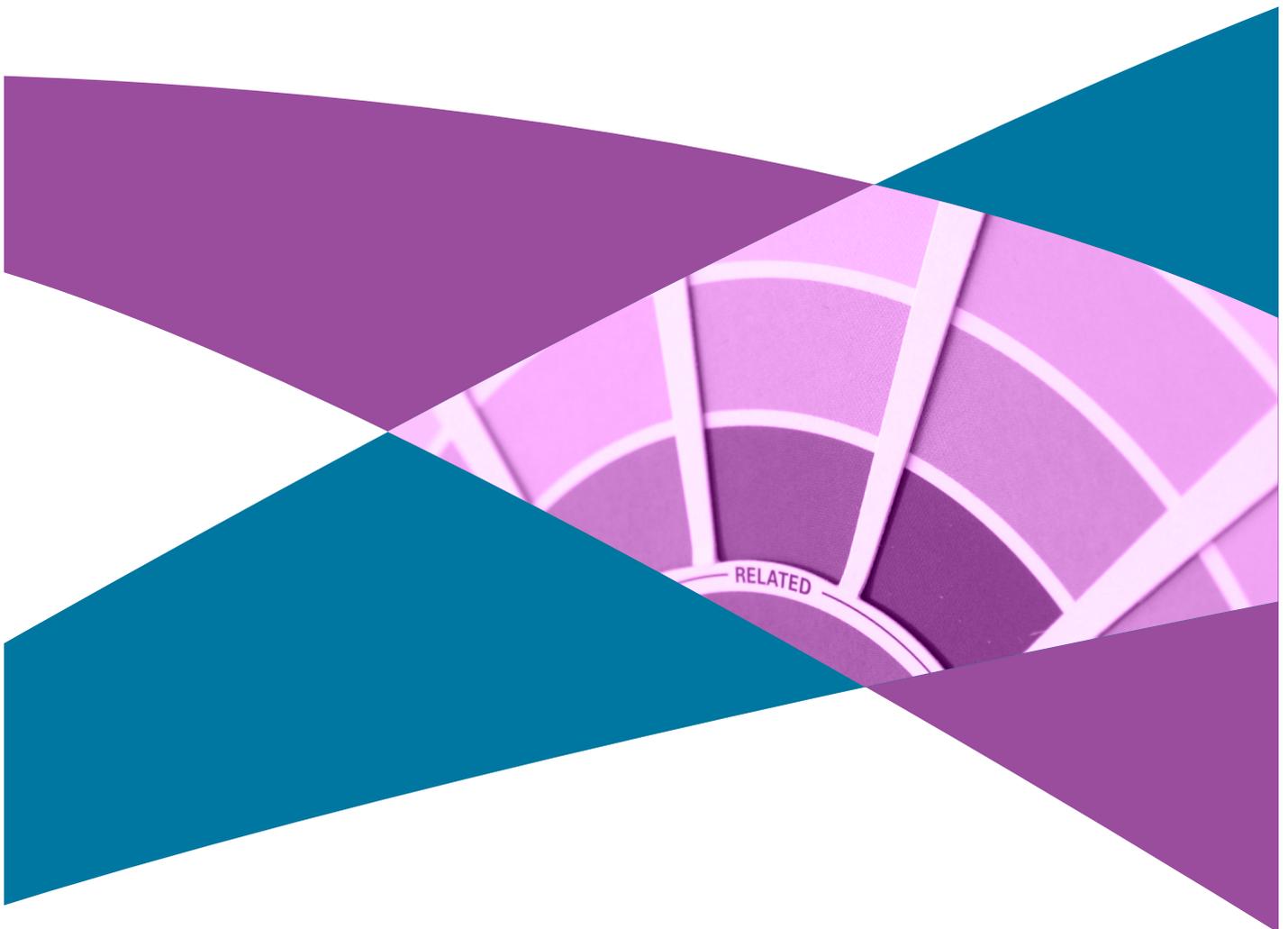




Intellectual  
Property  
Office

## The Consultation on the Reform of the UK Designs Legal Framework Government Response - April 2013





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# Executive Summary

Design is important to the UK economy: figures showed that UK business invested £15.5 billion in design in 2009<sup>1</sup>. Businesses can use design rights and other intellectual property to protect their creativity, which in turn can lead to investment in new products, the promotion of innovation and can help to sustain growth. To support this, the underpinning design legal framework needs to be flexible and responsive to business needs.

The Hargreaves Review of Intellectual Property (IP) and Growth, commissioned by the Prime Minister and published in May 2011, acknowledged that the system for protecting designs was difficult for business to understand and to use effectively.

Following on from the Hargreaves Review, the Intellectual Property Office (IPO) published, in September 2011, a call for evidence and associated online survey. Responses to those, as well the results of IPO funded research, fed into an assessment of the need to reform the designs framework, which the IPO published in December 2011. This was followed in July 2012 by a consultation with proposals to amend the system.

This document sets out Government policy on amending the designs legal framework in light of that consultation. It is the Government's intention to legislate as soon as possible to help modernise and improve the design framework so that it is less complex to use. The proposals, listed below, will be taken forward alongside other non-legislative changes, such as electronic filing, to help streamline registration processes and make them easier for businesses to use. The changes fall broadly into three categories:

1. Measures to simplify design law and get the IP framework to better support innovation
2. Enforcement of designs and understanding the design rights of others
3. Other things to improve the Design Framework e.g. information provision.

## **1. Measures to simplify design law and get the IP framework to better support innovation**

There are many different types of protection available for designs including EU registered and unregistered rights, UK registered and unregistered rights, and copyright. This can make the protection available under design law difficult to understand. Many respondents to the consultation agreed that - where it makes sense to do so - UK and EU laws should be harmonised. In light of this, the changes below are intended help reduce the overall complexity of the designs system.

- UK unregistered design right (UDR) will be retained. UDR arises automatically without the need for the designer to register their designs with an authorising body (e.g. the Intellectual Property Office), and protects designs for up to 15 years. It tends to be relied on in preference to registered designs by those working in industries in which designs are rapidly superseded, such as the fashion industry. These industries often do not wish to use their time, money and energy registering designs whose value is transient. Small and medium sized enterprises (SMEs) also tend to rely on unregistered rights.

<sup>1</sup> NESTA (2012) UK Innovation Index 2012, p. 4 ([http://www.nesta.org.uk/home1/assets/features/innovation\\_index\\_2012](http://www.nesta.org.uk/home1/assets/features/innovation_index_2012))

- The definition of an unregistered right will be amended to prevent existing right holders from using a very small part of their design as the basis for a claim that a third party is infringing their design. This change will make the rights that have been protected clearer, and allow others to legitimately build on existing ideas without fear of legal action, thereby removing an unnecessary barrier to innovation.
- To be considered valid an unregistered right should not be ‘commonplace’ in the relevant design field. However, the law as it stands is not consistent, or clear about whether this refers to a design that is ‘commonplace’ in the UK, the EU or a wider area. This uncertainty is unhelpful for business so the Government intends to amend the law to specify the relevant geographical area. This will also broadly align it with another aspect of design law which sets out rules on design ownership based on the geographical location of an individual designer or business. This will make the law more consistent and easier to understand.
- The types of defence that an individual or business can use, when defending themselves against accusations of design infringement, will be amended to align UK law with the EU system. These defences will:
  - cover situations where a third party, acting in good faith and without copying, has used or made preparations to use a design before the application date of a registered design. This will allow third parties to continue using the design (along the same lines), without fear of someone trying to stop them at a later date and jeopardising their investment. This will increase certainty for businesses and should reduce their risks.
  - permit the use of unregistered designs in certain specific circumstance, such as for private and non-commercial use or for teaching purposes, for example a school teacher in carpentry being able to demonstrate how to produce design protected features without infringing the design right.
- UK law currently treats UK registered designs and EU registered designs differently in relation to the infringement of the associated UK copyright. A business given permission to use a design registered in the EU (which will cover the UK) could find itself in breach of UK copyright laws, whereas the same is not true of a design registered in the UK. The Government will change the law so that businesses which have permission to use a design registered in the EU can defend themselves against accusations of infringement of UK artistic copyright<sup>2</sup> in the same way as they can if the registration is for a UK national right.
- The law identifying who may own a UK unregistered design right will be simplified and extended to include anyone of any nationality provided that, broadly speaking, they either live in the EU, carry out business in the EU or market articles made to the design in the EU. This will mean that more of those who are economically active in the UK will be able to benefit from UK protection.

2 Copyright which applies to ‘artistic works’ such as photos, sculptures, paintings, models, collages, etc

- Ownership of designs
  - UK laws relating to the ownership of designs commissioned by another individual or business will be amended, so that the designer is the initial owner. This will remove the confusing situation in which UK rights are automatically owned by whoever has commissioned the design, and the related EU rights (which include the UK in their scope) are automatically owned by the designer. This change means that the initial ownership of closely related rights will no longer end up with different parties. It also brings the UK design rules into line with UK copyright.
  - The requirement for an applicant to be the owner will be removed, aligning it more closely with EU rules on registered designs. This will reduce the possibility of delays in cases where ownership has to be clarified before an application can be made. Reducing the likelihood of delays will reduce the risk of others claiming the rights, or a registration becoming invalid because the design was made public before registration was granted.
- The period of deferment of publication for design applications will be extended to allow an applicant to delay publication for up to 30 months. This will offer greater flexibility for those wishing to avoid disclosing their designs before they are ready to launch them.

## **2. Enforcement of designs and understanding the design rights of others**

Design owning businesses confirmed in their responses to the consultation that enforcing their rights can be very time consuming, costly and divert resources which should otherwise be put towards business development. To help make enforcement easier and less costly, various changes are being proposed which should help all businesses, but particularly SMEs, enforce their rights.

