ACID RESPONSE TO ARTIFICIAL INTELLIGENCE, INTELLECTUAL PROPERTY AND DESIGNS CONSULTATION

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 a member of the Alliance for Intellectual Property (IP) which is a UK-based coalition of 19 trade associations and enforcement organisations with an interest in ensuring intellectual property rights receive the protection they need and deserve. Its members include representatives of the audio-visual, music, video games and business software sectors, as well as sports industries, branded manufactured goods, publishers, authors, retailers, and designers. ACID's CEO [redacted] OBE., is a Vice Chair of the Alliance for Intellectual Property.

Global conversation on AI, IP and Designs through WIPO

We understand that a considerable amount of work has been undertaken by the World Intellectual Property Office (WIPO) in the context of the above by creating a multi stakeholder forum. To date there have been the following sessions:

- The WIPO Conversation on Intellectual Property (IP) and Artificial Intelligence (AI)
- WIPO held the First Session of the WIPO Conversation on IP and AI in September 2019 and published a draft Issues Paper on IP policy and AI, and started a public consultation process inviting feedback to help define the most-pressing questions likely to face IP policy makers as AI increases in importance. Over 250 submissions were received in the consultation process.
- In May 2020, a revised Issues Paper on IP policy and AI was published taking into account the submissions received.
- A Second Session of the WIPO Conversation on IP and AI took place in July 2020 discussing some of the issues set out in the Revised Paper. Over 2,000 people from 130 countries, including representatives of Member States, academic, scientific and private organizations joined the meeting in a virtual format.
- WIPO held the Third Session of the Conversation on IP and AI on November 4, 2020, in a virtual format with more than 1,500 registered participants from 133 countries.

We agree with WIPO that AI is increasingly driving important developments in technology and business and is employed across a wide range of industries with impact on almost every aspect of the creative process. The development of AI interacts with IP in many ways, see attached link to designs in particular. Whilst we welcome WIPO's interaction in providing a global forum for moving

conversations along with multi stakeholders, we feel it is early days in coming to the conclusion of a universal definition of AI although initial understanding is that AI is generally considered to be a discipline of computer science aimed at developing machines and systems that can carry out tasks considered to require human intelligence.

Ethics surrounding AI (and IP) will be critical in futureproofing its efficacy not only its use in data driven innovation and technology but also in its interaction with IP and whether the national/global IP framework is fit for purpose.

There is a virtual exhibition (WIPO) until December 18, 2020

WIPO asks, is AI relevant to IP policy? Until now, creation and innovation were solely human activities and are part of what defines the human species. AI is evolving fast and used in creating art, music, design etc., and solving technical problems. Therefore, the growth of AI is raising fundamental questions of the existing IP system. Do AI-generated works and inventions fit into the current system? How should the value of human creation and innovation, and the value of AI creation and innovation be balanced? These questions lie at the heart of the existing IP frameworks, including copyright, patents, industrial designs, trade marks and trade secrets.

- Should IP policy create new rights in data as a critical component of AI?
- Should AI algorithm be treated like software, Should AI algorithms be patentable?
- Can AI be an inventor or creator within the existing IP framework or is a human required?

National conversation - UK Intellectual Property Office has given the following explanation and asks whether we agreed with the analysis?

A design protects the appearance of the whole or part of a product resulting from features such as lines, contours, shape, texture and ornamentation. Protection rewards investment in the creative process and allows the owner of the design to control its use.

Several different types of design protection are currently available in the UK. They are registered designs, unregistered design right, and registered and unregistered Community designs. These rights differ in types of product which can be protected, length of protection and geographical scope of protection.

The current legal framework for design protection in the UK is set out in:

- *the Registered Designs Act 1949 (the "RDA") and Registered Design Rules 2006*
- *the Copyright, Designs and Patents Act 1988 (the "CDPA") for UK unregistered design right*
- *Council Regulation 6/2002 on Community designs (the "CDR") for registered and unregistered Community designs*

The UK left the EU on 31 January 2020. We are currently in a transition period. At the end of this period the Community Design Regulation will no longer apply in the UK. From that date, UK design protection will be provided by UK registered designs, UK unregistered design right and a newly created supplementary unregistered design. This will provide similar protection to the current

unregistered Community designs (UCD). Applicants will still have the option of applying for a registered design using WIPO's Hague system for international registration (s15ZA RDA).

