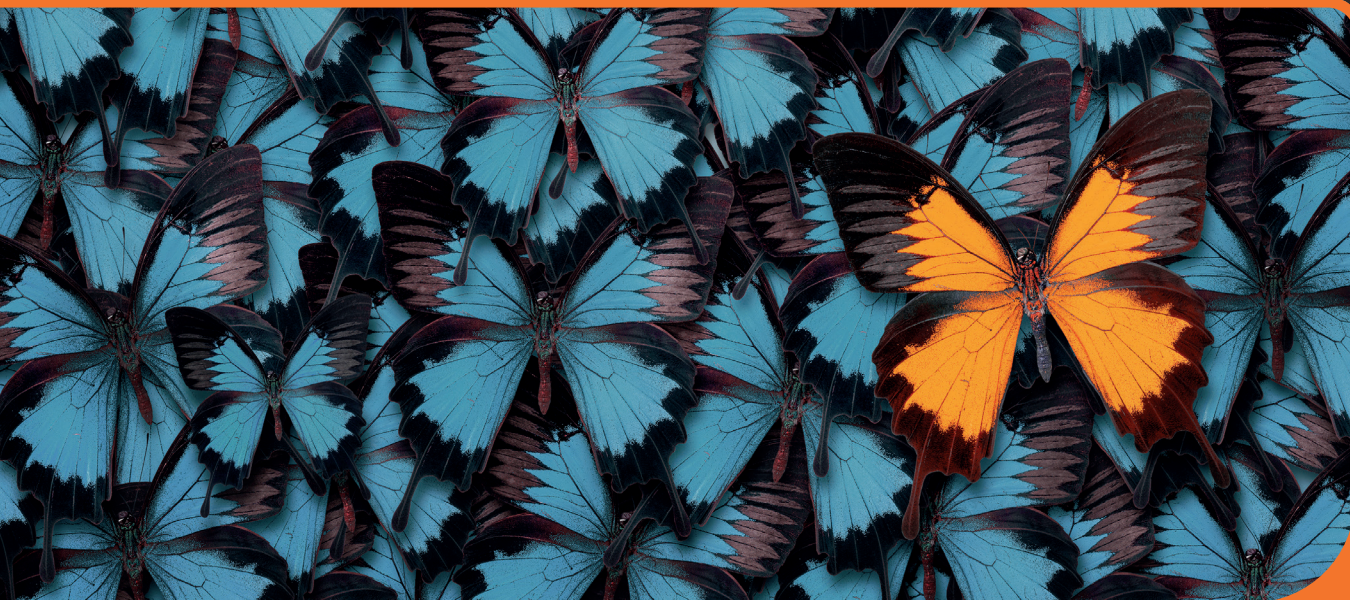


International **Comparative** Legal Guides



Practical cross-border insights into designs law

Designs **2022**

Second Edition

Contributing Editors:

Katharine Stephens & Ewan Grist
Bird & Bird LLP

ICLG.com



ISBN 978-1-83918-153-5
ISSN 2635-2788

Published by

glg global legal group

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London SE1 3PL

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www.iclg.com

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Printed by

Ashford Colour Press Ltd.

Cover image

www.istockphoto.com

Strategic Partners



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Christine Danos

1 Relevant Authorities and Legislation

1.1 What is the relevant Design authority in your jurisdiction?

The relevant design authorities are the UK Intellectual Property Office (the “UKIPO”), the High Court of England & Wales, the Court of Session in Scotland, and the High Court of Northern Ireland.

1.2 What is the relevant Design legislation in your jurisdiction?

In the UK, the main relevant legislation is the Registered Designs Act 1949 (the “RDA”) and the Copyright, Designs and Patents Act 1988 (the “CDPA”).

2 Application for a Design

2.1 What can be registered as a Design?

A UK registered design protects the appearance of the whole or a part of a product resulting from the features of, in particular, the lines, contours, colours, shape, texture and/or materials of the product itself and/or its ornamentation can be registered as a design provided that such design is novel and has individual character.

2.2 What cannot be registered as a Design?

A design cannot be registered if it:

- is not novel; and/or
- does not have individual character.

Note that a design applied to or incorporated in a product which constitutes a component part of a complex product shall only be considered to be new and to have individual character: (a) if the component part, once it has been incorporated into the complex product, remains visible during normal use of the latter; and (b) to the extent that those visible features of the component part fulfil in themselves the requirements as to novelty and individual character.

