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Consultation outcome

Call for views on designs: Government response

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Executive summary

1. An effective intellectual property (IP) system is vital to the government's ambition for the United Kingdom (UK) to be the best place in the world to innovate. Great design helps UK products stand out, demonstrate quality, and attract consumers in a competitive global marketplace.
2. Recent figures from the Design Council show that design is an economically important and growing sector of the UK economy. It was worth £97.4 billion gross value added (GVA) in 2019, up from £85.2 billion in 2016. In 2020 the sector employed 1.97 million people, 1.62 million of whom were professional designers.
3. The Intellectual Property Office (IPO) is the government agency responsible for ensuring the designs framework supports rights holders to protect designs and enforce their rights. We want the designs system to be responsive to the changing needs of UK innovators, creators, businesses and consumers.
4. Following the UK's departure from the European Union (EU), we have new flexibilities to define the domestic designs regime. As we negotiate trade deals with international partners we want to ensure the UK system supports designers and encourages overseas investment. This will give the UK a competitive edge and allow designers to get the most from new opportunities.
5. In the recent [call for views on designs \(https://www.gov.uk/government/consultations/reviewing-the-designs-framework-call-for-views/call-for-views-on-designs\)](https://www.gov.uk/government/consultations/reviewing-the-designs-framework-call-for-views/call-for-views-on-designs) the government sought stakeholder views on three broad areas – new opportunities, future technologies and better regulation. These covered a wide range of designs issues. We also published a designs survey aimed at designers with a lower level of IP knowledge and held a number of roundtables.
6. We received 57 responses to the call for views and 288 responses to the survey.
7. Responses to the call for views were received from designers (5), design consultants (2), academics (2), legal firms and professionals (17), legal trade bodies and professional bodies (7), other trade bodies (10), small and medium size enterprises (SMEs) (9), large enterprises (4) and other (1).
8. Responses to the designs survey came predominantly from lone designers (58%) and small businesses employing fewer than 10 people (22%). This provides additional insight into how these groups use design protection in the UK.
9. This is the government's response to the call for views and survey. It gives a high-level summary of stakeholder views. A more detailed analysis of responses is available in the annexes to this response. This document also sets out the government's views on the issues and next steps.

Summary of responses

Registered designs – search and examination

10. It is clear from responses that customers value the speed and value offered by the UK registered designs system. Respondents do not want changes in relation to prior art searching to undermine this.
11. There were mixed views on mandatory search and examination pre-registration. Those in favour thought it would increase certainty of validity of design protection. Those against raised concerns about potential delays and increased costs of registering designs. Some raised concerns about the difficulty of performing a comprehensive search due to the existence of unregistered designs.

12. The general view was that a high-quality search tool using AI could overcome some of the concerns raised by respondents. Such a tool could be used by both the IP and customers performing pre-application searches.

13. Several respondents commented on the need for a robust tool for searching the designs register. The current system allows searching by design number or owner name only. This was said to be unhelpful to customers performing clearance searches. A professional legal body suggested an online file inspection service would be useful.

14. Many respondents commented positively on a two-tier system such as that offered by IP Australia. This would require a novelty search before enforcement but maintain the speed and low cost of obtaining initial registration. It was said that this could potentially offer the best of both worlds.

15. There were mixed views on the introduction of a bad faith provision. Some respondents considered it could be a helpful tool for customers. Others said it is unnecessary given existing novelty grounds. It was also mentioned that bad faith is subject to much debate in trade marks.

16. There was limited support for introducing an opposition period. It was felt that this would add unnecessary delays to registration and result in drawn out legal challenges. Those in favour suggested that opposition would provide a way to deal with clearly invalid registrations.

17. Several respondents requested that the UK joins the World Intellectual Property Organisation's (WIPO) digital access system (DAS) for designs. This would reduce administrative burden on applicants who file in multiple territories.

Government response:

The government acknowledges the importance placed by customers on the speed and value of the UK designs registration service. The government also recognises concerns that pre-registration search and examination could impact the time taken to register designs. On the other hand, searching could increase certainty of validity of design protection. It could also help counter anti-competitive filings. The government will further consider options for search and examination. Stakeholder views will be sought at consultation.

The government will also give consideration to joining the WIPO DAS system for designs. This will be considered as part of the IPO's digital transformation programme.

Simplifying the designs system

18. The general view from respondents was that the different overlapping forms of design protection makes the UK system complex and that it should be simplified. Some responses said that the availability of different types of design protection gives designers flexibility to choose how to best protect their creations. Customers do not want simplification to result in lower levels of protection.