- Criminal sanctions for the deliberate copying of registered designs will be introduced. They will be restricted to activities carried out in the course of business, with the alleged infringer knowing or having reason to believe the design was registered. A defence will apply where the alleged infringer has a reasonable belief that the design in question was invalid, for example, if it was widely known in a design field.
- Changes to the route for appealing against IPO decisions on designs will be introduced. These will allow users to choose between using the Appointed Person, which is likely to deliver a quicker and cheaper final decision, and the High Court which allows for further appeals should a case warrant it. It will also mirror the system currently used for trade mark appeals. Overall, this should particularly benefit SMEs.
- A voluntary, non-binding Design Opinions Service will be introduced to give those involved in e.g. potential infringement actions an impartial view on the strength of their case before they engage in full legal proceedings. This is also something which will particularly benefit SMEs.

### 3. Other things to improve the design IP framework

The consultation included some other, more process-focused, proposals intended to help improve the overall working of the system. The changes below will help improve access to information about designs or extend the choices available to business for protecting their designs.

- Provision will be made to allow more information on registered designs to be provided voluntarily, so that third parties can identify the designer, whether (and if so when) the design was made public before the design was applied for, and whether the applicant is willing to licence the design.
- Changes will also be made to
  - provide inspection of documents by electronic means; and
  - simplify the requirements to record changes in ownership of designs at the IPO.
- Provision will be made for the UK to join the Hague Agreement in its own right. This will introduce a flexibility of choice that would benefit those, most likely SMEs, seeking more targeted, country specific protection for design rights.

The Government is committed to ensuring that businesses, especially SMEs, are made aware of and understand the proposed changes to the law, and in particular, how the changes will affect them. The desire for clear information and guidance about the proposed legal changes was reflected in the responses the Government received to the consultation.

The IPO will work with interested parties to publicise these changes to the law, in particular focussing on making the changes understandable to SMEs. In addition, the IPO is continuing to build its awareness raising activities and reviewing links with intermediaries who can appropriately direct businesses to information and support. The IPO will refresh its advisory literature, and maintain a dialogue with SMEs and their representatives to ensure its services fully meet the needs of business.

# Introduction

## The Importance of Design to the UK economy

1. The design industry makes a significant contribution to the UK's growth and innovation. An estimated £33.5 billion<sup>3</sup> was spent on design in 2008, demonstrating the value that it brings to the economy. The most recent figures show that UK businesses invested £15.5 billion<sup>4</sup> in design in 2009 which represents 1.1% of GDP<sup>5</sup>. Businesses that practice and sell design cover a diverse range of sectors, including: architectural and engineering services, computer and telecommunications services, printing and publishing, fashion and craft and advanced manufacturing<sup>6</sup>. Most design-intensive sectors play a leading role in UK trade, exporting a large share of their output. This accounts for around 2% of UK exports.
2. Design is key to the UK knowledge economy and plays an important role in the innovation process. Design rights and other intellectual property rights (IPR) sustain growth by promoting innovation and investment through the offer of a time-limited monopoly to creators and inventors, and also those who license or distribute their work. This reduces the uncertainty of investment in creativity, promotes competition through new ideas, and stimulates innovation and economic growth. As IP rights form a monopoly, there is a possibility that an overly rigid and inflexible IP framework can act as a barrier to innovation which builds on or adds value to the work of others. The Government recognises the importance of design in incentivising creativity and wishes to minimise inflexibilities in the IP framework.
3. The 2011 Review of Intellectual Property and Growth, commissioned by the Prime Minister and led by Professor Ian Hargreaves (the "Hargreaves Review")<sup>7</sup>, made a number of recommendations which the Government broadly accepted, making a commitment to bring forward policy proposals in due course.
4. In relation to designs the Professor coined the phrase, "Patchwork of Protection" and also pointed out the lack of understanding of the relationship between design rights, innovation and growth. To some extent the latter gap has been "plugged" and is continuing to be addressed, by research published by the IPO and others<sup>8</sup>.

3 The estimate of £33.5bn in spending comes from Haskel and Pesole (2011) as, "In 2008, UK private sector firms purchased about £26bn worth of architectural and engineering design services, but produced about another £7.5bn worth on their own-account." (p 24) <http://www.ipo.gov.uk/ipresearch-designsreport1-201109.pdf>

4 The estimate of £15.5bn in investment comes from the NESTA 2012 Innovation Index.

5 The two figures of £33.5bn spending and £15.5bn investment are not contradictory as they measure slightly different things, at different times and use different methods. Spending is focused on consumption in the present whereas investment is expenditure on resources that may have longer lasting payoffs.

6 IPO (2012) UK design as a global industry: International trade and intellectual property <http://www.ipo.gov.uk/ipresearch-ukdesign-201207.pdf>

7 Digital Opportunity: A review of Intellectual Property and Growth, May 2011 <http://www.ipo.gov.uk/ipreview.htm>

8 For example, the following publications: UK design as a global industry; The development of design law - past and future; The Economics of Design Rights; Intellectual Property Enforcement in Smaller UK firms. See the IPO website at: <http://www.ipo.gov.uk/pro-ipresearch/ipresearch-right/ipresearch-right-design.htm>

5. The so called patchwork of protection issue is more problematic. The latter is a consequence of the historical development of IP in general and designs in particular, such that they are regulated in the UK by a number of overlapping, even cumulative rights, most of which are listed here:
- Copyright;
  - Registered Community Design;
  - International Design designating the EU;
  - Unregistered Community Design;
  - Semiconductor Topography Right;
  - UK Registered Design; and
  - UK Unregistered Design Right.
6. Of these, copyright is being considered by the IPO elsewhere<sup>9</sup>; the substantive provisions of the EU registered right, international design designating the EU and the EU unregistered right are outside our competence to amend or repeal, as is much of the UK registered design. All of the latter are based on EU legislation, and there is currently not the will, or prospect, of reform of the latter in the near future. As for the Semiconductor Topography Right, it's clearly rather esoteric and no-one is calling for its amendment or repeal and – even if they were – it is also based on an EU directive.
7. The modifications to the law set out in the following pages are thus restricted to the UK unregistered right (UDR) and those parts of the UK law governing registered designs that do not emanate from the EU directive. But this is not to say that the proposed revision has little or no value. There are a number of positive changes that can be made to registered design law, which were set out in a consultation (“the Consultation”<sup>10</sup>) conducted in summer 2012. A summary of the responses<sup>11</sup> received was published in January 2013, and this document now describes how the Government intends to take the proposals forward in the light of those responses.
8. One of our respondents commented that the Consultation on the Reform of the UK Designs Legal Framework represented more piecemeal tinkering and stated that what is urgently required is a thorough re-appraisal of UK design law as a whole in its international and European legal context followed by fresh legislation. There is weight to this statement, but the tone of the Consultation and the responses to it are, in general, one of evolution, as opposed to revolution, because they are circumscribed by the constraints set out previously.
9. It should also be noted that legislative changes are not the only alterations to the design system in the UK that are being planned. There are a number of changes to the process of seeking registration in the UK that will facilitate the experience of small firms in the UK when registering designs – such as the introduction of an electronic document management system for handling design applications<sup>12</sup>. It remains the case, however, that the effectiveness of the latter, and speed with which it can be implemented, will be facilitated by the legislative modifications herein described.

9 See the IPO website at: <http://www.ipo.gov.uk/types/hargreaves/hargreaves-copyright.htm>

10 Consultation on the Reform of the UK Designs Legal Framework – July 2012 : <http://www.ipo.gov.uk/pro-policy/consult/consult-closed/consult-closed-2012/consult-2012-designs.htm>

11 Consultation on the Reform of the UK Designs Legal Framework: Summary of Responses - December 2012, at <http://www.ipo.gov.uk/response-2012-designs-summary.pdf>

12 See Strategic Goal 2 of the IPO's Corporate Plan at <http://www.ipo.gov.uk/about-plan2012.pdf>

## The economic benefits of the proposed changes

10. The changes set out below are intended to help improve the system, by harmonising it - where appropriate - with the EU regime, so that the designs system overall is easier to navigate. While it is difficult to estimate the monetised impact of the new provisions, a range of benefits are expected for both business and government:
  1. Resource saving to business
  2. Deterrence of deliberate infringement
  3. Harmonisation (parity, reduced complexity and flexibility)
11. **Scope of Design Protection** (*reduced complexity, resource savings*): Collectively, these provisions<sup>13</sup> could modernise and simplify the law to provide a clear, consistent and equitable framework for protection of designs. Business could benefit from *greater legal certainty over product design* innovation and greater clarification over what they can protect. This should allow investment in new product design with lower risk of copying and the potential for an increase in trade. Greater certainty over legal rights could lead to a *reduction in use and cost of legal services* to business.
12. **Ownership Provisions** (*reduced complexity, resource savings*): Legal provisions on ownership of UK designs will be aligned with those for EU designs which should *reduce complexity and uncertainty for business* – a view supported by the majority in consultation. These provisions should provide clarity of ownership, lessen the scope for unnecessary legal disputes due to uncertainty and reduce the administrative burden with official recording of registrations. The change could *reduce resources* needed by business to consider complex ownership rules, and thereby avoid disputes, a feature supported in consultation. With greater clarity over ownership rules, businesses can have greater confidence in proceeding with agreements to manufacture or license.
13. **Criminal Sanctions** (*infringement deterrent, parity*): The implementation of criminal sanctions for UK and EU registered design could create a significant *deterrent effect against deliberate copying* that current civil sanctions do not supply, a view supported by the majority of respondents in consultation. There will be familiarisation and ongoing costs to police, trading standards authorities, magistrates and judges. In addition, the increased number of cases will incur costs to the Crown Prosecution Service, HM Courts and Tribunal Services and HM Prison and Probation Services. The introduction of criminal sanctions for the counterfeiting and piracy of copyright protected audiovisual products in the UK provides a precedent and also means that implementing criminal sanctions for registered design infringement will create a *coherent approach* to the protection of IPR matched with copyright and trade marks. In addition, the civil regime could become more effective if businesses know the escalation of their activity may result in criminal proceedings.
14. **Appeals Route** (*flexibility, parity*): The provision could improve access to justice for businesses using the UK designs registration system by allowing them to choose an appeal route against decisions of the registrar either in the High Court (for complex or important cases) or the Appointed Person (AP) (suitable for cheaper and quicker decisions). The improved system could *provide flexibility to business* where complex matters could go to court where time/costs are not limited, or, businesses could use the less formal AP system where resource costs are likely to be lower for business. This revised appeals mechanism, reflecting the most popular view in consultation, will mirror the system already in

