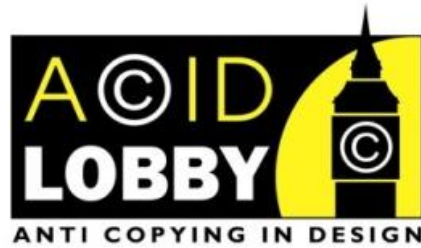


you wouldn't say that
COPYING
was the sincerest form
of **flattery**
if it cost you
your business

A black and white photograph of a hand holding a pair of handcuffs. To the right of the text are three small inset images: a vase with flowers, a table, and a lounge chair.

ACID (ANTI COPYING IN DESIGN)

SUBMISSION TO THE HARGREAVES REVIEW MARCH 2011



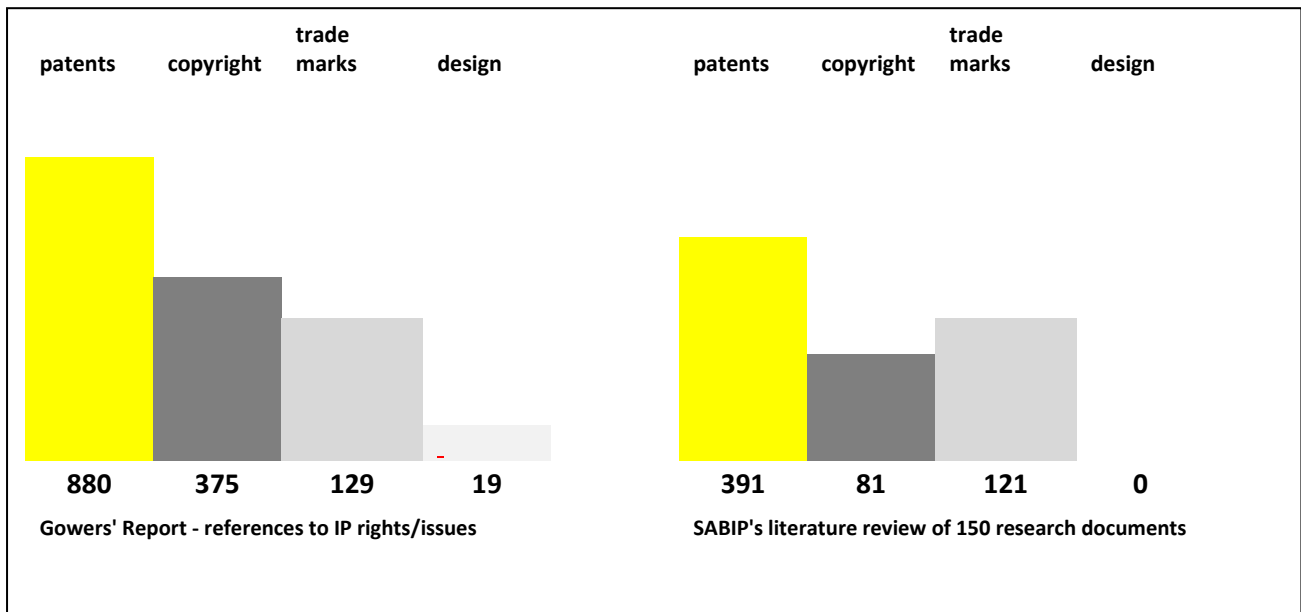
In support of the UK's champions of the economy

“In intellectual property law, an industrial design relates to the aesthetic or outward appearance of a product. It is what makes a product attractive or appealing to customers and visual appeal is one of the key considerations that influences the decision of consumers to prefer one product over another. Industrial design helps companies to differentiate their products from those of competitors and enhance brand image of their products. This is why ensuring the proper protection of industrial designs is so important”

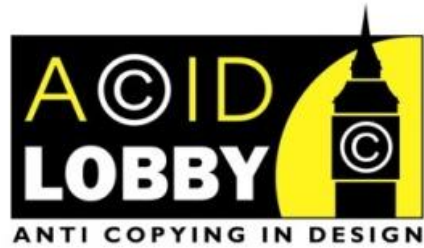
Makil Idros, Director General, World Intellectual Property Organisation (WIPO)

£22 billion was invested by UK businesses in design in 2007. In 2008 the figure increased by £1 billion to £23 billion. This data provides evidence reinforcing design's significance as a conduit to innovation and growth. In September 2010 BIS Secretary Vince Cable said, “UK businesses invested £65 billion in IP creation in 2009”

“Design is an unsung hero in the UK economy. Original design leverages value, but this takes investment and it needs to be protected” Sebastian Conran, Designer and ACID Ambassador



“Design's significant IP contribution to the UK's GDP has rarely been acknowledged within Government, BIS, UKIPO dialogue or IP Reviews” Dids Macdonald, ACID (Anti Copying in Design) CEO



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SUMMARY AND RECOMMENDATIONS

Key Points

ACID welcomes the opportunity of the UK Review into Intellectual Property and Growth to raise awareness about, in particular, the difficulties which affect the UK's designers and the uncertainty experienced by micro firms and SME's in effectively enforcing IP infringement. We hope that the IP Review team will consider the following key points and recommendations based on evidence/case studies supporting the ACID submission.

