

# PMS AND TRUNKI – FAIR OR UNFAIR COMPETITION?



World IP  
Day  
Special

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# CAMPAIGNING UPDATE

## ALL PARTY PARLIAMENTARY GROUP ON IP AND SMES RECENT MEETING IN WESTMINSTER

Chaired by Pete Wishart, MP, Micro and SMEs met MPs and Lords from both Houses at an action packed debate of the All Party Parliamentary Groups (APPG) for IP and small business. Many were visibly shocked to hear of the scale of copying of original designs. The meeting was designed to investigate the opportunities and challenges facing small businesses in promoting, protecting and valuing their Intellectual Property (IP). Small businesses are delivering innovation and driving competition in both the knowledge and manufacturing economies, making the UK a world leader in the creative, branded and design industries. IP underpins this success, providing lone, micro and small businesses with the security they need to invest.

Research released by the Federation of Small Businesses revealed concerns on issues such as IP infringement and access to finance means that many of these small businesses still struggle to maximise the potential of their IP. ACID members included MD Heather Culpan of Burgon & Ball and Rachel Jones of Totseat both with their fair share of IP challenges.

**ISSUE:** Design Infringement is rife and taking legal action is expensive and time consuming, access to justice is the luxury of the few. For SMEs the time taken litigating is taking their eyes off running and growing their business. Take Burgon & Ball as an example - 26 cases of infringement in 4 years. But this is not an isolated case. Consistent copying affects job certainty and growth. Currently the IP regime for micro and SME IP rich design - led companies is not fit for purpose as it allows the perpetrators to play the system and carry on selling infringing products.

## CURRENT STATUS: IPEC INCLUDING SMALL CLAIMS TRACK

- Intellectual Property Enterprise Court (IPEC)
- The objective for micro and SMEs is to get the infringing design/s off the market. Often it can take 2/3 years to get to a Court hearing with the infringer still selling copied products
- Currently there is a significant backlog
- Since Spring 2015 there has been 600% increase in Court Issue Fees to £10,000 – so many micro and SMEs are priced out of litigation. Reverting to the pre 2015 Issue Fees is called for.
- Cost of “Letters before Action” anything from one to tens of thousands of pounds, then up to 100K of correspondence before getting to a court hearing
- SME definition of “small” and being referred to the IPEC is different from that of Chancery Judges (i.e. anything less than 500K should be passed down to IPEC)

## POTENTIAL SOLUTIONS:

- Whilst the process itself has been fine-tuned and improved, the IPEC is the victim of its own success and has become clunky. Appoint more Judges, currently there is only one Judge so it takes ages to actually get to a Court hearing
- Currently registered design infringement cannot be heard in the Small Claims Track. This is anomalous.

- Make ADR and mediation a pre-requisite before entering the Court process. Lawyers tend to suggest mediation at the end of a lengthy legal exchange of letters rather than at the beginning. ACID's mediation process of a timed, 3 hour mediation WITHOUT lawyers is simple and very effective.
- Introduce Unfair Competition (on a par with our EU counterparts) so when IP law fails UK designers (UC) as it often does, they can resort to UC. In the UK, passing off is useless for small trade only designers as consumer confusion is necessary to prove a case and this is impossible (and expensive) in a David v Goliath retailer, for example, their strategy (and we have evidence of thousands of cases) is to stonewall legal challenge and perpetuate litigation, then settle after an expensive legal exchange and insist on confidentiality so no-one is aware of the damage done to micro and SME design innovators and their businesses.
- Introduction of criminal provisions for unregistered Design rights as a deterrent because majority of UK designers do not register their designs. And why would they in light of the Trunki case?

**ISSUE:** There is no examination for registered designs so there needs to be absolute clarity on what you can and cannot rely on. The push by Government to encourage designers to register their designs is not equally matched by budget to ensure strong enforcement support.

**EVIDENCE:** In light of Trunki case dismissal, this has plunged the design community into chaos and a disbelief in justice. Clearly as PMS explained they had been "inspired" by the Trunki product to produce a "cheaper and similar product to give consumer choice and value for money". Is this fair competition for a Hong Kong based company to blatantly produce look alikes free riding on the back of the design equity of a UK innovator? It took just under a million pounds for Trunki to hear Supreme Judges rule that their registered Community design was not valid. Is the PMS business model fair competition?

#### POTENTIAL SOLUTIONS:

- IPO (and EUIPO formerly OHIM) must provide absolute clarity and clear guidance as soon as possible on what you can and can't rely on in a simple, user-friendly way
- Introduction of Unfair Competition if IP law fails
- Match Government energy to encourage designers to register with stronger enforcement and easier access to justice to stop infringers continuing to sell copies.
- Criminal provisions for UDR to bring in line with copyright and act as a deterrent and to enable TSI, PIPCU engagement.

**ISSUE:** Escalating infringement of IP rights online

#### POTENTIAL SOLUTIONS:

Despite MOUs at top level there needs to be more connection to what happens at grass roots. Further simplify the process of take-down, will to help originators by online providers. Put pressure on to have a consolidated and unified approach and create an industry standard amongst online providers.

#### ISSUE: 3D PRINTING AND IP CHALLENGES

At the moment because the majority of designers and manufacturers rely on unregistered rights this is an open door for counterfeiters because infringement is not a crime so TS, IPCU, CPS and enforcement bodies cannot intervene. 3D Printing machines are cheaper, materials more cost effective and there is no criminal redress. So TSI, CPS Enforcement Agencies cannot be involved. ACID would like to work positively with the IPO and the Government to change the current policy position of "wait and see."

#### POTENTIAL SOLUTION:

- Introduction of criminal provisions for UDR and explore technology to secure software and provide deterrence.

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# DIDS MACDONALD

DEAR ACID MEMBER

It was a very sad day for British design and creativity when ACID member Trunki (Magmatic) lost its legal battle against PMS International leaving them free to continue to sell the Kiddee look alikes. The Supreme Court Judges' "sympathy for Magmatic" will fall on stony ground for most designers in the UK, not least Trunki inventor and innovator Rob Law who put his faith into the design registration system and a vast amount of money to fight his corner.



PMS Managing Director Paul Beverley had openly admitted that he came up with the idea for Kiddee Cases after seeing Trunki luggage. He described the Court's decision as a "victory for fair competition" stating that it "ensures that the Kiddee Case can continue to be sold to price-conscious UK families."

Rob Law responded, "In my honest opinion, the Trunki was willfully ripped off. We stood up to this behaviour, held it to account and took our case all the way to the highest court in the land only for the judges to rule that we are not protected against the copy. They're effectively sending knights into battle without armour."