Additionally, any aspect of a design which falls within one or more of the following exclusions shall not be protected as a registered design:

- (1) features of appearance of a product which are solely dictated by its technical function; or

- (2) features of appearance of a product which must necessarily be reproduced in their exact form and dimensions in order to permit the product in which the design is incorporated or to which it is applied to be mechanically connected to or placed in, around or against another product so that either product may perform its function.

Finally, a design cannot be registered if it is contrary to public policy or to accepted principles of morality.

2.3 What information is needed to register a Design?

The application must contain: representation(s) of the design; a brief description of the nature of the product to which the design relates; and administrative details such as the name and address of the applicant. Additional information may include: information about any priority claimed to a filing outside of the UK; an additional description of the design; an illustration disclaimer; and whether the design features a repeated surface pattern.

2.4 What is the general procedure for Design registration?

An application must first be submitted to the UKIPO. The UKIPO will then assess whether the design satisfies the definition of a design and if the application is correct in order for registration (*NB.* the UKIPO will not carry out any substantive examination of novel or individual character). If there are objections, the examiner will issue a report detailing the reasons why. Applicants have a period of two months to resolve issues raised. If there are no objections raised or the objections are resolved, the design will then be registered, unless the applicant has opted to defer registration (see question 2.16 below).

2.5 How is a Design adequately represented?

It is possible to represent the design using photographs, line drawings, computer-aided design (“CAD”) or rendered CAD. The optimum format will likely depend on which aspect of a design the applicant is seeking to protect. Up to 12 illustrations may be provided in one filing.

2.6 Are Designs registered for specific goods or products?

No, a design registration is not limited to a particular product type, despite the fact that the applicant is asked to identify the

nature of the product depicted in its design for the purposes of the Locarno classification. The Locarno identification enables designs to be classified and searched within the register.

2.7 Is there a “grace period” in your jurisdiction, and if so, how long is it?

In the UK, there is a grace period of 12 months from the date of first public disclosure.

2.8 What territories (including dependents, colonies, etc.) are or can be covered by a Design in your jurisdiction?

UK registered designs cover England, Wales, Scotland, Northern Ireland, and the Isle of Man.

2.9 Who can own a Design in your jurisdiction?

Any natural or legal person can own a design in the UK.

2.10 How long on average does registration take?

If no objections are raised and the registration is not deferred, then registration can be obtained within two weeks.

2.11 What is the average cost of obtaining a Design in your jurisdiction?

At the UKIPO, a standard online application for registration of one design is £50. Additional designs can be filed at cheaper prices per design. This excludes associated professional fees of a law firm/attorney.

2.12 Is there more than one route to obtaining a registration in your jurisdiction?

There are currently two routes: a UK-registered design issued by the UKIPO; or an international registration obtained through the Hague Protocol designating the UK.

2.13 Is a Power of Attorney needed?

No, a Power of Attorney is not required.

2.14 If so, does a Power of Attorney require notarisation and/or legalisation?

This is not applicable.

2.15 How is priority claimed?

Priority is claimed at the application stage. Priority documents do not need to be submitted to the UKIPO if the applicant declares at the time of filing that the UK application is identical to the application from which priority is claimed.

2.16 Can you defer publication of Design applications in your jurisdiction? If so, for how long?

Publication of a design application can be deferred for up to 12 months from the date you apply for registration. The choice to defer must be included in your application.

3 Grounds for Refusal

3.1 What are the grounds for refusal of registration?

The examiner can refuse the application if: the administrative requirements for application are not met; the images used are unsuitable; the design sought to be protected does not satisfy the definition of a design (often because the images show multiple designs rather than a single design); or if the design is contrary to public morality.

3.2 What are the ways to overcome a grounds objection?

How objections are overcome will depend on the type of objection, but will usually involve remedying a deficiency in the application or amending images.

3.3 What is the right of appeal from a decision of refusal of registration from the Intellectual Property Office?

Any decision from the UKIPO can be appealed to either the Appointed Person or the High Court in England, Wales and Northern Ireland and the Court of Session in Scotland.

3.4 What is the route of appeal?

There are two routes: (1) to an Appointed Person; or (2) to the High Court in England, Wales and Northern Ireland and the Court of Session in Scotland.

4 Opposition

4.1 Can a Design application be opposed, if so, on what grounds?

Unlike in a trade mark application, there is no possibility for opposition to an application by a third party.

4.2 Who can oppose the registration of a Design in your jurisdiction?

This is not applicable.

