

Anti Copying in Design – Written evidence (PBS0048)

Anti Copying in Design welcomes the opportunity to respond to a request from policy analysts reporting to the [House of Lords EU Services Sub-Committee](#), chaired by Baroness Donaghy on the [inquiry](#) into the future UK-EU relationship on professional and business services. The broad theme of which is the future of UK-EU trading arrangements in these services, together with other conditions that should be put in place after the transition period to support UK professional and business services providers trading with the EU.

The Design Council had drawn their attention to ACID's work on design law reform and designers' intellectual property rights, in the context of the future UK-EU relationship. The ACID submission to the enquiry is based on this request. It covers (among other things) our view on the intellectual property provisions contained in the Government's and EU's respective proposals and the implications for UK designers if no new arrangements are in place by the end of the year.

ACID will leave it to other design sector-led organisations Design Council, Design Business Association, Chartered Society of Designers and others who are in a better position to provide sector expertise and insight supported by data to answer and comment on the other specific elements of the enquiry

About Anti Copying in Design (ACID)

Anti Copying in Design (ACID) was founded in 1998 and is the UK's leading design and intellectual property campaigning organisation. It is a forward-thinking membership trade association for designers and manufacturers; a not-for-profit organisation funded by membership fees.

Over the past 20 years ACID has been a consistent voice calling for design law reform and influential in providing evidence to support many of the IP and design reforms which have taken place in the UK before and since the Hargreaves Review. ACID spearheaded a UK campaign for the introduction of criminal sanctions for the intentional infringement of both registered and unregistered designs. This campaign resulted in a partial success with the criminalisation of intentional of a registered design (included in the 2014 IP Act). ACID continues to campaign for intentional infringement of unregistered designs to attract criminal sanctions as the ultimate deterrent against copying.

ACID is also a member of the Alliance for Intellectual Property (IP) which is a UK-based coalition of 20 trade associations and enforcement organisations with an interest in ensuring intellectual property rights receive the protection they need and deserve. Its members include representatives of the audio-visual, music, video games and business software sectors, as well as sports industries, branded manufactured goods, publishers, authors, retailers, and designers. ACID's CEO Dids Macdonald, OBE., is a Vice Chair of the Alliance for Intellectual Property.

Why are Unregistered Design Rights so important to both UK and EU?

What are Unregistered Community Designs? - Unregistered Community Designs are intellectual property rights [governed by an EU Regulation](#). A business, organisation or individual that owns an unregistered Community design (the right holder) currently has that right protected across all EU member states including the UK.

Unregistered Community designs protect a range of design features including two- and three-dimensional aspects such as surface decoration and product shape. The unregistered Community design provides 3 years of protection from the date that the design is first made available to the public ('disclosed') within the EU. The unregistered Community design is entirely separate from the UK's own design right, which only protects product shape and configuration for a maximum period of fifteen years.

2016-now - The majority of UK and EU designers rely on unregistered UK and Community design rights. Since 2016 ACID has provided evidence to urge the UK Government to provide clarity for designers, deal, or no deal, about the potential loss of EU design protection in 27 remaining EU states. Equally important, is vulnerability for EU 27 designers who will lose protection for the EU unregistered Community designs in the UK.

ACID has urged the UK government to provide clarity about simultaneous publication of designs so that UK and EU 27 designers are not left in a vulnerable position because of loss of protection. Further references to our raising this subject on IPO radar are [here](#) [here](#) [here](#)

There was no provision for unregistered community designs rights' protection in the Withdrawal Bill. Despite UK IPO design registrations growing by 46% this must be put in the context of only 20,000 per year. There is no data available about the number of 2D and 3D designers in the UK but in total there are 1.69 million people employed in design and design skills.

Progress - ACID welcomes that, following consistent representations to the Intellectual Property Office, the text from the UK on design rights includes the recognition that designs shown in the UK would receive protection across the EU27.

