BREXIT - EVIDENCE TO SUPPORT PARITY OF UK UNREGISTERED DESIGN RIGHTS with EU UNREGISTERED DESIGNS
Evidence & findings following ACID research questionnaire

About ACID

Over the past 20 years, Anti Copying in Design (ACID) has been a pioneering champion for design law reform and influential in providing evidence to support many of the IP and design reforms which have taken place before and since the Hargreaves Review. Spearheading an ongoing campaign to make all design theft a criminal offence is one of ACID’s prime objectives to act as a significant deterrence against design theft. A positive start to this was the introduction of criminal sanctions for the intentional infringement of a registered design (included in the 2014 IP Act). More recently, ACID joined other stakeholders to ensure that the UK is no longer a trading post for replica designs. ACID represents designers from diverse sectors from fashion to furniture, lighting to giftware within design and manufacturing. ACID’s aims and objectives are IP education & awareness, prevention against IP infringement, deterrence and supporting its members to achieve growth through their tradable IP.

ACID is committed to raising awareness about intellectual property infringement within the creative industries and encouraging IP respect within declared corporate social responsibility. ACID’s powerful logo is a real symbol of deterrence, actively helping its members protect against the potentially devastating damage inflicted by IP infringement. The majority of ACID members are lone and micro enterprises and SME’s, supported by ACID corporate members who are high profile advocates.

ACID’s raison d’etre is to ensure that design rights in particular, and intellectual property (‘IP’) in general, are acknowledged and valued and that a robust, efficient legislative and regulatory regime exists, which enables these rights to be properly enforced and protected.

Brexit – general comments

Billed as a “Golden Age within 2 years” and “A new agreement would be the easiest in history” by International Trade Secretary Liam Fox, the impact of Brexit is probably one of the most potentially economically damaging period our country has experienced in a time when Britain has gone from the fastest growing economy of the G7 to the slowest. It is essential that the intellectual capital upon which our economic growth has existed is not further undermined in ongoing negotiations.

With a little over a year until the UK leaves the EU, ACID, along with other stakeholders, is seriously concerned that the business interests of IP rich companies who rely on trade marks and designs are and will be threatened. There does not appear to be any leadership in decision making to provide certainty when Brexit becomes a reality and the consequences thereafter. It is apparent that there have been no formal consultations between the EPO and the UK IPO to pre-empt meaningful discussions which would provoke discussions, debate and consultation amongst stakeholders and UK businesses which will be affected. This has led many to waste valuable time playing the “speculation game” because of what seems like inertia and an apparent lack of momentum and clarity. This is very concerning not least because of the complexity of administrative and procedural issues around the various IP rights. There is little doubt that UK businesses need certainty in this complex legal area.
In summary

- There should be no loss to UK businesses of existing EU rights and no lessening of protection in 27 other member states and no extra burden of costs or extra administration associated with leaving the EU which will, if not addressed, bring disruption at a time when it is least needed. In any transition period focus should be given to retaining the benefits of the EU system until all avenues have been explored to the benefit of UK businesses.

- Whilst there has been a recent position paper issued by the EU commission on IP it fails to address the significant position of the UK with regard to the relationship of UK IP rights with the remaining 27 member states. Any erosion of EU trade marks, registered and unregistered EU rights would appear to be contrary to the combined effort of many to harmonise these rights over several decades. Reversal or dilution of any of the benefits of this hard fought for harmonisation will, we believe, significantly disadvantage and de-motivate many UK IP rich businesses.

- Whilst the UK’s EU Withdrawal Bill aims to incorporate the majority of EU law on the day after Brexit so that they are the same as the day before we have concerns that this cannot happen where EU trade marks and Community designs IP rights are concerned because of the complexity and transitional arrangements will need to be in place so that these laws can be enacted.

- Failure by the UK government or its agencies, charged with being responsible for IP, to provide an agreement to ensure that those with existing EU trade marks and Community registered and unregistered rights suffer no loss of protection in 27 remaining member states is paramount. Equally important is a negotiated agreement that future trade marks and registered and unregistered design rights will have the same EU benefits post Brexit.

- With specific reference to designs, we share the view of the Design Council that it is crucial to maintain high standards of design and access to IP protection. For a sector punching well above its weight (workers with design skills contribute £209bn to the UK economy (GVA) according to the Design Council1) current, protection of the intellectual capital which supports this diverse sector is crucial. If there is a lack of access to Registered Community Design and Trade Mark registrations spanning all member states this will severely affect UK design brands and designers. We are in accord that the UK system is not an adequate substitute for the EU system as it stands.

- EU unregistered design protection has been a highly effective means by which UK designers have had effective design protection since 2002 and we believe that this has been contributory to significant growth within the design sector. The potential threat of being unable to enforce this right will be calamitous and also leaves the door wide open for EU copyists to plunder UK designs without fear of legal redress or enforcement especially for lone, micro and SMEs who comprise the majority of this sector.