4.3 What is the procedure for opposition?

This is not applicable.

5 Registration

5.1 What happens when a Design is granted registration?

A registration certificate is issued, and the design is entered onto the register of designs.

5.2 From which date following application do an applicant's Design rights commence?

Once registered, UK-registered design rights take effect from the date of filing the application.

5.3 What is the term of a registered Design right?

Up to 25 years, provided the design is renewed every five years.

5.4 How is a Design renewed?

A design may be renewed online by submitting a DF9A form at the UKIPO up to six months before or six months after the expiry date of the registration (renewals after the expiry date may be subject to additional fees).

6 Registrable Transactions

6.1 Can an individual register the assignment of a Design?

Yes, an individual can register the assignment of a design.

6.2 Are there different types of assignment?

No, there are no different types of assignment.

6.3 Can an individual register the licensing of a Design?

Yes, an individual can register the licensing of a design.

6.4 Are there different types of licence?

Licences may be exclusive or non-exclusive. Exclusive licences give the licensee an exclusive right to use the design registration to the exclusion of all others, including the design proprietor. A non-exclusive licence can be granted to any number of licensees.

6.5 Are there any laws which limit the terms upon which parties may agree a licence?

Licences cannot be anti-competitive.

6.6 Can Designs be the subject of a compulsory licence (or licences of right), and if so, in what circumstances does this arise and how are the terms settled?

In respect of a UK-registered design, no (but note that a person who, before the application date of a design, used a registered

design in good faith or made serious and effective preparations to do so may continue to use the design for the purposes for which, before that date, the person had used it or made the preparations to use it).

In respect of a UK unregistered design, a licence of right is available in the last five years of the term of design protection.

6.7 Can a Design licensee sue for infringement?

Yes, where the licence provides for this, or if the design owner otherwise consents. In addition, an exclusive UK design licensee can bring infringement proceedings in their own name, although the proprietor must also be joined in the proceedings.

6.8 Are quality control clauses necessary in a licence?

Quality control clauses are not necessary but are desirable to preserve reputation.

6.9 Can an individual register a security interest under a Design?

Yes, an individual can register a security interest under a design.

6.10 Are there different types of security interest?

As designs are considered intangible property, security usually takes the form of a mortgage or charge.

7 Invalidity

7.1 What are the grounds for invalidity of a Design?

The grounds for invalidating a design are:

- the design did not satisfy the definition of a design;
- the design was not new and/or lacked individual character over cited prior art design(s);
- the design is solely dictated by technical features;
- the design is part of a complex product and is not visible during normal use; or
- there are other reasons for which it could have been refused registration (e.g. the registered proprietor is not the proprietor of the design, or it involves the use of a distinctive sign or copyright work that is subject to objection by the rights holder).

7.2 What is the procedure for invalidation of a Design?

The applicant of the revocation action must submit the DF19A form to the UKIPO. The UKIPO will serve this on the design owner who will have two months to file a defence and counterstatement, which will in turn be served on the applicant. Submissions and the filing of evidence will be timetabled subsequently. Once a hearing has taken place or the submissions have been filed and reviewed, a hearing officer will issue a decision in writing.

Alternatively, invalidity can be pleaded as a counterclaim in an infringement action before the English courts.

7.3 Who can commence invalidation proceedings?

Any legal or natural person.

7.4 What grounds of defence can be raised to an invalidation action?

The grounds of defence will depend on the application raised.

7.5 What is the route of appeal from a decision of invalidity?

Appeal may be made either to the Appointed Person or to the High Court.

8 Design Enforcement

8.1 How and before what tribunals can a Design be enforced against an infringer?

A UK design may be enforced against: an alleged infringer of the design in the High Court; the Intellectual Property Enterprise Court (the “IPEC”); or in certain county courts.

8.2 Are the issues of validity and infringement heard in the same proceedings or are they bifurcated?

Issues of validity and infringement would be heard in the same proceedings.

8.3 What are the key pre-trial procedural stages and how long does it generally take for proceedings to reach trial from commencement?

The key pre-trial steps may include:

- exchange of pleadings;
- attending a Case Management Conference (“CMC”) to determine the timetable to trial;
- disclosure; and
- exchange of fact evidence and (if any) expert evidence reports.

The Civil Procedure Rules (“CPR”) Directive on Pre-Action Conduct sets out guidance for the parties, which includes ensuring that they understand each other’s positions, and making reasonable attempts to settle the proceedings.