How true. This has plunged design law into chaos and confusion and more needs to be done immediately from both the EU and UK to create simple, clear guidelines about what can and can't be registered. Certainty is paramount about what one can rely on to stop companies like PMS free-riding on the creativity, investment of British designs like Trunki, otherwise what is the point of registering design? Was this fair or unfair competition?

At least our EU counterparts can rely on unfair competition if IP law fails them. IP in the EU is a human right not a property right and EU Courts have a much more robust approach to blatant copying. One lawyer I spoke to, with a lifetime of dealing with design law, said, "It is for this reason I would never take a design case in the UK." Whilst we very much welcome the UK IPO's move to reduce fees and introduce online registration, hand in hand with their push for design registration must be an equal focus to create a more robust approach to enforcement. Introducing unfair

competition (should UK IP law fail) would be a good start, not to mention exemplary damages and appointing more Judges for the IP Enterprise Court to deal with cases in a timely manner to stop infringing products continuing to be sold for sometimes 1, 2 and 3 years before a case is heard. It is anomalous still, that registered design infringement cases cannot be heard in the small claims track. In February we were delighted to welcome Tom Duke, IP Attaché to China along with Chinese officials from the British Embassy in Beijing – Tom and the team in Beijing provide a terrific, practical and accessible IP resource which many ACID members value and have used. This was the second in our annual ACID China Group symposiums. It was a pleasure too, to welcome John Alty, IPO CEO hot foot from his recent China visit when he talked about the continued strengthening of top level bilateral relations with the IPO's counterparts in China. The IP Attachés were certainly an inspired initiative by the UK Government.

Recent figures show that four UK Intellectual Property Attachés based in China, Brazil, South East Asia and India have helped to protect £400 million worth of IP assets for UK businesses. See Page 14.

ACID will soon embark on its third decade and to ensure a dynamic future, in May, ACID's Advisory Board will meet for the first time. We have reached a time in our lives where the ACID voice needs to be a louder, stronger and more powerful influencer for change in the ongoing IP infringement and counterfeiting battle. It is imperative that UK design, whilst being lauded for the amazing success story that it is, has the support not only of a strong legal system but there is a change in the culture that it is OK to steal ideas and free ride on the back of creativity with little or no redress. As active IP advocates joining the Advisory Board (or think tank), ACID will benefit from their ideas, experience and expertise to reach this objective. **Watch this space!**

# GUEST EDITOR



Mick Ryan, Head of Business Issues & IP  
at China - Britain Business Council (CBBC)

**Mick Ryan is based in Shanghai and is Head of Business Issues & IP at CBBC. Mick works closely with UK Government and important UK and EU industry associations on cross-sector initiatives to protect the interests of British companies in China.**

CBBC was delighted to take part in the ACID IP China Group meeting in February when our Executive director Lise Bertelsen explained how Chinese e-commerce is booming. It is already the second largest global e-commerce market after the US and so far only half of Chinese citizens are online. Alibaba Group is the standout success with its wide range of e-commerce platforms catering business-to-consumer (B2C) sales, as well as C2C, B2B, and even cross-border trade. To give an idea of scale, the transaction volumes on Alibaba's platforms already surpass the combined international totals of eBay and Amazon. However, because of the low entry barriers and simple procedures to set up e-stores, particularly on C2C marketplace Taobao, international brands estimate they lose millions each year to IP infringement. Both Alibaba and the Chinese state recognise the problem too – official news agency Xinhua estimates \$45 billion sales in fakes on Alibaba annually. Bigger brands employ full-time lawyers or agencies to find and remove up to tens of thousands of infringing links each month, but everyone wants to see progress that can help all rights owners large and small, international and Chinese.

## CBBC Online IP Programme

With the support of the British Embassy Beijing, China - Britain Business Council (CBBC) signed a strategic agreement on IP protection with Alibaba Group during the visit of the UK's IP Minister to China in September 2014. CBBC and Alibaba hold quarterly roundtable sessions which give UK companies an opportunity to meet Alibaba's IP teams to discuss best practice for online enforcement, and look at special initiatives which could be piloted with certain British rights owners. In one successful project in late 2015, Alibaba worked with British engine lubricant producers on a major criminal enforcement campaign. This successfully dismantled a nationwide network producing and distributing counterfeit oils, and was Alibaba's highest value enforcement of 2015.

## Design Rights Fast-track Enforcement

British companies and Alibaba both have difficulties removing design infringing products from Taobao. There are simply too many, and Alibaba has the added complication of 'fake complaints' from companies saying competitors are infringing their IP. It causes delays while Alibaba tries to make fair judgements or while the local IP Office helps on complex decisions.

Using the CBBC agreement as a vehicle, Alibaba agreed to pilot a fast-track enforcement project for one prominent British company with registered designs in China. Under the pilot, Alibaba assume that complaints are made in good faith, and remove listings of design infringing goods without detailed analysis. The quid pro quo is that the British company has to make absolutely sure that the goods in question are design infringing. The project is still ongoing, but initial analysis has indicated an interim win. The average time for a request has reduced from roughly three weeks to one. And total numbers of infringing goods listings have drastically reduced too. Going forward, CBBC and Alibaba will need to do some analysis of lessons learned, and look at how scalable the methodology would be, in order to benefit all companies with registered designs.

## 2016-17: Keep Updated and Get Involved

Alibaba are willing partners, and are enthusiastic about CBBC continuing to introduce British rights owners to their IP team, as well as trying out new initiatives. From April 2016 CBBC will also look to build on the success of our Alibaba work to start cooperation with other important e- and m-commerce platforms. We have already had explanatory conversations with WeChat, Baidu and JD.com. We are enthusiastic and proud about our relationship with ACID through the ACID IP China Group. We encourage all ACID members to be stakeholders in the CBBC Online IP Programme - just email :

[Mick.Ryan@cbbc.org.cn](mailto:Mick.Ryan@cbbc.org.cn) and sign up.



# CASE STUDIES

## ALICE TAMS ACTS TO PROTECT ARTWORK IN CHRISTMAS COPYRIGHT BATTLE



ACID member Alice Tams, an illustrator who trades under the name “Birds In Hats”, is the creator of a popular series of illustrations of birds wearing a variety of hats. She produced a calendar for 2013 featuring a different bird wearing a different hat each month. December 2013 featured a particularly distinctive penguin wearing a Christmas jumper (also designed by Alice) and a cracker hat, which Alice had previously used as a Christmas card design. In December 2014, Alice was alerted by several friend and family members to a jumper on sale in Sainsbury’s supermarkets under their “TU” range featuring a penguin in a cracker hat and Christmas jumper. They all thought that Alice had licensed her penguin design to Sainsbury’s because it looked identical to Alice’s design.