<sup>13</sup> These provisions include: amending the definition of UDR, amending the geographical scope of the originality requirements, and extending the qualification requirements.

existence for trade marks and *improve parity* with it. There will be some additional annual costs to Government in funding the new systems as well as costs to the IPO in defending cases, though there has only been one case in the current system over the last five years. The low volume of cases suggests there is either little demand for appeals or little demand for the current appeals process. It may be that changing it will increase the number of appeals to a similar percentage to that for trade marks.

15. **Opinion Service** (*flexibility, resource savings, parity*): The provision will provide a voluntary, low cost, non-binding Design Opinions Service (DOS), to help resolve infringement disputes in an informal setting without the need for court or formal proceedings. This service is intended to reflect the Patent Opinions Service<sup>14</sup> which is already familiar to users of UK IPRs, and will improve *parity with other IPRs*. The DOS could provide business with a *cost effective alternative* to civil litigation and a useful barometer in deciding whether to pursue disputes more formally. Design right holders and businesses involved in disputes will be able to take quicker and more informed decisions on what, if any, action they wish to take in disputes on validity, subsistence and the existence of rights. There is a risk that a non-binding opinion service could be ineffective. If opinions are ignored by business, and court proceedings pursued, it could simply become another step to add costs in the dispute process. Despite this, the majority of consultation respondents saw value in the IPO offering a DOS, in particular highlighting the benefit of *lower costs* to SMEs. The IPO will incur a cost in running the DOS which will vary on a case by case basis *as seen with the Patent Opinions Service*.
16. **Inspection of Documents** (*flexibility, reduced complexity, parity*): The provision will enable business to view documents online and receive information in respect of registered designs. This will run alongside the current system which is paper based and considered by some to be time consuming. With an overwhelming consensus in consultation, the online system will provide business with a quicker, environmentally friendly and *cheaper alternative* to the current process. In addition, the online system will provide *consistency with other IPRs*, matching the IPO's provision of information for patents. More firms may be likely to use the service if there is no cost to them and there could be further unquantifiable benefit to business from *improved knowledge of registered design rights* which may prevent inadvertent copying.
17. **Hague Agreement** (*resource savings, flexibility, parity*): The provision will enable designers, particularly SME's, to take full advantage of the flexibilities and economies of using Hague to gain protection at home and in important overseas markets.<sup>15</sup> Businesses could *save money on design registrations* overseas and protect their IPR more efficiently. The provision could encourage non-UK owners of design to register their rights in the UK for manufacturing, distribution or licensing of their intellectual property. Consultation found that the majority of respondents were in favour of joining the Hague, which will *increase flexibility for UK applicants* and harmonise our approach with the EU.
18. Overall, the provisions could provide several anticipated benefits for business and government. Documenting these benefits with evidence is challenging and the data is difficult to quantify. The Consultation has suggested that these concepts have support from stakeholders.

14 <http://www.ipo.gov.uk/pro-types/pro-patent/pro-p-dispute/pro-p-opinion.htm>

15 The Hague agreement allows business to register designs in any signatory country through one application in one language. At present the UK is not a member, but the EU is, meaning firms can get protection in the UK via an EU application but this is more costly than selecting the individual country.

# Changes to UK Unregistered Design Right (UDR)

## Description of UDR: should the right be retained?

19. The proposal was whether UDR should be retained and, if so, were there circumstances in which it might be removed.
20. Though there was some minor dissent, the majority of respondents, including the legal profession, manufacturers and designers, were in favour of retaining UDR. The case made for retention was convincing. The right is relied upon when all other forms of protection are inapplicable for a number of reasons: copyright protection is excluded, the design at issue was never registered, the Community unregistered right has lapsed (it lasts for only three years) and where UDR extends to certain functional designs not covered by other rights.
21. In relation to designs that have not been protected by registration, UDR is particularly useful for SMEs who may not have registered their rights because of lack of awareness of the importance of doing so – or for other reasons – for example, the fashion industry is profoundly design driven, but only a few out of a plethora of designs actually turn a profit. Registration of every design is pointless and expensive, and design owners must rely on unregistered rights to protect the relatively few creations that turn a profit.
22. Against this background, the reasons given for repeal of the right were not compelling, most of which referred to simplification of the designs regime and greater harmonisation with EU law. Though reducing the complexity of design law was one of the recommendations of the Hargreaves Review<sup>16</sup>, this should not be undertaken blindly: UDR is currently a very useful protection for industry, particularly for the smaller businesses that make up the majority of designers that might seek its protection in the UK.
23. Overall, retention of UDR is believed to be desirable and thus the right will not be considered for repeal at this time.

## Changes to the definition of UK Unregistered Design Right

24. The Consultation proposal suggested a change to the definition of UDR in the Copyright, Design and Patent Act 1988 (as amended; the “CDPA”). The current definition arguably has an indeterminate scope, applying to any aspect of the shape or configuration (whether internal or external) of the whole or part of an article (section 213(2) of CDPA). This formulation has been criticised by commentators, and in case law, as it potentially creates a basket of rights in an existing design and proprietors can easily establish that a new and competing design infringes theirs by basing a claim on a very small and ‘cropped’ part of an article. In this way they can say that another design article infringes theirs even when the overall appearance of that article is not very similar at all.

16 Digital Opportunity: A review of Intellectual Property and Growth, May 2011 <http://www.ipo.gov.uk/ipreview.htm>

25. Despite this observation there was little support from respondents to the Consultation for a change to the CDPA to, for example, make it consistent with the definition of design in both the UK Registered Designs Act 1949 (RDA) and the Community Design Regulation (CDR)<sup>17</sup>. It was pointed out that complete harmonisation by importing requirements for visibility in normal use, and the exclusion of protection for functional designs, would largely remove the need for UDR altogether, so there was only an argument for limited harmonisation.
26. In fact, a small majority of respondents did not agree that the definition of UDR was flawed: they believed it gave business flexibility and provided a range of sensible and appropriate defences which would not be available. No evidence was provided showing that the scope of protection afforded by UDR had been used to prevent others from establishing new designs or businesses had been deterred from launching designs as a result of being unsure of whether infringing unregistered designs existed in the UK.
27. Nevertheless, a problem was identified in that the specific scope of a design did not need to be elucidated until such time as it was enforced – whilst this offered a useful and flexible tool against infringers, it created uncertainty for third parties. Further, UDR subsisting in just part of a part of an article placed a considerable burden on defendants and lawyers, as the precise nature of the right being asserted in a legal action may not be clear until the submission of pleadings.
28. On balance, it is considered likely that clarifying and limiting the current protection for any “aspect” of the design of a “part” of an article would reduce the tendency to overstate the breadth of UDR and the uncertainty this promotes, particularly in relation to actions before the courts. Though some considered that this amendment would not achieve the desired effect, the proposed change would move the definition closer to that in EU law (which also refers to “a part of a product”) – where “cropping” appears to be less of an issue – whilst retaining the value of UDR as identified by respondents to the Consultation.
29. Consequently, the Government intends to delete the phrase “any aspect” from section 213(2) of the CDPA.

### **“Originality” and UK UDR**

30. The Consultation discussed the lack of certainty as to the meaning of commonplace in the CDPA in relation to UDR, and suggested that there would be benefit in setting out a geographical delineation: what is commonplace in the European Economic Area. A range of views were expressed on this point in the Consultation, but no consensus view emerged from respondents.
31. It was contended, for example, that the test, in referring to what is “commonplace in the design fields in question” (section 213(4) CDPA) – effectively to that which is known to be so in the relevant design corpus – could in theory include those designs in the EEA and beyond. This would depend on circumstances, making the test a practical one of factual enquiry, specific to each case.

17 COUNCIL REGULATION (EC) No 6/2002 of 12 December 2001 on Community designs: [http://oami.europa.eu/ows/rw/resource/documents/RCD/regulations/62002\\_en\\_cv.pdf](http://oami.europa.eu/ows/rw/resource/documents/RCD/regulations/62002_en_cv.pdf).

32. However, others thought the lack of a definition raised factual questions and it was for this reason it had been criticised by the Court of Appeal<sup>18</sup>. There therefore still exists uncertainty in relation to the meaning of commonplace.
33. On balance, there would seem to be a case for clarification of this term, which is not defined in the CDPA. However, as one respondent pointed out, if the term is retained, it is sensible to ensure that the area of prior art is the same as the catchment area for qualifying individuals under section 217 CDPA, otherwise, a commonplace design could qualify for protection in the UK.
34. Consequently, the Government intends that the reference to commonplace in the CDPA should be extended to “commonplace in any qualifying country”, by an amendment to section 213(4) CDPA. The definition of “qualifying country” will remain unchanged and will include, as now, the UK, EU member states, etc (see CDPA section 217).