Proceedings might take approximately 12–18 months to reach trial depending on their complexity and the court’s availability.

8.4 Are (i) preliminary, and (ii) final injunctions available and if so on what basis in each case?

Preliminary (or “interim”) and final injunctions are available.

In the UK, preliminary injunctions are only sparingly granted. The Court must be satisfied that there is a serious question to be tried, that the balance of convenience favours the granting of the preliminary injunction and that the claimant will suffer irreparable harm to their business if the defendant’s activities continue (or commence) pending trial. The claimant must also act with due urgency.

A court will typically award a final injunction if infringement is established at trial.

8.5 Can a party be compelled to provide disclosure of relevant documents or materials to its adversary and if so how?

Yes, assuming those documents/materials fall within the scope of the “disclosure” which the court has directed. Disclosure varies depending on whether proceedings are issued in the IPEC or the High Court and what form of disclosure the court has ordered. For example, if the court orders standard disclosure, a party must disclose documents which support or adversely affect its or its opponent’s case, which have been retrieved following a proportionate search. Issue-based disclosure is becoming increasingly common compared to standard disclosure. A party may also apply to the court for specific disclosure of particular documents in certain circumstances.

8.6 Are submissions or evidence presented in writing or orally and is there any potential for cross-examination of witnesses?

Written submissions are made in the form of a skeleton argument submitted shortly before trial, supplemented by oral submissions during the trial. Fact and expert evidence is provided to the court in the form of signed witness statements and the witnesses may be cross-examined during the trial.

8.7 Can infringement proceedings be stayed pending resolution of validity in another court or the Intellectual Property Office?

Where UK-registered design validity proceedings are pending before the UKIPO at the same time as infringement proceedings before the English courts, it is likely that the court proceedings will continue and determine both validity and infringement together.

8.8 Is there any alternative shorter, flexible or streamlined procedure available? If so, what are the criteria for eligibility and what is the impact on procedure and overall timing to trial?

Proceedings in the IPEC are intended to be shorter, simpler, and less expensive than High Court proceedings as certain steps such as disclosure and evidence are more limited in scope and trial is limited to two days. Additionally, damages recovery is limited to £500,000 and costs recovery to £50,000 in the IPEC.

As an alternative to the IPEC, the High Court also operates a shorter trial scheme which modifies certain procedural steps (such as disclosure) to shorten the path to trial. To use the High Court’s shorter trial scheme, the case must, however, be capable of being heard within a four-day trial, and the issues must be relatively straightforward. In the High Court, damages and costs recovery are uncapped.

8.9 Who is permitted to represent parties to a Design dispute in court?

A solicitor or barrister may represent parties in court proceedings. Alternatively, but this is generally not advisable, the parties may represent themselves as litigants in person.

8.10 After what period is a claim for Design infringement time-barred?

After the expiry of six years from the date of the last infringement, unless there has been deliberate concealment, fraud, or a procedural mistake.

8.11 Are there criminal liabilities for Design infringement?

Yes, a criminal offence exists for deliberate copying of a registered design, but offences appear to be rarely, if ever, prosecuted.

8.12 If so, who can pursue a criminal prosecution?

Normally, Trading Standards would need to recommend a prosecution to the Crown Prosecution Service.

8.13 What, if any, are the provisions for unauthorised threats of Design infringement?

Any person aggrieved by an unjustified threat of design infringement proceedings may: (a) initiate proceedings seeking a declaration that the threat was unjustified; (b) seek an injunction preventing the threats being continued; or (c) make an application for damages in respect of any losses resulting from the threat. It is a defence to show that the threat was justified, i.e. that the acts alleged do, in fact, constitute infringement.

A communication contains a “threat” if a reasonable person would understand that a registered design exists and there is an intention to bring infringement proceedings in relation to an act done in the UK. Threats in respect of primary acts (i.e. making and importing) are not actionable, however.

9 Defences to Infringement

9.1 What grounds of defence can be raised by way of non-infringement to a claim of Design infringement? For example are there “must match” and/or “must fit” defences or equivalent available in the jurisdiction?

Typically, the defendant will argue that the allegedly infringing design does not create the same overall impression on the informed user as the asserted registered design (and hence does not infringe), and that the asserted registered design is in any event invalid for the reasons set out in question 7.1 above.

