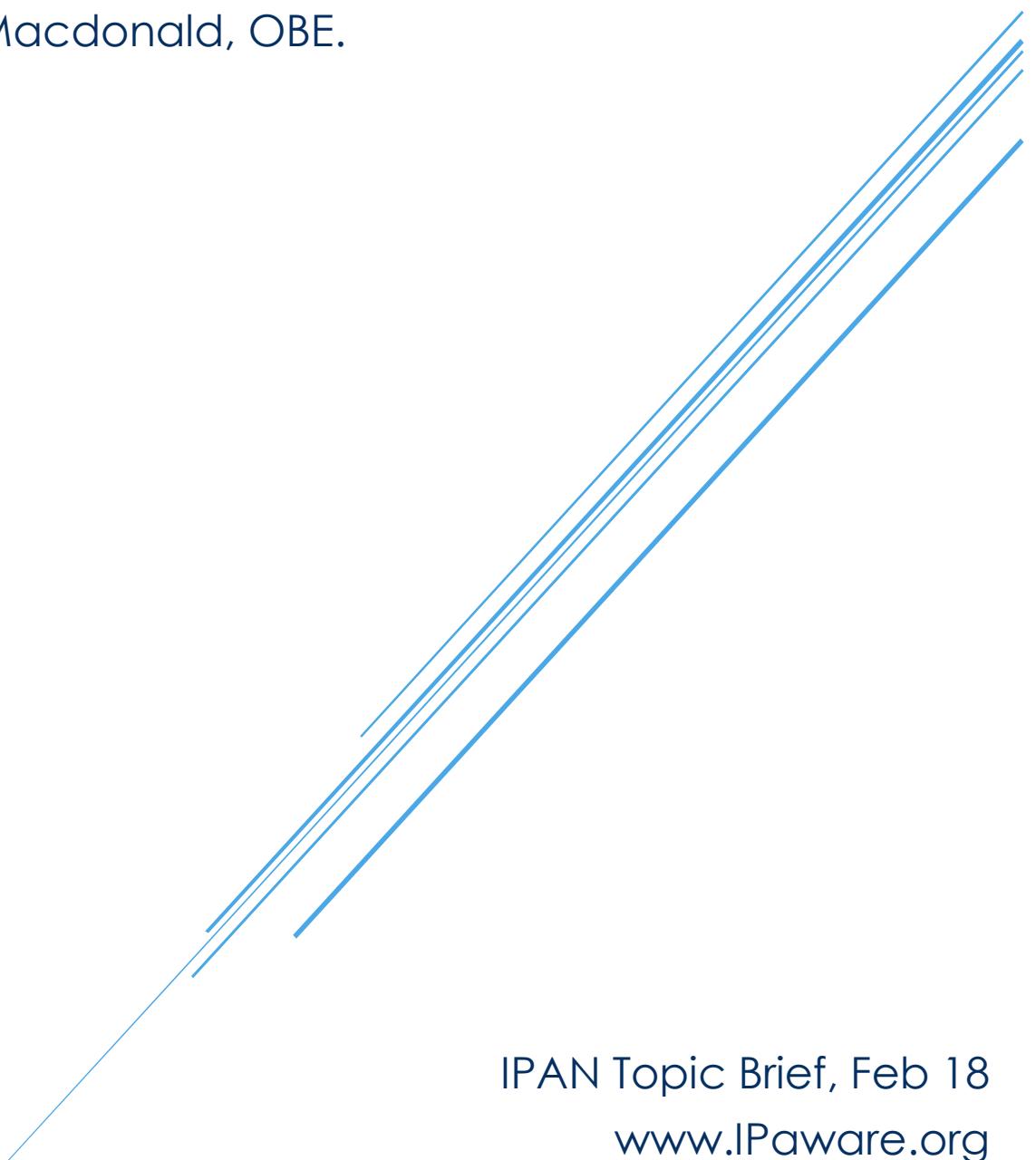




DESIGN AND IP

Dids Macdonald, OBE.