### **UK Unregistered Design Right and “general concepts”**

35. The proposal was to introduce an amendment excluding general ideas and concepts from the definition of design so as to clarify the law. Only a couple of respondents supported such an amendment. One felt recent judgements of the courts, by an overly strict application of the “idea-expression dichotomy”, tended to result in interpreting “copying” so narrowly as to eviscerate the rights of design’s proprietors.
36. However, the overwhelming majority of respondents disagreed with amending legislation to exclude “general ideas and concepts” from the CDPA. They felt excluding these themes would lead to confusion and uncertainty around existing case law, require further litigation to clarify wording and inevitably narrow the scope of protection for designs. It was also considered that the principle that UDR does not protect ideas as such is well established and understood, and mixing up that principle with the originality test will add to the confusion. Further, such an amendment was unlikely to have the desired effect of widening the scope of copying as defined by the Courts. The IPO considers that there is weight to these arguments.
37. As a consequence, the Government is not minded to introduce the change suggested in the Consultation document.

<sup>18</sup> Dyson Ltd v Qualtex (UK) Ltd, 2006,879; paragraph 14, 98

## Defences against accusations of infringement

38. The proposals were, first, to introduce a provision into the RDA that reflected Article 22 of the CDR governing Registered Community Design (RCD), which allows for a right of prior use for any third person who can establish that before the date of filing of the application, he had in good faith commenced use of the design.
39. Next, amendments were proposed to the CDPA to mirror the defences to non-infringement, as currently set out in section 7A of the RDA. The latter include acts done privately and for purposes which are not commercial, experimental, teaching purposes or for the purpose of making citations, and some more esoteric defences.
40. There was little evidence from the Consultation that the lack of a prior use defence was problematic in practice. However, a majority of respondents were in favour of the change, given that there was a potential for injustice if there remains no prior user right. Further, by analogy with patents, it would be the natural corollary of a first-to-file monopoly protection system in protecting investments made in good faith by third parties. The aim of a right of prior use is to provide an entitlement to limited exploitation where circumstances justified this (see the 23<sup>rd</sup> recital to the CDR). It seems right that, on grounds of policy, the Government should seek to harmonise law with EU legislation on this point by creating a prior right defence for UK registered designs that mirrors that in the CDR.
41. Introduction of the defences in section 7A(2) of the RDA into the CDPA was not seen by respondents to the Consultation as a pressing change to the law. However, the majority were in favour on the basis of harmonisation with RDA and EU law: the further defences were seen as worthy, but not crucial.
42. As a consequence, and on balance, the Government intends to introduce into the CDPA the defences set out in the section 7A(2) of the RDA.

## Defences against accusations of infringement of artistic copyright

43. The Consultation considered amending current section 53 of the CDPA which broadly says that acts carried out with permission from the owner of a UK registered design do not infringe any artistic copyright that might also exist in the article in question. The proposal was to extend this 'defence' to RCDs as well, with a further question as to whether it should equally apply to unregistered rights.

44. The general consensus was that extending the section to cover RCDs would help align UK and EU law and ensure consistency, although a query was raised as to the compatibility of the current and proposed section 53 CDPA with EU law. Suggestions were made for safeguarding the position where there were differences in ownership between the copyright and the design. The point was also made that there had been cases where the owner had applied for registration of a design which incorporated material alleged to be the copyright of a third party and where title had not passed to the applicant, and invalidity proceedings had to be pursued with the associated costs.
45. In line with respondents' views, the Government intends to implement the proposed amendment to help remove some of the differences between the handling of UK and Community designs, and reduce the overall complexity of the design's system. The compatibility of UK law with that of the EU was originally considered when the UK implemented changes arising from the Directive<sup>19</sup>, and was reconsidered in the light of this proposal. We take the view that this section will remain compatible with EU law, even after the proposed amendment.
46. In relation to the suggestions and the examples of difficult cases referred to above, the section under consideration does not provide for cases where the registration itself has been falsely made, but is intended to protect third parties, who acting in good faith under specific arrangements with the proprietor of the registered design (even where it is incorrectly registered), may find themselves in danger of falling foul of copyright law. Other provisions, such as invalidation proceedings mentioned above, are already available in design law to permit registrations to be challenged. The Government therefore does not intend to include any further amendments on this point.
47. In relation to the question about the possible extension of section 53 CDPA to cover unregistered rights, respondents' views were more mixed. Some favoured this as introducing further consistency, and the suggestion was made that the defence could perhaps usefully be extended to cover EU unregistered right. Others thought it was unnecessary and inappropriate, as unregistered design right and copyright under UK law were intended to be mutually exclusive. Reference was made to the nature of registered and unregistered rights which meant that they should not necessarily be treated in the same way, an example given was section 239(3) of the Patents Act 1977, which allowed a patent owned by an employee to override unregistered rights owned by the employer, but not registered rights.
48. Given the inherent distinction between UK unregistered right and UK copyright, it is not appropriate to extend the defence to cover UK unregistered right. The alternative of including the EU unregistered right within the defence, would seem to add another point of difference, and therefore complexity, in dealing with UK and EU rights. Taking these points into consideration and, as another response mentioned, that the current defence arises through the public register which acts as prima facie proof of title, the Government does not intend to extend the defence to cover any unregistered rights.

19 Directive 98/71/EC of the European Parliament and of the Council of 13th October 1998 on the legal protection of designs: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31998L0071:EN:HTML>

## “Qualification” for UK UDR protection

49. As proposed in the Consultation, it is considered that there is a benefit in removing the qualification requirements in that there is the potential to “free up trade”, largely because the current requirement can be said to act as a latent trade barrier, in that those who might seek to trade in the UK do not, given an increased risk that their designs might be subject to non-actionable copying. However, some respondents pointed out that unregistered design rights are available on the basis of reciprocity, in light of the availability of unregistered rights to UK nationals offered by foreign states, and there would be no advantage to the UK economy whatsoever to extend unregistered rights to, for example, United States nationals, in the absence of a reciprocal provision in United States benefiting UK nationals. Though the requirements for qualification are complex, they have the underlying objective of denying design right protection to individuals and businesses from countries under whose law British designers do not enjoy similar protection.
50. Though there is weight to this contention, the vast majority of those who responded to the Consultation were in favour of relaxation of the qualification requirements, if not for outright repeal. It was pointed out that they have been criticised in case law<sup>20</sup> and the existing arrangement means that the designs of businesses and nationals of countries outside the EU can be pirated freely if they did not register. Others commented that there was no satisfactory alternative protection to UDR, and the current qualification criteria led to considerable difficulty when advising clients based outside the EU: “...before dismissing the possibility of bringing a claim based on UDR, it is necessary to pursue sometimes lengthy enquiries into the citizenship or habitual residence of the individual designer, a member of the design team, the commissioner or the place of first marketing”.
51. In relation to the reciprocity point raised above, a lack of mutuality exists in the current law. For example, given that the definition of a qualifying country includes the EU, an individual/business (where all other conditions applied) in Germany would have the right in the UK, but no-one in the UK would enjoy the same right in Germany. If an issue arose around a design right, litigants from the UK would have to seek redress under EU unregistered rights (which only last three years), or other legislation, such as laws of unfair competition. It therefore seems a reasonable compromise to extend the right, but only to those who trade, or are going to trade, in the EU: it is reasonable that designers that operate in the EU should be able to protect their designs.
52. Consequently, the Government will relax the qualification requirements to include anyone of any nationality provided that either:
- the designer is habitually resident in a qualifying country (broadly the EU or another state to which the Act has been extended by Order);
  - the person who employed the designer to create the design has a place of business at which substantial business activity is carried on; or
  - articles made to the design were first marketed, broadly, in the EU.

<sup>20</sup> Mackie Designs Inc v Behringer Specialised Studio Equipment Ltd [1999] All ER (D) 411.

# Ownership of designs

## Commissioned designs

53. The Consultation sought views about whether the UK law on ownership of commissioned designs should be brought into line with that for the Community design (and UK copyright law). This would mean that the designer would be the first owner of the design, rather than – as now – the person commissioning the work.
54. Such a move to harmonise the UK and EU systems was generally regarded positively by respondents. They felt it would improve consistency, and reduce the likelihood of overlapping rights being held by different entities. Overall, this would reduce complexity and therefore costs in legal disputes.
55. Some felt that the EU system should in fact harmonise with the UK: the EU system could be problematic for commissioners trying to enforce their rights who had made no provision for ownership, and who therefore had to track down designers to get cooperation in any litigation.
56. As respondents pointed out, the proposal would be a reversal of the traditional understanding in industry, that those paying for the creation of a design owned it. This could be particularly problematic for SMEs who do not tend to have the resources necessary to track changes in the law. However, it was suggested that some problems could be alleviated by long transitional periods and wide publicity. It was also suggested that commissioners should be presumed to hold an exclusive royalty free licence, unless there was agreement to the contrary, and/or they should have the ability to enforce the right as an automatic licensee.
57. We take the view, as those proposing it recognised, that securing a change to the current, generally accepted EU-wide regime is unlikely to be practical. And, it would mean that the ownership provisions of UK design and UK copyright law, which are closely related, continue to remain out of step with each other. The Government therefore intends to amend UK law as proposed, so that the first owner of commissioned designs is the designer, with possible statutory safeguards for commissioners at least for a transition period.
58. Acknowledging the concerns about changing the status quo, the IPO will work with bodies representing and promoting designers, as well as IP legal advisors to publicise these and other changes to the law, and their potential impact. This should help alleviate some of the concerns about this change in particular.

