



## ENFORCEMENT FRAMEWORK REVIEW

**Anti Copying in Design (ACID) welcomes the opportunity to respond to Parts One and Two of a Review of the UK IP enforcement framework.**

### **About Anti Copying in Design (ACID)**

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

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

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

### **Comments on the Introduction**

***“The UK has one of the best intellectual property (IP) systems in the world”*** – ACID believes that this statement needs qualification. It relies on a *legal* index provided by the law firm Taylor Wessing who create an annual global index. This presents a statistical comparison of how jurisdictions are viewed in terms of “IP competitiveness”. Jurisdictions are rated as places in which to obtain, exploit, enforce and attack the *“three main types of IP: trademarks, patents and copyright”*. The Creative Industries and design, especially, comprises 87% lone, micro and SME companies and for them, litigation is the luxury of the few and, therefore, they would not consider the UK to have one of the best IP systems in the world. The design community comprises 1.69m actors.

This index does not measure enforcement across the spectrum from lone/micro to large organisations but measures enforcement for those who can afford to litigate, a fundamental and differentiating factor.

Most designers lone, micro and SME companies simply cannot afford to litigate because of cost and time factors. It is good, therefore that the Review will look at “cost of legal challenges” but in terms of enforcement, the above statement does not reflect an accurate picture of the UK's IP system, certainly for most SMEs.

It is a mantra (without the necessary qualification) used by Ministers and Government officials that is becoming increasingly frustrating for SME designers who struggle to access the justice system.

*“The group raised three key issues during initial discussions*

- **Cost of legal challenges**
- **Accessibility and effectiveness of judicial processes and**
- **Online Infringement\*\***

\*\* We are now informed that online infringement will not be covered in the Enforcement Framework Review because of the fear that further concentration would dilute the work of the industry round tables as part of the Industrial Strategy. We resolutely disagree with this. Whilst we understand that there has been significant progress in some areas, we believe that the enforcement framework objectives must be more ambitious in their remit of tackling the very demanding challenges that online infringement pose to lone, micro and SMEs. They form the critical mass who increasingly find their work infringed on online marketplaces and through social media platforms with little hope of redress. The work already achieved on the Round Table groups and through a tougher enforcement framework would surely complement one another?

Please [watch a video](#), representative of thousands of micro SMEs who struggle consistently with any hope of addressing online infringement. Although this video was made a couple of years ago, what is apparent is that the scale of the issue has accelerated rather than dissipated. Not to include Online Infringement in this major enforcement review would be a travesty. This is Nessie lost 25% of their workforce because of online theft. This is not just about cutting staff, but it is also about the loss of their livelihoods and the impact that this has on their families. All because of indiscriminate online copying which is almost impossible to police and equally impossible to enforce effectively.

#### **A general comment about consultations and research projects**

In general, one of the reasons there is such a poor response to consultations and reviews is that they are complicated and time-consuming and, since the Hargreaves Review, many have seen very little or no improvement in cost and time effective access to enforcement. Organisations and individuals are also “consultation weary” because they receive very little feedback. Take the ACID response to the [Design Rights Infringement](#) research. Despite spending a considerable time responding, supported by many design organisations, ACID has yet to hear of any progress in policy reform as a result. The remit of expensive research was to provide “robust methodology for the measurement of design infringement”. ACID would respectfully ask what progress has been made on this?

#### **A. Cost considerations for court action**

In examples A, B, C, D you use 4 trade mark examples, In E and F you use copyright examples. We think there should be at least two design examples such as, *“When an innovative and design led furniture maker left her designs with a major UK furniture retailer, she was told she would be paid a commission and a royalty if they were used. The major retailer ([Swoon v Simone Brewster](#)) used them without permission and when challenged with a letter before action clearly came back with a paltry amount so she had no option but to go to social media. Eventually, Swoon came back and publicly apologised and paid her an undisclosed sum”*



A similar set of questions can be asked.

Re A – A3 and A5– We searched on the **Citizens Advice Bureau** and could find no access to IP help through their website and wonder why this is included as an option?

### **B. Pro Bono Publico**

We also searched the IP pro bono scheme which looks very helpful, but it is not generally publicised, and we believe few know about it. Please can you confirm how many cases have been referred through this scheme.