Potential consequence - of EU/UK reciprocity if not negotiated or there is a no deal, UK designers will lose unregistered Community design (UCD) protection in EU27. Similarly, EU designers will lose UCD protection in the UK. This could, potentially be calamitous and evidence presented by many points to a loss of 20% jobs and 25% turnover. ACID [evidence](#) reinforces that design infringement is blatant and deliberate and 99% were concerned about the potential loss of EU unregistered design.

A new UK Supplementary Unregistered Design Right (SUD) which will be introduced on January 1, 2021 - The UK Supplementary Unregistered Design protection mirroring the Unregistered Community design for 2D and 3D designs and last for 3 years. At the moment, first disclosure in the EU will not establish SUD. However, as mentioned above, included in the EU/UK trade negotiation text is the recognition that designs shown in the UK would receive protection across the EU. Of course, this will not happen if it is unsuccessfully negotiated or there is no deal.

Existing Unregistered Community Designs - will continue to be valid in the remaining EU member states. Protection of existing unregistered Community designs in the UK will be provided for with no action required by the right holder. Provision will be made regarding the status of legal disputes involving unregistered Community designs which are ongoing before UK courts

Background - There have been thousands of settlements of disputes on behalf of ACID members, the majority based on unregistered UK and EU design rights. A very small percentage have reached a final Court hearing, and this is largely because micro and SME's cannot afford to take legal action against much larger companies who increasingly take the fast track to market through consistent infringement. For more information visit www.acid.uk.com

Registration statistics - There are no figures available on how many designers rely on unregistered design rights. However, in the year 2017-18 there were approximately 20,000 UK design registrations for the entire UK (an increase of 46%). However, there has been a decrease in international registrations to WIPO of 58% since 2000. The EU receives approximately 85,000 design registrations per year which is an average of 3035 per EU member state. UK EU design registrations are above average at approximately, 5,500 per year.

Unregistered design IP Databank - ACID has an IP Databank which does not add to protection but provides an independent evidence of the date of receipt of designs and receives, on average, lodgement of between 20 and 25,000 per year. Clearly this is representative of membership and does not cover an entire country

Design UK - statistics

- IP-rich businesses and creators within the design sector grew and outperformed the wider economy evidenced by data and reportage in the Design Council, The Design Economy 2018. The design economy generated **£85.2** in gross GVA to the UK in 2016.
- Between 2009 and 2016 the design economy grew by **52%** employing **1.69** million people in design roles. Digital design now accounts for just over one in three design roles in 2016. The digital design sub sector is the UK's most valuable design exporter delivering **27.9** billion in 2015, equivalent 58% of all design exports¹.

¹ Design Council [Design Economy 2018](#)

- The most recent data provided by the Design Council is that in 2013 design exports amounted to **£34 billion 7.3%** of all UK exports. Goods up to **69%** of the total and services **31%**.
- Of the **1.69** employed **80%** have less than **10** employees, **67%** have less than **4** employees, therefore most with this sector are lone, micro and SME.
- Latest Design Council estimates post Covid 19 will be reduced workforce by **300,000** and a **£37**billion loss. After the EU, the US is the most significant export market for design.

Design Rights – General UK national design registrations will be unaffected by Brexit. Registered Community Designs (RCDs) and the related Unregistered Community Design right, however, are governed by an EU Regulation. The Withdrawal Agreement provides, similarly to the position with EU trade marks, that the holder of a Registered Community Design that has been registered by the end of the transition period (or, if publication has been deferred, published by the end of the transition period) shall be automatically granted an equivalent UK national registered design for the same design.

Holders of a right in relation to an unregistered Community design which arises before the end of the transition period shall automatically become the holder of an equivalent UK right affording the same level protection. The regime regarding profession representation will also be very similar to that for trade marks.

UK – Registered designs (UK RD) - Protect the appearance of a product. To qualify the design must have individual character, be new and must create a different overall impression on the informed user. Design right will protect any or all the following elements: colour, ornamentation, contours, lines, texture, materials, or shape. It is a monopoly right and lasts for 25 years, renewable every five years. There is no substantive examination of a UK registered design and it can be deferred for 12 months.

