



CONSULTATION ON THE INTELLECTUAL PROPERTY ENFORCEMENT FRAMEWORK

ANTI COPYING IN DESIGN (ACID)

ACID welcomes the opportunity to reply to the consultation and questionnaire on the UK Intellectual Property Enforcement Framework. The Government, through its agency, the Intellectual Property Office, has called for evidence to form the basis of an Enforcement Framework on which policy will be based for the next five years. The IPO has no enforcement powers but instead provides strategic leadership by developing policies, ensuring the legal framework is fit for purpose, coordinating activity, and supporting operational enforcement activity through the IPO Intelligence Hub. Information about the consultation can be found [here](#)

ABOUT 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 pioneering champion 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 inclusion 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 infringement of a registered design (included in the 2014 IP Act). ACID continues to campaign for intentional infringement of unregistered designs to attract criminal sanctions.

ACID is a member of the Alliance for Intellectual Property (IP), a UK-based coalition of 19 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.

Recently, an ACID led campaign to provide clarity for designers regarding the potential loss of EU unregistered design protection in the 27 remaining EU states, post Brexit, has failed. Despite support from Government, and an inclusion in the negotiating text between the UK and EU, the EU have rejected reciprocity and, therefore, a level playing field. This will leave designers in a vulnerable position because of loss of protection in EU27.



ACID Settlements

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.

Background to the Consultation on the IP enforcement Framework

Prior to this consultation, a working group of 16 members was set up, co-chaired by an IPO Official and Sir Robin Jacob in October 2019, to help the IPO achieve its aim of identifying if and what issues rights holders and businesses face protecting their IP when using the current IP enforcement framework. The group met with the caveat to identify issues that were practical and deliverable. Nick Kounoupas, ACID's Chief Counsel took part in these meetings.

The issues raised by this committee to form the basis of a 5-year IP enforcement Framework were:

1. The cost of legal challenges.
2. The costs from defending an action.
3. The accessibility and effectiveness of the judicial process and suggested remedies such as improvements to processes at the Small Claims Track (SCT) at the Intellectual Property Enterprise Court (IPEC) and introduction of a statutory damages regime.
4. Inclusion of registered designs within the scope of the small claims track (SCT) of the IPEC.

ACID comment

Whilst ACID members have welcomed a positive review of the above issues, they do not believe that the issues raised were ambitious enough to deal with the deterrent aspect against copying necessary for lone, micro, and small designers. Through this consultation process, we wish to ensure that the issue of criminal provisions for the intentional infringement of an unregistered design is also considered. We have provided case study evidence and comments from ACID members including evidence that copying within the design sector is blatant and deliberate. The need is and will be exacerbated by the failure to obtain reciprocity in the trade deal talks.

Currently there is no level playing field for access to justice when small companies are victims of IP theft committed by large companies. Often, major players who copy, rely on this fact to perpetuate litigation, and stonewall any legal challenge because they have the funds to do so,

- Lone, micro and SMEs in a David v Goliath IP issue do not have fair access to justice because it is cost and time prohibitive. For the majority, litigation is the luxury of rich. For example, in a motor vehicle accident between an individual motorist and, say a Marks & Spencer pantechnicon, wherever the fault lies, there is a level playing field in access to justice. The same is not experienced by SMEs pitted against, for example, major high street retailers.



