

O Sun God, Savitr!
Thou dazzling fount of life-persuasive light!
Sublimest mystery speeding from afar!
Swift became that burst too potent on the sight!
This radiant type of strength and youth!
Glowing eternally!



శ్రీ వేపచేదు విద్యా పీఠము

May the golden-eyed Savitar come hither!
Steering forth he rises from the lap of the dawn!
Praised by singers, my God Savitar!
Stepped forth and never missed his place!
He steps forth the splendor of the sky the wide!
Seeing, far-shining, the shining wanderer!
-Rig Veda. vii. 65

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He alone shines!
All luminaries get illuminated by His Illumination!
The whole Universe is enlightened by His light!
-Kathopanishad

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Issue 157

Dr. Sreenivasarao Vepachedu¹, JD, PhD, LLM

THE DOCTRINE OF PATENT EXHAUSTION **Exhaustion Extinguishes Patent Exclusionary Power Globally**

A patent right, a right enforced by an individual country under the laws of that country, is an exclusionary intellectual property right (IPR) bestowed upon an inventor or joint inventors for inventing new and non-obvious invention that is useful for the public, granted by the government of that country, usually represented by an administrative agency or a branch of the government called “the patent office,” and provides a right to exclude other from making, using, offering for sale, or selling the invention throughout the country in which the patent is granted. That IPR is accepted by a majority of the countries² in this world today along with the United States³.

The right to use, sell, or import an item exists independently of the Patent Law. What a patent grants exclusively to the patentee is a limited right to prevent others from engaging in those practices⁴. Whoever engages in one of these excluded acts, without authority from the patentee, may face liability for patent infringement⁵. However, when a patentee sells an item of the product protected by the patent exclusionary right, the patentee can no longer control that item through the patent laws, i.e., its patent rights have been “exhausted,” in other words the so-called “doctrine of patent exhaustion⁶” applies to extinguish the patent exclusionary right to that particular item sold. For over 160 years, this doctrine has imposed a limit on the patent right and extinguished the exclusionary right⁷, even when a patentee sells an item under an express, otherwise lawful restriction, the patentee does not retain patent rights in that product⁸. The law is well settled that an authorized sale of a patented product places that product beyond the reach of the patent⁹.

The exhaustion rule marks the point where patent rights yield to the common law principle against restraints on alienation. The Patent Act promotes innovation by allowing inventors to secure the financial rewards for their inventions. Once a patentee sells an item, it has secured that reward, and the patent laws provide no basis for restraining the use and enjoyment of the product. Allowing further restrictions would run afoul of the “common law’s refusal to permit restraints on the alienation of chattels¹⁰.” Patent exhaustion reflects the principle that, when an item passes into commerce, it should not be shaded by a legal cloud on title as it moves through the marketplace¹¹.

Exhaustion is a distinct limit on the patent grant, which is triggered by the patentee’s decision to give a patented item up for whatever fee it decides is appropriate. The patentee may not be able to command the same amount for its products abroad as it does in the United States. But the Patent Act does not guarantee a particular price. Instead, the Patent Act just ensures that the patentee receives one reward—of whatever it deems to be satisfactory compensation—for every item that passes outside the scope of its patent monopoly¹².

The exhaustion doctrine is not a presumption about the authority that comes along with a sale. It is a limit on the scope of the patentee’s rights¹³. The Patent Act gives patentees a limited exclusionary power, and the exhaustion doctrine extinguishes that power. A purchaser has the right to use, sell, or import an item because those are the

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rights that come along with ownership, not because it purchased authority to engage in those practices from the patentee¹⁴.

Nevertheless, if the patentee negotiates a contract restricting the purchaser's right to use or resell the item, it may be able to enforce that restriction under the contract law. Many manufacturers or distributors place restrictions on the resale of their goods. Generally, these restrictions will be found legal if there is a "reasonable business objective" and there is no "adverse effect on competition." Some examples of restrictions that are usually upheld are: A requirement that the distributor sell or not sell to certain customers; A requirement that the distributor conduct business only in certain areas; A requirement that the distributor sell only at certain specific locations. These restrictions will usually be a part of the distributorship agreement and will be enforced by cutting off supplies of the manufacturers goods or terminating the distributorship contract.

Since many distributorship contracts may include covenants not to compete which may limit the ability of the distributor to work for a competitor, this can be a significant punishment. Sale for resale¹⁵ includes the sale of goods which will be resold in their original form, in an altered form, or as a part or ingredient of another article. A sale of goods which the seller knows, or has reasonable cause to believe, will be resold after processing or manufacture is a sale for resale¹⁶. The most common restriction that is not enforceable is a restriction on resale price maintenance¹⁷. This restriction is a requirement that the distributor sell the product at a minimum set price level. This requirement prevents resellers from competing too fiercely and driving down profits and reduces the ability of buyers to choose from sellers with independent prices; it is a violation of competition¹⁸ and antitrust laws¹⁹.

