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Submission to the Department of Foreign Affairs and Trade on:
Services Exports Reform
and
Australia and EU Free Trade Agreement
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Scope of this submission:

This submission outlines the Design Institute of Australia's priorities for services exports reform and negotiations for the Australia EU Free Trade Agreement.

Introduction

The DIA is the peak professional association for designers and design businesses in Australia, representing design professionals in all manner of design disciplines for over sixty years.

As a professional body, the DIA is run and funded by designers for designers. The DIA champions design and design thinking as a central element in a flourishing digital economy and a sustainable future.

The DIA believes the design industry contributes to the commercialisation of IP across all sectors of the economy, and that the design rights system can maximise the benefit of this contribution. Design transforms innovation into income.

The DIA is advocating for diverse, fair and sustainable markets for Australian designs, underpinned by a robust framework of intellectual property protection. We believe that increasing protection for designers to align with international norms will stimulate rather than stifle innovation, encourage economic growth and heighten Australia's global standing.

The contribution of design to the Australian economy

IP Australia estimates that the contribution to Australia's GDP of design-related industries and workers was approximately AU\$67.5 billion per annum by 2018, or more than 3.5% of GDP – equivalent to the size of the construction industry¹.

Compared with other industries, the cultural and creative industries have higher spillover effects into other industries in terms of total output, value-added and employment multipliers.² The design industry contributes to the commercialisation of intellectual property across all sectors of the economy.

There is potential for this contribution to be even greater. Research commissioned by IP Australia³ suggests that Australia lags behind its international peers in the size of our design workforce.

International competition

Australia's highly skilled and innovative design community offers the prospect of solutions to the world's most pressing problems, as well as ways to make everyday life more comfortable and enjoyable.

The design rights system is crucial to realising the potential benefit of design's contribution. A strong, flexible designs protection system in Australia would benefit the important and valuable creative contributions which designers make to the Australian economy, and in particular the design industry's contribution to the commercialisation of intellectual property.

The DIA is advocating for diverse, fair and sustainable markets for Australian designs, underpinned by a robust framework of intellectual property protection.

Australian designers are hindered in the international design market by the limitations of the system of protection for their intellectual property. They need a system that can accommodate the breadth of design work and the reality of evolving production and retail modes here in Australia and overseas. The intellectual property framework in Australia lags behind the rest of the world and leaves local designers exposed.

We believe that increasing protection for designers to align with international norms will stimulate rather than stifle innovation, encourage economic growth and heighten Australia's global standing.

Specifically, we support:

- increasing the term of protection for registered designs from ten years to twenty five years, in line with the term of protection stipulated in the *Hague System for the International Registration of Industrial Designs* (Hague);
- reforming the copyright/designs overlap provisions to anticipate the increasing use of 3D printing

¹ Falk, M. R., Campbell, M. et al. 2020. Design's Role in the Australian Economy. IP Australia, Canberra

² Trembath, J.L., Fielding, K., September 2020, 'Pre-release extract, Australia's cultural and creative economy: A 21st century guide'. Working Paper 1. Produced by A New Approach think tank with lead delivery partner the Australian Academy of the Humanities, Canberra

³ Falk, M. R., Zhang, H. et al. 2019. Designs Law and Practice: Design within Australia and How Australia Compares to its International Peers. IP Australia Economic Research Paper 08. IP Australia, Canberra

- and scanning, and digital blueprint files;
- allowing new technologies and forms of design, such as graphical user interfaces (GUIs), to be registrable under the *Designs Act 2003*;
- reducing the cost and complexity of filing for design rights; and
- making it easier to respond to infringement.

Given international designers are able to register their work and enjoy the protections of their home jurisdiction in Australia, our system has the potential to restrict the ability of our designers to not only compete internationally but to assert their rights within Australia against foreign designs.

Specific reforms

Term of protection

The maximum term of protection in Australia is unfairly limited and should be increased to at least allow a second renewal. This would extend protection for a design that remains current in the market to a total of fifteen years, which would still be markedly shorter than the life plus 70 years protection afforded under the Copyright Act and the 25 years maximum term in the EU.

Enforcement of protections

Australian designers are disadvantaged compared to their EU counterparts when responding to rights infringements.

In addition to generally being smaller entities with fewer resources for pursuing infringements such as unauthorised copies, Australian design companies are not able to call on federal powers to seize problematic imports in the way that publishers or inventors can rely on Border Force to enforce copyright and patent protections.

Extending the remit of Border Force to cover the Designs Act would both provide equity across creative industries and also more closely align with settings within the EU.

Virtual designs

Design in the IT and technology sectors has become increasingly important, especially in light of products whose dominant visual features are interactive light displays on portable screens. Differentiation and investment in design is an important source of competitive advantage, and User Interface Design is an important emerging design discipline in software engineering and website design.

