CS(COMM) 586/2019 (Del. HC May 16, 2025) (India) (order on interlocutory applications).

from these interim orders. According to published reports of the judgment, it held prima facie that refurbishers who had removed the original marks were not using them and so could not infringe under Section 29; that "reverse passing off" is not recognised in Indian law; and that "changed" in Section 30(4) must be read with "impaired," so that a change which restores or improves the goods without prejudice to the proprietor is not a legitimate reason. It also declined to disturb the disclosure directions as a matter of appellate restraint over discretionary interim orders.[78] In May 2026 the Supreme Court declined to entertain a special leave petition arising from the litigation.[79] A dismissal without reasons does not declare law.[80] The suits remain to be tried.

The concept of the condition test in Indian law resembles that of Penelope's shroud. It takes full shape in 2012. Gradually, however, it has been unpicked altogether in 2026. They both have one aspect in common. In the first case, the concept is interpreted as broad enough to encompass warranty differences. In the latter case, its meaning becomes narrow. At the same time, neither of the interpretations can be considered final.

This leaves space for many questions, such as whether the term "market" has a clear meaning, whether differences in terms of warranty or descriptions of goods qualify as independent grounds for a claim, whether the first sale of goods abroad by the affiliate is treated as a sale with the consent of the owner of the trademark, and whether importation of goods infringes Section 29(6). The judgment of 2026 shows additional differences from the Mitsubishi case. The right holder has the right to prevent debranded goods from being imported into EEA countries but may not intervene with regard to lots of debranded goods sold outside of India since the removal of the trademark makes goods no longer being subject to legal protection.

2. Patents and Section 107A(b)

According to Section 48, a product patentee is entitled to prohibit any third party "without his consent" from making, using, offering for sale, selling, or importing the patented product in India.[81] According to Section 107A(b), the law states that "It does not amount to infringement to import patented articles", under valid authorisation by the responsible person for

[78] *W. Digit. Techs. Inc. v. Geonix Int'l Pvt. Ltd.*, FAO(OS)(COMM) 146/2024 (Del. HC Mar. 9, 2026) (India) (Division Bench) (as reported in *Sale of Used HDDs With Disclosure Does Not Amount to Trademark Infringement: Delhi High Court*, LiveLaw (Mar. 10, 2026), https://www.livelawbiz.com/trademark/delhi-high-court-greenlights-refurbished-hdd-sales-rejects-reverse-passing-off-claims-by-tech-giants-525871).
[79] *W. Digit. Techs. Inc. v. Hansraj Dugar*, Special Leave Petition (Civil) No. 17783 of 2026 (India) (dismissed May 27, 2026).
[80] *Kunhayammed v. State of Kerala*, (2000) 6 SCC 359 (India).
[81] Patents Act, 1970, § 48(a) (India).

manufacturing and selling the product.[82] In 2002, the law was put in place, and at that time it talked about a "person duly authorized by the patentee in regard to any selling or distributing of the product". The current wording has replaced that phrase since 1 January 2005.[83]

There are three interpretations yet none has been accepted by the court. According to the first reading, the phrase "duly authorized in terms of the law" is still interpreted as valid authorization provided by the patent holder, irrespective of whether he/she is the actual owner or licensee, thereby showing that the provision reflects a principle of principles of international exhaustion. Hence, this reading is consistent with section 48 which presents the definition of the right in terms of consent and keeps the provision in line with the conventional term "exhaustion." Its weakness is textual: Parliament deliberately removed the words "by the patentee." Second, the phrase refers to any authority conferred by the law of the place of manufacture or sale. That would cover goods made under a foreign compulsory licence and, arguably, goods made where no patent exists. It respects the 2005 change in wording, but on its widest version it would leave little of the importation right in Section 48, and it would be hard to defend under Articles 28 and 30 of TRIPS. On the third, the authority must arise under Indian law, and the import must come directly from the authorised person, which would make the provision far narrower than its reputation.[84]