IPAN Topic Brief, Feb 18

www.IPan.org

@IPAware

DESIGN AND IP

Dids Macdonald, OBE., CEO of Anti Copying in Design & Vice Chair of the Alliance for Intellectual property. www.acid.uk.com. @didsmacdonald

Fact & Figures - Design and Design Skills Underpin the UK's Knowledge-Based and Manufacturing Industries

The Design Council has taken a wider definition of "Design" by analysing the Office of National Statistics data to better understand the value of design across the UK Economy. Their report confirms that UK Design punches well above its weight. In 2013, the design economy generated £71.7bn in gross value added (GVA), equivalent to 7.2% of total GVA (Design Council, Design Economy report 2015¹). In the period 2009-2013, GVA increased by 27.9%, compared to 18.1% across the UK economy as a whole. Design skills add significant value to the UK economy, contributing an estimated £209.3bn in GVA to the UK economy in 2015. Design skills are an integral part of the UK economy, and as the economy changes, demand for these skills is growing. Recent research from the World Economic Forum² and NESTA³ suggests that demand for skills such as operations analysis, visualisation and thinking creatively is likely to grow in the near future. Not only are such skills highly associated with design, they are a valuable part of the UK economy, contributing to higher levels of productivity and innovation⁴.

Approximately 580,000 people are directly employed in the UK's design industries and a further one million designers work across the economy in non-

¹ <http://www.ipotest.org/types/hargreaves.htm>

² World Economic Forum <https://www.weforum.org/agenda/2016/01/the-10-skills-you-need-to-thrive-in-the-fourth-industrial-revolution/>

³ Nesta 2017The Future of Skills, employment in 2030

https://www.nesta.org.uk/sites/default/files/the_future_of_skills_employment_in_2030_0.pdf

⁴ Designing a Future Economy, Design Council

<https://www.designcouncil.org.uk/resources/report/designing-future-economy-report>

design industries. This makes the design economy equivalent to the ninth biggest employer in the UK.

Design is more important to the UK than many acknowledge. For every £1 invested in design business can expect over £4 in net operating profit and the export of product, graphic and fashion design services increased by 76% since 2009. The UK has worldwide acclaim for its design and innovation excellence and British designers lead in socially responsible and environmentally sustainable innovation. Internationally, the UK Design sector retained its 6th place in world rankings from 2010-2015. Workers with a design element to their work were 41% more productive than average. As well as some notable household names, Britain's design sector comprises mainly micro-enterprises or SMEs with fewer than 4 employees, many, highly innovative and world renowned.

The UK increasingly earns more from designing successful products than from manufacturing them. The design sector employs over 1.6 million people. Design is a diverse profession spanning product and industrial, graphic, clothing, advertising multi-disciplinary, digital design, craft, architecture and the built environment impacting many areas of the economy. Communications design, followed by digital and multimedia design, remains the dominant design disciplines in the UK. As well as the more obvious areas, such as advertising, architecture, art markets, audio-visual, crafts, fashion, screen, music, performing arts and publishing, design is a key element in computer and video games, engineering, software and products of all types.

Despite the importance of 3d design, in 2017 only 8,500 (approx) designs were registered in the UK and in the EU a little over 5500 designs were registered. The majority of designers, therefore, rely on unregistered UK and EU design protection.

The ability to protect the intellectual capital underpinning their innovation is crucial to maintaining their competitive edge. In the UK, designers rely on all intellectual property (IP) rights, but less on patents, with the majority relying on unregistered rights such as design right and copyright.

"The ability to protect the intellectual capital underpinning their innovation is crucial to maintaining their competitive edge."

Legislative Changes 2011-2017

In May 2011, the independent review of IP and Growth by Professor Ian Hargreaves⁵ (commissioned by the Prime Minister in November 2010) reported as one of its findings that design had a "very important contribution to make to growth" and that the design sector's IP needs "had been neglected". Following an Intellectual Property Office (IPO) evidence based assessment of the relationship between design rights and innovation, and subsequent Calls for Evidence, an IP Bill, was announced in May 2013 including reforms to both design and patent law. In October 2014 the IP Act became law and the most significant feature was the introduction of criminal provisions for the intentional infringement of a UK registered design. Individual company directors may become liable. For designers, an Opinions Service will be created and there is clarification on design ownership of commissioned work which now remains with the designer.