- Often, articulated by the IPO and by Ministers, “*The UK is one of the best IP systems in the world*” (according to the Taylor Wessing **legal** index). However, as this includes final Court hearing data and, as the majority of design cases do not ever reach a final Court hearing, it is certainly not representative of the UK design community (87% are companies with less than 10 employees) and, therefore, SME. This brings such a statement into question on what is not said, that there is no level playing field with accessible justice for lone, micro and SMEs. These are Creative Industries’ champions’ who not only face ongoing and growing copying challenges but almost impossible enforcement barriers due to lack of time and funds to pursue design infringement effectively in a timely manner. The Taylor Wessing Index also relates to the efficiency of the national IP registration system on which the UK IPO excels. However, the majority of UK designers rely on unregistered rights.
- Taylor Wessing are also an international City law firm with partner rates from about £400 per hours upwards. Their clients and those who were surveyed probably do consider the UK IP system to be one of the best on the world. The UK might be the best system in the world for the registration of trade marks and patents and perhaps copyright but not as regards to protecting designers, so IP is the wrong label. Would ACID members say it is one of the best design protection systems in the world. Obviously not!
- At the time of writing there is a question mark about an Impact Assessment which states that most UK designers do not rely on unregistered design rights. We refer to 12.5 in the note to the Draft Designs and International Trade Marks (Amendment etc.) (EU Exit) Regulations 2019 published in January 2020. This is inaccurate. For example, the IPO receives approximately 20,000 design registrations for the entire UK (as well as from other countries) whilst ACID, a relatively small organisation, in comparison to an entire country, receives about 20-25,000 unregistered design lodgements per year.

Design – UK facts and figures

- The UK design sector produces £85.2 billion to the UK GVA and employs 1.5 million in design and design skills. Most are micro and SME (80% have less than 10 employees, 67% have less than 4 employees). In the UK, according to the Design Council¹ the average hourly earnings for designers are £16.24 per hour.

¹ The Design Economy 2018



- There are no figures available on how many designers rely on unregistered and registered designs. 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.
- ACID has an IP Databank which does not add to protection but provides independent evidence of the existence of designs on date of receipt and receives, on average, lodgement of between 20 to 25,000 per year. Clearly this is representative of membership and does not cover an entire country.

Recommendations

- **Cost and Time of taking Legal Action** - ACID has provided evidence which supports an IP enforcement Framework review to examine the costs of legal challenges. The majority of designers are lone, micro and SME. The average hourly earnings for a designer are around £16 per hour and this leaves little chance for a designer SME to afford IP legal fees (from £200-£500+ per hour), leaving narrow routes to enforcement.
- **Statutory Damages** - The effectiveness of the current judicial processes should be improved significantly to streamline processes at the Small Claims Track (SCT) and include the introduction of statutory damages. ACID believes this would act as a deterrent and most ACID members support this. The current options of choosing between two systems are complex and can create a barrier for SME rights' holders in taking legal action. Further research into statutory damages would be welcomed as a further option.
- **SCT – Inclusion of Registered Design Cases** - The inclusion of registered designs within the scope of the small claims track (SCT) of the IPEC is something that should have been addressed years ago. After all, what is the point of having an SCT if small, registered design cases cannot be heard? As the strategy of the IPO encouraging the registration of designs has been successful and seen a marked increase, it is anomalous that common sense has not prevailed thus far.
- **SCT – Introduce an Online System** - We support creating an online system to offer a cost-effective means to submit claims which would reduce the time and expense of a full court hearing and which could be dealt with administratively.
- **SCT – Increase level of potential damages, currently £10,000** - We also support an increase in the level of potential damages which, currently, at £10,000 is too low taking into account the cost of the time and administration that rights holders have to experience to take legal action through SCT.
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- **Introduction of Criminal Provisions for intentional unregistered design infringement** - As UK designers will lose the protection of automatic unregistered designs rights' protection in EU27 as from 1 January 2021, now could not be a more appropriate time to consider strengthening the deterrent factor against copying by introducing criminal provisions for the infringement of an unregistered design making
- individual directors also liable. As a result of this failure in the Brexit negotiations, Government has an obligation to support UK designers in the same way as copyright creators with stronger IP rights.

Attachments include:

Case Study Evidence from 9 ACID members

Evidence of 26 interviews with companies who were asked. their opinion on any messages to Government/Policy Makers on IP issues.

These case study examples all focus on supporting common themes:

- Stronger enforcement.
- Cost & time effective access to IP enforcement and statutory damages.
- Introduction of criminal provisions to be extended for unregistered design infringement as a real deterrent against copying.
- Design infringement is blatant and deliberate which reinforces previous ACID research of 89% and 92% whom agree.