Positioning paper
BEDA: Supporting innovation and opportunity in EU design IPR
Introduction
BEDA aims to create increased awareness of the importance of design as a business tool. We wish to ensure that politicians and other stakeholders understand that design can be an enabler for change and improve competitiveness for Europe, along with improving life for European citizens. As a result of years of successful lobbying in Brussels, today design is part of Innovation Union 2020, the innovation policy for Europe.

Intellectual property rights (IPR) are important business tools and valuable assets for companies. In this document we share some of the IPR-related issues designers confront, along with our recommendations.

Background
Intellectual property rights are becoming more and more important. IPR-intensive industries, such as the design industry, contribute 39% of GDP in the European Union, worth a total of €4.7 trillion. All member states of the EU have implemented laws to protect intellectual property rights, and research shows that registrations increase every year.

Within the European Community, it is now possible to register Community trademarks and designs that confer the proprietor or owner with unitary protection in the 28 countries of the European Union, through one single application. When ratification of the Agreement on the Unified Patent Court by the Member States has taken place, it will also be possible to register a patent with unitary effect for all those European countries participating in this enhanced cooperation. With the introduction of these Community rights, it has become easier to protect intellectual property for the whole territory of the European Union, which allows creators to enjoy their rights exclusively, sell them to third parties or fight against unauthorised use. There is no Community copyright or EU Copyright Law, but national copyright laws are more or less harmonised by the EU Copyright Directive. However, major fields have been left untouched or are only ‘quasi-harmonised’.

At the same time, the digital revolution, and the long time it has taken (and still takes) the industry to come up with proper distribution systems for a broad repertoire of affordable protected content, contribute to devaluation of intellectual property rights in the public’s perception, especially where copyrights are concerned. Major publishers and producers earn vast amounts of money with (restrictive) copyrights, but are reluctant to share a fair portion with authors and performing artists. Sharing and downloading copyrighted material is widespread, and in some countries, such as (until recently) the Netherlands, allowed, even if this content comes from an illicit source such as file-sharing networks. “Open source” is often also used as a buzzword for unlimited innovation and experimenting, thus creating a -false- contrast between pro-copyright and pro-open source movements.

EU intellectual property rights – the issues for EU designers
Although the value and importance of intellectual property rights in the economic world is clear, authors, such as designers, experience that the negotiation of their intellectual property rights with commissioners and those who commercially exploit their rights, is becoming more and more difficult – not the protection of their creations by intellectual property rights, but ownership of those rights. Contracts between designers and their commissioners often involve a total transfer of rights through excessive buy-outs and other

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1 Research carried out by the European Patent Office (EPO) and the Office for Harmonization of the Internal Market (OHIM): "Intellectual property rights intensive industries: contribution to economic performance and employment in the European Union Industry-Level Analysis Report", September 2013
2 Case C-435/12, ACI Adam BV v. Stichting de Thuiskopie (European Court of Justice, April 10, 2014)
unfair terms. The contract party demands the right to register all possible IP rights, as well as a full, unlimited transfer of the copyrights, in which case the creator also needs to waive their moral rights. This often occurs in contracts with public bodies, which should be the positive point of reference for all commissioners.

Remuneration for this transfer is little to none, and is often non-negotiable. If intellectual property rights as part of the design process are no longer regarded as being of any value, then business models need to be revised: the unique result of the design process will (have to) become more expensive.

Another issue is design competitions, where organisers claim to possess automatically the intellectual property rights and commercial rights to projects receiving awards. The recommended approach is to award the projects (in which case competition organisers possess the right to publish designs and promote the competition) and then possibly negotiate transfer of commercial authors’ rights with designers. BEDA has stated its position in the paper: “BEDA recommended guidelines for design competitions”.

At the same time, some national design rights laws, such as Benelux Law, allocate design rights (and through a linking provision, the copyrights too) on commissioned works to the commissioner, whereas the rules about Community Designs allocate these rights to the designer. This leads to the situation that within one single design the design rights can be vested in the commissioner (e.g. Benelux Law) as well as in the designer (EU Law).

It is important that intellectual property rights are (first) allocated to the designers (or to the employer in the case of designs created as part of the employee’s duties), for these rights protect the results of their creative processes, are an important incentive to create new designs, and constitute important business tools.

**Developments in Brussels**

The Legal Committee of the European Parliament has commissioned a study that examines the provisions of national copyright and contract law that affect the bargaining power and the contracts that creators enter into, to exploit their rights in the EU. This study confirms that, failing a European harmonisation of the legal provisions related to creators’ contracts, the matter is left to national laws, and finds that there are considerable discrepancies between countries. One of the conclusions is that the existing contractual protection of authors, as included in copyright law and, indirectly, in general contract law, appears not to be sufficient or effective to secure a fair remuneration to authors or address some unfair contractual provisions. The study also provides a set of recommendations, including the imposition of minimal formalities in contracts transferring exploitation rights, the obligation for the transferee to exploit the rights, a black list of unfair terms, a general right to fair remuneration, the unwaivability of remuneration rights or the introduction of a right to remuneration for certain kinds of digital exploitation, and the possibility for collective agreement or model contracts and collective actions by representatives of the authors, now often forbidden by competition laws.

