



ANTI COPYING IN DESIGN (ACID) RESPONSE TO THE CALLS FOR VIEWS INDUSTRIAL STRATEGY

About ACID

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

The organisation is committed to raising awareness about intellectual property infringement within the creative industries and encouraging IP respect within declared corporate social responsibility. ACID's powerful logo is a real symbol of deterrence, actively helping its members protect against the potentially devastating damage inflicted by IP infringement. The majority of ACID members are micro enterprises and SME's, supported by ACID corporate members who are high profile advocates. There have been thousands of settlements on behalf of ACID members, the majority based on unregistered design rights. A very small percentage have reached a final Court hearing and this is largely because micro and SME's cannot afford to take legal action against much larger companies who consistently take the fast track to market through consistent infringement.

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

IP and the Industrial Strategy

ACID has supported bodies such as the Creative Industries Federation, the Creative Industries Council, Design Council and Sir Peter Bazalgette's Industrial Strategy review in fostering the creation and development of IP in those sectors. We share the views of the Alliance for Intellectual Property, that whilst copyright is clearly very important in any creative industries sector agreement, we reiterate our belief that IP should be a standing feature of all sector agreements and every sector agreement should look at how IP is promoted and protected. ACID believes that Designs, particularly because of their significant contribution to the UK's GVA should be part of the articulated voice on the importance of IP generally within the Industrial Strategy. A copyright-centric voice does not represent the broader attributes of the significance of UK's other IP-intensive sectors and rights holders. Too often in the past, Designs have been referred to as the Cinderella right. This was reinforced by Professor Ian Hargreaves in the Hargreaves Report of 2011 when he said, "The role of IP in supporting this important branch of the creative economy has been neglected"¹.

¹ https://en.wikipedia.org/wiki/Hargreaves_Review_of_Intellectual_Property_and_Growth

"How can you help us?"

The IPO is an organisation whose prime purpose is to protect "ideas" when they develop by providing a service to formally grant IP rights so we feel that to start a request for information sharing with "We want your ideas!" is somewhat unfortunate! It could imply that it is OK for the IPO to freely use others' ideas and not acknowledge the originator, especially as there is not going to be a form response. We take as an example your reference in the calls for evidence to "Its (i.e., the IPO) "Banking on Finance" report – this was the idea and catalyst of the IP Awareness Network (IPAN) which was rarely acknowledged and is now very much forgotten. I also note a talk given by a senior IPO official at an IPAN event when they said "we want to use your ideas shamelessly". I am sure this was not their intention at the time but it implied it was OK for the IPO to use ideas but this was unacceptable to many present who have made a career/business about having creative ideas and innovative approaches to IP infringement, for example FACT, FAST, PRS, BPI, ACID etc. to name but a few.

We are quite sure that this is and was not the intention of the IPO but for those who have used creative ideas to try and help in the protection of IP, it is somewhat cavalier at best and an ill choice of words at worst! For example, 20 years ago ACID was created, out of utter frustration felt by many designers that there was no support from the then Patent Office, to plug a gap in their offering to help designers. ACID (as have many other organisations) has successfully done this for nearly twenty years by consistently coming up with low cost, creative ideas to educate, provide preventative and deterrent tools of self help underpinned by support.

ACID, very much on its own, has raised the profile of IP and design from the "Cinderella right" status to be on radar both nationally and internationally. The basis of this was born out of creative ideas which we not only developed but had the courage to implement on a shoe string and we are proud to have helped many thousands to date create a proactive IP strategy.

The point is that ideas have to fly and, sometimes those with creative thought have to take risks and, by influencing the influencers, they are able to harness support for a movement of change. It is the role of organisations like the IPO to support positive change following campaigners' efforts. It is acknowledged that the IPO and other government organisations do not work in an environment where risk is encouraged, quite rightly, the opposite. An innovative approach to IP issues is what others have and can do successfully. 20 years ago ACID was not created, for example, with consultation, expensive research or Government backing, it was emerged out of a passion for design and a passion for design protection. ACID employs 7 people and exists as a not for profit organisation with no Government, public sector or other financial support.