The better reading of the existing text, in the author's view, lies between the first two. The words "duly authorised ... to produce and sell" suggest a positive authorisation relating to the patented product, not merely the absence of a prohibition. On that view the provision covers goods sold by or with the consent of the patentee anywhere, and goods produced under a governmental authorisation such as a compulsory licence that substitutes for consent, but not goods made in a country where no patent exists. That is an argument, not settled law. The executive has treated Section 107A(b) as permitting parallel imports,[85] and since 2018 customs officers no longer enforce patents at the border at all.[86] A patentee who objects must therefore sue, and the court will face the interpretive question with no authority to guide it. The TRIPS position varies with the reading. The consent of reading sits within Article 6. The middle

[82] Patents Act, 1970, § 107A(b) (India).
[83] Patents (Amendment) Act, 2002, No. 38 of 2002, § 44 (India) (w.e.f. May 20, 2003); Patents (Amendment) Act, 2005, No. 15 of 2005, § 58 (India) (w.e.f. Jan. 1, 2005); *see* Patents Act, 1970, § 107A n.5 (as consolidated by the Office of the Controller General of Patents, Designs & Trade Marks to Aug. 1, 2024).
[84] Basheer & Kochupillai, *supra* note 11; J. Sai Deepak, *Section 107A(b): Does It Really Endorse International Exhaustion? – II*, SpicyIP (Oct. 5, 2010), https://spicyip.com/2010/10/section-107ab-does-it-really-endorse.html.
[85] Circular No. 13/2012-Customs, *supra* note 86, ¶ 4(i).
[86] Intellectual Property Rights (Imported Goods) Enforcement Amendment Rules, 2018, Notification No. 56/2018-Customs (N.T.) (India).

reading depends partly on the contested view that Article 6 extends to non-consensual first sales and is safer if supported by Articles 30 and 31. The widest reading is exposed.

Section 107A(b) also leaves a domestic gap. It deals only with importation. The Patents Act contains no provision stating that a patented article sold in India by or with the consent of the patentee may be used, resold or repaired without further permission. Indian courts would probably reach that result through the implied-licence reasoning inherited from English law, under which a purchaser takes free of restrictions not brought to its notice,[87] but implied licence differs from exhaustion in one important respect: it can be excluded by express conditions. The repair and reconstruction line has likewise received no reported appellate treatment in India, although the refurbishment of patented components raises it directly. A patent statute that addresses imported goods but is silent on goods sold at home has its priorities in an odd order.

3. Copyright and Digital Copies

Section 14(a)(ii) of the Copyright Act gives the right to issue copies "not being copies already in circulation," and the Explanation to Section 14 treats a copy sold once as already in circulation.[88] The courts have read this territorially. In *Penguin Books*, importing American editions of titles licensed for India was held to infringe.[89] In *John Wiley & Sons v. Prabhat Chander Kumar Jain*, the court restrained the export of low-priced editions licensed only for the subcontinent.[90] A proposal in the Copyright (Amendment) Bill, 2010 to treat lawfully published foreign copies as non-infringing was dropped, and a study commissioned afterwards by the Ministry of Human Resource Development recommended only a cautious opening for printed books.[91] One economic explanation is that India's software and film industries make it a net exporter of copyright goods, while its firms hold relatively few patents.[92]

On conveyance, the most relevant authority comes from tax law. In *Engineering Analysis*, deciding whether payments for software were royalties, the Supreme Court held that end-user licences and distribution agreements for packaged software did not transfer any right under Section 14, and described the 1999 amendment to Section 14(b)(ii) as statutory recognition of the "doctrine of first sale/principle of exhaustion."[93] Earlier, packaged software had been

[87] *Betts v. Willmott* (1871) LR 6 Ch App 239 (Eng.).
[88] Copyright Act, 1957, § 14(a)(ii) & Explanation (India).
[89] *Penguin Books Ltd. v. India Book Distributors*, AIR 1985 Del 29 (India).
[90] *John Wiley & Sons, Inc. v. Prabhat Chander Kumar Jain*, 2010 (44) PTC 675 (Del) (India).
[91] Nat'l Council of Applied Econ. Rsch., *The Impact of Parallel Imports of Books, Films/Music and Software on the Indian Economy with Special Reference to Students* (2014).
[92] Maskus, *supra* note 9, at 107.
[93] *Eng'g Analysis Ctr. of Excellence Pvt. Ltd. v. Comm'r of Income Tax*, (2022) 3 SCC 321, ¶ 120 (India).

treated as "goods" for sales taxes.[94] These decisions support the exhaustion of the distribution of rights in a copy of a program that is sold. They do not decide whether a downloaded copy is "sold," whether a resale that requires a new reproduction is permitted, whether contractual bans on resale bind later buyers, or how other works are treated. They do not establish a general digital resale right, and a tax court's characterisation of a transaction is not a ruling on the scope of the reproduction right.