UK – Unregistered Design Rights (UDR) - Arise automatically and lasts for anything up to 15 years depending on when it is published. It only protects shape or configuration. The test is whether the design is commonplace in the design field in question. It is created (see Section 213 CDPA, EU RCD and EU design rights and UK registered design use the individual character, test but the UK UDR does not.

Design and Trade

The UK has one of the best developed and applied IP regimes in the world. Creators and businesses have been able to use that framework to develop exciting and innovative products, designs and content using the latest technology and manufacturing techniques. The Taylor Wessing Global IP Index (GIPI5) ranks the UK third globally, while the 2017. However, it is important to acknowledge that this is a *legal* index. US Chamber of Commerce International IP Index ranks the UK second.

While no system is perfect and there are some areas, such as cost and time effective enforcement, or the UK framework that could be strengthened, our current advantage must not be jeopardised as we seek to develop new trading relationships. However, the majority of UK designers are micro, and SME 80% have less than 10 employees and access to cost and time effective enforcement and this is a challenge.

It is essential that the protection and promotion of IP is at the heart UK-EU relationship on professional and business services, ensuring that everything we create in the UK has the potential to achieve its maximum value and that creators are properly rewarded. The opportunities provided by a new UK EU trade relationship should not threaten the UK's world leading regime, but rather be used to raise standards in the areas with whom we will work with. This will not only protect and promote British IP but provide opportunities for creators and rights holders to benefit socially, culturally, and economically in the same way that the UK has.

The principals for future relationships for business and services in the context of IP should include defending standards to national reform where current practice falls short of standards which UK legislation has already recognised are necessary for the effective development of intellectual property laws, including in the digital environment. (a) **defending standards**, such as the Three Step Test for defining the scope of exceptions and limitations to copyright against efforts for "watered down" or overly vague descriptions that require litigation to interpret, alongside detrimental costs to businesses. Such defence also means considering the huge importance of the UK design sector and the central role that IP rights play in allowing designers to contribute to the UK both culturally and economically. (b) **allowing flexibility** for higher levels of protection to be applied, whilst pushing for new standard levels of protection when international norms have already moved beyond minimum levels established under International Treaty provisions (for example on the terms of protection for copyright and building on recent UK changes to registered design rights, recognising the further steps needed to bring parity with the current European system); (d) **making provision for effective enforcement of rights, including in a digital environment** through concepts of civil liability for secondary infringement, application of systems of good practice developed between traditional and new platforms, particularly linked to updated provisions for injunctive relief while addressing outmoded aspects of systems for rights owners serving notices on platforms covering notice and take down; (e) **sustaining the UK's trade mark exhaustion regime**, ensuring that no trade agreement is inconsistent with or undermines the UK's regional exhaustion approach resulting from current EU status.

Summary

The Government has worked hard to ensure continuity and has implemented measures to mitigate the loss of Community design protection in the UK after the end of the transition period. However, this adds to the complexity of an already very complex set of design laws. Education and awareness will be an essential constituent for those who wish to continue what is already an excellent working relationship with their EU counterparts and established commercial partners.

EUIPO representation for registered Community designs - As matters currently stand, after the end of the transitional period on 31 December 2020, UK lawyers will lose the right to represent UK designers before the EUIPO in matters relating to EU trade marks and Community designs. In spite of the plan to convert EU registered rights into UK national rights, retaining the characteristics of the original right, this will result in every design business which sells its products or services beyond our shores having to instruct two sets of lawyers and applying for two sets of registered trade marks and designs, at great expense. This will put an extra financial burden on UK rights' owners.

The bottom line for those who seek the fast track to market through design theft is, "Can I get away with it", "Am I going to get caught?" "Is the law going to prevent me?" "What is the speed of enforcement?". Sadly, for UK designers it is still cost and time prohibitive to take legal action in an unlevel playing field and most copyists and counterfeiters get away with it.

Adam Aaronson, Award winning glass maker and leader in his field said, "In a car crash, there's no difference between a juggernaut and a motorcycle. Both have equal protection under the law. Isn't it time to level the playing field for designers faced with IP theft? Why are giants allowed to use their financial muscle to ride roughshod over individual designers and steal IP with impunity because the individual can't afford to litigate?"

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