19. The most common suggestion was for a single unregistered design which has the best elements of current unregistered design protection. It was generally felt that it would be desirable to harmonise term, qualifying criteria, infringement provisions, exceptions, threats provisions and liability of innocent infringers across unregistered designs. Another suggestion was to harmonise provisions for authorship of computer-generated designs across all forms of design protection. There was also a call for the government to review the overlap between the design and copyright regimes and to consider consolidating designs law into a single piece of legislation.

20. Definitions in designs legislation were generally considered fit for purpose, but some responses suggested certain terms should be considered further by government. Some respondents thought that the scope of “get up” is unclear. Others said it was important for definitions to remain relevant in the face of technological developments.

21. Some respondents were keen to maintain a high-level of harmonisation with the EU designs regime and to seek greater harmonisation of designs internationally. They considered this would benefit businesses operating globally.

22. It is clear that lone designers and small companies who cannot afford to employ legal representatives find it hard to understand the UK designs system. The designs survey showed that small design companies had little knowledge of how to protect designs. Nearly half of respondents were not aware a design could be registered and three-quarters indicated they had a poor knowledge of unregistered design protection. There were multiple requests for better guidance to help creators unfamiliar with IP law to navigate the system and understand how to best protect their products.

23. Although half of the respondents to the survey suggested they had little knowledge of protecting designs using copyright, nearly a quarter considered their knowledge to be good or very good. This may suggest a greater awareness of copyright compared to design protection.

Government response:

The government acknowledges that the UK designs system is complex. This can be a particular problem for customers without legal representation. The government will investigate options to simplify the designs regime, in particular unregistered designs.

The government will also consider the relationship between design and copyright law, and the need for reform or guidance.

The government will consider how it can improve guidance for designers. We will consider options such as providing more targeted guidance for specific sectors. We will work with key stakeholders to reach designers who do not engage with government directly.

Disclosure of supplementary unregistered designs

24. Many responses said the recent changes to disclosure requirements have resulted in more complexity and costs for business. Many called for clarification of disclosure requirements for supplementary unregistered designs (SUD). Several respondents felt that the law should be changed to allow SUD to subsist in the UK following disclosure in the EU, or indeed anywhere in the world.

25. Respondents said businesses operating globally must now choose between SUD protection in the UK or unregistered Community design protection (UCD) in the EU. The fashion sector expressed particular concern with the current situation. They indicated that some companies are already choosing to disclose in the larger EU market. The future of events such as London Fashion Week was said to be at risk.

26. Several responses suggested companies are relying on simultaneous disclosures to get unregistered design protection in both territories. It was commented that, as this approach has not been tested in the courts, it is not without legal risk. The lack of clarity on what constitutes simultaneous disclosure was raised. Government was urged to provide clarification. Some said this should be by way of legislation.

27. Although about half of survey respondents do business in the EU, only about a third were aware of changes to automatic protection of unregistered designs. This is despite guidance on gov.uk. The vast majority (83%) of respondents do not plan to make changes to the way they launch or show products now that we have left the EU. Of those who have made, or plan to make changes, around 40% indicated they would no longer sell or register designs in the EU. Reasons provided were “red-tape” and cost implications. Others (15%) said they now prefer selling in the larger EU market. 10% of respondents indicated they have changed their policy on disclosure, for example now first disclosing their products online.

Government response:

The government recognises that there is currently uncertainty amongst users of the system about disclosure requirements for supplementary unregistered designs. This includes uncertainty in relation to simultaneous disclosure. The government will consider the issue further. It will seek additional stakeholder views and evidence on options to address the problems raised.

Future technologies

28. Views were mixed on whether the current framework adequately meets the needs of future technologies. There were concerns that the current system may not provide adequate protection against infringement assisted by 3D and 4D printing. Respondents urged government to monitor the situation in relation to these technologies.

29. There was a significant call for the IPQ to accept digital representations and expand the list of allowable file formats. Respondents requested the government keep this under review as technology develops. One respondent indicated a lack of international harmonisation of representation requirements could cause problems for customers filing in multiple jurisdictions.