Table 1: Exhaustion rules by jurisdiction and right

Jurisdiction and right	Exhaustion rule	Principal authority	Status	Consequence for parallel trade	Key qualification
US: copyright	International, for owners of lawfully made copies	17 U.S.C. § 109(a); *Kirtsaeng* (2013)	Settled for physical copies	Genuine copies made abroad may be imported and resold	Licensees are not owners (*Vernor*); no digital resale (*ReDigi*)
US: patents	International	*Lexmark* (2017)	Settled	Authorised foreign sale exhausts; restrictions enforceable only in contract	No exhaustion for sales outside a licence (*General Talking Pictures*); repair v. reconstruction
US: trademarks	International, subject to common control and material difference	15 U.S.C. § 1124; *K Mart*; *Lever*; 19 C.F.R. § 133.23	Settled rule; outcome fact-dependent	Affiliated genuine goods admitted unless materially different	Labelling cure; low materiality threshold
EU/EEA: trademarks	Regional (EEA); international precluded	Dir. 2015/2436 art. 15; EEA Prot. 28; *Silhouette*; *Davidoff*	Settled	Goods first marketed outside the EEA can be blocked	Burden may shift (*HP v. Senetic*); repackaging conditions (*BMS*)
EU/EEA: patents	Regional	*Centrafarm*; *Merck v. Stephar*; UPCA art. 29 (participating states)	Settled	Free movement within the area; external imports can be blocked	Specific Mechanism for certain medicines
EU/EEA: copyright	Regional; international precluded	Dir. 2001/29 art. 4(2); *Laserdisken*; Dir. 2009/24 art. 4(2)	Settled; digital position split	Physical copies move freely within the area	Downloaded software exhausted (*UsedSoft*); e-books not (*Tom Kabinet*)
India: trademarks	International	Trade Marks Act § 30(3)(b); *Kapil Wadhwa* (DB, prima facie)	Contested: interlocutory rulings; Supreme Court appeal pending	Genuine imports permitted with disclosure	Scope of § 30(4) unsettled (2012 v. 2026 readings)
India: patents	Probably international; scope disputed	Patents Act § 107A(b)	Contested: no judicial construction	Executive treats parallel imports as lawful; no border enforcement since 2018	Meaning of "duly authorised under the law"
India: copyright	National in effect	Copyright Act § 14(a)(ii) & Expl.; *Penguin*; *Wiley*	Settled at High Court level	Imports of copies licensed for other territories infringe	Software sold outright: first sale recognised in a tax case (*Engineering Analysis*)

Source: author's analysis of the authorities discussed in Parts IV and V. "Status" refers to the position as at October 2026.

[94] *Tata Consultancy Servs. v. State of Andhra Pradesh*, (2005) 1 SCC 308 (India).

IV. What The Framework Shows

Table 2 applies the three questions to the material in Part V. The test set in Part II was whether the framework explains outcomes that the territorial label leaves unexplained. Three examples suggest that it does.

Table 2: The consent, condition and conveyance questions compared

Question	United States	European Union / EEA	India
Consent	Authorised sale, including by a licensee within its licence; post-sale restrictions bind only in contract	Unequivocal consent (*Davidoff*); graduated burden (*Van Doren*; *HP v. Senetic*); economic links (*Schweppes*)	Trademarks: "by the proprietor or with his consent," undefined; patents: "duly authorised under the law," contested
Condition	Trademarks: material differences, low threshold, labelling cure; patents: repair v. reconstruction (*Aro*)	Legitimate reasons (art. 15(2)); *BMS* repackaging conditions; 2022 safety-feature rulings	§ 30(4): broad observation (2012) v. impairment-centred prima facie reading (2026); disclosure directions
Conveyance	Owner v. licensee (*Vernor*); reproduction bars digital resale (*ReDigi*); state disclosure law (California)	Downloaded software exhausted (*UsedSoft*); e-books not (*Tom Kabinet*)	Software sold outright recognised in a tax case (*Engineering Analysis*); no rule for downloads

Source: author's analysis. The framework is the author's proposal, not a test adopted by any court.

