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PARALLEL UNIVERSE

How ending parallel import restrictions cuts costs for British consumers

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Contents

Summary

- Parallel imports are genuine products imported into the United Kingdom without the consent of the intellectual property (IP) rights holder, often taking place when there is a price or availability difference between markets.

- Parallel import restrictions (PIRs) allow producers to control distribution across borders and price-discriminate between different national markets.

- The UK historically allowed parallel imports based on a principle of international exhaustion of rights. This changed following the harmonisation of EU trademark rules in the late 20th century, with the European Court of Justice (ECJ) requiring member states to block imports of genuine goods from outside the EU without rights holder permission.

- Brexit has provided an opportunity to diverge from the EU approach and abolish an effective trade barrier. The previous government consulted on the future parallel import regime in 2021 but did not make a final decision prior to the election. There is therefore an opportunity for the new government to take action.

- Since Brexit, the UK has continued allowing parallel imports from the EU/EEA while restricting imports from the rest of the world. This approach is arbitrary, inconsistent, and may violate World Trade Organization (WTO) obligations.

- Removing PIRs would intensify competition, lower consumer prices, expand consumer choice and improve supply chain flexibility.

- Academic evidence from Australia, New Zealand and within the EU suggests benefits to consumers from allowing parallel imports. The NHS, for example, is estimated to save hundreds of millions of pounds each year as a result of parallel imports from the EU.

- Arguments from rights holders against removing restrictions – such as harming domestic creative industries, reducing investment incentives, impacting product quality, distorting retail competition, and environmental/ethical concerns – are not well supported by evidence. There may be limited exceptional cases, such as low-cost pharmaceuticals for developing countries, warranting continued restriction.

- The UK should revert to its historical stance by allowing parallel imports from all countries with narrow exceptions as needed. This would be consistent with the approach taken by many other nations globally.

Foreword

This paper touches upon two subjects which often divide classical liberals: intellectual property (IP) rights and Brexit. As is often the case, one can find IEA authors on both sides of these divides, as well as on the fences, and in places outside of the pro–anti spectrum.

So, these are stroppy waters for classical liberals to get into – but Martin Howe and Matthew Lesh manage to navigate them safely. They come up with a pragmatic, evidence-based, consumer-friendly solution which should appeal to classical liberals across those divides, and hopefully far beyond.

The topic requires some scene-setting.

Suppose a brewery sells a beer for £2 a bottle in Market X, and for £4 in Market Y. Let us also suppose that this is the result of price discrimination, as opposed to, for example, differences in retail rents, staff costs or sales taxes. The price differential opens arbitrage opportunities. I could buy the beer for £2 in Market X, and resell it at a price between £2 and £4 in Market Y. Should I have a right to do that?

If we think primarily in terms of physical property rights, the answer is, of course, yes. Once the brewery has sold me the beer, it is no longer theirs. It is mine. I can do with it whatever I like, and I do not need the previous owner's consent. I can drink it, store it, give it away as a gift, pour it down the sink – or resell it in a different market (making it a 'parallel import', since it is in parallel to the import channels explicitly authorised by the

brewery). And if this undermines the brewery's sales strategy, that is their problem, not mine.

IP can complicate this picture. Unless we reject the concept altogether (as some classical liberals do; *see* e.g. Stephan N. Kinsella's book *Against Intellectual Property*), we have to accept that there can be residual IP rights retained by the former owner even after the sale. The purchase of a book, for example, does not give me the right to copy and distribute its content. Proponents of a strong pro-IP view would argue that residual rights over the trademark give the brewery the right to limit resales, for example into a geographically separate market.

For the purposes of this paper, though, the authors do not need to resolve the more philosophical question of what exactly should or should not be covered by IP protection. The point is that the UK government clearly does not believe in a version of IP which is so encompassing that it could be used to justify a parallel imports ban. We can tell this from the simple fact that they do allow parallel imports – as long as they are from the European Economic Area (i.e. the EU plus Norway, Iceland and Liechtenstein). It is this inconsistency which Howe and Lesh rightly draw attention to, because it is indefensible regardless of where we stand on the wider issue of IP.

Until 2021 this was not something any UK government could have done much about. The UK was bound by the EU's approach, which is to allow parallel imports within the European Economic Area (EEA) while restricting them from outside. But now that the UK has left the EEA, this is, at best, an anachronism.

Whether it was a wise choice to leave the EEA in the first place is a question which has divided IEA authors as much as it has divided people elsewhere, a disagreement which will no doubt flare up again in due course. But for the purposes of this paper,

it is irrelevant where the reader stands on this matter. For better or worse, the UK is not currently a member of the EEA. As long as that is the case, there is no reason to treat parallel imports from the EEA so differently from parallel imports from elsewhere.

This leaves two consistent potential approaches: extend the parallel import ban to the EEA, or lift it for the rest of the world (with some narrowly defined exceptions). Howe and Lesh make the case for the latter approach, on the basis of empirical evidence for what happens when parallel imports are allowed where they were previously not. They show that this tends to enhance consumer welfare without any significant downsides elsewhere.