The 2014 IP Act: Summary

- The intentional copying of a registered design is now a criminal offence and individual directors may be liable
- Design ownership: the owner of a commissioned design is now the designer and not the commissioner
- The definition of unregistered design right has been narrowed slightly
- Where someone uses a design in good faith that is subsequently registered by another person, there will be some protection from an infringement claim on prior use of a design
- There is simplification of the qualifying rules for an unregistered design right in the UK and restricting the ability to base a claim for copying on a cropped area of an unregistered design i.e., a 'part of a part')
- The meaning of 'originality' within the definition of unregistered design has been refined
- Eligibility requirements defining who may claim UK unregistered design rights have been streamlined

⁵ <http://www.designcouncil.org.uk/what-we-do/design-economy>

As a part of the Enterprise and Regulatory Reform Act 2013⁶, the UK Government announced the repeal of section 52 of the Copyright, Designs and Patents Act (CDPA). The repeal of section 52 means the period of copyright protection for an artistic work, which has been industrially manufactured, will be extended from 25 years to the life of the artist plus 70 years. Transitional arrangements were originally recommended for a five year period but, following a legal challenge and further consultation the transitional period was revised to 6 months from April 28 2015. Businesses which sell replica furniture could become liable to a potential fine of up to £50,000 and a custodial sentence of up to 10 years. Other EU countries had adopted this law for many years and, until recently only Estonia, Rumania and the UK were the only countries which did not adhere to EU law.

The UK IPO provided guidance⁷ to help creators, rights holders and users of artistic works which have been industrially manufactured (that is, more than 50 were made). The law on these works changed on 28 July 2016 and affects how these works can be used.

The UK Government intends to ratify the Hague Agreement on Industrial Designs by 31 March 2018 with the new registration service being available from spring 2018. By joining the Hague system, UK businesses will continue to have access to the international system of design registration after Brexit. An international application can cover up to 100 different designs. The EU is also one of 66 members, which gives UK businesses access although the UK is not currently a member in its own right.

The difficulty in defining the design sector has itself contributed to the failure to understand the correct relevancy and focus on IP rights for design within policy

Enterprise and Regulatory Reform Act 2013

The Hague Agreement on Industrial Designs

⁶ http://www.legislation.gov.uk/ukpga/2013/24/pdfs/ukpga_20130024_en.pdf

⁷ Repeal of section 52 of the Copyright, Designs and Patents Act 1988:
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/606207/160408_guidance_s52_final_web_accessible.pdf

making thus far. This difficulty has been compounded by the absence of any Standard Industrial Code that realistically captures 21st century design industry sectors of the 21st century.

Research on Design

Independent research⁸ commissioned by the IPO examined where design activity takes place in the UK, how it is purchased and how registered rights are used. There is an analysis of the impact of registered design rights on business performance and further research has looked at the reasons for the behaviour of firms when interacting within the current IP framework for design.

A constant theme running through current evidence and research is that SMEs face a continuing problem of infringement. It is almost impossible to seek redress because of time, legal costs and scale of opponents⁹. Research has identified the continuing challenge of lack of funding to deliver innovation through design - the average hourly rate for designers is £16.23 across eight different design disciplines by the latest Design Council publication The Design Economy¹⁰

Current IP research includes work on the relationship between unregistered design rights and innovation.

Leading Business by Design¹¹ is a Design Council qualitative research project that investigates the strategic use of design at senior levels in a sample of UK and global businesses. The report highlights our three key findings on how businesses can benefit from design:

1. Design is customer-centred - Benefit is greatest when design is intimately related to solving problems, especially customers' problems
2. Design is most powerful when culturally embedded - It works best when it has strong support in the organisation, especially from senior management
3. Design can add value to any organisation - Design can benefit manufacturing and service-based organisations, small, medium or large

⁸ Design Economics – Chapter 3 Sep 2011: <http://www.ipo.gov.uk/ipresearch-designsreport3-201109.pdf>

⁹ See page 3 of the Anti-Copying in Design response to the design consultation in 2012: <http://www.ipo.gov.uk/response-2012-designs-acid.pdf>

¹⁰ The Design Council, The Design Economy 2015
<https://www.designcouncil.org.uk/resources/report/design-economy-report>

¹¹ <http://www.designcouncil.org.uk/resources/report/leading-business-design>

Despite research being commissioned in 2015, the UKIPO have failed to publish research on much needed Design Rights Infringement. The objective of which was to develop a survey and methodology that could be replicated in future years.