In summary, we are happy to share our ideas but, like many others, we would like to see more acknowledgment of our industry and private sector initiatives to balance the perceived IPO support of and for legally-led organisations/institutes/academics.

"IPO – What are we trying to achieve"

Whilst ACID welcomes the IPO's commitment to find ways to improve the UK's impressive IP regime by encouraging more collaboration and commercialisation to stimulate knowledge exchange and promote innovation, sight must not be lost of its primary function as the official government body responsible for efficient intellectual property rights granting in the UK as an executive agency of BEIS; We understand that the IPO operates as a trading body, a successful business and commercial model which supports a staff of 1000.

As an organisation which, naturally, has to adhere to statutory regulations many of the industry-led initiatives which have helped significantly and contributed to ideas protection are, by nature of their creativity, more entrepreneurial in their approach. Entrepreneurial and creative thinking to enable innovation in ideas protection are, naturally, anomalous within the confines of a risk averse regulatory environment. The benefits of having an accessible intellectual property system in the UK to enable the economy and society to benefit from knowledge and ideas. Creating sound IP policy, educating consumers about IP rights and responsibilities,

supporting IP enforcement by the granting of UK patents, trade marks and design rights is already a significant remit.

There is a danger that “running with ideas” in a risk averse environment may dilute and devalue the powerful reputation of the IPO. Collaboration and high profile acknowledgement/ support of those industry sectors/organisations who already work in the vast area of “ideas/IP rights’ protection, would seem to be a clearer way forward.

The IPO has been very clear on its priorities which we understand are delivering excellent customer services and contributing to the UK’s goal of delivering an open, flexible Digital Single Market. We support further improvement on how the UK IP framework helps IP rich UK businesses to confidently approach international trade and your work on enforcement activities and increasing the number of businesses that better understand how to manage and exploit their IP. Including exploring a greater regional presence and better IP trading is another priority we share.

In summary, we believe that innovative ideas approaches to improve the IP system should be wholeheartedly supported by the IPO but the IPO should not dilute its primary priorities by leading on these – what works in the private sector may not work within a more restricted and formal regulatory body structure.

“IPO - What will we do with your ideas?”

ACID welcomes that the IPO consider the development of the government’s industrial strategy as a continuing dialogue and that by this paper you are continuing to test and evaluate proposals received from many quarters, not least the private sector and we naturally expect that any viable proposals will be subject to rigorous, evaluative impact assessment which will examine any costs and benefits of any changes. If any of the ideas we and others have put forward are developed, we look forward to being acknowledged and would like to give you a continued and ongoing commitment to work with you collaboratively.

What can we do to encourage innovation through collaboration through targeted non-regulatory interventions?

Enforcement

We endorse and support the view held by the Alliance for Intellectual Property that it is impossible to talk about the creating and developing of IP without stating the absolute need for creators to be able to protect and enforce their rights and for public bodies to uphold the law. In this context it is imperative that Trading Standards officers across the country, local police and PIPCU’s work should not be the subject of future cuts but should be the subject of additional funds to deal with their increasing challenges.

Online IP theft

The increasing challenges on lone, micro and SME design-led companies to deal with the growing and “out of control” threat of online infringement needs a robust Government-led strategy to reduce this threat to growth and job security. Building on the excellent Codes of Practice already in place, working with user platforms and marketplaces is very important. But even more important is the need to ensure a robust framework to identify and remove illegal content/knock-off designs, counterfeit products and to improve track down and take down procedures and protocols. This will require strong influence/incentives on intermediaries and hosting providers to take and be responsible for actions to reduce online infringement to protect all parties.

IP Trading Platforms

In our experience there is no one size fits all, either nationally or internationally which is probably why you have rightly supported this with the statement that there is a lack of clarity in respect of pricing, volume, coverage and operation, therefore these cannot be classed as fully functional. However, unless the IPO is going

to be the catalyst for a global IP trading platform it is very difficult to imagine that this is worthy of expensive research, consultation discussion, debate and attendant budgets.