It is a classic no-regrets proposal. What is the worst that could happen? It could turn out that the price differences the authors discuss are really caused by other factors, leaving little scope for non-EEA parallel imports in practice. In that case, no harm would have been done: it would simply not have much effect either way. In a more optimistic scenario, though, parallel imports could deliver a much-needed boost to consumers' living standards.

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Introduction

'Parallel imports' are authentic products that are imported into the United Kingdom without the consent of the owner of the IP rights. The WTO (2011) defines the practice as 'When a product made legally (i.e. not pirated) abroad is imported without the permission of the intellectual property right-holder (e.g. the trademark or patent owner).' The name comes from the fact that they are usually imported by other traders 'in parallel' with goods coming through the producer's own 'official' distribution system. Parallel imports normally take place when there is a price or availability difference between two markets, most often in pharmaceutical, beauty, creative, electronics and clothing sectors.

PIRs allow producers to control the distribution of their products across borders, enabling price discrimination through the imposition of higher prices on consumers in certain markets. While ostensibly designed to protect IP rights, these restrictions effectively serve as trade barriers and an indirect tax on British consumers and businesses. Understandably, rights holders, including prominent multinational brands, support maintaining these restrictions to maximise their profits. Nonetheless, revising these regulations would alleviate cost-of-living burdens, enhance supply chain resilience, and expand consumer options.

The UK has opted to continue allowing parallel imports from the EEA[1] since Brexit but also has continued to prevent such

1 The European Economic Area or EEA comprises the EU plus Norway, Iceland and Liechtenstein. The same rules applied to parallel imports into the UK from the latter three as from the EU.

imports from the rest of the world. This approach is arbitrary and inconsistent, as it differentiates between parallel imports from the EU and identical products imported from other locations. The government has the power to resolve this disparity, which originates from the case law of the ECJ, and to revert to the UK's traditional stance of permitting parallel imports from all nations. In 2021 the previous government consulted on altering the approach to parallel imports (Intellectual Property Office 2022) but left office in 2024 with a final policy decision still pending.

UK intellectual property law, EU harmonisation and European Court of Justice rulings

Historically, UK law generally allowed parallel imports, generally applying a legal principle called 'international exhaustion of rights'.[2] British IP law focused almost exclusively on preventing the sale of counterfeit products, rather than on controlling the distribution of genuine goods. The associated case law dates back to the 19th century. In *Betts v Willmott* (1871) the court upheld a retailer's legal right to sell patented bottle capsules in England that were sourced from the patent holder's factory in France. Similarly, in *Revlon v Cripps & Lee* (1980) the Court of Appeal maintained this stance, denying Revlon's attempt to obstruct the import and sale by a parallel trader of genuine beauty products from the US that were priced lower than in the UK market.

The UK's treatment of parallel imports did not immediately change following membership of the European Economic Community (EEC). However, this situation changed following the harmonisation of EU trademarks rules under the Trade Marks Directive (1989) and subsequent judicial interpretation.

2 The World Intellectual Property Organization explains that 'under a system of international exhaustion, goods put on the market by or with the consent of the patent owner anywhere in the world would result in the patent owner's rights being exhausted in the country concerned'. (https://www.wipo.int/edocs/mdocs/patent_policy/en/wipo_ip_bkk_11/wipo_ip_bkk_11_ref_topic14.pdf)

In the first instance, the ECJ interpreted the Treaty of Rome (which has now become the Treaty on the Functioning of the European Union) as removing most legal barriers to parallel importation within the internal market. The ECJ established in the *de Peijper* case (1976)[3] that national authorities cannot prohibit the parallel importation of pharmaceuticals from another member state when they are essentially identical to and from the same source as those already licensed domestically. That case involved state regulatory action, but the same principle was applied in numerous IP cases, notably *Merck v Primecrown*[4] (1996), which held that if an IP rights owner puts a good on sale in one member state, then the rights holder has no ability to prevent its onwards sale into another member state. Additionally, it is permissible for parallel importers to modify or relabel packaging to meet language requirements of the importing country, provided such changes do not compromise the product's integrity. For pharmaceuticals, this often involves over-stickering or replacing the outer packaging and inserting a leaflet in the appropriate language while retaining the original internal packaging such as blister packs.