- If UK designers first show, exhibit or “make available” their design in the UK they will be faced with a dilemma of whether they will be eligible for EU registered design protection should they wish to apply for this a year after the design/s were first shown. This may well put extra financial and administrative burdens on designers/design companies having to re-locate their businesses to the EU in order to attain comprehensive design protection.

- For designers only to be able to rely on UK unregistered design right will be a severe disadvantage to the majority of fashion and product designers in the UK as the majority of whom rely on unregistered EU design right which offers a much broader protection in terms of surface area.

Evidence to support the statement that the majority of UK designers rely on unregistered rights (copyright and unregistered design right)

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In the IPO’s own commissioned research² in 2009 there were **15000** core designers and **587000** design related occupations.

<table>
<thead>
<tr>
<th>Sectors</th>
<th>Number of core designers</th>
<th>Number of design-related occupations</th>
<th>Share of sectoral workforce</th>
<th>Concentration index²</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fashion and craft</td>
<td>53,000</td>
<td>81,000</td>
<td>24%</td>
<td>7.97</td>
</tr>
<tr>
<td>Advanced manufacturing</td>
<td>30,000</td>
<td>80,000</td>
<td>10%</td>
<td>3.33</td>
</tr>
<tr>
<td>Printing and publishing</td>
<td>13,000</td>
<td>12,000</td>
<td>7%</td>
<td>2.43</td>
</tr>
<tr>
<td>Other production</td>
<td>30,000</td>
<td>159,000</td>
<td>4%</td>
<td>1.39</td>
</tr>
<tr>
<td>Telecoms &amp; computer services</td>
<td>18,000</td>
<td>23,000</td>
<td>6%</td>
<td>2.04</td>
</tr>
<tr>
<td>Design services</td>
<td>46,000</td>
<td>5,000</td>
<td>20%</td>
<td>6.53</td>
</tr>
<tr>
<td>Architecture</td>
<td>58,000</td>
<td>92,000</td>
<td>30%</td>
<td>9.77</td>
</tr>
<tr>
<td>Other services</td>
<td>67,000</td>
<td>155,000</td>
<td>1%</td>
<td>0.33</td>
</tr>
<tr>
<td>UK Economy</td>
<td>315,000</td>
<td>587,000</td>
<td>3%</td>
<td></td>
</tr>
</tbody>
</table>

*Source: 2009 Annual Survey of Hours and Earnings, 2009 Labour Force Survey (ONS Crown Copyright)³*

Designs Registered for the entire UK per year from 2011 – 2016 were as follows³:

<table>
<thead>
<tr>
<th>Designs</th>
<th>Applications</th>
<th>Registrations</th>
</tr>
</thead>
<tbody>
<tr>
<td>2011</td>
<td>4,730</td>
<td>3,423</td>
</tr>
<tr>
<td>2012</td>
<td>5,231</td>
<td>5,144</td>
</tr>
<tr>
<td>2013</td>
<td>5,210</td>
<td>4,671</td>
</tr>
<tr>
<td>2014</td>
<td>5,084</td>
<td>4,901</td>
</tr>
<tr>
<td>2015</td>
<td>6,472</td>
<td>5,690</td>
</tr>
<tr>
<td>2016</td>
<td>10,030</td>
<td>8,481</td>
</tr>
</tbody>
</table>

Based on **315,000** designers in 2009 and, using 2011 figures, this would indicate that **0.01** designers registered their designs in the UK. In comparison to the whole of the UK’s designers, ACID, however, receives around **25,000** lodgements to its IP Databank (copyright, designs and unregistered trade marks) per year, reinforcing the evidence that the majority of UK’s designers rely on unregistered EU and UK Design rights (and copyright).

Further statistics provided by the Design Council (Design Economy 2015) based on 8 design disciplines (digital, multidisciplinary, graphic, architecture, product & industrial, advertising, craft, fashion) a total of 1.6m were employed. Of these product/industrial, fashion and craft totalled **321,400** which would again indicate in 2015 that **0.017** designers register their designs. The European Intellectual Property Office⁴ receives approximately **85,000** registrations per year from 28 member states including UK which averages out to **3035** per country per year. The UK has a higher number of registrations of approximately **5500**.

The Hague system for the international registration of industrial designs provides a practical business solution for registering up to 100 designs in over 66 territories through one single international application has received, on average, very few registrations. Total figures for 2015⁵ were **4,111** which averages out at **62.28** designs registrations per country.

In a very recently published set of IP registrations by WIPO⁶ world-wide (covering 159 countries) Despite whilst WIPO report that industrial design filing activity during 2016 grew by 10.4% to an estimated 963,100 applications containing 1.2 million designs on average this is still only **7547** per country which is hardly a significant number.

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² UK design as a global industry: International trade and intellectual property https://www.gov.uk/government/publications/uk-design-as-a-global-industry


⁵ WIPO design registration figures http://www.wipo.int/edocs/mdocs/govbody/en/a_56/a_56_5.pdf

of design registrations and only further reinforces the statement that the majority of global designers rely on unregistered design rights.