The DIA supports extending protection to virtual and non-physical designs as it would reflect advances in copying technologies, such as 3D scanning and printing, as well as the ways in which they are used in contemporary design.

The current settings afford greater protection for foreign designers than for Australians. It is therefore unsurprising that the bulk of registration of virtual designs is by multinationals. Reform to give confidence to local designers that their work can be accommodated within the system of IP protection is likely to lead to increased registrations.

Unregistered designs

The recent introduction of a grace period for publication prior to registration is a welcome improvement that will increase the number of designs being registered.

The grace period should protect designers, their successors and third parties who have published the design with the consent of the designer or a successor. The grace period should apply automatically, and there should not be any requirement to file a declaration that the designer intends to rely on the grace period.

This would harmonise Australian arrangements with the EU as well as other comparable foreign jurisdictions such as the US, Canada and Japan, and align with the grace period in the patents legislation.

Australia will be required to provide a twelve month grace period if it becomes a party to the Design Law Treaty being developed by the World Intellectual Property Organization. Automatic application of the grace period would avoid the imposition of an additional regulatory burden on applicants and administrative costs for IP Australia, and align with the patents system.

A grace period is important because it allows designers to test the market before designs and manufacturing are fully finalized, with the confidence that their design filing won't be invalidated by inadvertent disclosures or unauthorized exploitation by a third party learning of a design during the grace period.

Right to repair

The DIA supports the types of actions and reforms outlined in Table 1⁴ (Examples of international approaches to a 'right to repair') in the Productivity Commission's Discussion Paper with regard to product design standards, product information and labelling, as well as laws prohibiting planned product obsolescence. The EU Ecodesign Directive for appliances is noteworthy as is the durability Index recently announced by France. These measures require a strong circular design approach that serve to benefit the consumer, the environment and progressive manufacturers, producers and retailers.

Education, professional development and ongoing training related to design for repair should also be pursued as part of the overall package of reforms to support the Right to Repair.

The benefits of introducing measures similar to those currently used overseas, such as product design standards and reparability ratings, are likely to outweigh the costs and any risks, especially if Australia can learn from overseas policy reforms and how they've been implemented.

Product design standards such as the EU Ecodesign Directive should be seriously considered for similar categories of electrical and electronic products in Australia.

Similarly, the Durability Index from France should be considered with a view to its applicability in Australia, given its contribution providing practical consumer information at the time of purchase.

Alignment with copyright protections

Designers should not lose copyright protection when they subsequently register their designs. The intersection of the *Copyright Act 1968* and the *Designs Act 2003* requires urgent attention by IP Australia.

The DIA recommends that s18 of the *Designs Act 2003* and the overlap provisions of the *Copyright Act 1968* [regs] be made consistent, but with the definition of 'industrial application' increased from 50 to provide protection during a period of market testing for, say, a line of garments or a range of furniture. A higher number is preferable as, for example, expensive tooling having been set up for manufacture – even if less than 50 products have actually been made – may indicate an intention to manufacture in quantities greater than 50 which may invalidate a design filing.

The pricing model for filing is also unsuited to some types of designs. For example, a fashion designer usually produces a line of garments each season. Registering each item has exorbitant costs that disadvantages this mode of design compared to other disciplines. We seek a pricing model that can accommodate the variations in designs being created.

A further difference from the Copyright Act is that the Designs Act is silent on the moral rights of designers to be recognized for their work.

Conclusion

As the world is poised to embark on recovery from the COVID-19 pandemic, Australia has the opportunity to harness our depth of design expertise to build new markets and maintain our place as a successful, sophisticated nation. Indeed, the pandemic has exposed weaknesses in our trading patterns and highlighted the importance of continuing to develop formal agreements.

Within this context we are seeking reform to Australia's IP framework to better accommodate these and other global shifts in consumer behaviour and unanticipated developments in manufacturing and production. We suggest that any reforms should be accompanied by comprehensive education strategies targeted to designers, manufacturers, retailers and consumers to maximise their impact.

The DIA believes that – in the main – professional designers are best placed to maximize use of their designs. A robust system of protection for intellectual property is therefore not a constraint on innovation and economic growth, but rather key to incentivizing creativity and adoption of efficient and accessible designs.

A quality intellectual property framework for design would not only enhance the prosperity of our design

⁴ Right to Repair- Issues paper, Productivity Commission, December 2020, p25.

community, deliver the flow-on social benefits of inclusion and increased wellbeing that derive from good design, and foster sustainability and adaptability, but would also drive economic gains for Australia as a nation increasingly competing in global markets.

Thank you for the opportunity to comment.



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