9.2 What grounds of defence can be raised in addition to non-infringement?

The following are the grounds of defence that can be raised in addition to non-infringement:

- the design was used in good faith (or serious preparations had been made to do so) by the defendant prior to the registration of the design;
- the act of infringement was done privately;
- the use was for experimental purposes or for teaching;
- repair or replacement of spare parts – see question 9.3;
- the rights in the designs were exhausted; or
- the defendant was not responsible for the acts alleged to infringe.

9.3 How does your jurisdiction deal with Design protection for spare parts?

It is not an infringement of a registered design to make a repair to complex products to restore their original appearance.

10 Relief

10.1 What remedies are available for Design infringement?

The following remedies are available: injunction; declaration; damages or an account of profits; delivery up or destruction of goods; or publication of the judgment and recovery of costs.

10.2 Are damages or an account of profits assessed with the issues of infringement/validity or separately?

The UK operates a split trial system with liability (i.e. validity and infringement) determined at trial. If liability is established, quantum is dealt with in subsequent proceedings, unless it can be agreed between the parties.

10.3 On what basis are damages or an account of profits assessed?

Damages in the UK are intended to put the claimant in the position they would have been in but for the wrong that occurred, and are calculated by one of three methods:

- (a) lost sales (i.e. the sales the claimant would have made but for the infringer’s activity);
- (b) lost licences (i.e. the royalty the claimant would have made from a licence); or
- (c) the user principle (where the claimant is not in the business of licensing, the licence that would have been charged if the parties had reached a deal).

An account of profits is assessed by reference to the net profits the infringer has made from the activity. If the profits are mixed up in legitimate activity or material, then the amount of the award can be reduced to take this into account.

Damages cannot be recovered from “innocent infringers” of registered UK designs.

10.4 Are punitive damages available?

No, punitive damages are not available.

10.5 Are costs recoverable from the losing party and, if so, how are they determined and what proportion of the costs can usually be recovered?

Normally, the unsuccessful party will be ordered to pay a portion of the successful party’s costs. These costs are usually assessed after the trial and can be subject to a detailed assessment by the court if the parties cannot agree on an amount to be paid. In High Court proceedings, the successful party might normally expect to recover (on the standard basis) around 70% of its incurred costs from the unsuccessful party. In the IPEC, the successful party can recover up to £50,000 of its incurred costs from the unsuccessful party.

11 Appeal

11.1 What is the right of appeal from a first instance judgment and is it only on a point of law?

Appeals are only permitted on a point of law. Permission is required from either the first instance judge or Court of Appeal. Such permission will be given where the court considers that there is a real prospect of success or another compelling reason for the appeal to be heard.

11.2 In what circumstances can new evidence be added at the appeal stage?

The circumstances are very limited and normally limited to where the evidence could not have reasonably been obtained for use in the lower court, and where the use of such evidence would have had a real impact on the result of the case.

12 Border Control Measures

12.1 Is there a mechanism for seizing or preventing the importation of infringing articles and, if so, how quickly are such measures resolved?

Regulation (EU) No 608/2013 (as adopted into UK law following Brexit) provides for a mechanism allowing UK customs (UK Border Force) to detain goods suspected of infringing the IP rights of a rightsholder who has filed an “application for action” (i.e. a Customs Notice). Such detentions provide an opportunity for the rights holder to take legal action to determine whether the goods are infringing if a resolution (normally destruction of the detained goods) cannot be agreed between the parties themselves.

13 Other Related Rights

13.1 To what extent are unregistered Design rights enforceable in your jurisdiction?

In addition to registered designs, there may also be protection for designs by way of:

- UK unregistered design right (under Section 213 of the CDPA 1988);
- two new UK unregistered design rights introduced at the end of the Brexit transition period to mirror the protection previously afforded by the Community unregistered design right: the Continuing Unregistered Design (“CUD”) right and the Supplementary Unregistered Design (“SUD”) right (under The Designs and International Trade Marks (Amendment etc.) (EU Exit) Regulations 2019); and
- copyright in certain artistic works.

13.2 What is the term of unregistered Design rights enforceable in your jurisdiction?

An unregistered UK design right lasts for:

- (a) 15 years from the end of the calendar year in which the design was first recorded in a design document or an article was first made to the design, whichever first occurred; or

- (b) if articles made to the design are made available for sale or hire within five years from the end of that calendar year, 10 years from the end of the calendar year in which that first occurred.

The new UK CUD and SUD rights last for three years from the date of first publication.

Copyright in artistic works last for 70 years from the death of the author.

13.3 What, if any, are the key differences between unregistered and registered Design rights in your jurisdiction?

Whilst unregistered design protection arises automatically if all the relevant criteria are satisfied, the term of protection is shorter, and copying must be proven to establish infringement.