The ECJ, however, interpreted the EU's Trade Marks Directive (1989) to require member states to block the importation of genuine goods from outside the internal market unless the IP rights owner provides explicit permission. In *Levi Strauss & Co. v Tesco Stores Ltd* (2001) the ECJ determined that the UK retailer Tesco was not authorised to import and sell authentic Levi jeans sourced from North America. The ECJ concluded in this case Levi's consent to the goods being resold into the EU must be 'unequivocally demonstrated', rather than simply implied, further discouraging parallel importation. In a parallel

3 The *de Peijper* case related to regulatory restrictions imposed by national drug regulators.

4 Joined cases C-267/95 and C-268/95.

decision, *R v MAFF ex parte British Agrochemicals Association,* the court applied the same principle in a regulatory context by preventing the UK's Ministry of Agriculture, Fisheries and Food from allowing imports of agrochemical products from non-EU countries that were not licensed for sale under EU rules, despite being identical to products licensed within the EU. A failure to comply with these restrictions on parallel imports can attract severe penalties. In *R v C and Ors* (2017) the UK Supreme Court found that parallel importation could not only give rise to civil penalties but also create criminal liability for trade mark infringement, on a par with counterfeiting. These decisions gave rights owners the power to prevent the importation into the EU of their own genuine goods put on the market elsewhere in the world, so giving them effective sole control of entry of their goods into distribution channels within the EU.

An inter-related issue that is likely to grow in importance is the treatment of the parallel imports of *services.* The aforementioned rules about parallel imports only explicitly apply to goods, and the treatment of services from outside the EU is not entirely clear under existing law. The Joined Cases C-403 & 429/08 *Football Association Premier League v QC Leisure/Murphy v Media Protection Services* [2012] FSR 1 considered the importation of a satellite decoder card that allowed UK viewers to access broadcasts from other member states. The ECJ found that the case fell within rules about services, as the cards were simply a means of accessing a service, and concluded that Premier League could not prevent cross-border reception of signals by consumers in other member states. It is likely, though not entirely certain, that this would also mean blocking parallel service imports from outside of the EU.

Britain's exit from the European Union and parallel imports

The allowance of parallel imports from the EU/EEA and restriction on parallel imports from other countries has been retained following Britain's exit from the EU.[5] The government opted to preserve the free movement of goods from the EEA area *into* the UK and amended several of the IP statutes to change references from EEA to 'the UK-EEA area'. This is a unilateral rather than a mutual arrangement, meaning that parallel imports cannot move from the UK into the EEA (Intellectual Property Office 2021).

The current discrepancy is plainly illogical: there is no objective justification for post-Brexit UK continuing to treat parallel imports from the EU/EEA differently to other countries. It may also be unsustainable under the UK's WTO obligations. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) allows WTO members to adopt policies in relation to parallel imports (Article 6, paragraph 5(d)). But these are subject to Most Favoured Nation (Article 4) and national treatment provisions (Article 3), which require

5 The European Union (Withdrawal) Act 2018 and regulations, The Intellectual Property (Exhaustion of Rights) (EU Exit) Regulations 2019, SI 2019 No 265, made under section 8, maintained the status quo between 2020 and 2023. The Intellectual Property (Exhaustion of Rights) (Amendment) Regulations 2023, under the Retained EU Law (Revocation and Reform) Act 2023, once again maintained the existing regime from 1 January 2024 while a final decision on parallel imports is pending.

any concessions or privileges granted to one nation to be given to all other WTO nations. These provisions likely prohibit the discrimination between parallel imports from different countries in the absence of objective justifying factors which no longer exist following the UK's exit from the EU.

The government consulted in 2021 on the future direction of PIRs and has published a summary of responses but has not yet made a final decision on the future regime (Intellectual Property Office 2022).[6] The UK's Trade and Cooperation Agreement (TCA) with the EU explicitly allows both parties to determine their policies in relation to parallel imports. The government's consultation considered options including maintaining the status quo, moving to a 'national exhaustion' regime meaning blocking parallel imports from all countries, moving to an international exhaustion regime meaning allowing imports from all countries, or introducing a mixed regime that varied by product.

Adopting a national exhaustion regime, preventing parallel imports from all countries, EEA and non-EEA, would indeed be one way to resolve the current inconsistency in approach. However, this would have severe negative implications, allowing IP rights holders to segment the UK market from all other markets and increase prices beyond even EU levels. This would be damaging not only to consumers but also to government and the NHS, which benefits from lower drug prices enabled by parallel importation from the EU/EEA. Parallel imports provide for almost 9% of the medicines dispensed in British pharmacies, at a value of around £750 million (Ernest and Aguiar 2020). This is thought to save hundreds of millions every year directly and

6 The government stated in the Explanatory memorandum associated with the introduction of the Intellectual Property (Exhaustion of Rights) (Amendment) Regulations 2023 in October 2023 that no final decision has been made.

through a clawback mechanism from pharmacists.[7] It would also be inconsistent with the aforementioned historical principles of UK IP legislation, which were designed to prevent counterfeit or infringing goods rather than to limit the trade of legitimately licensed merchandise. The benefits of an alternative approach, namely removing PIRs from all countries, is discussed in the next section.

7 The UK government receives a direct clawback, valued at around 10%, because UK pharmacies and wholesalers are able to partake in parallel importing at a discounted rate compared to the negotiated prices with the pharmaceutical industry. For further discussion, see West and Mahon (2003) and BAEPD (2018).