## Claim to ownership

59. The Consultation considered whether the specific requirement, in section 3(2) of the RDA, that the applicant for a design registration had to be the proprietor could be removed. It was thought that this section could make it difficult to correct errors.

60. Although some respondents agreed with this reasoning, others considered the provision redundant, especially as there was provision elsewhere in the law for a design in the wrong name to be invalidated. It was also pointed out that this type of requirement was not included in either patent law or Community Design law, the latter for example specifying merely that the applicant should be identified. It was also suggested that it could help remove delays in filing, where ownership was not already clear or assignments were being carried out and it removed a mechanism for disputes including infringement cases.
61. Others however were mainly concerned that removing this section could allow those who were not the proprietor to make fraudulent applications. It was suggested that some safeguards should be added to prevent third parties registering another's design; section 3(3) should also be removed; and that a provision similar to that in the Patents Act 1977 regarding entitlement disputes should be introduced.
62. Having carefully considered the concerns raised, the Government intends to remove section 3(2). It seems that few other forms of IP require the proprietor specifically to be the person making an application, which can – in some circumstances – hold up applications. Whilst this may suggest opening up the application procedure to unscrupulous third parties, there would seem to be little practical difference to what currently happens now: the Registrar is not in a position to investigate or make unjustified assertions about the true status of the applicant as the real owner at the time the application is filed and, due to the nature of the registration process, third parties will only become aware of the application, and the applicant, once it has in fact been registered. At this point, as has been pointed out, a declaration of invalidity can be sought. The Government therefore does not propose to amend the law in any other respect on this issue.

### Joint proprietors

63. The Consultation proposed amending the RDA to incorporate joint ownership provisions, similar to those already provided for unregistered design right in the CDPA.
64. Although most respondents agreed with this in principle, and a specific example was given where the lack of provisions had created a problem, several respondents suggested that it was not necessary: authorities were quoted which suggested that given other provisions in the law, it would be interpreted such as to allow for joint ownership.
65. Having carefully considered the responses, it would seem inappropriate to amend the law in the manner suggested, given that joint ownership is already recognised. The Government therefore does not intend to introduce such an amendment.
66. However, a related issue was raised about how joint ownership of designs should be treated, with regard to exploitation by one of the parties, and in relation to enforcement. A suggestion was made that provisions similar to section 36 of the Patents Act 1977 should be introduced in respect of UK registered, UK unregistered and Community designs (where the UK property law applies) which would allow one party to exploit the design independently of the other, under certain circumstances. This would seem to bring some clarity to the law and potentially facilitate uses by a single designer, which otherwise may be difficult to achieve where numerous designers were involved in the creation. The Government sees merit in this proposal and intends to explore this option further.

## Deferment of publication for registered design applications

67. The Consultation considered whether the current period of deferment, which allows applicants to delay registration and publication of their designs for up to 12 months, was sufficient or whether it should be extended to 18 months, 30 months or some other period.
68. Many respondents were aware that any period in which an application for a registered design was unpublished could impact on those searching to establish whether their own design was likely to infringe others' designs. Some members of one respondent body believed that the deferment period was used deliberately to make it difficult for third parties to carry out meaningful searches for clearance purposes. Suggestions were made to limit this potential negative effect by, for example, giving the potential 'infringer' a limited prior use right in certain restricted circumstances, and by introducing specific provisions to deal with co-pending design applications.
69. However, respondents also recognised that an extension of the current 12 months would offer greater flexibility for those wishing to avoid disclosing their designs to competitors (or unscrupulous third parties) before they were ready to launch them. Overall, a 30 month period was considered to offer the greatest benefits, especially because it added a degree of harmonisation with the way the EU system operates, so reducing the complexities of the design's system overall, and enabling applicants to make a choice between EU and UK registration based more on specific business need rather than solely on the possible period of deferment.
70. We agree that harmonisation with the EU design's system, where appropriate, is desirable, and that there may be cases in which a longer deferment period can reduce the risk of competitors, or other third parties, being given advance notice of an upcoming launch. The Government therefore intends to allow applicants the option of deferring publication of their design for a maximum period of 30 months after application, in line with the EU design's registration system for the reasons given above. This change in the law will be implemented via secondary legislation.
71. We note the concerns about the potential negative impact on third parties and the suggestions made to mitigate any such effects. The extent to which the existing deferment period of 12 months is a significant problem was not clear from the responses received. Nor was it clear whether any extension of the period would significantly increase the difficulties. Current legislation does not include the safeguards proposed but instead relies on the status of the deferred application, meaning that until such time as the application is registered (and published), the design will be treated as 'unregistered' and any legal action will need to establish that the alleged infringer copied the design in question before it can be successful. This serves to offer some kind of 'safeguard' in instances where potentially infringing designs arise independently of each other. The Government therefore does not propose to implement the suggested proposals.

## The need for criminal sanctions for the deliberate copying of designs

72. The Consultation asked whether criminal penalties should be introduced for the deliberate copying of a design right. To inform this proposal the Consultation sought evidence on the effectiveness of existing civil sanctions, asked what impact sanctions might have upon enforcement agencies and sought views on which design rights, including RCDs, should attract criminal sanctions.
73. The majority of respondents who answered questions on this topic supported the introduction of criminal sanctions for the deliberate copying of a design right. This included support from SMEs, independent designers and the IP legal profession. Most criticised existing civil remedies because of the time, cost and uncertainty they presented to SMEs in protecting their designs and argued designers can find it difficult to protect their designs against those who deliberately copy them. It was suggested deliberate copiers of designs are taking advantage of this uncertainty which in turn is creating concern amongst SMEs and independent designers over how feasible it is to protect against copying. It was felt criminal sanctions would address this disparity by levelling the playing field between small and big organisations. For example, several legal bodies said they were aware of examples in which civil remedies had proven ineffective against multiple and persistent offenders who were well resourced and untroubled by potential infringement cases. It was also suggested criminal sanctions would make the civil regime more effective, with companies more likely to respond positively to approaches under civil law (for example complying with notification letters and removing infringing materials) if they knew an escalation of their activity may later result in criminal proceedings. There were differing opinions on which design rights should attract criminal sanctions, but the majority believed they should at least cover UK Registered Design.
74. Among those opposed to criminal sanctions, legal bodies stressed that were such cases criminalised they would be too complex to be heard by non-experts and inexperienced judges and juries would be unable to weigh up whether a design was valid and had been infringed with the requisite knowledge. Others felt that it would be difficult to capture the policy aim in legislation without compromising unintentional infringement and in reality enforcement agencies would lack the specialist knowledge and resources to successfully pursue cases. Some respondents suggested civil remedies should be strengthened to ensure SMEs were not discouraged from enforcing their rights, for example encouraging court generosity in awarding additional damages for flagrant behaviour.
75. A common point of contention was whether designs should attract a criminal sanction in line with copyright and trade mark law. Others said the threat of a criminal record may have a chilling effect on honest traders, but provide little deterrent to hardened criminals. However, those in favour of sanctions consistently argued for the protection of design rights to be placed on the same level as other intellectual property and saw no justification for not doing so.
76. Some responses called for balance between enforcement and innovation saying it was important to foster creativity and innovation in design, where designers look to previous work for inspiration, whilst also protecting original work from deliberate copying. Others felt criminal sanctions worked against the public's interest in designers being able to innovate outside the valid scope of a design or after the term has ended for a product.

77. As to the scope of design rights which should attract criminal sanctions, one response felt scope should be restricted to anyone who knew or had reason to believe a design was subject to a registered right and where the infringing product was a copy intended to mislead as to the identity of the manufacturer. Others felt a criminal offence should be restricted to deliberate copying with a view to mass production and consequent detriment to the design right owner or apply to primary infringers of registered design rights in cases of deliberate or slavish copying.
78. There was concern the proposal could mean all acts which currently fall within design infringement were criminalised, respondents felt this would mean even non-deliberate copying would be criminalised, for example, those competitors seeking to innovate around existing designs.
79. In order to be a realistic threat, many thought criminal sanctions must be appropriately funded with resources being ring fenced to provide for training, business advice and enforcement. Some thought sanctions would place an additional burden on local authorities which would raise expectations to unrealistic levels and potentially undermine relationships with SMEs. Others thought whilst infringement in copyright and trade mark cases was fairly straightforward once the facts were established design may hinge on complex legal arguments around slight changes to appearance which in turn would require costly specialist legal advice to enforce through the criminal courts.
80. Some responses pointed to a lack of evidence in the accompanying impact assessment on which to base a policy decision, and said making a balanced assessment of the economics was therefore very difficult. One felt the underlying figures in the Consultation document too vague and did not reveal the details of the cases where right's holders complain that they had been copied.
81. The Government believes there is a justifiable argument that blatant, deliberate copying of designs, for commercial gain safe in the knowledge that many of the victims will be unlikely to have the resources to respond, is an act worthy of punishment. It also believes the UK needs a coherent approach to the protection of intellectual property rights as criminal gangs do not divide up the rights they plan to steal. For example, a fake iPhone steals the Apple design as much as it does the trade mark and any copyright existing in applications stored on it. Extending criminal sanctions to designs will reflect the "suite" of theft that has occurred and forms a necessary weapon in the armoury of enforcement authorities.
82. To this end, the Government supports the creation of a criminal offence for the deliberate copying of UK and EU Registered Designs; that is the unauthorised making, marketing, importing or the otherwise use of a design in the course of business. After consideration, the Government is of the view that unregistered design rights would require too high a level of evidence to prove a criminal activity had taken place; this decision reflects the views of the majority of respondents.