The first concerns United States patents. On a territorial classification, *Lexmark* makes the United States an international-exhaustion country, which suggests that genuine patented goods sold anywhere may be imported. In fact a patentee that sells abroad through licensees whose licences exclude the United States can still treat those goods as infringing, because no authorised sale occurred. The consent question, not the territorial rule, decides the case. This is the pattern Abbott described a quarter of a century earlier: territorial division by contract, with exhaustion limited to policing what contract cannot reach.[95]

The second concerns India's refurbished drives. On a territorial classification, Indian and EEA law simply differ one is international, the other regional. That explains why the drives could be imported into India, but not why debranded goods are treated no differently in the two systems. The advantage is based on the inquiries regarding conditions and consent. Regarding the establishment of the EEA, the Owner's ability to control the first sale in a particular region is safeguarded, and so debranding is a violation at this early stage, while in the case of Mitsubishi. The Indian legislation views an overseas first sale as the point of concern. Hence, it is about the issue of indirect "use" and the question of whether or not goods could have been harmed.

[95] Abbott, *supra* note 5, at 614.

The third concerns copy of software. The European Union is regional in its territorial scope, and yet *UsedSoft* and *Tom Kabinet* reach opposite results for downloaded software and e-books within that same regional rule. Only the conveyance question explains why.

The comparison also yields two findings about India specifically. India's regime is inconsistent across rights: trademark and, on the usual reading, patent law follow international exhaustion, while copyright remains territorial. Since most branded goods carry copyright-protected labels, packaging, manuals or software, the narrower rule can be used to stop what the wider rules permit. Australia addressed this by providing that copyright in an "accessory" to an article is not infringed by importing it with the article.[96] Second, India's position in the trade is unusual. For many goods, and for price-controlled medicines in particular, Indian prices are lower than those in high-income markets, so India is more often a source of parallel exports than a destination for parallel imports.[97] Its own rules therefore matter mainly for the minority of products, such as some patented medicines, electronics and luxury goods, where Indian prices are not the lowest. For those products, clear rules on the three questions matter more than another statement of territorial scope.

Disclosure also has a home outside trademark law, which the Indian cases have not yet used. Packaged goods sold in India must already declare, among other things, the name and address of the importer where the goods are imported.[98] Misleading statements about warranty or origin can be unfair to trade practices under consumer-protection law.[99] The disclosure directions in *Kapil Wadhwa* and *Seagate* therefore fit an existing regulatory pattern. They do not require trademark law to do all the work. Competition law is relevant in the other direction. The Competition Commission has treated manufacturers' restrictions on the supply of spare parts and diagnostic tools to independent repairers as an abuse of dominance,[100] which suggests that attempts to use intellectual property rights to close the aftermarket for refurbished goods may face scrutiny beyond Sections 30(3) and 30(4).

[96] Calboli, *supra* note 8, at 27–28 (discussing Copyright Act 1968 (Cth) s 44C (Austl.)).
[97] Jhanwar, *supra* note 13, at 126–27.
[98] Legal Metrology (Packaged Commodities) Rules, 2011, r. 6 (India).
[99] Consumer Protection Act, 2019, § 2(47) (India).
[100] *Shamsher Kataria v. Honda Siel Cars India Ltd.*, Case No. 03/2011 (Competition Comm'n of India Aug. 25, 2014).

V. Two Stress Tests

A. Medicines

Exhaustion removes a patent or trademark objection to an import. It does not authorise anyone to sell medicine. In India, an imported drug must be registered, which covers both the foreign manufacturing site and the product, and the importer must hold an import licence; new drugs need separate permission under the 2019 Rules.[101] Labelling should conform to the requirements of India, which differ from those of other countries. This means that relabelling or repackaging of products may be required.. A parallel importer may satisfy patent law under Section 107A(b) and trademark law under Section 30(3) and still be unable to sell lawfully. The same separation exists in the united state, where the import programme rather than patent law is barrier,[102] and in the european union, where parallel importers obtain a simplified marketing authorisation for products already authorised in the importing state.[103]