The benefits of removing parallel import restrictions

The economic implications of parallel imports restrictions are relatively straightforward. They give an import monopoly to the domestic distributor, limiting competition and enabling producers to charge higher prices and in turn make larger profits. The losers are domestic consumers, who pay more for branded goods that are available cheaper offshore. We can therefore expect several benefits from removing PIRs.

Lower consumer prices, more choice and supply chain flexibility

Parallel imports would intensify competition in the UK market, lowering prices for consumers. This would apply even if relatively few retailers or distributors actually partake in parallel importing, as the potential for these goods to enter the market could force rights holders to lower their domestic prices closer to the levels they charge in other markets. It also helps consumers indirectly by increasing broader competitive pressures and thus lowering prices for other products in the same market. This benefit is most likely to apply to tradable products, such as books, cosmetics, fashion, and information technology equipment.

There are many examples of British consumers paying more for popular branded consumer goods compared with counterparts in other countries, such as the US (see Table 1).

The price difference will also relate to other differences between the markets, including taxation, such as VAT and corporate taxes; regulatory burdens; land, labour and energy costs; and supply chain differences. Conversely, the US market has higher household incomes, which, all else being equal, would be expected to result in higher consumer prices. Prices can also vary as a result of competitive pressures and market structure. Nevertheless, it is unlikely that these factors alone entirely explain the large differentials that exist between the US and the UK. This provides some initial evidence of potential benefits to British consumers of abolishing PIRs.[8]

Table 1. *Examples of price differences between the United Kingdom and the United States*

Product	UK price	US price	Difference
Levi's Men's 501 Original Fit Jeans Stonewash 30/30	£69.99	£38.54 ($47)	82%
Chanel No. 5 100ml	£109.86	£94.25 ($114.95)	17%
The Handmaid's Tale	£8.79	£7.33 ($8.95)	20%
Apple iPhone 16 Pro (256 GB)	£999.00	£819.18 ($999)	22%
J.R.R. Tolkien 4-Book Boxed Set: The Hobbit and The Lord of the Rings Mass Market Paperback	£26.12	£22.08 ($26.93)	18%

8 This price comparison methodology has also been used in previous analysis of the impact of parallel imports. For example, Australia's Productivity Commission (2009) used the finding that Australians paid 35% more for books compared with the US to help demonstrate the cost of PIRs. Price comparisons are not an attempt to quantify the level of price reductions that could follow the removal of restrictions, which would also depend on various factors such as wholesale discounts or shipping costs.

Product	UK price	US price	Difference
Potensic ATOM GPS Drone with 4K Camera	£359.99	£163.99 ($199.99)	120%
Logitech M720 Triathlon Multi-Device Wireless Mouse	£48.94	£28.61 ($34.90)	71%
Adidas Excel 6 Backpack	£51.84	£40.18 ($49.01)	29%
Logitech for Creators Blue Yeti USB Microphone	£99.99	£86.91 ($105.99)	15%
Dyson V11 Absolute Cordless Vacuum Cleaner	£492.00	£401.75 ($489.95)	22%
Command Small Picture Hanging Strips 18 pairs	£15.99	£8.24 ($10.06)	94%
Huggies Size 3 Diapers, Little Movers Baby Diapers, Size 3 (16-28 lbs), 25 Count	£30.07	£8.15 ($9.94)	269%
Band-Aid Brand Flexible Fabric Adhesive Bandages for Wound Care and First Aid, All One Size, 100 Count	£15.00	£6.95 ($8.48)	116%
iHealth Digital Thermometer PT2L	£19.00	£8.70 ($10.62)	118%
Lenovo IdeaPad 3 Chromebook 14 Inch Full HD Laptop (MediaTek MT8183, Integrated ARM Mali-G72 MP3 GPU, 4GB RAM, 64GB SSD, ChromeOS) - Abyss Blue	£219.99	£179.58 ($219)	23%

Source: Amazon US, Amazon UK, January 2024 (Exchange rate $1 = £0.82)

In addition to lower prices, allowing parallel imports could result in more consumer choice, as it would enable the imports of goods that might not otherwise become available in the UK market. A greater variety of products on the UK market are a significant and undermeasured benefit of international trade (Feenstra 1994). Parallel imports could also help improve supply chain flexibility, helping alleviate shortages by providing distributors and retailers with more sources to access goods.

The government's consultation on exhaustion of IP rights regime (Intellectual Property Office 2022) received feedback that moving to a system of allowing parallel imports from all countries would provide greater choice of goods and availability of supply, as well as boosting competition, which reduces prices for consumers. The consultation notes one example, from the pharmaceutical industry during the Covid-19 pandemic, of parallel imports (from the EU) used to fulfil hospital demand for a specific drug during a supply shortage. An earlier study found that the NHS received a direct saving of €986.2 million between 2004 and 2009 as a result of parallel imports (Enemark and Pedersen 2011), along with a clawback from retail pharmacies valued at £100 million per annum, indirect savings as a result of stronger underlying price competition and filling supply shortages (BAEPD 2018). These benefits would likely increase if the UK allowed parallel imports from all countries.[9]

9 In the case of pharmaceuticals, in addition to stopping rights owners enforcing IP rights against parallel importers, it would be necessary to extend the current regulatory system under which the MHRA grants parallel import licences for drugs imported from the EEA to drugs from other countries. The system involves the MHRA checking that the imported drugs are clinically equivalent to the corresponding drugs sold in the UK, and there is no reason why this system cannot be extended to cover drugs from outside the EEA.