Far more worthy would be to tackle this in a completely different way and create a much needed dialogue with the Treasury about the value of the UK's IP to the economy and the creation of a tax credit system which benefits all IP rights owners in tangent with developing a national IP valuation and compliance model, a little along the lines of ISO 9000. An automatic requirement to lodge possession of IP within a similar "ISO 9000" model will start to build up a national audit of IP ownership which could lead to a sensible UK one size fits all IP Trading Platform supported by industry.

Once a national system is created, with the vast networking powers of the IPO across the EUIPO and WIPO this could reach international status through a global network. The benefits could be enormous not only from an IP trading perspective but a "safer" and more productive IP trading platform perspective, which could have a far reaching effect on tackling counterfeiting and piracy by calling governments to account. For example China, whose ambition is to be a key IP global trader but who, on the other hand, are an economy supported by counterfeiting and piracy.

Reference to the ACID Marketplace in this context is inappropriate because this is an innovative idea to make a **SAFER** trading IP platform for lone, micro and SMEs by putting in appropriate measures such as a Code of Conduct and tracking of "interests" which will lead to a safer trading environment. It is positioned as an alternative and additional resource to one's own platforms.

B2B model agreements

ACID acknowledges the value of standard agreements such as the Lambert Model IP Agreements for all the reasons you describe, with the caveat that all agreements should be checked over by an IP lawyer or specialist advisor if additional bespoke clauses be required. ACID has its own standard set of agreements which our members use and of particular significance is the ACID Licence Agreement, which was created to provide a basic level playing field between licensee and licensor (designer and manufacturer) both with different needs but requiring certain safeguards. The process (which took a year!) involved representatives of designers (licensor), manufacture (licensee), a couple of IP specialists and ACID. The net result was an agreement created in simple, uncomplicated legal language with practical explanations positioned as the basis of a legal tool which, when checked, could be re-used in different business situations. Again this is positioned as a starting point and industry standard.

ACID welcomes the idea of B2B model agreements but, as ever, using the combined input of user, recipient, IP advisor, industry representatives and IPO. Complicated agreements make for protracted legal intervention. "Fit for Purpose" for B2B agreements quite simply put, means that one can rely on the small print if things go wrong, provide assurance for the relationship to work and do not require extensive budgets to seek resolve if a relationship fails. A pre-requisite if there is a disagreement could be to go to mediation. In our experience lawyers are reluctant to go to mediation until a significant amount of costly legal correspondence has ensued which leads to erosion of the mediation model. Our own 3 hour timed model without lawyers provides an excellent means of alternative dispute resolution much earlier in what can become a complicated, expensive and time-prohibitive experience with, often, only lawyers benefitting from the experience.

Voluntary IP Register

ACID was very clear from the start that our Design & Copyright Databank would NOT be called a "register" because we were determined that there would be no undermining of official registration. Indeed, before designs are submitted there is a box to tick that it is understood by the user that this is not the same as official registration. We explain the differences between official registration and the clear benefits of an official UK and EU registration system which we still do see as the preferred option.

ACID supports the view that the introduction of such a register would not be welcome due to the increased legal and administrative burden both for the user and the IPO. One also has to refer again to the primary

function as the official government body responsible for efficient intellectual property rights granting in the UK as an executive agency of BEIS and this will undoubtedly cause confusion.

Despite the significant efforts of the IPO, Government, industry organisations there is still confusion and lack of clarity about IP rights and we believe that a voluntary IPO register would only serve to confuse rather than simplify or not be of any benefit. For example, users may say, *"We have sent our IP to the IPO voluntary IP register so we are protected!"* and this could lead many creators of original works to feel they have registered protection when they do not. ACID is very clear to point out that the ACID Copyright & Design Databank does not add to IP rights. As the majority of ACID's thousands of settlements have been based on unregistered rights (copyright & UDR) education has played a significant role in lodging designs on the ACID system as it provides a paper trail from the seed of an idea to marketplace of significant stages, a solid evidence base (or paper trail) on which to rely. In many ways it is much more comprehensive than having the confines of a registered design i.e., what you register is what you rely on. Trunki was a very expensive lesson to learn not only for Rob Law but for many thousands of designers. It undermined the registration system and the design community lost confidence in the system which was supposed to guarantee a monopoly right.

