



Small business and IP Protection

Introduction

We recently heard evidence from a number of small businesses relating to the protection and infringement of their intellectual property.

Two of these businesses, Tangle Teezer and Burgon and Ball have very different histories but are united in their determination to protect their intellectual property.

Burgon and Ball has been producing cutting tools in Sheffield since the 1730s. In recent years the Company decided that to compete against lower cost commoditised products, it needed to invest in design to differentiate its gardening products. Creating its own design team based in Sheffield, it has revolutionised the gardening sector. Its award winning gardening equipment, made in the UK, is stocked by major retailers across the UK and is known for its quality and craftsmanship.

Tangle Teezer is a great British success story. In 2003, hairdresser Shaun Pulfrey had a flash of inspiration and designed a new brush that would get make it easier to untangle hair. Re-mortgaging his house, getting turned down by the Dragons on Dragons Den, he beat the odds and now sells 17 hairbrushes a minute, 13 of them for export to 60 countries. All the design and manufacturing of his products is undertaken in the UK and he has won the Queens Award for Enterprise on two occasions and is used by UKTI in its Britain is Great campaign.

These two companies have done what the UK Government has clearly stated British businesses need to do to compete internationally. They have invested in design to add value to their products and used the quality of UK manufacturing to differentiate themselves against lower quality far Eastern suppliers.

To protect their investment, these companies invested significantly not just in design and manufacturing but also in the protection of their intellectual property. That protection is seen by both companies as a core part of their business model. If their products can be easily copied, their investment in design will be worthless unless it can be protected.

The companies, and the other two witnesses, Dids Macdonald OBE who co-founded Anti Copying in Design (ACID) and Neil Sharpley from the Federation of Small Business (FSB), talked about the challenges that micro and SME companies face in protecting their intellectual property.

Access to justice

All the witnesses described the difficulties and costs they face in defending their intellectual property against copying and counterfeiting. They described the scale of investment in legal costs required to take action through the courts. Dids Macdonald talked of the difficulties many of her members found in dealing with major UK high street retailers, who often copy innovative designs created by their members once they see proven market success. Many then commission Chinese manufactures to reproduce them cheaply so that they can be imported for sale. Often the look alikes have been subtly changed so that it is very difficult to

legally challenge. Due to the lack of protection for registered (post Trunki) and unregistered designs and the costs of taking action, there is little deterrent for them not to copy designs.

The witnesses also described the length of time cases could take to go through the courts. They said there was a severe backlog of cases at the Intellectual Property Enterprise Court (IPEC) which was hindering designers stopping those copying their designs. The objective of taking speedy legal action is to ensure the removal of copy products from sale so if a case takes up to 3 years before reaching a final court hearing, an alleged infringer has reaped the rewards of significant sales during this period damaging the originators growth prospects. Burgon & Ball has taken 26 legal actions in the last 3 years. The witness described how this time and investment could have been redirected to growth activities rather than to fight their corner.

Tangle Teezer said they had some protection from patents they said it was much harder to protect their designs and they could not only rely on patents

All the witnesses suggested that the introduction of mediation intervention before, often lengthy and expensive legal action, would be a useful way for smaller companies to protect their IP and reduce costs as they would then not have to proceed through the courts. However, the difficulty with that process as it currently stands is that because there is no obligation to engage in the mediation process, larger companies with greater access to resources are willing to play the system pursue a lengthy series of correspondence, knowing that many smaller companies and designers will not have the financial resources to continue to instruct their solicitors to respond to the letters before action..

Trunki case¹

The witnesses also expressed great concern relating to the recent Supreme Court judgement relating to Trunki. They said the Judgment meant that they were worried that the level of protection offered by registered design rights was now confused and much lower than they had originally thought. The witnesses suggested that the IPO had encouraged Trunki to take its case and that they should now give detailed guidance and clarity for designers on how registered designs could protect them. In other words, as registered design are not examined, designers who register their designs should know exactly what they can rely on if their intellectual property is infringed.

It was also suggested that EU designers have the benefit of Unfair Competition to rely on if IP law fails them. In the UK “Passing Off” is an unsatisfactory remedy for unfair competition because the majority of small trade only companies cannot provide evidence of consumer confusion when they are pitted against major high street retailers.

Registered design rights

The witnesses also suggested that the legislation that made intentionally copying a registered design right a criminal offence had been welcomed by many designers, however, it is still early days in knowing how to engage with Trading Standards and managing what is perceived as a lack of understanding how to interpret the new law. Therefore, further guidance needs to be undertaken. They also suggested that, as the majority of designers rely on unregistered designs (UDR), UDR should also have criminal provisions.

¹ <http://ipkitten.blogspot.co.uk/2016/03/trunki-judgment.html>

Intellectual Property Enterprise Court

The witnesses were supportive of the IPEC but did suggest it was overwhelmed by the number of cases it was dealing with. There was also a question about the limit on the financial damages that could be awarded in the court, particularly given the 600% increase in charges for the court. There was a suggestion that the limit might be increased to reflect the increase in fees and to widen the number of cases that might be brought.

Online infringement of IP rights

Witnesses said that despite Memorandum of Understanding at a strategic level more training of online trading platform needs to be done at grass roots to simplify the process of take-down. The escalation of online infringements is increasing and the process for take-down still lengthy and over complicated for many.

Conclusions

We were surprised at the depth of concern felt by small businesses with regards to the access to justice, or lack of it, in respect to the protection of their IP rights, particularly amongst the design community. The IPO has had some significant success in promoting to small businesses, including partnerships with the likes of the British Library, the importance of their IP rights and in promoting the registration of design rights. Clearly the IPO also has a financial interest in promoting Registered Design Rights and we are pleased to see that the IPO has committed to reducing its fees for registration.

This good work will be undone, however, if designers lack confidence in the legal process of defending their rights. The Trunki case in particular is causing significant concern and advice from the IPO for registered design rights holders is urgently required. We also believe that the Department for Business, Innovation and Skills should:

- Engage with the current access to justice reform agenda being conducted by the Ministry of Justice to see whether reforms such as enforced mediation could be introduced.
- Remain open to reassessing whether unregistered design rights should be given greater protection
- Consider whether the broader law of unfair competition could be applied to those that deliberately copy designs to close the 'Trunki' loophole.
- Engage with online trading providers to simplify take-down procedures

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