Previous studies on the impact of removing parallel import restrictions

The academic evidence paints a positive picture for consumers from allowing parallel imports.

Australia and New Zealand

Australia and New Zealand removed PIRs on sound and video recordings (CDs and DVDs) and computer software in the 1990s, while New Zealand went further by also abolishing the restrictions on books. A New Zealand government-commissioned study found that the abolition resulted in lower prices and more availability (Moore, Volkerling and van der Scheer 2007). Similarly, the Australian Competition and Consumer Commission (ACCC) (2009) found a substantial narrowing between Australian and overseas prices for these products. Specifically, ACCC surveys of CD prices indicated that prices declined by 13% in the years following the removal of restrictions. Similarly, Chen and Png (2004) looked at the removal of PIRs on CDs in the 1990s across Australia, Canada, Hong Kong, Israel, Malaysia, the Netherlands, New Zealand, Norway, Singapore, and the US, and found an associated 7.2% to 7.9% reduction in the retail price. Burgess and Evans (2005) found that New Zealand's decision to allow the parallel importation of DVDs resulted in movie studios bringing forward the release date of films into New Zealand cinemas. By contrast, Australia's decision to maintain PIRs on books led to a significant price premium, increasing the average book price by approximately 10% for the average Australian book (Deloitte Access Economics 2012). While these specific products may no longer be entirely relevant – due to the advent of digital streaming and downloading of music, movies and software – the Australian and New Zealand experience does

provide a powerful case study of how the removal of parallel imports can reduce consumer prices. The issue of differential pricing of downloaded or streamed digital 'goods', where price differentials to consumers are often maintained through IP rights enforcement combined with geo-blocking or other measures which restrict cross-border supply, merits attention, a point we briefly made in the introduction in relation to the cross-border supply of services.

European Union

There have been several investigations into the impact of allowing parallel imports between EU countries focused on the impact on pharmaceuticals:

- Ganslandt and Maskus (2004) used pharmaceutical price data between 1994 and 1999 to investigate the impact of Sweden joining the EU in 1995, allowing parallel imports from other member states. They find that the prices of Swedish drugs facing competition from parallel imports reduced by between 12% and 19%.

- Kyle (2011) finds a smaller effect, a 3% reduction in prices as a result of European parallel imports, as firms partake in strategic behaviour to continue differentiating products between markets.

- Duso, Herr and Suppliet (2014) investigated the impact of parallel imports on the prices of anti-diabetic drugs in Germany between 2004 and 2010, finding that parallel imports reduced the prices for patented drugs by 11%. They find that this increases the consumer surplus while reducing profits for manufacturers.

- Méndez (2018) investigates the cost of statins in Denmark and finds that eliminating parallel imports would result in a lower consumer surplus (by DKK 111.41 million or around $18.2 million), higher government expenditure and increased profits for producers.

- Granlund and Koksal-Ayhan (2015), investigating Swedish drug prices between 2001 and 2004, find that competition from parallel imports reduces prices by between 15% and 17%.

- Granlund and Koksal-Ayhan (2016) looked at how EU enlargement in 2004, thus increasing competition from parallel imports, affected Swedish drug prices between 2003 and 2007 and find that drugs which faced competition from parallel imports had an average reduction in price of between 19% and 22%.

- Granlund (2022) finds – from analysis of monthly data including 1,586 Swedish on-patent pharmaceuticals between 2002 and 2007 – that a product facing competition from at least one parallel trader selling an equivalent product results in a 9% price reduction in the long run compared with a product that faces no competition from parallel imports.

- Some studies find no significant effect on pharmaceutical prices. Kanavos, Costa-Font and Gollier (2005) find that pharmaceutical parallel trade in the EU largely benefits wholesalers in the supply chain and not health insurers or consumers, though this likely reflects the role of regulation in controlling pharmaceutical prices in many nations. Kanavos and Vandoros (2010) also find a limited impact on the basis that prices are largely impacted by domestic regulation and wholesale market competition.

Responding to the arguments in favour of parallel import restrictions

There were several arguments to oppose allowing parallel imports from all countries in the government's consultation (Intellectual Property Office 2022). The majority of the responses to the consultation came from the pharmaceutical and creative sectors. These are self-interested rights holders and thus their arguments should be treated with some caution and assessed carefully based on the evidence.