After nine months of correspondence between Alice’s lawyer, Sainsbury and the lawyers for Sainsbury’s supplier, Jo-Y-Jo Limited, a settlement was negotiated avoiding the need for Court proceedings. Despite not acknowledging any copyright infringement and claiming only a small profit for Sainsbury’s and a loss for Jo-Y-Jo on the Christmas jumper, Jo-Y-Jo finally offered to pay Alice Tams a substantial sum for damages and costs and agreed not make any further use of Alice’s penguin design.

**Gavin Llewellyn of Stone King LLP said:** “The problem for Alice was the need to keep a lid on her legal costs whilst ensuring that she was not deprived of the opportunity to protect her valuable intellectual property rights and her reputation. The fact that Sainsbury had stopped selling the jumper early on meant that Alice was able to pursue the case without having to seek alternative means to fund a legal action. I am delighted that Alice stuck to her guns and that we were able to obtain what was due to her for the unauthorised use of her design.”



Alice Tams said: “I’m very pleased that I continued to fight my case and received a settlement that I was happy with - though I am disappointed that it was dragged out by the other parties for as long as 9 months, especially when it seemed to me such an obvious case - most people assumed I had licensed or commissioned the work. I hope more small businesses fight for their proper treatment and representation and do not see this kind of thing as a ‘rite of passage’. I also hope more big businesses can see the mutual benefits of working with and supporting small businesses and designers openly.”

*ACID Comment: “9 months seems an incredibly long, drawn out and unfair period of time for Sainsbury and Jo-Y-Jo’s lawyers to drag their heels. Sadly, this is typical of the majority of micro business’s IP claims against major retailers. I would encourage a more positive and timely response in the future in line with what I am sure must represent Sainsbury’s CSR views on respect, compliance and ethics when using the IP of others without permission, albeit that they did not admit liability.”*



**Alice Tams Original**



**Sainsburys**



**SK STONE KING**

Gavin Llewellyn, Stone King LLP  
[www.stoneking.co.uk](http://www.stoneking.co.uk)

# £15K PAID AFTER BLUEBONE CHALLENGED BAUMHAUS OVER LOOKALIKE



Gavin Llewellyn, Stone King LLP  
www.stoneking.co.uk



Despite not acknowledging infringement, Baumhaus Imports have paid ACID member Bluebone £15,000 over a lookalike challenge. When Bluebone discovered competitor Baumhaus was importing a furniture range known as “Urban Chic” which looked virtually identical to its “Titanic” range of furniture, they decided to act decisively. After lengthy legal exchanges a settlement was reached avoiding the need for Court proceedings. Baumhaus claim only to have made only a small profit on sales of their Urban Chic range and have agreed to stop manufacturing or importing Urban Chic and to pay £15,000 compensation to Bluebone for its UK sales. Baumhaus said the settlement would wipe out its profits on the Urban Chic range.

**Dale Boal of Bluebone said: “In today’s market it is increasingly challenging for companies to present original designs, concepts and ideas. As a company Bluebone make huge efforts to work with manufactures and designers to bring interesting, design led, commercial products to our clients and retail partners. It is extremely important that we are able to avail of the services such as those offered by ACID in the battle to protect our products against copying. We are very pleased that by working together with Mr Olivier Lalmand, the original designer, and the services of Stone King solicitors, we were able to negotiate a halt to the import of these products and secured a level of compensation. It has certainly spurred us on to continue defending against other perceived infringements, of which we have several currently pending.”**

Bluebone is the exclusive distributor for the Titanic range in the UK and Ireland, which was designed by Olivier Lalmand and which is protected by registered and unregistered design rights. The Titanic range is distinguished by its signature “double-barrel” steel frame, use of mosaic boatwood and steel drawer fronts.

**ACID Affiliate Lawyer, Gavin Llewellyn of Stone King LLP** said, “This case shows that even where there is arguably little or no profit in the sales of allegedly infringing products, the IP right owner can still claim compensation for the losses which it has suffered. In this case, Bluebone were able to take action to protect their exclusivity with the benefit of legal advice and secure a settlement which meant that they did not suffer any additional loss to their own business. This is vital for micro, small and medium-sized businesses, who need to safeguard their IP assets.”

**ACID Comment: “The Furniture sector, whilst global, is small in terms of key players. Bluebone are known for their originality and design led capability. Who wants to be known for a lookalike challenge? What does it say about a major brand who appeared to take the fast track to market going so close to the bone?”**

# TRUNKI AND THE CHANGING FACE OF DESIGN PROTECTION

The Supreme Court finding that look-a-like ride on suitcases manufactured and imported into the UK by PMS International did not infringe the Community Registered Design has thrown the design world into disarray. Central to the Court's decision is the different interpretation that may be given to CAD drawings over line drawings which are filed at the European Design Register to protect a designer's work. Until the Trunki case, it had generally been assumed that filing CAD images gave them the same protection as filing line drawings i.e. that it protected the shape of the design and shape alone.

After the Supreme Court ruling it is clear that designers need to understand a good deal about design law and have thought through their filing strategy carefully even if they are at a very early stage of their business. This flies in the face of one of the important features of the European Community registered design, which was intended to provide a low cost protection which designers could apply for themselves and which would offer the same protection in whatever member state a copy product was sold. In this piece we will set out some guidelines for designers as they go about securing registered designs.

Before that, it is worth reminding ourselves about the Trunki story and why this case has created such a storm. Famously rejected by Dragons' Den investors in 2006, Trunki went on to become a British business success story. Around 20% of all 3 to 6 year olds are proud owners of a Trunki suitcase and the design is acknowledged to have been 'very clever', 'revolutionary' and 'a great idea'.

It was very concerning, therefore, when in 2012 Trunki's founder Rob Law noticed a discount version being offered for sale by PMS – a company based in Essex and Hong Kong. PMS admitted that they took two of the most popular Trunki styles – a tiger and a ladybird – and adapted them for the discount market. Trunki sued and its claim was upheld in the High Court.

So far so good. However, PMS appealed and the Court of Appeal overturned the first court's decision. On a further appeal to the Supreme Court that Court has affirmed what was generally regarded as a surprise decision from the Court of Appeal.