83. The offence is intended to help reduce the scale of design copying in the UK whilst increasing protection for the holders of registered design rights. Taken together, these measures will enable designers to better commercialise their design property and contribute more effectively to economic growth in the UK. Criminalising copying of registered designs will also have a positive effect on encouraging companies to register their designs rather than relying (often as a result of having no IP protection strategy) on UK unregistered design rights that offer less protection. This will create a culture where designers actively promote their designs as valid and registered; and suppliers and manufacturers, as they should now, ensure the designs they commission and market are original and validly registered. Criminal sanctions will also make the civil regime more effective, with companies more likely to respond positively to approaches under civil law if they know an escalation of their activity may result in criminal proceedings further on. Lastly, extending criminal sanctions to registered designs will fill an existing hole in the system for enforcement agencies.
84. Among those respondents who weren't in favour of sanctions there were concerns we were suggesting all acts which currently fall within design infringement should be criminalised, respondents felt this would mean even non-deliberate copying would be criminalised. However, it was the intention only to target activity involving the deliberate copying of someone else's ideas and creativity. The criminal offence will contain defences against unintentional infringement of registered design rights.
85. A new criminal offence will create an additional method of enforcement and protection to existing civil sanctions in place for design infringement. Obviously, the reforms to the Patents County Court, and increased use of mediation services in IP disputes, will continue to help those cases best determined by civil remedies.
86. The Government notes the comments of respondents regarding the evidence used in the impact assessment (IA) and consultation paper. Part of the intention of the consultation was to encourage respondents to provide further evidence. Some were able to provide examples of individual instances of infringement which they believed illustrated the need for criminal sanctions, but more specific detailed information was not forthcoming. Whilst criticism was levelled at the figures used in the IA in particular, no further information was provided to help rebut them. However, as part of the iterative process of assessing the impact, the figures have been revisited. Evidence received to the Consultation highlighted numerous cases in which it was felt that designs had been deliberately copied for commercial gain. This supports evidence received by the IPO over a number of years that design theft is, and remains, a real and significant concern for designers and business.
87. Trading Standards Authorities, as they do now for trade mark and copyright offences, will be able to enforce registered design infringement and will balance the importance of pursuing a design case alongside the other kinds of intellectual property crime in which they are interested. The Crown Prosecution Service will treat any new offence with the same approach it does with the latter, using its usual discretion and margin of appreciation, including such factors as evidential sufficiency and the public interest in pursuing a conviction. Although some respondents to the consultation expressed concern about the difficulty of pursuing criminal cases under design law, this seems to reference current civil infringement rather than the narrower offence which the Government intends to introduce. There is no reason to believe this will be any more of a challenge for designs than for other forms of IP law given the specific focus of the offence. The Government intends to introduce a criminal offence which identifies the copying (rather than infringement) of a registered design in the course of business, knowing or having reason to believe that it is registered. The offence will have certain defences attached to it, for example, to reflect reasonable belief on the part of the potential infringer that the design in question was invalid.

## Routes for appealing IPO decisions on designs

88. The Consultation sought views on changing the current route of appeal against decisions of the IPO relating to designs. The proposal built on a previous decision to abolish the current Registered Design Appeal Tribunal (RDAT) and to replace it with the Patents County Court (PCC), by introducing, alongside the PCC, the AP appeals procedure (as set out in the Trade Marks Act 1994, as amended) as an alternative route.
89. We agree with respondents who acknowledged the quality of the decisions of both the RDAT and PCC, but nevertheless felt that it was not appropriate for either of them to be the sole route of appeal, as this would not offer the flexibility users may require. There should therefore be two options: one providing a less formal, less expensive route, which would offer a final decision, as embodied in the AP appeals procedure, and the other one allowing further appeals to the court, should resource and the importance of the case require this.
90. The question of which court would be appropriate was also considered by respondents. Some felt that the PCC would be suitable, whilst others preferred the High Court. Having considered the arguments, we believe that the High Court would present a more flexible option. As some respondents suggested, it does not have the 'limitations' associated with the PCC such as the two day limit on hearings.
91. We also consider that there is merit in harmonising the appeal route with that of the trade marks system: introducing the High Court instead of the PCC would reflect that system more closely.
92. The Government therefore intends to amend the current route of appealing against IPO decisions by providing two alternative routes, namely the High Court and the AP.

## Understanding other people's rights

93. Up until 2006, applications for registration of a design were examined for novelty based on prior art, including earlier applied for and registered designs. When this part of the examination process ceased some stakeholders expressed concern that not checking designs for novelty undermines the value of the design registration received, and that many registered designs were not valid and could not be relied upon, for example, in legal proceedings or as a right licensed to others. The Consultation sought to establish whether and to what extent designs on the UK domestic and Community designs registers are considered to be valid, and whether an assessment against "prior art" would have an impact on this perception, or help resolve legal disputes more quickly and cheaply.
94. The clear view was that there are designs on both the UK and Community design registers that are not valid, but the extent to which this was thought to be the case varied. One respondent considered as much as one third could be invalid; another was less specific saying only that it is a significant amount. One respondent said that whilst they could not provide specific figures, invalid design registrations are an obvious and self-evident result of a deposit system and the consequence of being able to obtain a quick and cheap registration. Notwithstanding this, some respondents did not see invalid designs being registered as an issue as there are procedures under which a registration could be challenged, although when giving views on the effects of a deposit system a significant number raised the time and cost of removing an invalid design registration as a problem. Views on the effect on the perceived value of a registration were mixed with a number of responses saying that it did not impact at all, whereas others felt that there was a potential for false perception of value particularly amongst small companies or the less IP literate.
95. Of the three listed options, the first two proposed that the IPO either reintroduce a search of the prior art found in the register of registered designs and RCDs, and unregistered designs as part of the pre-registration examination, or a more limited assessment excluding unregistered designs. In both cases this could result in an objection to the granting of a registration. A third option proposed an approach analogous to the current trade mark "notification" system, whereby a positive result from a search of registered databases could result in a "notification" to the applicant and the proprietors of the previous registered prior art, rather than presenting a barrier to registration.
96. Of the respondents who expressed a definite view on the reintroduction of any kind of prior art search, a ratio of around 2:1 were against. Some were concerned about the potential impact introducing a search may have on fees, with other arguments against including that this would be out-of-step with the OHIM and the uncertain accuracy/consistency of any search, both being reasons why the Government ceased the prior search in 2006. A small number of respondents gave a mixed view, often because their opinion was dependant on other factors such as the availability of a searchable database, clarification on how a design might be considered "new" compared to other designs and the level of fees that may result.
97. The Government agrees with the majority of respondents that the introduction of a prior art search may benefit the perceived validity of a registration, but would not have a significant effect, either in avoiding disputes, or in resolving them more quickly and cheaply. It also agrees that there would be little to gain by creating a two-tier system under which UK rights would be subjected to a limited and potentially inconsistent test for validity through a prior rights search whereas the RCD route would grant a similar right without any such search.

## A Design Opinions Service

98. The Consultation asked if there was value in the IPO providing a non-binding opinions service for designs along the same lines as that for patents. It was proposed the service should provide decisions on the validity of a UK registered design, whether two designs (one of which is registered) gave the “same overall impression” and provide an answer to disputes about the subsistence, term and ownership of unregistered design rights. It was suggested that a £200 fee should be charged in order to use the service.
99. The majority of respondents to the Consultation supported the introduction of a design opinions service run by the IPO for both UK Registered and Unregistered design rights. It was seen as a cost effective alternative to pursuing litigation and a useful barometer in deciding whether to pursue disputes more formally. It was generally agreed decisions must be non-binding and to ensure costs were kept low. The IPO’s existing mediation services received praise, and very few people suggested improvements<sup>21</sup>. In terms of cost, the majority of respondents also felt £200, in line with the Patent Opinions Service, was an appropriate cost for providing the service. In addition, an appeal or review route was generally seen by respondents as unnecessarily complicating the concept of an opinions service.
100. A minority of respondents raised concerns over the practicality of such a service. Several thought whilst useful for resolving disputes between SMEs and individual designers, particularly those with limited resources, larger corporations who had access to legal counsel would likely challenge or simply ignore decisions. Another concern was the IPO might lack experience in substantively examining designs and so could not advise on them with the same level of expertise it had gleaned from years of experience with trade marks and patents.
101. The Government agrees with the majority of respondents and believes the introduction of an opinions service will help address problems in the current framework as highlighted in the Hargreaves Review of IP. In particular, that report commented on the need to improve accessibility to the IP system for both those who hold IP rights but cannot afford to enforce them, and those who do not hold IP rights but are involved in disputes with parties that do. Such an Alternative Dispute Resolution tool for designers will better support businesses in resolving design law-related disputes in a prompt and cost effective manner. These comments are consistent with previous research which demonstrated the popularity of the existing non-binding opinion service for patents, and which suggested that it be extended to other forms of IP, such as designs.<sup>22</sup>
102. The IPO’s Patent Opinions Service<sup>23</sup> – for resolving matters of patent validity and infringement – was introduced in 2005, and in developing an equivalent service for design disputes, the Government intends to base it on the existing patent’s model.
103. The Government intends for the detail of the scope and specific questions on which design opinions can be issued to form part of secondary legislation; either existing or future. The intention is to consult upon and introduce these provisions at a time when the IPO has adequate operational and resource capability to do so.

21 The mediation service has been the subject of a separate call for evidence. That call for evidence and the IPO’s response can be accessed at: <http://www.ipo.gov.uk/types/hargreaves/hargreaves-innovation.htm>.