Impact on the creative industry

Rights holders claimed that it could lead to 'domestic revenue losses for many businesses', with a particular negative impact on the creative industry. This is an effective admission that rights holders use PIRs to segment markets, reduce competition and charge consumers higher prices. Policymakers' foremost concern should be with driving down prices for consumers, rather than producer revenues, and therefore should not be concerned about lower profit margins. A further point is that PIRs benefit companies selling goods into the UK market irrespective of the nationality of the company or of whether or not it has any creative or other activities here, so much of the benefit of the restrictions goes to foreign-based rather than UK-based companies, dissipating the majority of the benefits outside

the UK. By contrast, 100% of the cost of the restrictions is borne by consumers in the UK.

Rights holders also claim that the price differentials and higher profits are necessary to stimulate innovative and creative endeavours. But there is a lack of evidence to support this proposition. A Deloitte report commissioned by the New Zealand Ministry of Economic Development concluded that:

> …the available evidence suggests that removing parallel import restrictions tends to reduce consumer prices, with few negative consequences for domestic creative effort. This suggests that the benefits of removing parallel import restrictions tend to outweigh the costs. (Deloitte Access Economics 2012: 46)

The authors investigate and find no detrimental impact on the music industry, book publishing or computer software from allowing parallel imports. Specifically, they find that book titles published by local authors remained steady, and the share of authors in overall employment increased, following the changes. A separate study suggested that New Zealand's book publishing industry invested in technology and focused on export opportunities, with book exports nearly doubling after PIRs were liberalised (Wilson 2009). This study also finds the number of publishers grew and no negative impact on smaller, New Zealand-owned publishers.

The Deloitte study also highlights the lack of negative impact on Australia's music industry following the decision to abolish PIRs on CDs in 1998: Australian artists in the top 50 singles chart in Australia, music industry employment and royalties to artists increased over the subsequent years (Deloitte Access Economics 2012: 19–21). Conversely, a temporary New Zealand ban on the parallel import of DVDs was found to have had no positive impact on the local film industry.

Several factors might explain the lack of noticeable effect of eliminating PIRs on the creative industry. Firstly, commissioning decisions within this sector are likely to be primarily influenced by market dynamics unrelated to parallel importing. That is, even if parallel imports exert a slight negative influence, their overall impact is relatively insignificant. Secondly, the biggest beneficiaries of restrictions are multinational groups, based outside of any single country, rather than the domestic creative industry. In Australia, a Productivity Commission (2009) report on restrictions on the parallel importation of books found that much of the additional revenue goes to overseas authors and publishers, at a rate of 1.5 times that retained by local copyright holders. 'In effect, PIRs impose an implicit tax on Australian consumers which is used largely to subsidise foreign copyright holders,' the report concluded. Therefore, even if domestic creative protection is a worthy policy goal, restricting parallel imports would be an inefficient way of channelling support to UK-based businesses, as much of the benefit does not go to the UK and it comes with a large consumer cost, 100% of which is borne by consumers in the UK.[10]

Finally, Ahmadi and Yang (2000) propose an alternative explanation for the seemingly negligible negative impact on domestic industries from parallel imports. They suggest that, counterintuitively, parallel imports might actually bolster profits by enabling market segmentation: most consumers continue to buy the higher-priced, authorised versions of a product, while opening up a new opportunity for other more price-sensitive consumers to purchase the cheaper parallel imports. Consequently, sales to these price-sensitive consumers open up

10 Papadopoulos (2000) similarly found that for a net-importer of intellectual property the removal of PIRs is beneficial to domestic consumers mostly at the expense of largely foreign copyright owners.

an additional revenue stream for producers that enhances their overall global sales and profits.

Investment and innovation incentives

Rights holders raised concerns in the consultation that a reduction in domestic revenue could stifle investment and innovation. This is the most common argument and yet, it seems, there is a severe lack of empirical evidence to support the proposition that PIRs are necessary to promote investment and innovation. In the New Zealand case, the abolition of parallel imports was found to have been followed by an increase in the value of fixed assets in the book publishing industry such as printing (Wilson 2009: 15–16). It is possible, according to Matteucci and Reverberi (2011) and Hwang, Peng and Shih (2014), that depending on the market structure, parallel trade could actually increase sales, profits and associated research and development incentives. Or, alternatively, it could also have a relatively limited impact, as even if profits are marginally higher, there is no guarantee that this will be spent on research and development. At face value, many industries, such as fashion or cosmetics, have proportionally low research and development costs that are more than capable of being covered by global sales.

It is suggested in the consultation that this could particularly affect investment into biotech SMEs in the United Kingdom. This would rely on an unlikely assumption that these companies' investment attractiveness is dependent on the ability to charge higher prices in the UK alone, rather than from producing a product that can be sold profitably worldwide. The UK's pharmaceutical market accounts for just 2.5% of the global total, paling in comparison with the nearly half taken up by the US (Pharma News Intelligence 2023). It is therefore unlikely

that any changes in the profitability of the UK market, which is already limited by the NHS's collective buying process, will have a meaningful impact on investment. In any case, if the government's goal is to boost investment and innovation, this needs to be balanced against the aforementioned cost to consumers or, in the case of the NHS, to taxpayers. There are likely to be far less costly policies, such as tax incentives and regulatory reform, to make the UK more attractive for investment.