The Court found that the design filed (i) gave the impression of a horned animal and (ii) where the designer files CAD drawings which showed different parts of the design in different shades of grey, the rights of the designer were limited to a product which also includes those colour contrasts.

In other words, submitting CAD images to secure your registered design did not provide as broad a protection for the shape of a product as had been understood.



Article written by Margaret Briffa, a leading intellectual property lawyer and founding partner of ACID Legal Affiliate Briffa  
www.briffa.com

For Trunki, this meant that when it comes to comparing the registered design with the infringing product the exercise was not a comparison of the shape alone but shape and 'other factors' as well. When considering all those other factors, therefore, the Court of Appeal and the Supreme Court found that the PMS discount version creates a different overall impression from the Trunki.

In the light of this, there are some tips for a designer who wants to take advantage of the protection afforded by Registered Designs:

- (i) Where a design is filed in black and white whether by way of line drawing, photograph or greyscale CAD image the registered design will be deemed to cover all colours;
- (ii) Where a design is shown in colour those specific colours are claimed as part of the design protected;
- (iii) The widest protection can be secured by submitting drawings that only show the contours of the design;
- (iv) A line drawing is less likely to be interpreted as a drawing for a design that may have surface ornamentation than a CAD image;
- (v) Simplicity or absence of surface ornamentation may be a feature the registered design – but whether it is or not may well not be clear and ultimately a court would need to decide whether what was on the register showed an 'absence of ornamentation';
- (vi) A designer should consider registering both line drawings and specific coloured designs of its products and on the same day to get the broadest and surest protection.

# ARTIST'S RESALE RIGHT



ABBEY YOUNG, HEAD OF COMMUNICATIONS,  
DACCS

This year marks the 10th Anniversary of the Artist's Resale Right (ARR) in the UK.

As one of the most important pieces of legislation introduced in modern times supporting the livelihoods of visual artists, design creatives may know little about ARR or how their work could be eligible for royalties.

ARR provides a royalty for artists and artists' estates, whose works are still in copyright, whenever their work is resold by a dealer, gallery or auctioneer for €1,000 or more. This allows artists to share in the increasing value of their work.

Artists receive royalties based on a small percentage of the sale price of works resold for €1,000 or more. There is also an overall royalty cap of €12,500 (about £10,000) on individual works resold for over €2 million.

To date, DACCS has distributed nearly £47 million in ARR royalties to over 3,900 artists and estates. In 2015 the median monthly ARR royalty payment was £272.

# DACS



The studio of John Hoyland. Photograph by Brian Benson © Brian Benson, 2016. Image courtesy DACCS.

Within the ARR Regulations, there is a non-exhaustive list of copyright protected works of graphic or plastic art that qualify for ARR, which has left room for flexibility in the way in which artistic and design works are covered.

However, in order to dispute ARR royalties that may be due, some art market professionals focus on elements like functional purposes to deny their qualification as an eligible work under the ARR Regulations. This is particularly relevant for such design works that are not expressly listed but still qualify as works of plastic art and of artistic craftsmanship, such as furniture, thus qualifying for ARR Royalties.

DACS campaigned for the Artists' Resale Right on behalf of artists and was instrumental in supporting the introduction of ARR in the UK. Over the last decade and going forward, DACS will continue to ensure that artists receive this valuable source of income to support their practices and to campaign for fairer remuneration for design creatives.

ACID members can support ACID and DACS' work, campaigning to protect the rights of visual artists and design creatives. To find out more about ARR and DACS' 10th Anniversary campaign, please visit <https://www.dacs.org.uk/for-artists/artists-resale-right> and sign up to DACS' newsletter for updates and events.

If you believe you are due ARR royalties, please contact DACS. You may be eligible to register for ARR and it is free to sign-up.

Established by artists for artists, DACS is a not-for-profit visual artists' rights management organisation.



The studio of John Hoyland. Photograph by Brian Benson © Brian Benson, 2016. Image courtesy DACS.

# 2016 THE YEAR OF THE MONKEY!

UK IPO CEO JOHN ALTY, CHINA IP ATTACHÉ TOM DUKE, LISE BERTELSEN OF THE CHINA BRITISH BUSINESS COUNCIL AND TRUNKI'S LAURA BREEN JOINED THE 2ND ACID CHINA IP GROUP ROUND TABLE BREAKFAST SYMPOSIUM.

Whilst it is clear that working with China effectively offers many opportunities to UK designers and manufacturers there are also many issues of dealing with IP intellectual property challenges effectively. The ACID China IP group was formed to open channels with Tom Duke, the UK IP attaché based in Beijing, officials from the British Embassy in China, UK IPO foreign policy officials and the UK IPO designs team and to act as a positive conduit for member engagement, sharing information and intelligence.

Talking about the IPO's intensive designs modernisation programme in the UK and about his recent trip to China, the IPO CEO John Alty said,

**“Overall, the changes we are making will deliver a streamlined, more cost effective service for our existing customers. We are reaching out to designers who could benefit from our services but are not currently using them.”**

The approach will start by “Understanding our Customers” via an extensive customer journey mapping exercise including the testing of the online filing form. Looking to the future will be a targeted outreach programme to educate designers of the benefits of formal designs protection, online services to include webmarking for registered designs, progressing international registrations through the Hague Agreement by the end of 2016 and including registered designs in the IPEC Small Claims Track. Strategically John talked about designs in the context of reforms within the overall development of the IP infrastructure in China and acknowledged, “A system which is developing quickly and largely in a positive direction.”



Tom Duke, Dids Macdonald and John Alty

For example in 2015, the Chinese State IP Office (SIPO) received 551 applications for design rights and over 100,000 civil IP cases involving 98% Chinese were litigated through the Chinese Courts. He described the pace of change in the Chinese IP system as impressive. The UK, for example, is seen by the Chinese authorities as a serious and valued partner.

On enforcement John acknowledged that this remains a serious problem and sales at trade fairs and via e-commerce can be particularly damaging. However, there is a high level commitment to joint working on IP cooperation with China is an IPO priority and designs protection and enforcement is a key part of this. On a recent trip by the Chancellor there was a joint communiqué on designs and IP enforcement which was a clear sign of political engagement at a higher level. Bilateral plans continued to be discussed and progressed during John's recent visit to China involving work plans with key Chinese agencies and ongoing policy dialogue. Later this year there will be a 2016 UK-China IP Symposium, a great opportunity for UK designers to interact with senior Chinese policy makers. This will follow a summer 2016 visit to China by the IP Minister Baroness Neville-Rolfe.