Awareness of “Design”

The terminology “Design” and “IP and Design policy” can often be misleading because it covers such a broad spectrum. According to the Cox Review of creativity in business:¹²

“Design” is what links creativity and innovation. It shapes ideas to become practical and attractive propositions for users or customers. Design may be described as creativity deployed to a specific end.

The UK Government has recognised a need to improve awareness and understanding of the potential of design and creativity among policy makers and design customers – both private and public organisations¹³. There remains a disturbing tendency to undervalue professional designers, as demonstrated by the practice of “free pitching” in public and corporate procurement¹⁴.

Relevant Legislation

In the UK the designers may rely on IP rights that arise automatically (copyright, UK and EU unregistered design right and goodwill in a trade name or get-up) or registered rights (a registered design, trade mark or perhaps a patent). UK and EU unregistered design right are relatively new and provide protection from copying for the whole of the appearance of a product rather than just the 3D elements. Colours, materials, surface patterns as well as shape can all not be protected. UK unregistered rights protect the shape and configuration of 3D objects.

Post Brexit, one of the most significant challenges will be for designers relying on unregistered EU design rights as it is a much stronger right than the UK equivalent unregistered design. Designers will, potentially lose automatic

⁷ In the Cox review of creativity in business, prepared for HM Treasury, November 2005: http://webarchive.nationalarchives.gov.uk/+/http://www.hm-treasury.gov.uk/coxreview_index.htm

⁸ For example, see Chapter 4 of the Cox review above and the IP Awareness Survey for the IPO in 2006 Dr Robert Pitkethly: <http://www.ipo.gov.uk/ipsurvey.pdf>

⁹ See <http://www.dba.org.uk/guides/client.asp>

protection in 27 other member states. There is concern that this issue will not be included in the Withdrawal Bill and poses a potentially calamitous consequence for the majority of UK designers. The organisation Anti Copying in Design (ACID) has provided economic, legal evidence and case study evidence to the UK IPO which has been described as very useful.

Broader Applications of Design

Recent research¹⁵ carried out by the Design Council and Warwick Business School has found that Design is now firmly on the business agenda:

- *Design is customer-centred – benefit is greatest when design is intimately related to solving problems, especially customers' problems and most powerful when culturally embedded and confirmed that it adds value to any organization*
- *Design is most powerful when carefully embedded – it works best when it has strong support in the organisation, especially from senior management*
- *Design Can add value to any organisation – Design can benefit manufacturing and service-based organisations, small, medium or large*

The Design Council has also shown how “Design” can be more broadly applied to convert national and global challenges into opportunities for innovation. Their approach partners, designers with business decision-makers, policy-makers, educators and architects to engage with the latest thinking and insight into design and innovation and apply it to tackle big challenges and improve everyday life. This has stimulated different ways of tackling challenges such as those within the Health Service by bringing together a range of experts such as technology and materials specialists and manufacturers – examples include:

- *Design Bugs Out project¹⁶ which designed new furniture and equipment to help combat the spread of MRSA and C. difficile and*

¹⁵ <http://www.designcouncil.org.uk/knowledge-resources/leading-business-design>

¹⁶ <http://www.designcouncil.org.uk/our-work/challenges/Health/Design-Bugs-Out/>

- Design for Patient Dignity project¹⁷, which developed innovative new designs showing how different privacy and dignity issues could be solved
- Living Well with Dementia,¹⁸ Dementia is a huge issue for the UK and the world, but it is also a real opportunity for social innovation. Living well with dementia demonstrates design's potential to confront a truly global problem and change real lives for the better
- Designing for those with Arthritis makes sense¹⁹ Why designing arthritis makes sense

Further Reading:

Government Guidelines on the Changes to Design Law have been produced by the Intellectual Property Office:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/323145/changes-to-designs-law.pdf

¹⁷ <http://www.designcouncil.org.uk/our-work/challenges/Health/Design-for-Patient-Dignity/>

¹⁸ The Design Council, Living Well with Dementia

https://www.designcouncil.org.uk/sites/default/files/asset/document/LWWD_booklet_web_Final.pdf

¹⁹ Designing for Arthritis sufferers

<https://www.designcouncil.org.uk/resources/report/design-economy-report>