Product quality and differences

Rights holders said that parallel imports could hurt their brand recognition and reputation by giving consumers access to products 'of inferior quality, unknown provenance, or with differences in formulations and/or specifications' and that this could 'cause consumer confusion and/or dissatisfaction' (Intellectual Property Office 2022). One example provided is American editions of English language books with different spellings.

However, parallel imports are *genuine products* and often identical from other markets and therefore generally of the same or indistinguishable quality. It is often only possible to tell the difference and enforce PIRs by identifying batch or serial numbers.[11] In cases where there is international variability in

11 This is widespread practice in the beauty products and cosmetics sectors, where multinationals maintain databases of batch or serial numbers which allow them to identify the country where the multinational first put a particular product on the market. Since only the producer has access to this information and it is not possible to tell from the product, because there are no detectable differences between the products sold on different markets, producers can use this information to their advantage either by taking legal action against traders, including those who may be unaware that they are reselling parallel imported goods, or by throttling supplies to the source of the unofficially re-sold goods.

products, if a product follows all the usual legal regulatory standards (eg safety standards, clear labelling), then it should ultimately be a matter for retailers and consumers to decide whether they are satisfied (or not). Retailers would rapidly cease selling the parallel imported goods if consumers found products to be too different or dissatisfactory. Alternatively, if a producer is embarrassed by the quality of their product, they should perhaps cease selling it anywhere in the world rather than allowing it in some jurisdictions and not others, or at least label it differently so that its different kind or quality is apparent from the packaging.

Retail market structure

Rights holders claimed that it could distort retail competition in favour of larger retailers, including online retailers. This is scarcely believable. There is no reason that smaller retailers would not also be able to benefit from parallel imports, either directly through partaking in the practice or from lower prices provided by distributors. In any case, if larger retailers are able to provide a cheaper product to consumers through economies of scale, this is not, in itself, a major concern. Governments should be agnostic about the structure of the retail sector as long as there is ongoing competition.

Environment and ethics

Concerns were raised about the environmental and ethical impact due to longer transportation routes and diverting supplies. The concerns about the environmental impact of global trade are likely overstated, with the vast majority of emissions coming from the production and domestic transport of goods,

rather than global shipping.[12] Therefore, an increase in imported goods (if that were to happen, as opposed to domestic prices being reduced) would have a very marginal environmental impact. There may be some more genuine and limited concerns about diverting supplies of pharmaceutical goods from economically less developed countries, which are discussed below.

British soft power

Finally, rights holders claimed that it could diminish the UK's soft power, particularly for the creative industry, leading to lower UK content sales overseas. This argument is not particularly believable – it is difficult to imagine that allowing parallel imports would meaningfully change demand for UK culture overseas, which has over time proven extremely popular. In any case, the aforementioned evidence suggests that creative production has not been impacted by changes to parallel import rules in other jurisdictions.

Exceptional cases and a mixed regime

There may be exceptional circumstances that warrant limits on parallel imports. One such case often put forward is in relation to pharmaceutical companies offering patented medications at substantial discounts to consumers in developing nations. Bale (1998) highlights the risk that if these discounted drugs

12 This point is most clearly established for food, where the vast majority of emissions come from production rather than transport. Ritchie, H. 'You want to reduce the carbon footprint of your food? Focus on what you eat, not whether your food is local', *Our World in Data*, 2020. Accessed: 29 January 2024 (https://ourworldindata.org/food-choice-vs-eating-local).

were to be imported back into developed countries, it could potentially diminish the supply in developing countries and deter pharmaceutical companies from offering such discounts or investing in research and development. It takes, on average, around 10 to 15 years and US$1 billion to US$2 billion to develop a new drug, and relatively few receive final approval (Sun et al. 2022). Given the high costs associated with drug development, it is not entirely unreasonable to expect that wealthier nations bear a greater share of the expense. This would be a conscious decision that, in these special cases, UK consumers should pay a higher share of the cost of developing drugs than patients in less developed countries. The same principle could potentially be applied to educational materials provided to developing countries at a lower cost. The UK therefore may wish to maintain a specific restriction on the importation of some products, practically enabled by distinctly marked products to prevent their re-entry into more affluent markets.