30. The general view was that existing provisions in law for dealing with computer-generated designs are adequate. Some suggested introducing a provision relating to authorship of computer-generated designs for SUDs. The majority of responses considered AI should not be recognised as the owner or author of a design. This is consistent with [responses to the government's 2021 call for views on AI and IP \(https://www.gov.uk/government/consultations/artificial-intelligence-and-intellectual-property-call-for-views/government-response-to-call-for-views-on-artificial-intelligence-and-intellectual-property#designs\)](https://www.gov.uk/government/consultations/artificial-intelligence-and-intellectual-property-call-for-views/government-response-to-call-for-views-on-artificial-intelligence-and-intellectual-property#designs). Other respondents called for consistency of approach across all IP rights in relation to AI.

31. Some respondents raised interesting questions on distributed ledgers such as blockchain, and decentralised autonomous organisations. These concerned ownership, enforcement and disclosure.

32. Respondents were generally in favour of IPQ ceasing to accept physical specimens. Several respondents considered this should only happen when convincing digital 3D representations are allowable instead. A couple of responses were in favour of retaining the option to file specimens.

33. Only a quarter of survey respondents said that technological advances had impacted the way they protect designs. A third said that they had not. Responses suggested that there are benefits and disbenefits to technology. Technology can make it easier for designers to find copies, and to prove when they produced a design. For example, using digital date and time stamps. On the other hand, it can make selling infringing copies easier.

34. The use of non-fungible tokens (NFTs) and blockchain to prove ownership and provide an audit trail was mentioned in responses to both the survey and call for views. One survey respondent mentioned NFTs in relation to selling virtual copies of goods. Several respondents to the call for views said that design protection should extend to virtual designs. One respondent from the fashion sector explained that the growth in virtual clothes and “skins” was expected to be a big market opportunity.

Government response:

As technology develops, stakeholders want ways that designs can be represented to be updated. The government recognises that allowing additional file formats could be useful to customers. The government also recognises it could make filing in multiple territories complex. The government will consider this issue further. It will seek further stakeholder input at consultation.

More generally, the government recognises that as new technologies are adopted by society there may be an impact on designers. The government will keep the impact of technological changes on the designs system under review. It will also consider how to ensure the designs system is flexible enough to support developments in technology.

Deferment

35. There was general consensus that a deferment provision is desirable for commercial reasons. There were mixed views on how long a deferment period should be. 12, 18 or 30 months were suggested. Some respondents thought harmonising with the EUIPO at 30 months would avoid confusion for designers and companies seeking protection in several territories.

36. There were also mixed views in relation to what information should be published about a deferred application. These ranged from basic information (applicant’s name, filing/priority date, and design field/classification) to no information at all.

37. A significant number of responses suggested that there might be a need to consider prior-use and co-pending applications.

Government response:

The government acknowledges stakeholders would like a deferment provision. It recognises the need to balance the interests of designers and third parties on this issue. Government will consider options for a deferment provision and stakeholder views will be sought by consultation.

Enforcement

38. A significant number of respondents consider that enforcement in the UK is expensive. Some were of the view that the enforcement regime is also effective. Others consider it is ineffective and favours those with significant financial resources. This latter view was reflected in responses to the survey and at some roundtable meetings.

39. There were mixed views on whether registered designs disputes should be introduced into the small claims track (SCT) of the Intellectual Property Enterprise Court (IPEC). Some respondents wanted them included in the SCT, but others thought they should not be as registered designs cases can be complex.

40. There were some calls for the introduction of a designs opinions service. It was suggested this could provide a “form of expert determination without the cost of litigation”. Some respondents were in favour of greater use of alternative dispute resolution services such as mediation.

41. Views on criminal sanctions were mixed. Some respondents were strongly in favour of extending them to the intentional infringement of unregistered designs. Others were equally strongly opposed to doing so. Amongst survey respondents, the majority (80%) knew criminal sanctions exist for the intentional copying of a registered design. A similar proportion (78%) indicated that this had not changed how they enforce their rights. It was not clear from responses what the reasons for this were.

Government response:

The UK has an excellent enforcement system. However, the complexity and costs of bringing legal action can be problematic for smaller design companies who want to enforce their rights. The government will therefore consider whether there are measures which can be introduced to make enforcement easier for all rights owners.

The government recognises that there are opposing views on the existing criminal sanctions for registered designs as well as on any extension of criminal sanctions to unregistered designs. Some respondents argue that they are a deterrent to potential infringers. Others consider that extending them to unregistered designs will cause problems for business. However, no firm evidence has been provided to support these positions.

The government recognises that this is an issue of significant interest to some in the designs sector. It will therefore ask stakeholders for further evidence at consultation. Government will review the evidence submitted before deciding on next steps.

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