The above official registration figures from the UK, EU and WIPO provide undisputed evidence that the majority of EU and UK (as well as the rest of the world) designers rely on unregistered design rights. It is clear that the interests of designers who rely on both unregistered EU and UK rights must be protected at all costs.

Case Study Evidence

In June 2017 we provided case study evidence from our members (Schedule 1)
In September 2017 we sent a questionnaire to our members and to a broader design community through social media. We received 100 responses. (Schedule 2)

Preserving EU design laws post Brexit

Post-Brexit copyright will be about nuanced changes made to existing protection. But for design, Brexit offers an existential threat because of the possible loss of EU laws. UK designers will be severely disadvantaged if they lose EU unregistered design rights, on which the majority rely. EU design laws, both registered and unregistered, protect the individual character of a design in particular as they relate to the shape, texture, contours, lines, colours, ornamentation and materials of the design.

UK UDR protects only the shape and configuration of a design. Entire design sectors such as fashion, lighting and furniture rely on the EU scope to protect their 3D designs; UK law alone cannot protect 3D designs whose individual character is defined by shape, texture, contours, lines, colours, ornamentation or materials. If these EU laws are not transposed into UK law post Brexit, design protection for many design sectors will be lost. Accordingly, this is a potentially calamitous issue for many design sectors. ACID is pressing Government to introduce a new law which mirrors the protection afforded by EU unregistered design, replacing existing UK Unregistered design to put UK designers on a level playing field with their EU counterparts in terms of IP protection.

ACID Survey:

ACID believes this is a unique opportunity to ensure that designers’ IP rights are not eroded but supported as one of the UK’s most successful sectors.

Why do the majority of UK designers choose not register their designs?

In ACID’s 20 years of experience the familiar response is that, “The cost & time to seek legal redress is the luxury of the few, so why register!” Lone, micro and SME’s find the challenges of taking action against infringers too
time consuming and costly. It is anomalous, too, that the Small Claims Track within the Intellectual Property
Enterprise Court does not deal with cases based on registered designs. This simply does not make sense.

There have been thousands of settlements on behalf of ACID members, the majority based on unregistered
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 consistently take the fast track to
market through consistent infringement. There is a growing culture of much larger companies (retailers and
manufacturers) taking an aggressive legal stance by perpetuating litigation and stonewalling legal challenge thus
making it virtually impossible for small companies to pursue infringers. For example, the average hourly rate of
a designer across eight design disciplines (digital, product, advertising, architecture, multidisciplinary, graphic,
craft and fashion) is £14.10 per hour. IP specialist lawyer advice can range from between £220 - £500+ per hour.
A Government strategy of driving lone, micro and SME designers for IP specialist advice, therefore, does not
chime with the current IP legal business model. Further evidence of loss of trust in the registered design system
was highlighted in the Trunki case when Magmatic registered their design thinking that it was protected. After
spending around £1m the Supreme Court decided that the protection was not legally sound enough to rely on.

Conclusion

This is a unique, once in a lifetime opportunity to strengthen UK design law in a period of Brexit uncertainty. In
2014 in the UK intentional copying with immaterial differences of a UK or EU registered design became a criminal
offence (IP ACT 2014). This followed consistent campaigning by Anti Copying in Design. Unfortunately, ACID’s
main objective was to make the copying of an unregistered design a criminal offence as the majority of UK
designers rely on unregistered design. The UK Government did not agree claiming that it would be difficult to
create criminal liability for the copying of an unregistered IP right, even though there have been criminal offences
in respect of copyright (also an unregistered right) since 1840, and the current maximum penalty for criminal
copyright infringement is ten years.

3D printing is proving a boon to organised criminals who are exploiting this ground-breaking technology to
counterfeit on an industrial scale in near perfect quality. However, unless UDR copying is made a criminal offence
there are no criminal powers available to stop organised criminals, unless a prosecution for fraud or conspiracy
is pursued. Accordingly, Government needs to plug this gap in the law which will have the same impact on
manufacturing as the internet did on the creative industries. Whilst ensuring that there is a new UK law which
mirrors the protection offered by current EU unregistered design, the introduction of criminal provisions for the
intentional infringement of an unregistered design would give UK designers a competitive edge and lead over
their EU counterparts.

There is also a concern that the IPO/BEIS AND DCMS are not taking a lead on this which is further fuelling
uncertainty with both stakeholders and design and manufacturing businesses. If the Minister, the UK
Intellectual Property Office, their officers and staff are not making official recommendations, who is?

\textsuperscript{7} Design Council, Design Economy October 2015 http://www.designcouncil.org.uk/what-we-do/design-
economy?gclid=Cj0KCQiA84rQBRDCARIsAPO8RFz_arFdsv08Pc2VDgxsKh9-g2jzd8GESpz
y-Jai3agtIAx-xj24RpoAaAsohEALw_wCB