The main legal issues around AI and designs relate to authorship, ownership and infringement. The following sections set out the way the law deals with these topics. It asks questions about whether the balance is right, and whether the law may need to change to take account of the increasing prevalence of AI in future.

Authorship and ownership

This section sets out the law relating to the authorship and ownership of designs and asks questions about how the current law applies to AI systems and whether the law would need changing to recognise AI as the author of a design.

Although there are some differences, designs legislation gives the owner of a design the exclusive right to use it (s7(1) RDA, s226 CDPA and Article 19 CDR). Legislation sets out that the author of a design is treated as the owner (s2(1) RDA, s214(1) CDPA and Article 14 CDR) and the ways in which ownership can be acquired (s15B, 15C and 19 RDA and Article 14 CDR, for example by being given it or buying it.

There is nothing in the legislation that says who can apply to register a design. There is a requirement that an application must include the identity of the person making the application (Rule 4(1)(a) of Registered Design Rules 2006).

The RDA and the CDPA both say that where a design is generated by a computer, the person who made the arrangements necessary for the creation of the design will be considered the author (s2(4) RDA and s214(2) CDPA).

The language of the RDA and CDPA therefore suggests only ***a legal person*** *who can own property can be the author or owner of a UK registered or unregistered design. It is not currently possible for AI, which does not have legal personality, to be recognised in law as the author or owner of a design.*

Unlike in UK law, there are no specific provisions in the CDR in relation to who owns a design generated by a computer. The language of the CDR provides for a legal person to be the owner of the right in the Community design. Although this legislation will no longer apply in the UK from 1 January 2020, we are seeking your views on the Regulation as concepts relating to UCDs will still be relevant to the new UK supplementary unregistered design.

1. Do you agree with the analysis above which concludes that it is not possible for AI to be the author or owner of a UK or Community design?

Yes, in the broadest sense, but there would need to be a determination for AI to be the author or owner of a UK or Community design and, presumably, this will not happen until there is a Court judgment to create a precedent. Since the CDPA and Registered Designs Act already contain provisions to treat a person who has made arrangements for the

creation of a computer-generated design to be the author or creator, these provisions may need to be clarified or expanded to cover situations where AI is involved in the creation of a design.

An AI system might be the author of the right, since section 214 provides: "In the case of a computer-generated design the person by whom the arrangements necessary for the creation of the design are undertaken shall be taken to be the designer." How that is interpreted depends upon how the system is deployed in each case. It could be interpreted to give the creator of the AI system ownership of the design right, which would not be desirable.

The current provisions in the CDPA relating to UK unregistered design right do not make provision for the owner of design right to be an AI system. Design right vests in a person or a person's employer. Further, a design only qualifies for protection if the designer is a qualifying person (either an individual or a company which fulfils the qualification requirements). It would be possible to make provision for the owner of the AI system which created a design to be in the same position as the employer of an individual and to own the design right, but design right cannot currently be owned by a non-entity. Alternatively, section 220 could be relied upon ("Qualification by reference to first marketing") to enable the person who markets the design first to own the design right, provided that they meet the criteria set out in that section.

If an AI system were to own design right, it is not clear how that right could be assigned or licensed. Further, the owner of design right has the exclusive right to reproduce the design and do other things in relation to the design and articles made to the design. If the company which owns the AI system uses it to create designs, it is not clear how the company would obtain the right from the AI designer to exploit the rights in the design, which is presumably the reason why it created the designs in the first place. It is also difficult to imagine how an AI system can grant consent, which requires an act of free will and freedom of choice to be made.

2. Are there, or could there be, any tensions with the current legislation when seeking to register a design or be recognised as the owner of an AI-created design? Who would be the legal entity applying for the rights?

We believe that the person who made preparations for the creation of a computer-generated design is the author or creator (s2(4) RDA and s214 CDPA) and therefore the first owner of the unregistered design right with the right to apply for design registration.

3. Who should be recognised as the author of a design created by AI where the system has been bought from a supplier, and the buyer has provided input or data to the system? Does the wording of legislation need to be changed?

If the existing provisions in the RDA and CDPA regarding authorship of computer-generated designs are read broadly, these provisions could give the creator of the AI system rights to be identified as the author and first owner of a design, even if they have not inputted data required for it to operate. **4. Do you consider that legislation should be changed to allow AI systems to be recognised as the author of a registered design or designer of an unregistered design?**

Fundamentally, we believe and share others' views that AI and systems should not replace designers/creators as IP owners. There are already provisions in the law covering designers/creators as IP owners supported by innovation/technology. For the reasons stated above, those provisions should be looked at to ensure that they do not end up being interpreted so as to give the creator of an AI system the rights to a design which a designer used the AI system to create.