Thus, the patentee's decision to make a sale is all that matters for the doctrine of patent exhaustion to apply to extinguish the patent right to exclude. Contractual restrictions and locations have been irrelevant²⁰ to this doctrine for the past 160 years.

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REFERENCES AND NOTES²¹

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² The Patent Cooperation Treaty (PCT) now has 152 Contracting States:

http://www.wipo.int/pct/en/pct_contracting_states.html; The World Intellectual Property Organization (WIPO) is the global forum for intellectual property services, policy, information and cooperation. WIPO currently has 189 member states.

<http://www.wipo.int/members/en/>; The Paris Convention, adopted in 1883, applies to industrial property in the widest sense, including patents, trademarks, industrial designs, utility models, service marks, trade names, geographical indications and the repression of unfair competition. The Paris Convention has 177 contracting parties.

http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=2

³ 35 USC §154(a)

(§ 154. Contents and term of patent; provisional rights

<https://www.gpo.gov/fdsys/pkg/USCODE-2011-title35/pdf/USCODE-2011-title35-partII-chap14-sec154.pdf>) and

Infringement of patent 35 USC §271(a) (a) Except as otherwise provided in this title [35 USCS Sects. 1 et seq.], whoever without authority makes, uses or sells any patented invention, within the United States during the term of the patent therefor, infringes the patent. (CHAPTER 28 —INFRINGEMENT OF PATENTS; 271 Infringement of patent.

https://www.uspto.gov/web/offices/pac/mpep/consolidated_laws.pdf).

⁴ *Crown Die & Tool Co. v. Nye Tool & Machine Works*, 261 US 24, 35 (1923)

<https://supreme.justia.com/cases/federal/us/261/24/case.html>

⁵ What is patent infringement? <https://www.uspto.gov/patents-maintaining-patent/patent-litigation/about-patent-infringement>

⁶ “Under the doctrine of patent exhaustion, the authorized sale of a patented article gives the purchaser, or any subsequent owner, a right to use or resell that article.” *Bowman v. Monsanto Co.*, 133 S. Ct. 1761, 1764 (2013).

https://www.supremecourt.gov/opinions/12pdf/11-796_c07d.pdf

⁷ When a patentee sells an item, that product is no longer within the limits of the patent monopoly and instead becomes the private, individual property of the purchaser. *Bloomer v. McQuewan*, 14 How. 539, 549–550.

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⁸ The Supreme Court of the United States (SCOTUS) has long held that, even when a patentee sells an item under an express, otherwise lawful restriction, the patentee does not retain patent rights in that product. *Quanta Computer, Inc. v. LG Electronics, Inc.*, 553 US 617 (2008), a well-settled line of precedent. <https://www.supremecourt.gov/opinions/07pdf/06-937.pdf>

⁹ *Intel Corp. v. ULSI Sys. Tech., Inc.*, 995 F.2d 1566, 1568, 27 USPQ2d 1136, 1138 (Fed. Cir. 1993).

¹⁰ *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 US 519, 538.

As Lord Coke put it in the 17th century, if an owner restricts the resale or use of an item after selling it, that restriction “is void, because . . . it is against Trade and Traffique, and bargaining and contracting between man and man.” 1 E. Coke, *Institutes of the Laws of England* §360, p. 223 (1628). Congress enacted and has repeatedly revised the Patent Act against the backdrop of this hostility toward restraints on alienation, which is reflected in the exhaustion doctrine.

¹¹ *Impression Products, Inc. v. Lexmark Int’l, Inc.* 581 US at 11 (2017) https://www.supremecourt.gov/opinions/16pdf/15-1189_ebfj.pdf

¹² *Id.* at 4-5.

¹³ *United States v. General Elec. Co.*, 272 U. S. 476, 489 (1926) <https://supreme.justia.com/cases/federal/us/272/476/case.html>

¹⁴ *Impression Products, Inc. v. Lexmark Int’l, Inc.* 581 US 3 (2017) https://www.supremecourt.gov/opinions/16pdf/15-1189_ebfj.pdf

¹⁵ 29 CFR 779.332 - Resale of goods in an altered form or as parts or ingredients of other goods or services. <https://www.law.cornell.edu/cfr/text/29/779.336>

¹⁶ Sales of parts with the expectation that they will be incorporated in aircraft and that the aircraft will be sold clearly are sales for resale. *Arnold v. Ben Kanowsky, Inc.*, 361 US 388. <http://caselaw.findlaw.com/us-supreme-court/361/388.html>
The sale of lumber to furniture or box factories, or the sale of textiles to clothing manufacturers, is a sale for resale even though the goods are resold in the form of furniture or clothing. The principle is also illustrated in cases where the article sold becomes a part or an ingredient of another, such as scrap metal in steel, dyes in fabrics, flour in bread and pastries, and salt in food or ice in beverages. *Mitchell v. Douglas Auto Parts Co.*, 11 WH Cases 807, 25 L.C. Par. 68, 119 (N.D. Ill., 1954).