CBBC Senior Director Lise Bertelsen talked us enthusiastically through the massive benefits of over 60 years of experience which the China British Business Council has to offer. Guest editor Mick Ryan covers most of the points raised in his article with a design focus on Page 6. The China - Britain Business Council and the British Chamber of Commerce in China are the leading organisations helping UK companies grow and develop their business in China. Their missions are to help UK companies of all sizes and sectors, whether new entrants or established operations, access the full potential of the fastest growing market in the world. They deliver a range of practical services, including: advice and consultancy, market research, event management, an overseas market introduction service, trade missions and exhibitions, and setting up rep offices. Through 60 years of engagement, we have built up exceptional connections with government and business across China.

Laura Breen's Trunki update was delivered just a couple of weeks before the Supreme Court Judgment in favour of the PMS look alike which has subsequently plunged the design community into uncertainty about current UK and EU registered design protection. Laura talked amongst a myriad of Trunki copy case studies about one Chinese copycat "Shrek" and how a registered design enables action in the EU and how patent registration thwarts action in China but at what cost – 18 months for an invalidation process? Working with Yellow Brand for their online brand protection out of 800 reported infringements, 737 were removed in 2015. With the fabulous new Jurni carry on luggage about to hit world markets her advice is, "Protect it by trade marks and patents."

Tom Duke's advice included "If you think China has any relevance to your business, protect your IP there, just as you would in the UK. Don't forget that Hong Kong, Taiwan, Macau and mainland China are four, separate IP territories. Do proper due diligence, do background checks on partners and look to build longer-term relationships to reduce the risk. Get contracts right and consider the likely jurisdiction of disputes and location of assets of the counterparty. Monitor and try to take action against infringement. Don't forget prior to trade fairs to allow a minimum of four weeks to prepare papers for enforcement." More of Tom's Q & A, tips, guidelines and advice will follow in the next newsletter. Tom reinforced his willingness to help with further IP queries:

Tom.Duke2@fco.gov.uk

Dids Macdonald closed the event by saying, "2016 is the year of the Monkey so, following 12 months of the dignified and surefooted Goat, the New Year of the Red Monkey, according to astrologers, is going to shake, rattle and roll. We look forward to doing just that by working positively and collaboratively with all stakeholders to ensure that the best possible resources and intelligence are available to designers to grow their businesses in China and also protect them from copies. Copies of original products threaten our industry and hinder originality. It is pervasive and attacks the very heart of innovation, something we are very good at in the UK."

# HOW TO USE CUSTOMS TO SUCCESSFULLY DETAIN INFRINGING GOODS

TM ® © **BRIFFA**

Article written by Ramsay Monine from ACID Legal Affiliate, Briffa [www.briffa.com](http://www.briffa.com)



Nicola Brady spent years developing her uniquely shaped lint brush design and had secured design registrations in her native Canada, America, China and a Community Design Registration at the EU IPO. Below is an image of Brady, Inc's Registered Community Design Right.

Following a string of awards for the lint brush design Brady Inc., was starting to generate healthy profits so she started to expand her business into Europe and then into the UK. She negotiated an agreement with Chesterton Partners who initially only ordered a few hundred units but these units sold quickly and orders grew steadily.

To her horror, a friend visited a trade fair in China and sent her some pictures of an identical lint brush design but in different packaging.

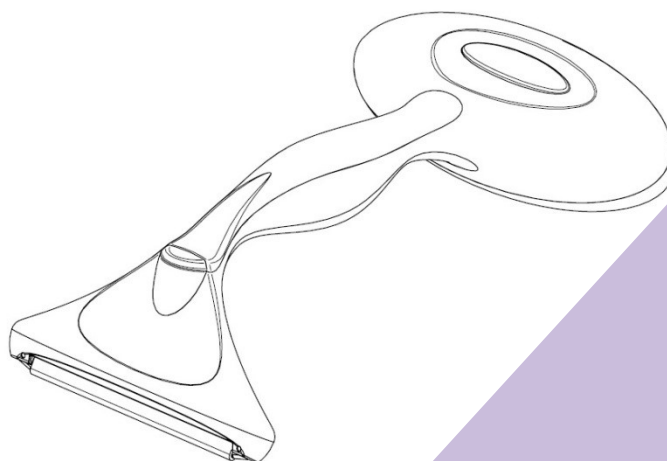
Nicola then discovered that QRC PLC, a large discount wholesaler, was going to import this product in large quantities. And sell in minimum quantities of 100 units.

Nicola was worried that Chesterton Partners would seek price reductions, or worse stop selling her product, if a cheaper lower quality product was readily available and consumers could potentially assume that QRC PLC's product originated from Brady Inc.

As a member of ACID, Nicola contacted ACID Affiliate law firm, Briffa and they advised Nicola to take the following steps:

1. File a customs notice called an EU Applications for Action to notify all EU member states customs offices of her IP rights so that any suspected infringing products could be detained.
2. Use specialist IP investigators to gather as much information as possible on the QRC PLC shipment of the infringing product into the UK.
3. To raise a red alert notice once the investigators had obtained sufficient information on the shipment informing customs of a specific incoming shipment carrying infringing goods requesting customs to detain those goods.
4. Send a cease and desist letter to QRC when the infringing product had been detained or, in the event they were not detained to be sent anyway.





Within a week IP investigators located two possible ships carrying QRS's infringing goods and a red alert notice was filed.

Briffa were then notified that a shipment containing the infringing products had been detained. A cease and desist letter was sent to QRC PLC and to customs confirming the QRC PLC's copycat product infringed Nicola's IP rights and requesting the destruction. Faced with this pressure QRC PLC agreed to the destruction of the infringing product including payment of Nicola's legal costs and an agreement not to sell or import the infringing product or infringe Nicola's IP rights in her lint brush. They also had to provide invoices from the manufacturer of the copycat product.

This was a very important result for Nicola; she kept her market share, was not forced to reduce her prices to compete with QRC PLC and felt she could now concentrate on growing her business in Europe.

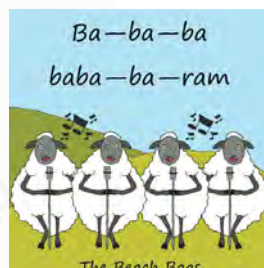
### Some useful tips

- Ensure you have an effective enforcement strategy in place to deal with counterfeit products/copycat products.
- Secure IP registrations for patents and designs as soon as your product is developed (but before placing it on the market or disclosing it to third parties).
- Secure patent and design registrations in all jurisdictions simultaneously (or within the priority period) that you plan on trading in to preserve novelty and police your rights.
- Consider filing trademarks registrations also in all jurisdictions you intend on trading in to adequately police your rights.
- In order to spread costs when filing for protection in multiple jurisdictions ask your lawyers about claiming priority and monitor the market regularly in order to detect infringements.
- Consider filing an EU Application for Action and ensure you keep the information updated.
- Obtain legal advice as soon as you become aware of an infringement and ensure terms of settlement include cessation of infringing activities and provision of information of the manufacturer the copycat products.