### **C. Experience of the judicial system**

You use the acronym IPEC, many do not know of the existence of the Intellectual Property Enterprise Court (IPEC). Alongside the trade mark example should be a designs' example. We feel that the legal terminology in the TM case is too complicated for most SMES. For example, you refer to “costs gap” “summary judgment” and “passing off”

### **D. Preliminary and out of court solutions available**

ACID is a passionate proponent of mediation and has its own informal alternative dispute resolution service for infringements discovered at exhibitions. Thus far, around 4000 have taken place with very few cases reaching a final court hearing. It is a pre-requisite of ACID accredited exhibition organisers that the ACID protocol is used if there is a copying complaint. This leaves the exhibition organiser in a neutral position allowing ACID to try and bring a resolution to the issue.

ACID also has a 3-hour time mediation without lawyers if there is a member to member complaint which is a cost and time effective solution to issues that are rarely about points of law but on trying to find a commercial solution to a legal problem.

Your Example: In ACID's experience, usually a legal challenge starts with an exchange of letters before action. So often, funds can be exhausted in a convoluted legal exchange which can be cost prohibitive and mediation is rarely mooted as an option in time as both parties get increasingly entrenched in their positions. It is not in the legal business model's commercial interests to suggest mediation at an early stage and we find that it is usually at the end when, as you say in your example, “an attorney will inform their client that there could be a costs penalty at the end of litigation if they rejected the offer of mediation”.

What is often forgotten is the cost before one even gets to Court of time-consuming legal exchange. IP lawyers can charge between £175-£500 per hour whilst designers' average hourly rate is £24.16, so it is no wonder that so many cases either fall by the wayside or designers adopt the view that they simply cannot afford to take legal action.

### **E. Improvements to processes at small claims track at IPEC (again, the full name should be included)**

As we have said on many occasions, it was ACID that spearheaded the campaign to introduce the smalls claims track in 2012 to help lone, micro and SME creators find effective redress for small claims.

It is anomalous that being able to hear registered designs was not fast-tracked more especially as Professor Hargreaves had said “Designs” have been neglected. We welcome the fact that there appears to be a will to change this status and would urge momentum. Implementing common sense and practical improvements to the legal system should not take decades.

The guidance and online forms are unbelievably complicated and should be “designed” to create a user-friendly journey. This is well outlined in your example though “seeking legal advice” usually has cost implications and should not be necessary with a well-designed application form using simple plain English language.

**F – Introduction of statutory damages regime** – the example seems over complicated and unclear

## The Importance of Design to the UK Economy 2020

### Design UK – latest statistics

- IP-rich businesses and creators within the design sector grew and outperformed the wider economy evidenced by data and reportage in the Design Council, The Design Economy 2018. The design economy generated **£85.2** in gross GVA to the UK in 2016.
- Between 2009 and 2016 the design economy grew by **52%** employing **1.69** million people in design roles. Digital design now accounts for just over one in three design roles in 2016. The digital design sub sector is the UK’s most valuable design exporter delivering **27.9** billion in 2015, equivalent 58% of all design exports<sup>1</sup>.
- The most recent data provided by the Design Council is that in 2013 design exports amounted to **£34** billion **7.3%** of all UK exports. Goods up to **69%** of the total and services **31%**.
- Of the **1.69** employed **87%** have less than **10** employees, **60%** have less than **4** employees, therefore most with this sector are lone, micro and SME.
- Latest Design Council estimates post Covid 19 will be reduced workforce by **300,000** and a **£37**billion loss. After the EU, the US is the most significant export market for design.

### In summary

#### Criminal sanctions for infringement of UK unregistered design right

**ACID would like to see this included in the Calls for Evidence in the Enforcement Review.** The Designs Review highlighted a concern about the criminalisation of non-deliberate copying, for example, competitors seeking to innovate around existing designs. However, as with criminal copyright infringement, the standard set for criminal liability would need to be a higher one than the standard for civil liability. The activities of genuine innovators would not therefore be impeded because they would not deliberately set out to copy. There needs to be a clear case of deliberate, wilful copying under the Copyright, Designs & Patents Act 1988 before any criminal liability is incurred for copyright infringement (see s.107(1) CDPA). What those provisions are aimed at is counterfeit products.