The IPO operates as a trading body, a successful business and commercial model which supports a staff of 1000 with attendant pensions, and, as such could come under criticism that they were "cashing in" on their position. Unless it is going to be FREE which would be a different matter entirely! ACID is supported by the Alliance for Intellectual Property who does not think it is appropriate for the UK IPO to extend official registrations to copyright works or to unregistered design rights where it is felt an additional legal and administrative burden would be incurred, especially by individual creators and SMEs.

The ACID Copyright & Design Databank provides our members with uniquely numbered evidence (and certificate) held by an independent and respected third party if needed for online and offline infringements with civil & criminal prosecutions. Part of this service is to also provide cost and time effective mediation where appropriate.

In summary, why reinvent the wheel IPO? Why not support a tried and tested system with a solid brand of deterrence and prevention against IP crime and, with IPO/Government support, make it available to the broader community? With the right sort of support we hope to research the value of adding block chain technology to make the ACID Copyright & Design Databank of IP even more robust adding to the all important deterrent value.

New financial markets

It is not the experience of ACID or its members that lending activity has changed in response to the increased realisation about the value of intangible assets regardless of the 2013 "Banking on IP report". However, it would appear that crowd funding and Angel investment is increasingly looking at IP rich SME companies to support and promote.

IP Licensing resolution (SEPS) and Royalty Free Patents

We do not have experience in this area so will not comment.

IP Valuation standards

ACID welcomes the initiative to identify the valuation market's structure, behavioural drivers and identify barriers which could be overcome to encourage more businesses to carry out valuations of their IP with a view to being able to trade, protect and invest in it more effectively. Our view is supported by over 50 examples of valuing IP within our own membership. We are not of the view that a government regulated standard valuation method would work. Why? Because one size does not fit all the diverse aspects of businesses whether micro or macro.

We believe that IP valuation should be considered in a slightly different context and thus, have created what we call an Intellectual Property Strategy Review following which there are recommendations in a comprehensive report, one of which is a more formal IP valuation. So, in other words the IPSR is positioned as an educational as well as a value process. Our IPSR involves an extensive pre-IPSR questionnaire to establish levels of IP understanding, formal registrations, agreements and IP awareness within the company. After this has been evaluated we visit the company and deliver an overview of IP rights which has been tailored to that company. We then spend 3 hours looking closely into their design creation process, seeing the manufacturing processes, review of any registrations and identify areas where there are clear gaps of both understanding, awareness and formal registrations.

Another key aspect is communication of an IP strategy throughout the value chain both internally and externally and we look at how IP is viewed within the company and in its internal and external relationships. Following the site visit a comprehensive report and recommendations are sent after which an implementation programme is discussed and agreed. Before any IP valuation takes place this gives the company an opportunity to create the necessary registrations, take a view on how they can implement our recommendations and then be ready for an IP Valuation. In our opinion IP Valuation is premature without a process of review, IP education and advice. Our IPSR's are available as a benefit to members free for those with turnovers above £2.5m.

Sir Peter Bazalgette² reports that despite the increase in IP investment, it is estimated that less than 10% of companies have carried out assessments of the value of the IP they hold. But how can they value something which the majority do not realise is an asset? Only by an enhanced process of education and awareness can organisations influence investors and lending institutions that they hold assets allowing lenders to make informed decisions? We believe the Finance Toolkit is a great initiative but how many people know about it?