# COPYRIGHT AND COPYWRONG – WHAT IS IT AND HOW DO YOU INFRINGE IT?

Artist and Illustrator Colin W Thompson was amazed to discover remarkably similar cards to his Flockin Sheep range displayed on the website of a former client who had previously commissioned Colin to produce artwork for the company. Despite having a licence agreement in place and supplying the artwork to Alistair Simon Wells of Northern Photography, Colin was not paid for his work. When a series of letters to Northern Photography produced no result, Colin decided to take legal advice.

As a Member of ACID, Colin knew he had access to specialised legal advice from ACID's legal affiliate teams, who are all intellectual property experts. Colin contacted McDaniel & Co.'s Partner Niall Head-Rapson who said, *"I assessed examples of his artwork and compared them with those discovered on Northern Photography's website. The cards were found to be substantially similar to those supplied previously by Colin and therefore we drafted a Letter Before Action. Despite receiving this letter the company failed to remove the similar card designs and continue to supply them to retail outlets in the Cumbria area as well as via their website."* Niall went on to say, *"Copyright, along with the other intellectual property rights such as trademarks, designs and patents, is essentially your power to stop other people doing what you do. The different facets of intellectual property seek to protect different things and copyright is the protection afforded to the expression of ideas, rather than the ideas themselves. Its primary purpose is to reward authors for the creation of original works."*



Copyright extends to mediums through which ideas are expressed, including original literary works, dramatic, musical and artistic works. It also protects sound recordings and performance rights. It is often possible for there to be more than one copyright in a work, for instance an illustrated book will have both literary copyright in the text and artistic copyright in the illustration. The law surrounding copyright can be found, mainly, in the Copyright, Designs and Patents Act 1988.

ACID Comment : "There is a common misconception when it comes to copying that if a certain number of changes are made to a work then it won't be copying. This is not the case, the relevant test for copying is that a whole or substantial part of the original work has been copied. When considering any changes that have been made it is a question of the substance of the changes rather than the number of changes that will be relevant. It should also be noted that the original work need only make up a small part of the copied work."

**Colin W Thompson's message to fellow artists and those who care about protecting originality is loud and clear, "If anyone comes across examples of the Northern Photography similar sheep-based designs, please consider sharing the information with ACID or direct to me. This will help me greatly to deal with this unfair issue."**

# MEMBER FOCUS

## ACID MEMBER Styling Homes and Gardens

### Why did you join ACID?

I joined ACID to help protect my IP and ideas as I am a sole-trader. The product I have created is a simple concept and could be easily re-created by one of the top horticulture companies.

### How did you start your business?

I was in IT for 20 years and I needed a change of scene, and do something more creative. I moved house into a new build that had a patch of turf and was really depressing to look at through my kitchen and patio window. The house move meant funds were very tight, but I needed to create a gorgeous garden on a budget. Underneath the turf, the ground was compacted and was a nightmare to dig. I thought there must be lots of people out there that have a new home with limited gardening skills, budget, and time, and want a gorgeous garden and possibly overwhelmed and don't know where to start – so Border in a Box was created last year. The prototype was launched at the Festival of Business at the Bank House Hotel in Worcester in September. After lots of feedback and various meetings with a local garden centre, the product was developed further and I was shortlisted for an award for innovation at the Enterprising Worcestershire Business Awards in November 2015. It has been an exciting first year of business!

### How do you create and protect your designs?

All of the garden designs are created by me, I choose a particular garden style and then research suitable plants that can work together in the conditions required. I then draw and label the designs, and package them with a planting plan which provides details and a photo of the plant along with flowering times. I include a bulb planting plan to provide all-year-round colour and an instruction sheet with top-tips and general advice. It's simple, it takes away the guess work of what plant works where, which means the

money you spend at the garden centre is good value rather than buying a bunch of plants that look OK until you get them home and die 6 months later because they are planted in the wrong place or conditions. I protect my designs by not advertising them on social media or websites, but provide an illustration and information on what's in the box. When I'm at an event, I show the potential client what is in the box, and it means they can't take it away and photocopy it.



### Which ACID services have you used?

I purchased the terms and conditions that I used on my website shop – I also use the logo on all my products and website. [www.borderinabox.net](http://www.borderinabox.net)

### What are you currently promoting?

My next big thing is creating a show garden at the RHS Malvern Spring Festival in May. It's very exciting! I will also be creating a [Border in a Box version of the show garden too](#), which will be fabulous! I have gained sponsorship from the [www.wlep.co.uk](http://www.wlep.co.uk) and my garden builder is Gareth Wilson <http://www.gkwilsonlandscaping.co.uk/> who is a multiple RHS medal winning garden landscaper. I've received sponsorship from various businesses – Digby Stone for the paving <http://www.digbystone.com/>, the seating is from Sui Generis <http://www.suigeneris.co.uk/> and fab sheep sculptures from Animals in Wire <http://www.animalsinwire.co.uk/>

# MEMBER PROFILE

## GAZE BURVILL

Gaze Burvill has been creating bespoke garden furniture for the past two decades and you are acknowledged leaders in your field. What is the importance of the intellectual capital which sits under your brand?

It would be easy to understate the value of intellectual capital, however, with a little consideration, the value appears to increase at every turn. Outdoor furniture is our area of expertise; we have been designing and building it for over twenty years and our furniture has to withstand some very challenging climatic conditions whilst retaining their aesthetic qualities. The knowledge and capability to achieve a piece of furniture that endures these tests is part of the design process and sets ourselves apart from others. This is our business.

Gaze Burvill has worked extremely hard to be at the forefront of this field, designing and creating items of furniture that are distinctive, comfortable and built to the highest specification. We have to protect this by having a robust strategy in place and the ability to identify infringements and act upon them rigorously. To not only protect the designs, but to protect the way that it is built. It is a firm statement of intent we value highly and would expect others to respect.


Your company prides itself on its skills and craftsmanship and the use of sustainable products. What level of importance does this level of excellence contribute to the future of Gaze Burvill?