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3 Study carried out by the Policy Department C: Citizens’ rights and Constitutional Affairs, at the request of the Committee on Legal Affairs: “Contractual arrangements applicable to creators: law and practice of selected Member States”, February 11, 2014.
Challenges for the design sector at national levels:

- Designers are increasingly confronted with the negative reputation of intellectual property and copyrights in the general public’s perception;
- Many producers and commissioners, both in the industry and government, underestimate the value and meaning of intellectual property rights for designers and wish to claim them all for themselves;
- Negotiating proper terms of ownership, use and remuneration of intellectual property rights and copyrights is becoming more and more difficult for designers;
- Some national laws on design rights attribute the design (and copy-) rights to the commissioners, whereas Community Law attribute these to the designer;
- Designers are experiencing more and more difficulty in receiving remuneration - besides remuneration for providing design services - for the (potential) value of their creative works and IP rights;
- Designers are increasingly forced to agree to an unconditional full transfer of intellectual property rights on their work in exchange for projects or design jobs. This situation prevents designers from further investing in the development and evolution of their design or creation; in that respect it is also an obstacle for innovation.
- The lack of European harmonisation of copyright law makes it difficult to protect and enforce copyrights in other Member States;
- Both EU and national competition laws forbid representatives of designers to negotiate minimum fees or collective model agreements;
- Business models of designers must change if a fair remuneration is no longer paid for intellectual property rights;

Supporting innovation and opportunity in EU design IPR
BEDA offers the following proposals with the aim of supporting opportunity, enterprise and innovation in EU design IPR:

- A respectful approach to intellectual property rights;
- The introduction of a uniform copyright law and copyright contract law within the legal structures of the Member States, thus ensuring fair remuneration and a stronger bargaining position for designers with regard to their intellectual property rights;
- Informing and educating the general public and, more specifically, commissioners and publishers on the meaning and value of intellectual property and intellectual property rights;
- Informing and educating designers on their bargaining position;
- Starting a dialogue among stakeholders on fairer contracts and exchange of best practices;
- Starting a lobby to take away the contradiction between national (e.g. Benelux) and community law with regard to the attribution of copy- and design rights on works made in commission;
About BEDA
BEDA exists to ensure permanent liaison between its members and the authorities of the European Union in order to communicate and promote the value of design and innovation to the European Community. Members can be design promotion centres and other publicly funded organisations that promote design nationally or regionally as well as professional and trade associations of designers form across Europe. Those professional associations represent some 400,000 designers from across Europe in every discipline of work from industrial design and interiors to digital design and branding. BEDA is not-for-profit organisation funded in its entirety by its members.

Executive summary
BEDA: Supporting innovation and opportunity in EU design IPR

BEDA aims to create increased awareness of the importance of design as a business tool, which also include intellectual property rights (IPR). BEDA has issued a positioning paper in which some of the IPR-related issues designers are confronted with are shared, along with BEDA’s recommendations.

With a contribution by IPR-intensive industries, such as the design industry, of 39% of GPD in the European Union, worth a total of €4.7 trillion, Intellectual property rights are becoming more and more important. All member states of the EU have implemented laws to protect intellectual property rights, but still major fields have been left untouched or are only ‘quasi-harmonised’, especially in the field of copyrights.

At the same time, the general public’s respect for copyrights is diminishing, due to the digital revolution and the long time it has taken (and still takes) the industry to come up with proper distribution systems for a broad repertoire of affordable protected content. Although the value and importance of intellectual property rights in the economic world is clear, authors, such as designers, experience that the negotiation of their intellectual property rights with commissioners and those who commercially exploit their rights, is also becoming more and more difficult. The protection of their creations by intellectual property rights itself is not disputed, but ownership of the rights. Contracts between designers and their commissioners often involve a total transfer of rights through excessive buy-outs and other unfair terms. Remuneration for this transfer is little to none, and is often non-negotiable. Some national laws attribute intellectual property rights to the commissioner, instead of the designer (like design rights under Benelux Law). If intellectual property rights as part of the design process are no longer regarded as being of any value, then business models need to be revised: the unique result of the design process will (have to) become more expensive.

In the positioning paper, BEDA offers some proposals with the aim of supporting opportunity, enterprise and innovation in EU design IPR. These include a respectful approach to intellectual property rights; the introduction of a uniform copyright law and copyright contract law within the legal structures of the Member States, thus ensuring fair remuneration and a stronger bargaining position for designers with regard to their intellectual property rights; informing and educating the general public - and more specifically commissioners and publishers - on the meaning and value of intellectual

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property and intellectual property rights; informing and educating designers on their bargaining position; starting a dialogue among stakeholders on fairer contracts and exchange of best practices; and starting a lobby to legally ensure the attribution of copy- and design rights for works made in commission to the designers.