Registration of a design implies a formal process to be followed which has strict criteria. Whilst this can be legally challenged, until that happens the owner has a formal official certificate which is numbered identification as evidence of ownership. However, the owner of a registered design is the person who is entitled to apply for it, who is the owner of the unregistered design right. Unregistered design, by its nature, is not formalised. It depends upon the identity of the designer and a determination of who is the first owner of the right. Therefore, in both cases, it seems illogical and undesirable to accord the title and status of designer and author to an AI system. It would lead to insurmountable problems in determining the authorship and ownership of design rights and entitlement to register designs, leading to more challenges to design registrations and challenges to infringement claims based on authorship and ownership of designs which would make it even harder for designers to protect their rights.

5. If so, how should we assess when AI stops being a tool programmed by a human and becomes an intelligent entity capable of producing its own IP? What proof or evidence would be required?

Fundamentally, we believe and share others' views that AI and systems should not replace designers/creators as IP owners even where they are supported by innovation/technology.

6. Unlike UK domestic legislation, the CDR has no provisions relating specifically to computer-generated designs. Does this result in legal uncertainty in relation to authorship and ownership of computer-generated designs? Would the same apply to AI-generated designs?

In our opinion until there are CDR provisions related to computer generated designs this would result in legal uncertainty in relationship of ownership.

7. Are there any other issues in relation to the CDR which we should consider in relation to AI?

We are not in a position to reply to this at the moment.

8. Can the actions of AI infringe a registered or unregistered design? Can AI do the acts set out in law(s7(2) RDA?

The difference between the two is that infringement of the former does not require proof whereas infringement of an unregistered UK design right might. It is not clear at this stage how an AI system could be said to have committed an act of secondary infringement of an unregistered UK design right based on knowledge or a reason to believe that the act was an infringing act.

It is also difficult to see how an AI system could infringe registered or unregistered design right, since who would be liable for the infringement? If the liability rests with the owner of the AI system which is used to commit the infringing act then, by the same token, it should be the owner of the AI system which owns the design right/registered design in a design created by AI. It would not be desirable to have such an imbalance between the ownership and infringement provisions.

9. When considering infringement are there, or could there be, any difficulties applying existing legal concepts in the registered designs framework to AI technology? Does AI affect the use of the "informed user" in measuring overall impression?

As stated above, it is difficult to see how an AI system could infringe a registered design, since who would be liable for the infringement? If the liability rests with the owner of the AI system which is used to commit the infringing act then, by the same token, it should be the owner of the AI system which owns the underlying design right and the registered design in a design created by AI. It would not be desirable to have such an imbalance between the ownership and infringement provisions.

The question of who is the informed user of a design is different from the question of who is the author, owner or infringer of a design. These are not the same concepts and we do not see why the use of AI to create a design should have any impact upon the test of the informed user in determining the subsistence of the right or its infringement.

10. If AI can infringe a registered design, who should be liable for the infringement? Should it be the owner, the programmer, the coder, the trainer, the operator, the provider of training data, or some other party?

As we pointed out above, if the liability rests with the owner of the AI system which is used to commit the infringing act (which surely it must) then, by the same token, it should be the owner of the AI system which owns the design right/registered design in a design created by AI. It would not be desirable to have such an imbalance between the ownership and infringement provisions. Clearly, there needs to be a legal person responsible for any infringement of a design right, whether registered or unregistered. It is difficult to see how an AI system could be such a legal person.

This is a very grey area and would need legal determination, so we are not in a position to comment upon this until further evidence is available.

Conclusion

- Although the provisions of unregistered Community design right and registered design law are different, the same principles should apply as far as ownership and infringement of the rights are concerned.
- We strongly believe that allowing AI systems to own design right is a very undesirable and dangerous move. It would lead to many complications in an already over-complicated design law system which seem to be unnecessary.
- Fundamentally, we believe and share others' views that AI and systems should not replace designers/creators as IP owners but should be *supported* by innovation/technology, not the other way around.

ACID's views are supported by the Alliance for Intellectual Property.

@ACID, December 2020