Gaze Burvill furniture is hand built by craftsmen and we want them to stay and develop with us, contributing to the company through their understanding of the designs and the materials they use. This investment is significant and we have developed strong working relationships with local colleges to identify the talent,

working with them to develop the furniture makers and designers of the future through apprenticeships and professional development. As we use traditional techniques such as Steam Bending alongside state of the art technology, the quality of the raw material is essential. We dedicate a great deal of time to selecting the finest timber from known managed (and renewable) sources which we even visit. Our work with Woodland Heritage helps to support the sustainable management of woodlands to produce fine timber from which furniture can be made.



 @GazeBurvill

 gazeburvill

[www.gazeburvill.com](http://www.gazeburvill.com)



The innovation which underpins your business combines creativity with the quality of design, product, service and people. How do you protect these valuable assets?

Gaze Burvill has developed a reputation as the leader in design led manufacturing of outdoor furniture and we work hard to retain it. By registering a number of designs through the UK and EU we hope to protect our designs and use this protection when infringements occur. All of our designs are registered on the ACID database. This is the first line of defence by demonstrating our intent to state our ownership of intellectual property. The Gaze Burvill team are ambassadors of the brand and we encourage them to be vigilant and aware of those seeking to exploit soft targets. They recognise the importance of the intellectual property in our designs and processes, taking pride in the fact they are part of its future.

You recently took advantage of the Membership benefit of a visit from the ACID IP Audit team. How useful was this meeting and what was the most significant thing you learned?

The decision to carry out an audit came from questions we found ourselves having to ask when confronted by an infringement of a design in the UK. Having the IP Audit helped us to put in context our large number of Design Registrations as well as our inherent design, copyright and trademark protections so that we can better use them to defend our Intellectual Property effectively. Recent cases reinforce the importance of registering the right elements of the design, but underpinning this with a sound knowledge of how to effectively respond and deal with suspected infringements.



How does IP infringement impact upon your growth potential? Have you experienced an increase or decrease in copying in recent years? Does this have an impact on the job certainty of your employees?

When an infringement occurs, it has an impact at many levels. A copied design will inevitably be priced lower and will not have the same attributes of comfort, quality, craftsmanship and longevity which are very hard to achieve. We have found them to be only a visual copy and often crudely done, but, this nevertheless has an impact on a customer of a genuine pieces who has purchased a piece of furniture at a premium, believing they own something unique. The purchaser of the copied piece will be let down by the quality of the build and we have even been approached by an owner of a copied piece disappointed their furniture had not lasted! Our increased vigilance has improved our awareness of infringements, and, by making ourselves a harder target by confronting those who believe it is acceptable, it has made a difference. As a design led company, the value of our designs is critical, to lose that edge through others copying our work does lead to uncertainty and has a very negative effect on morale and creative drive, we owe it to our team to protect them as best we can and keep us all motivated to produce work which is enjoyed and valued by those who buy it.

ACID values the support of Gaze Burvill as a longstanding member and supporter of the organisation. How has Gaze Burvill benefitted from this association?

As designers we are part of a community, ACID has established the values and boundaries shared within this community relating to Intellectual Property. Through networking opportunities, ACID provide us with the platform to make our intentions clear and share our experiences with others. By having access to IP legal support, we can pick our battles and launch our plans based on expertise rather than anger and frustration. Drawing on the vast experience ACID has and it's recognition to bringing more designers into the fold to create a critical mass who work together to minimise the corrosive damage caused by infringements whether intentional or not.



# INTELLECTUAL PROPERTY DISPUTES? IS THERE AN ALTERNATIVE TO LITIGATION?

IP disputes don't always have to mean costly and time intensive litigation. Many people are surprised to learn that only about 1% of IP disputes reach final trial. This is for various reasons; often, effective correspondence, called "letters before action", can provide a basis for settlement, and many disputes are also resolved through Alternative Dispute Resolution procedures (ADR). Seeking alternatives to disputes can be commenced at any time during the legal process, whether or not proceedings have actually been issued at Court. Often parties can amicably resolve disputes through ADR and, in some cases, they even end up working together again.

ADR is generally a voluntary process and relies on the parties having a desire to resolve the dispute between them. So the trick is to ensure that both parties are not too far down a legal journey before the subject is broached. The most common methods of ADR are arbitration and mediation.

## Mediation

It is good to talk and mediation provides a voluntary conduit involving both parties meeting with their legal advisors and a trained mediator at an agreed venue for the day (or sometimes longer) to try and resolve the dispute. The parties will select and agree the appointment of a mediator. The day usually begins with all parties meeting in one room with the mediator to present their opening positions. The parties will then go to separate rooms and the mediator will then act as a go between trying to broker a settlement. The mediator is impartial and does not decide the dispute but will give, usually, sensible opinions to the parties to try and assist them in reaching settlement between themselves.

Generally, the mediator will have a background in the relevant area of law. One of the most important aspects of mediation is that a settlement can be reached which encompasses terms the parties could not, and would not, have been awarded at trial. For example, the Defendant may agree never to make a particular design again, despite the fact all rights may expire within a few years. A Judge is strictly limited to the application of the law, whereas a mediator can suggest a more commercial solution, to which both parties may agree. ACID also has a new mediation service called "Mediate to Resolve" which is a timed 3-hour mediation without lawyers.



Kelly Hudson, Senior Associate and Trade Mark Attorney. McDaniel & Co



## Arbitration

This is conducted by a neutral person called an arbitrator, again who will usually have a background in the relevant area of law. An arbitration is a much more formal setting than mediation and the arbitrator will hear arguments and evidence from both sides before reaching a decision on the case. Arbitration can be binding or non-binding. If it is binding the parties agree to waive the right to a trial and accept the arbitrator's decision, and there isn't usually a right of appeal. If the arbitration is non-binding parties can request a trial if they do not agree with the decision.

## Other types of mediation

In addition to the above, parties will also often have inter-parties meetings to resolve disputes or may have a face to face meeting between the parties and legal advisors, this is known as a 'round table meeting or Counsel Mediation'. Another option is a Neutral Evaluation, where a neutral third party (the Evaluator) will look at evidence and give the parties an opinion on the strengths and weaknesses of their case to try and help them reach a settlement.

ADR is a valuable tool in any dispute and should never be overlooked by the parties as it can enable an agreement to be reached to the satisfaction of both parties without the stress and expense of going to a formal trial.