Keeping the two layers distinct clarifies the policy argument. Safety concerns, including the risk that counterfeits enter parallel supply chains, are real, but patent law cannot address them, because a patent does not distinguish between a safe and an unsafe genuine product. They belong to the drug regulator. Equally, the access case for parallel imports is weaker than it is sometimes made to sound. Swedish data show parallel trade reducing originator pricing power by twelve to eighteen per cent on average, yet later work found that much of the saving went to traders and pharmacies rather than patients or payers.[104] The industry argument that parallel trade undermines tiered pricing is strongest where originators supply poorer markets at low prices, and weakest where they do not supply them at all.[105] For India, the practical stakes lie in high-cost patented therapies that face no generic competition during the patent term. Two further points should be kept separate. Parallel trade in patented medicines is not trade in generics, which raises questions of infringement or compulsory licensing rather than

[101] Drugs and Cosmetics Act, 1940, §§ 10, 12 (India); Drugs Rules, 1945, pt. IV (India); New Drugs and Clinical Trials Rules, 2019 (India).
[102] *See supra* Part V.A.4.
[103] Commission Communication on Parallel Imports of Proprietary Medicinal Products for Which Marketing Authorisations Have Already Been Granted, COM (2003) 839 final (Dec. 30, 2003).
[104] Maskus, *supra* note 9, at 110–11 (discussing Mattias Ganslandt & Keith E. Maskus, *Parallel Imports and the Pricing of Pharmaceutical Products: Evidence from the European Union*, 23 J. Health Econ. 1035 (2004)); Calboli, *supra* note 8, at 11–12.
[105] Calboli, *supra* note 8, at 10–11; *see also* Sarah McKeith, *Pharmaceutical Patents in Developing Nations: Parallel Importation and the Doctrine of Exhaustion*, 6 Afr. J. Legal Stud. 287 (2013) (proposing a regional approach).

exhaustion. And whether savings reach patients depends on pricing and procurement rules, including the Drugs (Prices Control) Order, 2013, not on exhaustion law.

B. Digital Copies

Four things must be kept apart: ownership of a copy, the distribution of right in that copy, the reproduction of right, and the licence terms. Exhaustion only restricts the distribution of right and applies only to copies which have already been sold. A physical book may be resold without needing to be reproduced. On the other hand, a digital file cannot usually be transferred without making another copy, thus activating a reproduction right unaffected by exhaustion, which is the reason for ReDigi's failure. UsedSoft addressed the issue in software by applying the use of the buyer's copy in accordance with the directive on software and rendering the seller's copy useless. Tom Kabinet, on the other hand, did not see this approach suitable for e-books as the digital copies do not get worn out.

Three types of transactions should be differentiated. A one-time payment for continuous use of the downloaded copy is essentially a sale. A subscription or streaming service gives only limited access and is more like leasing or a service; no jurisdiction considers it exhausting anything, and it shouldn't either. Cloud software does not give the user any copy at all. Tokens linked to digital works add confusion, since transferring a token does not in itself transfer the copyright in, or even a copy of, the associated work; what the buyer acquires depends on the attached licence terms. Presently, Indian legislation doesn't respond to any of the questions above directly. Engineering Analysis is in favor of exhaustion in a situation where a copy of software has been sold. However, it has dealt only with tax issues and cannot be expanded to cover the right to resell digital products in general. Licensing proponents argue about the damaging nature of resale markets that sell perfect copies, which makes them very hard to control. The case for ownership is that consumers who pay a purchase price often receive less than they think, and that resale, lending and preservation depend on first sale.[106] A narrow rule for software sold outright, with deletion as a condition and with access-based models excluded, takes both concerns seriously.

[106] *See* Perzanowski & Schultz, *supra* note 15; Rosati, *supra* note 16, at 591.

Vi. Reform Proposals For India

The proposals below follow the analysis. Each is assessed for legal certainty, administrative feasibility, consistency with India's international obligations, and its effects on consumers, competition and innovation. Proposed statutory wording is a legislative recommendation, not existing law.