22 Review of the Opinions Service, March 2010: <http://www.ipo.gov.uk/opinion-surveyresponse.pdf>

23 <http://www.ipo.gov.uk/pro-types/pro-patent/pro-p-dispute/pro-p-opinion.htm>

## Inspection of documents

104. The Consultation sought views as to whether, or not, it would benefit business if the IPO extended the ways in which users could view information in respect of registered designs, with the provision of an electronic database. This proposal builds on the current service which provides postal copies of documentation on request, or makes the files available for inspection at the IPO. It would follow a similar approach to Ipsum – Online Patent Information and Document Inspection Service<sup>24</sup>.
105. The Government agrees with the overwhelming consensus of respondents who felt that the provision of such a service would be beneficial. Making information available 24/7 will benefit business in respect of time and subsequently money. The current system was considered to be out of step with other IP systems and the time in which information is currently provided, via the postal route, was deemed “incredible”.
106. Further, a more transparent system would help clarify the scope of protection and provide information regarding, for example, disclaimers made on the application form. It would also allow research to be carried out more quickly and may prevent inadvertent copying.
107. A concern was raised as to the potential use of the information being made available electronically, to be used by third parties as a basis for new ideas. However, it is not considered that the proposal embodied any greater risk than that presented by the current designs searchable database, which makes publically available representations of the registered designs.
108. The Government therefore considers there to be benefit to business of an online service for the inspection of documents and proposes to proceed with its introduction, following the development of suitable capacity to do so.

24 <http://www.ipo.gov.uk/types/patent/p-os/p-find/p-ipsum.htm>.

## Increasing information on registered designs

109. The Consultation sought views as to whether it would be beneficial to business if the IPO requested further information at application stage which could then be made accessible via the online register. We proposed to add three additional questions to the application form in respect of designer details: evidence of date and the location of first disclosure of the design (if applicable) and an indication of willingness to licence to third parties. We also sought a view on whether this should be supplied on a mandatory or optional basis.
110. Responses to this proposal were mixed with a diverse range of views being put forward. Respondents in favour felt that it would bring the UK in to line with the EU and US: the more information that is available the quicker and easier it would be to resolve disputes; designers may benefit from having the kudos of a recognised design and, if a designer were evidently willing to licence, this may encourage third parties to seek to do so, rather than copying or challenging a design by litigation.
111. Those against felt that it would make the system more bureaucratic and costly, and would complicate the application form process for some users. Respondents also questioned whether designers may, in reality, wish to be identified.
112. Consideration has been given to all the views provided by respondents. In order to make information available which will aid business and growth, but not increase bureaucracy, the Government favours the inclusion of the additional information being supplied on an optional basis. The Government acknowledges the risk of the information not being included if the requirement is not mandatory, but feels that a harmonised approach with the EU will, in the main, be beneficial to business without creating undue burdens.

## Simplifying requirements to record changes in ownership

113. The Consultation sought views on a proposal to remove section 19(3A) of the RDA which refers to the IPO not registering an interest in a registered design unless satisfied that the same interest applies to any associated unregistered design.
114. The general sense from the responses was that removing this provision of the Act would simplify procedures, help to ensure records were more easily updated and, as with other measures proposed, help ensure consistency with the EU's system. Moreover, some mentioned section 224 of the CDPA, which seemed to deal adequately with the original intention behind section 19(3A) of keeping associated registered and unregistered rights in the same ownership: section 224 presumes that on assignment of the registered design, the unregistered right "travels" with it, subject to an apparent contrary intention. We agree that simplifying procedures and aligning them more closely with those of the EU is desirable.
115. Nevertheless, some of those making otherwise supportive comments made proposals to ensure that ownership issues in these situations were adequately taken into account. It was suggested that the relevant form (DF12A) could include a statement indicating whether or not any associated unregistered design right has been assigned to the same assignee. This could have potential benefits – to encourage businesses involved in such assignments to consider ownership of all the potential rights associated with their design; and it may help third parties to more readily track any changes in unregistered designs. However, it places an additional burden on those seeking to register an assignment by requiring them to go through additional checks on the status of the unregistered design and could in fact delay updating the Register if those details need to be checked. As part of the acknowledged rationale for removing section 19(3A) was for records to be kept up to date more easily, it does not seem appropriate to require additional information to be supplied instead.
116. One respondent suggested that it would be preferable for the UK unregistered design right to simply be extinguished on assignment of the registered right to a non-resident national of a non-reciprocating country. It is possible that the latter could be defined by reference to a qualifying country under the proposed amendment to section 217 CDPA, but it seems reasonable for a right to be maintained where there is a continuing economic interest in the UK, as there would be where the proprietor had taken the trouble to purchase the registered rights.
117. On balance, based on the points made above, the Government therefore intends to remove Section 19(3A) from the RDA to ensure that records can be updated as easily as possible.

## The Hague Agreement

118. The Hague System for the International Registration of Industrial Designs allows the protection of design rights in any signatory country, singly or as a bundle, avoiding the need for separate applications and having to deal with language and currency differences. The UK effectively became part of the Hague system when the EU joined, but the UK not being a member in its own right means that anyone wishing to protect designs in the UK through the Hague system can only do so as part of the EU as a whole, and UK businesses cannot use Hague to gain protection at home and in particular EU markets. In this context the Consultation sought views on whether the UK being a member of the Hague Agreement in its own right would improve the design's framework.
119. Whilst respondents were unable to quantify the benefits of the UK joining, the majority were positive, citing the advantages as the ability to obtain cheaper protection in overseas countries, increased flexibility for would-be design applicants and the potential to increase applications for protection. It was also considered to be consistent with the EU position and a beneficial step for business and European integration. Responses mentioned that the UK taking individual membership showed that the UK embraced multilateral treaties, which in turn may influence others to join. Widening the current Hague membership (the US, China, Japan and South Korea being particularly mentioned) was seen as necessary to the usefulness of the Hague system.
120. As part of the case supporting UK membership the Consultation argued that making design right owners take broader (EU wide) protection than they needed in order to use Hague increased businesses costs and opened the risk of litigation. Whilst not specifically commenting on these "risks" the majority did agree that being able to obtain individual protection in selected countries, including the UK, rather than just EU wide, would offer a flexible option for business, particularly SMEs who may have more targeted needs for protection.
121. The Government agrees with the majority of respondents that the individual UK membership of Hague would introduce a flexibility of choice that would benefit those seeking more targeted, country specific protection for design rights, most likely SMEs. It would send a positive signal to others on the advantages of multilateral treaties, and as others join, increase the usefulness and usability of the international registration systems they create. One response that did not see joining Hague as a priority, highlighted that there would be a learning curve and need for education. The Government agrees that education will be important if holders of design rights are to gather the maximum benefit of the Hague system. As mentioned above, the IPO will work with a range of interested parties to help publicise these and other changes to the law, and their potential impact.

## Use of directions to enable speedier future reform

122. The Consultation sought views on whether the Registrar should be able to specify, by ‘directions’ the content and layout of statutory forms, and to specify the hours of business, for designs. Currently any such changes must be undertaken through specific legislation. This is not reflected in trade mark and patent law which provide sub-delegation to the Comptroller (in the case of patents) and the Registrar (in relation to trade marks) to issue “directions” to implement these kind of procedural or administrative changes.
123. We agree with the general tenor of the responses, that it made sense to harmonise the situation for designs with that for patents and trade marks. It would generally allow the IPO to reduce the delays in streamlining the UK system, which currently arise from having to use legislation rather than directions in relation to designs to make the sorts of administrative changes which may affect all three forms of registrable or granted IP. The Government therefore proposes to introduce a power to enable the IPO to make directions to amend design’s forms, and to amend its hours of business in relation to designs.
124. In relation to the suggestion that changes to such technical matters should only be made after consultation, we will include in secondary legislation a requirement that all such directions be published by the IPO, as is the case for patents<sup>25</sup> and trade marks<sup>26</sup>.

25 Patent Rules 2007, Rules 4(3) and 117(b) and (c)

26 Trade Mark Rules 2008, Rules 3(1) and 80.

## Further comments/suggestions on improving the UK designs framework

125. In addition to responding to the main questions in the Consultation, some respondents offered further ideas for improving the framework for designs in the UK. These ideas, and the Government's opinions on them, are set out below. The views of attendees to the designs stakeholder workshops, as well as commentators on the Design Council forum post on the introduction of criminal sanctions have been included within this summary.
126. It was suggested that the reference to the incorporation of the design number on products as set out in the RDA 1949 section 24B(2) should be removed. This was because it was felt to be:
- intrusive on the overall aesthetic of some products, such as jewellery or electronic components;
  - unnecessary, because of the ability to research registered designs online; and
  - needless, because no equivalent provision exists in EU design regulation.

There is no actual provision in the RDA that requires the number of a registered design to appear on the product for which it is used. Section 24B (2) limits the liability for damages of an infringer who was not aware that the design was registered, unless the registration number is on the item concerned, and was included within the original 1949 Act as section 9(1).

127. We acknowledge the point that it can be difficult to incorporate the design registration number on a small item, but it is not clear of the extent to which this is causing harm to business. We note for example that it was not raised as an additional area for consideration by respondents to the consultation on the damages regimes for innocent infringement<sup>27</sup>. However, although designs can now be researched online, the capabilities of the current systems still make it difficult to identify which design may be the one in question. We therefore feel that this additional information should still be provided on product items to enable potential infringers to readily conduct due diligence searches to establish whether or not the design they are potentially infringing is in fact still registered and is fully reflected in the product in question.
128. It was suggested that a recognised symbol, together with the date, be reintroduced to indicate the product is protected by a registered or unregistered design as per © for copyright or ® and ™ for trade marks. It was felt displaying the date of a design was more useful than knowing the registration number. Between the years 1842-1883 the Patent Office issued a registered design using a symbol of a diamond mark, along with a registration number. The mark contained information, such as the registration date and material used in the design, to allow it to be easily identified by the official records held by the Patent Office. The Patents, Designs and Trade Marks Act 1883 simplified the system and thereafter only a number was issued for registered designs.