# NEW MEMBER LIST



We would like to welcome to the ACID community

Member Name	Design Category	Member Name	Design Category
Silk Rose	Bridal	BODOLI	Interior Accessories
The Little Globe Co & Loraine Rutt Ceramics	Ceramics	Folia UK	Interior Accessories
Cows & Kisses	Childrenswear	Howsarlock Ltd	Interior Accessories
Three Point Design Limited	Design Agency	Little Cloud	Interior Accessories
Amazing Mentor	Education	Wildash London	Interior Accessories
CYB Services	Education	Jess Hughes Designs	Interior Design
Luminous Counselling	Education	Elizabeth Humble Jewellery	Jewellery
Quest Edutainment Company	Education	Heather Johnson	Jewellery
Albaquirky	Fabrics & Textiles	Joanna Wakefield Jewellery	Jewellery
Beauty and Blight	Fabrics & Textiles	Katie Loxton Ltd	Jewellery
Flohr & Co.	Fabrics & Textiles	SoHo Dispensers Ltd	Kitchen & Bathroom
Kanda Images	Fabrics & Textiles	Jessica Jones Lighting Ltd	Lighting
Melissa Taylor	Fabrics & Textiles	Lady Lexington ltd	Lighting
Sophie Rowley	Fabrics & Textiles	Lite4Life Ltd	Lighting
The Print Tree	Fabrics & Textiles	Lumino Limited	Lighting
Tinati Design	Fabrics & Textiles	Margit Wittig	Lighting
Eddies Dreaming	Fashion	Clough & Co.	Product Design
Faye UK Ltd	Fashion	Harry Cotgrove	Product Design
Orange Oxide Design	Fashion	Imageholders Ltd	Product Design
SD-Interiors&Accessories LTD	Fashion	Kahuna Huts Ltd	Product Design
Stylish Angel Limited	Fashion	MASH Designs Ltd	Product Design
The Stitch Society*	Fashion	OneStone42	Product Design
Ruthie L. Designs	Floor Coverings	The Empty Box Company	Product Design
Casa Botelho	Furniture	Tim Plunkett	Product Design
David Le Versha	Furniture	Unique Words	Product Design
Design By Davies	Furniture	With Love and Light	Product Design
Heritage Furniture UK Ltd	Furniture	charactermask.com	The Arts
Heseltine Design	Furniture	Ginger Line Designs	The Arts
MoroDeco Ltd	Furniture	Maggie Cooper Baskets	The Arts
Studio Vee	Furniture	Sarah Horne Flowers	The Arts
World of Weave Uk Ltd	Furniture	Tildy's Room	The Arts
Adam Christopher Design	Garden Products	VF Designs	The Arts
Betty Bay Design Limited	Giftware		
CoolSnowGlobes	Giftware		
Julia Gash Enterprises Ltd	Giftware		
Little Timbers	Giftware		
Miss Shelly Designs	Giftware		
The Laser Boutique	Giftware		
ART WORKS	Graphics		
Fox & Velvet	Graphics		
Lisa Kirkbride Designs	Graphics		
Nsaa Nefateri	Greetings Cards		
Paper Sole	Greetings Cards		
Richardson and Richardson	Greetings Cards		
Special Impression srl	Greetings Cards		



## ACID's Joining Criteria for New Members

In accordance with our policy that all members are provisional members for the first 6 months of their subscription period, we publish a list in each newsletter of companies which have recently joined ACID. In the event that there is any complaint against a new member, please write to the Chief Executive together with any substantiated facts. Hearsay, rumour or unsubstantiated facts will not be considered under any circumstances. Any complaint that should arise will be put before a panel comprising ACID's legal advisor, Chief Executive and two Corporate ACID Members from a different industry sector. If the panel decides that a complaint should be upheld their decision will be final and no correspondence will be entered into.

# World Intellectual Property Day 2016

April 26

# EVENTS & CALENDAR

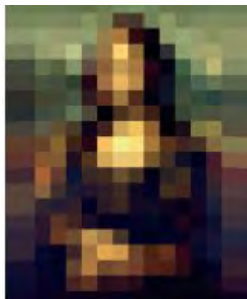
## 26 APRIL - WORLD IP DAY 2016 – DIGITAL CREATIVITY: CULTURE REIMAGINED

**WIPO:** “Reimagining culture – how we create it, how we access it, and how we finance it – is not without challenges. And the challenge of a flexible, adaptive intellectual property system is to help ensure that the artists and creative industries in our digital universe can be properly paid for their work, so they can keep creating. So this year’s World IP Day will explore some of the issues surrounding our cultural future.”

In the same breath breaking news tells us about a ‘new’ Rembrandt painting 400 years after the artist’s death. Researchers taught a computer to paint exactly like the Dutch painter by analysing 346 of Rembrandt’s paintings. The work of art was printed in 3D to allow the computer to even replicate the brush strokes. Amazing breakthrough technology for many, but maybe an open door, in the future, to criminality and the easy faking of masterpieces when this process is refined. 3D printing is one of THE most exciting emerging technologies but left unchecked it has the potential to cause mayhem.

### So what of ACID’s focus on World IP Day?

We salute Designs’ incredible success story for the UK. What other sector has grown 34% in the last five years? So we are going to be shouting very loudly, applauding its massive contribution to the UK economy with a simple message to support design originality and protection.



26 APRIL - WORLD IP DAY 2016

**EXCLUSIVELY**  
**housewares**  
14-15 June 2016 Business Design Centre, London  
14th - 15th June 2016  
Business Design Centre,  
London

**AUTUMNFAIR**  
4th - 7th September 2016  
NEC Birmingham

**glee**  
12-14 September 2016  
NEC Birmingham UK  
12th - 14th September  
NEC Birmingham

“  
**DESIGNERS ARE OWED A FAIR, ROBUST AND ACCESSIBLE ENFORCEMENT SYSTEM TO PROTECT THEIR DESIGNS. AT THE MOMENT ACCESS TO TIMELY AND COST EFFECTIVE LEGAL REDRESS IS THE LUXURY OF THE FEW. THIS HAS TO CHANGE!**  
”

**ACID (Anti Copying in Design) Ltd**      **HOTLINES**  
PO BOX 5078      Membership Office: +44 (0) 845 644 3617  
Gloucester      Email: info@acid.uk.com  
GL19 3YB

ACID Registered Head Office: UNIT 14, Staunton Court Business Park, Gloucester, GL19 3QS

Company Reg. No 3402512      VAT Reg. No 707 5923 23

Nothing in this newsletter is intended to be a complete statement of the current law and you should always take specialist advice in respect of your own particular circumstances ©ACID 2016

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