29 CFR Ch. V (7-1-11 Edition) <https://www.gpo.gov/fdsys/pkg/CFR-2011-title29-vol3/pdf/CFR-2011-title29-vol3-sec779-331.pdf>

The fact that goods sold will be resold as a part of a service in which they are used or as a part of a building into which they are incorporated does not negate the character of the sale as one “for resale.” *Mitchell v. Furman Beauty Supply*, 300 F. 2d 16 (CA-3); *Mayol v. Mitchell*, 280 F. 2d 477 (CA-1), cert. denied 364 U.S. 902; *Goldberg v. Kleban Eng. Corp.*, 303 F. 2d 855 (CA-5).

¹⁷ Can Restriction Be Placed on the Resale of Goods? <http://www.legalmatch.com/law-library/article/restrictions-in-the-resale-of-goods-by-distributors.html#sthash.mck8keQb.dpuf>

¹⁸ The law of unfair competition is primarily comprised of torts that cause an economic injury to a business through a deceptive or wrongful business practice. Unfair competition can be broken down into two broad categories. First, the term “unfair competition” is sometimes used to refer only to those torts that are meant to confuse consumers as to the source of the product. The other category, “unfair trade practices”, comprises all other forms of unfair competition.

https://www.law.cornell.edu/wex/unfair_competition

¹⁹ 41 CFR 102-75.270 Antitrust laws must be considered in any case in which there is contemplated a disposal to any private interest of: (a) Real and related personal property that has an estimated fair market value of \$3 million or more; or (b) Patents, processes, techniques, or inventions, irrespective of cost.

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Property means real property consisting of vacant land or buildings, or a portion thereof, that is excess, surplus, or designated as unutilized or underutilized in surveys by the heads of landholding agencies conducted pursuant to 40 USC 524.

<https://www.law.cornell.edu/cfr/text/41/102-75.270>

41 CFR 102-75.165 - Should related personal property be designated real or personal property for disposition purposes? Related personal property may, at the disposal agency's discretion, be designated as personal property for disposal purposes. However, for fine artwork and sculptures, the United States General Services Administration (GSA)'s policy is that artwork specifically created for a Federal building is considered as a fixture of the building. This also applies to sculptures created for a Federal building or a public park. Disposal agencies must follow the policies and guidance for disposal of artwork and sculptures developed by the GSA Office of the Chief Architect, Center for Design Excellence and the Arts, and the Bulletin dated March 26, 1934, entitled "Legal Title to Works Produced under the Public Works of Art Project."

<https://www.law.cornell.edu/cfr/text/41/102-75.165>

The SCOTUS held that the initial sales "relinquish[ed] . . . the patent monopoly with respect to the article[s] sold," so the "stipulation . . . fixing resale prices derive[d] no support from the patent and must stand on the same footing" as restrictions on unpatented goods. *United States v. Univis Lens Co.*, 316 US 241 at 249-251 (1942)

<https://supreme.justia.com/cases/federal/us/316/241/case.html>;

²⁰ As a result, restrictions and location are irrelevant for patent exhaustion; what matters is the patentee's decision to make a sale. Pp. 13-18. 816 F. 3d 721, reversed and remanded. ROBERTS, C. J., delivered the opinion of the Court, in which KENNEDY, THOMAS, BREYER, ALITO, SOTOMAYOR, and KAGAN, JJ., joined. GINSBURG, J., filed an opinion concurring in part and dissenting in part. GORSUCH, J., took no part in the consideration or decision of the case. *Impression Products, Inc. v. Lexmark Int'l, Inc.* 581 US ____ (2017). https://www.supremecourt.gov/opinions/16pdf/15-1189_ebfj.pdf

²¹ In addition to the primary sources cited above, additional references include: New York Times, Washington Post, Mercury News, Bayarea.com, Deccan Chronicle, the Hindu, Hindustan Times, Times of India, AP, Reuters, AFP, The Guardian, Pravda, Spiegel, Connexion, etc.

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"Where the mind is without fear and the head is held high, Where knowledge is free Where the world has not been broken up into fragments, By narrow domestic walls." Rabindranath Tagore (1861-1941), Gitanjali, 1912.

One World One Family

AUM! SWASTI!

Om! Asatoma Sadgamaya, Tamasoma Jyotirgamaya, Mritvorma Amritamgamaya, Om Shantih, Shantih, Shantih! (Aum! Lead the world from wrong path to the right path, from ignorance to knowledge, from mortality to immortality, and peace!)

SWASTI! AUM!

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