A. Consent and Section 107A(b)

The ambiguity in Section 107A(b) helps nobody. Importers cannot be sure the defence applies, and patentees cannot predict when imports will be stopped. A court could adopt the reading proposed in Part V, but legislation would be clearer and would separate two distinct policies: exhaustion based on consent, and access to goods made under governmental authorisation. The following text is proposed:

> **Proposed Section 107A(b)–(c) and Explanation (legislative recommendation; not existing law)**
>
> (b) the importation, by any person, of a patented product, or of a product obtained directly by a patented process, which has been put on the market in India or elsewhere-
>
> (i) by the patentee; or
>
> (ii) with the consent of the patentee, including by a licensee acting within the terms of its licence or by an enterprise which controls, is controlled by or is under common control with the patentee;
>
> (c) the importation of a patented product produced and sold outside India under a compulsory licence or other governmental authorisation granted in a manner consistent with Articles 31 and 31bis of the TRIPS Agreement, where the importation has been permitted under Chapter XVI on payment of such remuneration to the patentee as may be determined,
>
> shall not be considered as an infringement of patent rights.
>
> Explanation.-A contractual restriction on resale, export or import attached to a sale referred to in clause (b) does not make the importation of the product an infringement, but this Explanation does not affect any remedy in contract between the parties to that restriction.

Clause (b) is a consent-based rule of international exhaustion and sits squarely within Article 6 of TRIPS, as preserved by Article 13.11 of the India–United Kingdom agreement. The Explanation has taken the position of Lexmark, which states that restrictions on resale function in contract law and not in patent law and at the same time maintains the General Talking Pictures limit for licensees who are outside their licenses. Clause (c) keeps public-health imports available but grounds them in compulsory-licensing provisions and remuneration, so that their defence does not depend on the contested view that Article 6 covers non-consensual first sales. The proposal narrows the widest reading of the present text, which some value for

its breadth; but breadth that no court has confirmed protects nobody in practice, and a clear rule is more likely to be used. Contractual export bans that go beyond protecting legitimate interests would remain open to review under Section 3(4) of the Competition Act, 2002.[107]

Two further points belong to this proposal. The Act should also state the domestic rule that a patented article sold in India by or with the patentee's consent may be used and resold, with repair permitted but reconstruction not, so that domestic exhaustion no longer depends on an implied licence that contract can exclude. And clause (c) should be read with Section 92A, which already permits compulsory licences for export to countries with insufficient manufacturing capacity, so that India's import and export routes for compulsorily licensed medicines follow the same TRIPS logic.[108]

B. Section 30: Exhaustion, Legitimate Reasons and Disclosure

International trademark exhaustion has been applied consistently in the High Court since 2012, but it rests on interlocutory reasoning and an undecided appeal. A short amendment to Section 30(3)(b), referring to goods put on the market "in India or elsewhere," would settle the point. The Supreme Court could achieve the same result by deciding the appeal. The harder problem is Section 30(4). The following replacement is proposed:

> **Proposed Section 30(4)–(6) (legislative recommendation; not existing law)**
>
> (4) Sub-section (3) shall not apply where the registered proprietor establishes that there exist legitimate reasons to oppose further dealings in the goods, which shall be limited to cases where-
>
> (a) the condition of the goods has been changed or impaired after they were put on the market, in a manner that adversely affects their quality, safety or performance or is liable to harm the reputation of the trademark;
>
> (b) the goods differ materially from goods put on the market in India by or with the consent of the proprietor, in characteristics likely to be relevant to a purchaser's decision, and the difference is not disclosed in accordance with sub-section (5);
>
> (c) the goods have been repackaged or relabelled, unless the repackaging is necessary for the lawful marketing of the goods in India, does not affect their original condition, identifies the person who carried it out and the manufacturer, is not presented in a manner

[107] Competition Act, 2002, § 3(4) (India).
[108] Patents Act, 1970, § 92A (India).

liable to damage the reputation of the trademark, and the proprietor was given prior notice; or

(d) a batch number, code or other marking applied for the purposes of traceability, safety or recall has been removed or obscured.

(5) A difference in warranty, after-sales service, accessories, instructions or labelling shall not by itself constitute a legitimate reason where the goods, at the point of sale and in any advertisement or online listing, carry a clear and prominent statement that they are imported or, as the case may be, used or refurbished, and that the proprietor's warranty and service in India do not apply.

(6) For the purposes of sub-section (3), goods are put on the market with the consent of the proprietor if they are put on the market by a licensee acting within the terms of its licence or by an enterprise which controls, is controlled by or is under common control with the proprietor, but not if they are put on the market by an independent proprietor of the same or a similar mark in another country.