The current lethargy over this issue appears to be about what is important to business, such as stopping pirate DVDs and fake products which look genuine but which are dangerous and what is important to society, e.g. stopping money-raising for activities like drugs and terrorism which are often funded by counterfeiting. This ignores the fact that there is no difference between a counterfeit soft toy, which is protected by design rights, and a counterfeit "Burberry" check or "Louis Vuitton" print product, which is protected by copyright. Why should a soft toy designer not have the same access to the criminal justice system which Burberry or LVMH have and why should the public not be protected from such toys to the same degree? They can be dangerous too and some soft toy brands are highly desirable and coveted products (e.g. Steiff, Jellycat). The same applies to furniture designs and a whole host of other product designs.

What is the evidence for cases in which someone was wrongfully convicted of criminal copyright infringement under s.107(1)? It is unlikely that the provisions would have a negative effect on human rights and innovation.

Furthermore, under s.107(4) CDPA, if a matter is trivial, the sanctions will be commensurate. A fine will be imposed, not a prison sentence, and it will not be anywhere near the £50,000 maximum.

In continental European countries, it is often possible to claim copyright protection for a work which would only be protected by UK unregistered design right in the UK, as a work of the author's own intellectual creation. Therefore, the UK is lagging other countries in Europe by affording a lesser degree of protection to designs which do not qualify for copyright protection as sculptures or works of artistic craftsmanship.

Imposing criminal sanctions for UK unregistered design right infringement would highlight the importance of design to the British economy. It would encourage further innovation, with designers feeling more confident about protection for their works.

ACID and others were in favour that civil remedies should be strengthened to ensure SME's were not discouraged from enforcing their rights, for example, encouraging court generosity in awarding additional damages for flagrant behaviour.

The IPO states that "*unregistered design rights would require too high a level of evidence to provide a criminal activity had taken place, this decision reflects the views of the majority*" ACID questions this statement as the following were known to have been opposed to this assertion, namely **(The Alliance for Intellectual Property, ACID, Black + Blum, the British Furniture Confederation, Burgon & Ball, Simon Clark, Creative Barcode, Design Council Devonshire Pine Ltd., Jan Constantin, Morgan Contract furniture)**. In other words, **all the design-led organisations, Design Council being the most prominent, representing 1.69m designers' views**. Views were expressed that non-deliberate copying would be criminalised, but evidence provided on two occasions by ACID reinforced the fact that 89% and 90% of design copying was intentional and deliberate.

Please also watch a video [of three separate SME companies](#) who explain their frustrations of enforcing design infringement and the need for criminal provisions for the intentional infringement of unregistered designs. Although the video was taken some time ago, the stories are still the same.

## Conclusion

**Have there been improvements to Enforcement of designs and understanding the design rights of others since the Hargreaves Review?** We do not believe so. This Enforcement Review provides a rare and excellent opportunity to deal with a fundamental issue of enforcement by providing UK designers with a robust deterrent and criminalise the intentional infringement of an unregistered design. We very much welcome the introduction of criminal provisions for the intentional infringement of a



registered design and this has gone a long way in communicating deterrence. However, the bottom line to copyists and counterfeiters is:

1. **“Can I get away with theft?”**
2. **“Are the penalties sufficient to deter me?”**
3. **“Is there speedy access to enforcement?”**

The answer to point one is “Yes” and points 2 and 3 are “No”. Litigation is the luxury of the few and there is no level playing field between David and Goliath. There is absolutely no point in the UK Government and the IPO saying we have one of the best legal systems in the world if it is clunky, inaccessible to most and is based on a law firm’s legal index.

To quote one of ACID’s Council members, **Adam Aaronson, Glassmaker, Aaronson Noon**, *“In a car crash, there’s no difference between a juggernaut and a motorcycle. Both have equal protection under the law. Isn’t it time to level the playing field for designers faced with IP theft? Why are giants allowed to use their financial muscle to ride roughshod over individual designers and steal IP with impunity because the individual can’t afford to litigate?”*

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