27 <http://www.ipo.gov.uk/pro-policy/consult/consult-closed/consult-closed-2010/consult-2010-desleg.htm>

129. Whilst we acknowledge this suggestion could help improve people’s knowledge, in some limited instances, as to whether a design is registered, there are several objections to developing the idea in practice. For example, it may lead some to use the symbol rather than the registration number in ignorance of the potential effects on damages from an infringer. Showing that a design is registered does not enable due diligence searches to establish whether or not the design they are potentially infringing is in fact still registered and is fully reflected in the product in question.
130. It was suggested a system of classification be introduced to enable more effective searching of registered designs, for example, for logos and packaging, using the Vienna system. We have considered this, and whilst there is some merit in it, we feel it is inappropriate because Vienna is not entirely focussed on “products”. There are projects underway (Search Image at OHIM<sup>28</sup> and the Locarno Pilot Working Group at WIPO<sup>29</sup>) that are developing an indexing system for designs that will work with the Locarno classification, but supplement this by enabling a search to be focused on appearance features also. This “feature” classification takes some inspiration from the Vienna classification.
131. It was suggested that examiners be allowed to modify the descriptions given by applicants to that of a more standard Locarno term. We do not support this idea because the description used by an applicant can be important in defining the scope of protection. A description may relate to the whole of a design or only part or an aspect of it. Unilaterally changing the description may change the scope of protection away from what was applied for.
132. It was suggested we introduce binding descriptions on the register, similar to patents, to clearly show what elements (aspects) were actually protected. Design protection is for the appearance/aesthetics of a product. By introducing a binding description we will place an additional burden on applicants, and may inadvertently cause confusion leading to an unwanted limitation of the protection. For example, an application for a ladies handbag shouldn’t require or need further explanation. There is already an opportunity for applicants to limit or disclaim any aspect of their design supplied on the application form DF2A and DF2B – box F. Therefore, whilst it may be good practice for many applicants to use a description, we see no merit in making it compulsory and binding, especially as this would be out of step with EU requirements.
133. It was suggested that the licence of right period should be reconsidered because it favours the infringer and disincentives innovation. We disagree this would be the case. We believe it enables third parties to build upon an available design and by paying an appropriate fee to the unregistered design right holder would provide a clear incentive to further innovate through legitimate means.

28 The search image project covers the creation of an image search functionality that could later be integrated into TMView, DesignView or other software.

29 The Locarno Classification is an international classification system for industrial designs which was established in accordance with the Locarno Agreement of 1968. The Agreement is administered by WIPO and is open to States party to the Paris Convention for the Protection of Intellectual Property.

134. It was suggested that we enable third party observations to be filed, and the cited prior art to be made available to the public, in order to assist third parties in defining the scope of designs. We do not see that this sits particularly well with the processes involved in design registration. Unlike trade marks which advertise the acceptance of a mark to allow others to make observations or to formally oppose registration, or the process for patents where third parties are encouraged to make comments on the validity of patent applications, the ‘advertising’ of a design is not intended to allow others to prevent or comment on its acceptance, but merely to publicise the fact of the design’s existence, and its registration, which has already taken effect. Therefore we see no merit in proceeding with this proposal.
135. It was suggested that simplifying the calculation for the existence of designs by changing the 15-year-from-design time period to ten years from first marketing would increase transparency for third parties, clarify when designs expire and create more parity with Unregistered Community Designs. This was not raised as a significant issue at consultation and does not appear to be an issue in the market place.
136. It was suggested the IPO should introduce an electronic filing system and an automated registration system. The IPO’s work programme for 2012/17<sup>30</sup> has committed to focus on delivering all patents, trade marks and registered designs being processed in a fully electronic environment this will enable registered design processing to be as efficient and responsive as possible.
137. It was suggested we improve the use and awareness of design rights, including extending educational outreach and developing model agreements to permit ideas to be discussed confidentially with e.g. business advisors, potential sponsors at an early stage. We agree it is really important for businesses to be well-informed about managing their IP assets and feel confident they know when, and from whom, to seek help. Following the Hargreaves Review, the IPO is continuing to build its awareness raising activities and also review links with public and private sector partners who can direct businesses to it. The IPO will also refresh its advisory literature to ensure it fully met the needs of today’s businesses as well as maintaining a dialogue with SMEs and their representatives to allow it to adapt its services to ensure they fully meet the needs of business.
138. It was suggested that a set of comprehensive guidelines should be produced on the use of small claims track in PCC. With the ongoing reform of the PCC, the IPO is endeavouring to make civil enforcement accessible to everyone. A guide to the Patents County Court Small Claims Track is subject to review and amendment as and when necessary and the latest version can be found here:
- <http://www.justice.gov.uk/downloads/courts/patents-court/patents-court-small-claims.pdf>
139. It was suggested that a mail shot be sent to engineering firms specifically addressing awareness around Unregistered Design Rights. As mentioned above, we recognise the importance of raising design awareness and strive to find new ways in which to do so. The Business Outreach team at the IPO is continually looking at methods of raising awareness around IP.
140. It was suggested that the definition of design be extended to include “service design” e.g. Post Office queuing system. Currently this is not possible because the overarching EU legislation requires a design to be a “product”. In conjunction with other EU offices the IPO is continually reviewing the future direction of design protection.

30 <http://www.ipo.gov.uk/about-plan2012.pdf>

141. It was suggested that what was needed was a thorough review of design law, rather than piecemeal tinkering. Key considerations were cited as reducing the number of rights covering design; abolishing UK unregistered design; and, abolishing UK registered design right by lobbying EU to remove the requirement for MSs to have their own systems. Whilst we are undertaking a review, we are not in position at this time to address a complete overhaul of the designs system as suggested, which would include amending EU legislation. This Consultation has however considered one of the major proposals here, namely removal of the UK unregistered right. In the context of this Consultation, respondents have clearly stated that it met a business need and should be retained.
142. It was suggested an “imitation levy” was introduced for those wishing to substantially imitate others work to promote innovation amongst those not wishing to be subject to the levy. The Government notes that tax or levy-based systems can be inefficient and may present unreasonable barriers to business, and has yet to be convinced that the benefits of this proposal will outweigh its costs.
143. It was suggested that a two tier registration system was introduced, for example a “Design Reg-Lite” with a 5 year protection for e.g. fashion and low tech products, and a deeper and longer term of design protection for high-tech products. We believe the registration system already allows for this by means of the renewal process. A design registration is initially valid for 5 years and can be renewed for up to 25 years in total, every fifth year thereafter. Progressively higher renewal costs deter the maintenance of unused, unwanted designs, making them available for further innovation by third parties, whereas valuable designs can continue to be exploited by their owner for up to 25 years.
144. It was suggested that the protection for technical improvements of low merit was removed from UK unregistered design right. The implication of such a change would need to be subject to a wider review of the design’s framework which, as explained above, we are currently unable to undertake.
145. It was suggested that section 51 CDPA 1988 was amended to enable classic designs, which do not qualify as “sculptures” or “works of artistic craftsmanship”, to have protection against 3D copying (for example, to protect e.g. licensed merchandise) and that the duration of protection in comparison with copyright was improved. The IPO has been approached by some stakeholders who are keen to see amendments made to section 51 of the CDPA. This is an exception which effectively removes copyright protection from industrial designs. The film industry see this as a way to ensure full copyright protection for props and costumes, effectively reversing the Lucas Film case<sup>31</sup> in 2011 in which the Supreme Court held that the Star Wars storm trooper helmet did not qualify for copyright protection as a ‘sculpture’. However, section 51 provision serves an important policy function. It was introduced to prevent car manufacturers using copyright protection in drawings of spare parts to prevent third parties from making spare parts. The Government has said that there are no plans to repeal this exception.
146. Several respondents took the opportunity provided by this consultation to comment on the proposed repeal of section 52 of the CDPA. This is already the subject of proposals within the Enterprise and Regulatory Reform Bill<sup>32</sup> currently before Parliament and is therefore outside the scope of this consultation.

31 Lucasfilm Limited and others v Ainsworth and another [2011] UKSC 39 [http://www.supremecourt.gov.uk/decided-cases/docs/UKSC\\_2010\\_0015\\_Judgment.pdf](http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2010_0015_Judgment.pdf).

32 <http://services.parliament.uk/bills/2012-13/enterpriseandregulatoryreform.html>

## Annex A: List of Respondents

Alliance For Intellectual Property

Anti Copying In Design

Black + Blum

British Association of The International Federation of Intellectual Property Attorneys

British Brands Group

British Furniture Confederation

Burgon & Ball

Chartered Institute of Patent Attorneys

City of London Law Society

Clark, Simon

Colman+Smart

Creative Barcode

Creative Designer

Design Council

Devon County Council Trading Standards Service

Devonshire Pine Ltd

Dickson Poon School of Law

Dyson Ltd

European Communities Trade Mark Association

French Solutions Ltd

Gallafents LLP

Harker, Angela

Institute of Trade Mark Attorneys

Intellectual Property Bar Association

Intellectual Property Lawyers' Association

IP Federation

Jan Constantine Ltd

Kitchin LJ, Floyd J, Arnold J and HHJ Birss QC

Licensing Executives Society (Britain and Ireland)

Lucasfilm Ltd

MARQUES

Ministry of Defence

Morgan Contract Furniture Ltd

Motion Picture Association

Mucci, Peter

North East Trading Standards Association

Society of Chief Officers of Trading Standards in Scotland

Unilever N.V. and Unilever Plc



April 2013

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