Explanation.-A difference in price between markets, or a contractual restriction on the territory of resale, is not by itself a legitimate reason.

Several features deserve comment. The draft places the burden on the proprietor, consistently with *HP v. Senetic*, because the proprietor controls the information about where and how goods were first marketed. The requirements of the condition test are limited to adverse variations and customer-specific disadvantages, following the 2026 Division Bench interpretation instead of the sweeping 2012 point of view. Clause (c) applies the Bristol-Myers Squibb requirements for repackaging, which will be necessary according to Indian labelling law for drugs imported into India. The language of sub-section (5) treats disclosure as the normal remedy in cases of differences in warranty or services, encoding the principle established in Kapil Wadhwa and Seagate. The definition of consent in sub-section (6) addresses the concern behind Jhanwar's proposal of partial international exhaustion without creating a second territorial rule: goods first sold abroad by an independent owner of the foreign mark are not exhausted, while goods sold by an affiliate are. The proposal leaves materiality a matter of judgement, but it gives courts and customs officers a structured test. It falls within the freedom preserved by Article 6 of TRIPS and by Article 13.11 of the India–United Kingdom agreement, which extends to the "conditions" under which exhaustion applies.

C. Medicines

It is important that the Central Drugs Standard Control Organisation can approve parallel-imported drugs that are already recognized in India using a simpler registration process dependent on the initial registration. The responsibility of labeling, storage, drug safety, and retrieval would then remain with the importer. The proposal requires regulatory capacity and coordination with price control, so that any savings reach patients.

D. Copyright and Digital Goods

Three steps are proposed. To begin with, India ought to adopt an accessory-copyright provision modelled on Australia's system, whereby copyright on labels, packaging, manuals, or incidental software cannot impede the importation of goods that have been exhausted under patent or trademark law. Additionally, as suggested by the government's own study, a limited exception to Section 2(m) for printed books might help assess the impact before any more expansive change, though it must be checked against the commitments made by India. Thirdly, the Copyright Act should provide that a single payment for perpetual use of a downloaded computer program exhausts the distribution right in that copy, on condition that the transferor's copy is made unusable, and that subscription, streaming and cloud access do not. Extending the rule to e-books and other works should await evidence. Alongside this, the Central Consumer Protection Authority could require sellers to disclose whether a digital "purchase" conveys a copy or a revocable licence, as California now does, and non-transfer clauses in standard terms for perpetual licences could be reviewed as unfair contracts.[109] Legislation is preferable to judicial extension here, because deletion, verification, and scope need precise rules.

VII. Conclusion

The question at the centre of this article is how far an intellectual property owner may control genuine goods after their first authorised sale, especially when they cross a border. The usual answer is a choice of territorial scope. The comparison suggests that this answer is incomplete. In the United States, the European Union and the EEA, and India, much of the real allocation of control happens at three points: what counts as consent to the first disposal, when the condition of the goods lets the owner object, and whether ownership of a copy passed at all.

[109] Consumer Protection Act, 2019, § 2(46) (India).

Article 6 of TRIPS, read with the Doha Declaration, leaves Members free to choose their territorial rule and leaves these three questions largely to domestic law, subject to non-discrimination, to the other provisions of TRIPS, and to bilateral commitments. The treaty involving India and the United Kingdom reflects that freedom. The USA provides patent and copyright protection but does not make any licensing and contracting obligations so important and interprets trademarking quite separately. The EU keeps the regional border and makes sure the movement within the EEA is effective with the help of evidence and repackaging rules.

The current law in India is based on a prima facie ruling of a Division Bench from 2012, which is yet to be challenged by the Supreme Court, on certain interim orders passed on the refurbishment cases, on a provision of patent law not interpreted by any court so far, and on principles of copyright law that are against it. The suggested amendments preserve the open territorial approach of India and provide answers to three legislative questions: a consent-based Section 107A(b) with an independent trajectory for goods produced under a compulsory license; a structured Section 30(4) putting the burden of proof on the right holder and viewing disclosure as the basic remedy; a regulatory path for parallel imports of medicines and a narrow conditional rule for software sold fully. In this scheme, the right holder gets its remuneration at the first legitimate sale, wherever it takes place, and has the right to objection only provided that it is based on reasons linked to integrity of the goods, content of the message of the mark, and safety of users.