An earlier House of Commons' (1999) Trade and Industry Select Committee report published similarly concluded that the UK should generally allow parallel imports *except* in special circumstances. The report, written before ECJ case law firmly established restrictions on parallel imports from outside the EEA, concluded:

> In our opinion, in the areas of clothing and shoes, perfumes and toiletries, and motor vehicles, the potential consumer benefits of international exhaustion of trade mark rights outweigh the dis-benefits. In some sectors the consumer benefits may, however, be outweighed by the problems that international exhaustion would bring with it; particularly in the pharmaceutical and music industries. Whilst a seamless approach to international exhaustion would be preferable, we do not see the justification for retaining EEA-wide exhaustion for trade mark rights for all sectors in order to protect one or two sectors. We recommend that the Government and the European

> Commission work towards adoption of a broad principle of international exhaustion of trade mark rights, allowing grey imports of goods but affording exceptional protection to those sectors where such a principle could be shown to have severe detrimental effects. Such a flexible approach would not only lead to cheaper goods for consumers, but would address the different needs of different sectors (paragraph 90 (u)).
>
> We recommend that, in tandem with encouraging all concerned to move towards a regime of international exhaustion with reserved sectors, the Government and Commission design procedures for those sectors where international exhaustion is to apply for labelling of grey goods which are materially different to those of the same brand on the domestic market (paragraph 91 (v)).[13]

These matters should be carefully assessed and kept under review. Abbott (2007) highlights the significant uncertainty in relation to the pharmaceutical industry. The industry's assertion that a revenue reduction would lead to less research and development has never been empirically substantiated. In any case, a general presumption in favour of allowing parallel imports would not preclude the UK adopting a case-by-case approach on special cases, such as low-cost pharmaceuticals sold in developing market economies.

13 https://publications.parliament.uk/pa/cm199899/cmselect/cmtrdind/380/38002.htm

Discussion and conclusion

IP law incentivises innovative and creative endeavours by granting creators exclusive rights to their works, ensuring they can benefit financially. This right has always necessarily been balanced against the need to ensure competition and consumer access, and hence has tended to be time-limited.[14] If these rights are overextended, beyond what is necessary to encourage innovation and creativity, then consumers lose out.

In a major report to the International Law Association, Abbott (1998) states that advocates for PIRs are claiming that protecting their IP at the regional and national level exceeds the benefits from open trade. This is, Abbott argues, an entirely unjustified claim. Global trade is well understood, since the days of Adam Smith and David Ricardo, to produce significant benefits for all participants by increasing the productive allocation of resources, lowering prices for consumers and encouraging innovation. PIRs undermine this process by allowing companies to partake in international price discrimination, charging more to consumers in some jurisdictions compared with others.

For restrictions to be justified, there would have to be substantial benefits to the domestic creative sector. This claim

14 The major exception is trade mark rights which are not time limited. Trade mark rights have the slightly different purpose of allowing brand owners who build up a reputation for their goods to prevent other traders from diverting the benefit of the goodwill and reputation the brand owner has built up by selling non-genuine goods under the same or similar trademarks. Using trade mark rights to prevent the resale of *genuine* goods into different markets in order to enable the trade mark owner to maintain price differentials, whether across international borders or not, therefore goes beyond the purpose for which trade mark rights are conferred.

is not supported by the evidence, which has shown no negative impacts in cases where parallel imports are allowed. Therefore, the presumption, except in special cases, should be in favour of allowing such trade. Allowing parallel imports from outside the UK/EEA area would not only lower prices for consumers, but could also give consumers greater variety and deliver stronger supply chains. The government and the NHS would likely also be a direct beneficiary as a result of further parallel importation of medicines (from other developed economies, even if they are not allowed from developing economies).

Traditionally under UK law, rights holders have had the ability to control the manufacture but not the distribution of their product. This balance was undone following the development of EU trade mark law. The status quo – allowing parallel imports from the European Union/EEA but rejecting them from elsewhere in the world – is inconsistent, illogical and may be unsustainable under the UK's WTO commitments. There is no justification for treating EU imports differently from the rest of the world. In theory, the UK could address the inconsistency by preventing parallel imports from anywhere in the world. But this would be disastrous for British consumers, as it could allow multinationals to charge prices even above EU levels. It would also cement the idea, historically an anathema under UK law, that an intellectual rights owner should be able to prevent the cross-border circulation of genuine licensed goods in order to maintain price differences. A more logical and sensible way to address the inconsistency would be to allow importations from the entire world, perhaps with some exceptions for certain goods.

The removal of parallel imports restrictions would not be unprecedented. There are many countries across the globe that already allow parallel imports (Calboli 2022: 43–54). Significantly, when adopting legislation modelled on the UK's Trade Mark Act 1994, both Singapore and Hong Kong deviated

by substituting the UK Act's concept of EEA exhaustion with that of global exhaustion. The US has allowed parallel imports for copyrighted goods since *Kirtsaeng v John Wiley & Sons, Inc.* in 2012 and for patented goods since *Impression Prods., Inc. v Lexmark Int'l, Inc.* in 2017. Japan has allowed parallel imports since the 1970s (Clifford Chance 2011), South Africa allows parallel imports except when a product has been significantly modified (Mohunlal 2017), and the world's two most populous countries, India and China, allow parallel imports (Calboli 2022: 43). New Zealand has allowed parallel imports since the 1990s except for DVDs for a short period (Deloitte Access Economics 2012), and Australia allows parallel imports except for books and second-hand cars.

The UK following these international examples by abolishing PIRs for all jurisdictions could have substantial benefits for British consumers.

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