13.4 If unregistered Design protection is available in your jurisdiction, is protection cumulative or mutually exclusive?

Each regime protects different aspects of designs. It is possible that one or more rights may persist simultaneously or that different aspects of the design are protected by different rights. It is also possible to have both registered and unregistered rights simultaneously in a given design.

13.5 Is copyright available to protect industrial Designs?

Generally, industrial designs are protected as UK unregistered designs rather than copyright (although post the decision in *Cofemel* the position may now be more nuanced). The drawings of such articles may be protected by copyright as graphical works, although copyright will not be infringed in circumstances where a person makes an article to the specifications of a design document (unless the article is an artistic work), so the fact that copyright protection subsists may be of limited benefit.

14 Current Developments

14.1 What have been the significant developments in relation to Designs in the last year?

Following the end of the Brexit transition period on 1 January 2021, the UK is no longer subject to EU law (including the Community Design Regulation 6/2002) and Community designs (registered or unregistered) no longer cover the UK. To address the gap that this would have otherwise created: (i) any registered Community Design existing at the end of the transition period has automatically given rise to an equivalent UK registered design; and (ii) two new UK-unregistered design rights, the CUD right and the SUD right, have been introduced.

14.2 Please list three important judgments in the Designs sphere that have been issued within the last 18 months.

Rothy's Inc v Giesswein Walkwaren AG [2020] EWHC 3391 (IPEC) concerned the design of women's shoes made from woven recycled plastic. The central issue in dispute was the interpretation

of registered and unregistered Community designs. The claimant successfully argued that the RCD and UCD were valid and infringed. In what was the final Community design dispute to be decided in the UK, the case demonstrates the importance of careful detail in design registrations.

Freddy SPA v Hugg Clothing Ltd and others [2020] EWHC 3032 (IPEC) the English court issued an important judgment concerning passing off on the basis of post-sale confusion. The case concerned the design of jeans. Although it is well-established that post-sale confusion is actionable as a matter of trade mark law, its relevance in passing off cases was untested. The court in *Freddy* confirmed that post-sale confusion is actionable in passing off – the owner of goodwill is entitled to have it protected throughout the life of the product, not just at the point of sale. The judgment also comments on the concept of movement, and how it can be protected alongside shape and configuration in unregistered design law.

Lutec (UK) Ltd v Cascade Holdings Ltd [2021] EWHC 1936 (IPEC) concerned the design of exterior light fittings. The claimant registered two Community designs, and relied on UK RCD equivalents that came into being following the end of the Brexit transition period. The English court confirmed that line drawings contained in the claimant's designs did not claim an absence of surface decoration. The defendant had attempted to rely on a ridged surface effect as a means of distancing itself from the registered designs.

14.3 Are there any significant developments expected in the next year?

There is still considerable uncertainty as to whether the disclosure of a new design online (e.g. on a website or on social media) will count as a first disclosure of that design in the UK to trigger the unregistered design right in the UK (i.e. the SUD right) or in the EU to trigger a Community unregistered design right. It is possible that this issue may arise in the context of enforcement proceedings in the next year.

14.4 Are there any general practice or enforcement trends that have become apparent in your jurisdiction over the last year or so?

Design infringement cases continue to be frequently issued in the IPEC in the UK, rather than in the High Court, reflecting their typically lower value and complexity compared to, say, patent cases. However, the recent introduction of the High Court shorter trial scheme is now a good alternative, particularly for more complex cases and for litigants who wish to avoid the damages and costs recovery caps used in the IPEC.



Ewan Grist is a litigation partner in Bird & Bird's Intellectual Property practice based in London and head of our International Product Design group. He specialises in protecting and enforcing innovative or high-tech product design and associated branding. He advises clients throughout the product lifecycle on many aspects of product design creation, protection and enforcement in diverse areas such as medical devices, mechanical engineering, consumer goods, aviation, automotive and luxury goods. He frequently acts in complex litigation (often with a cross-border element) at the IPEC, High Court, Court of Appeal and CJEU, as well as in proceedings before the UKIPO and EUIPO. He also advises on customs enforcement programmes and detentions, often in collaboration with his international colleagues. Ewan is the editor of the Bird & Bird design law bulletin, <https://www.DesignWrites.law>, and serves on the Designs & Copyright Committee of the Chartered Institute of Trade Mark Attorneys ("CITMA").

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