In summary: Instead of trying to create new products or services wouldn't it be better to do a national campaign to support the Finance Tool kit with the objective of ensuring that all companies, lone, micro and SME can approach lenders with confidence to realise commercial potential to achieve growth

Industrial Strategy – further comments

Lack of access to a cost and time effective enforcement for lone, micro and SMEs through the civil courts

In preliminary research it would appear that for many lone, micro and SMEs when there is infringement, the process is often hampered by the current legal business model with excessive and, sometimes, unnecessary pre-action correspondence. There is a culture (by some) of legal point scoring and concentration on petty points which are out of kilter with the issue at hand. Perpetuating litigation and stonewalling legal challenge by a lone micro or SME company pitted against, say, a major high street retailer often ends up in a situation where the small guy gets blown out of the water and cannot continue because of cost and time challenges. This precludes a fast track route to what is widely considered as a very much improved structure within the IPEC. The current IPO strategy of steering SME registrants to legal help is simply not achievable. In the design sector, for example, average hourly rates (across 8 different design disciplines); according to the Design Council Design Economy 2015, the average hourly earnings are £14.10³. Pitted against the current IP legal model with fees anything from £200 - £500 there is little, or no way, specialist legal advice can be secured in contentious and non-contentious issues for the majority of lone, micro and SMEs.

ACID recommends that further work is done on recommended "Pre-action Protocols" which would go some way to making access to IP redress more user-friendly. **The IPO is in a unique position to be a catalyst to make this happen.** A promised meeting in June 2017 between ACID and a judicial committee thus far has not happened to articulate the issues.

² <https://www.gov.uk/government/news/bazalgette-review-sets-recommendations-for-continued-growth-of-uks-creative-industries>

³ <http://www.designcouncil.org.uk/what-we-do/design-economy>

The need to introduce criminal provisions for infringement of UK Unregistered Design Right

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

3D printing is proving a boon to organised criminals who are exploiting this ground-breaking technology to counterfeit on an industrial scale in near perfect quality. However, unless UDR copying is made a criminal offence there are no criminal powers available to stop organised criminals, unless a prosecution for fraud or conspiracy is pursued. Accordingly, Government needs to plug this gap in the law which will have the same impact on manufacturing as the internet did on the creative industries.

ACID is supported by the majority of the Alliance for Intellectual Property in the view that if criminal offences existed for the copying of unregistered designs, similar to those that already exist for copyright piracy and trade mark counterfeiting, it would be a compelling deterrent, and go some way to counter the estimated £165million per annum loss to the UK from design infringement. To address any concerns about creating a criminal offence, this would apply to clear-cut cases beyond all reasonable doubt of persistent, deliberate and wilful copying after a civil route has been exhausted.

The need to preserve the EU Unregistered and Registered Designs Rights post Brexit

Post-Brexit copyright will be about nuanced changes made to existing protection. But for design, Brexit offers an existential threat because of the possible loss of EU laws. UK designers will be severely disadvantaged if they lose EU unregistered design rights, on which the majority rely. EU design laws, both registered and unregistered, protect the individual character of a design in particular as they relate to the shape, texture, contours, lines, colours, ornamentation and materials of the design. UK UDR protects only the shape and configuration of a design. Entire design sectors such as fashion, lighting and furniture rely on the EU scope to protect their 3D designs; UK law alone cannot protect 3D designs whose individual character is defined by shape, texture, contours, lines, colours, ornamentation or materials. If these EU laws are not transposed into UK law post Brexit, design protection for many design sectors will be lost.

Accordingly, this is a potentially calamitous issue for many design sectors. ACID is pressing to introduce a new law which mirrors the protection afforded by EU unregistered design, replacing existing UK Unregistered design to put UK designers on a level playing field with their EU counterparts in terms of IP protection. **This is a unique opportunity to support UK designers by making a new law last for 15 years in line with current EU Unregistered designs.**

Post Brexit - generally

There is a real concern about lack of access to Registered Community Design and Community trade marks across 27 other member states and clarity over the transitional arrangements to ensure that the design sector does not bear the brunt of further expense required to register in 27 other member states as well as the UK. There is a concern that the IPO are not taking a lead on this which is further fuelling uncertainty with both stakeholders and design and manufacturing businesses. **If the IPO are not making official recommendations, who is? Can the IPO identify the decision-makers who will influence negotiations on these important issues?**