- ACID would like to see evidence of design and design issues as a key feature in future UK Intellectual property policy and included in the UK's IP Crime and Growth strategies.
- Many micro firms and SME's are the pioneers of innovation; they are leaders not followers and the true champions of the UK economy. The IP framework does not lead innovation and growth, however, it does provide the legal vehicle and platform with which to protect, register and commercialise tradable IP. An effective IP framework should focus on all the above and provide a tangible focus on resolving infringement uncertainty, providing an IP seed bed for investment and investor visibility to those who can successfully translate tradable knowledge and ideas into commercial reality
- ACID believe there should be the provision of hands-on, practical, sector-led IP advice and information for micro firms and SME's to help them maximise, protect and commercialise their IP
- ACID has presented an arguable case to bring unregistered design right in line with copyright. Current UKIPO policy is that design infringement may be inadvertent but, to date, have provided little or no evidence to support this.
- ACID supports the view held by many others that the UK has no dedicated law of unfair competition which currently provides little confidence (especially for micro firms and SME's) against copying and the deliberate sale of lookalikes.
- 89.7% of designers surveyed in a recent micro "IP scoop" believe IP infringement is blatant.
- If unregistered design right infringement was on a par with copyright infringement, design stakeholders could take part in positive discussions on the UK's Crime strategy.
- The majority of the UK's SME IP creators rely on unregistered rights and IP Protection generally for designers needs to be at a sufficiently high level to stimulate innovation and growth
- There is a need to improve awareness and understanding of the potential of design among policy makers and design customers in the UK and globally
- There is clear evidence of the "dog that didn't or couldn't bark" in the cost and complexity of enforcing IP rights in the UK and internationally for micro firms and SME's
- Mediation has a key role to play in IP disputes
- We support many IP stakeholders who believe there is a need for a further review of the system of damages to dissuade the protagonists
- Easier access should be available to user-friendly sector led services to help SME's protect and exploit their IP

- The current tried and tested IP framework for copyright should not be changed to suit current political and commercial aspirations which protect certain industries over others.
- Bona fide businesses need to have robust support to deter and challenge the damage done by illegal businesses and services
- The weight of arguments from the majority of IP lobbying stakeholders in music, film and media are foreign owned with UK subsidiaries and/or offices. The majority of designers and ACID members are UK based and owned.
- 2010/2011 has seen a marked increase in copying incidents at UK exhibitions/trade fairs and it is time for the exhibition industry to be made more accountable. At best, the Government should be looking at invoking some statutory powers to control matters. A minimum recommendation should be a commitment by exhibition organizers to remove products from sale where rights ownership can be confirmed by a stand owner and an infringing product is being unlawfully marketed.
- ACID questions whether future IP policy would not be better served in BIS with its own Minister of State. This would put IP on more influential radar within Government ensuring that future IP policy would be created from a broader influence. This would ensure that future policy recognises the all the commercial needs of UK innovation to maximise growth potential.
- Further consideration should be given to the US initiative of appointing a national IP Tzar in the form of an Intellectual Property Coordinator. By placing IP as a top priority as the “US’s single most important asset”, The President of the United States has put emphasis on an IP framework which will not only provide a robust legal framework but will also concentrate on advancing and delivering growth, jobs and revenue by bringing together all IP stakeholders together as an all encompassing IP model.

ACID has submitted several case studies which demonstrate the difficulties faced by micro firms in affording the time and money to enforce IP infringement, many of whom simply go out of business because they cannot fight their corner. The case studies also highlight the vulnerability of SME’s who respond to tenders/pitches only to find that either their products are given to a third party to produce more cheaply or their work is stolen and changed sufficiently so that it is difficult and costly to legally challenge. Government could lead on this within its own procurement terms and conditions by encouraging respect for IP at the tender/pitch stage as an industry standard.

A couple of the case studies demonstrate the current culture of some major high street retailers who follow SME innovators, select products which have a proven market success and then copy them. They are then sent out to China to manufacture cheaply and brought back to flood the market. There is no level playing field in micro v macro legal challenges and current practice is to stonewall challenge and perpetuate litigation.

Further case studies highlight issues at the exhibition/trade fairs where, unlike EU counterparts, UK exhibition organisers do not take a tough stance on copying. A trade fair is usually the first point of market entry for new, innovative products and whilst it is a valuable platform it is also vulnerable to copyists. The UK Exhibition industry is worth £9.3 billion. Among other issues faced by micro firms is the difficulty to protect, register and enforce their IP rights in BRIC countries; the difficulties in accessing sector specific IP training and education and up to 89.7% also believe that IP infringement in the UK is blatant.

Other issues faced by SME’s is the increasing occurrence of walking off with entire businesses and creating copycat trading companies using every aspect of the original brand owners identity, including its look and feel, text, brand voice and communication platform.

ACID (ANTI COPYING IN DESIGN)

ACID (Anti Copying in Design) is a membership organisation representing 1000+ companies from 25 different industry sectors. ACID's members have a collective turnover of approximately £6+ billion. The organisation is committed to raising awareness about intellectual property infringement within the creative industries and encouraging IP respect within declared corporate social responsibility. ACID's remit is to encourage intellectual property creation as a positive force. ACID's powerful logo is a real symbol of deterrence actively helping its members protect against the potentially devastating damage inflicted by IP infringement. The majority of ACID members are micro enterprises and SME's supported by ACID corporate members who publicly endorse ACID's aims and objectives. ACID continues to use every opportunity to lobby and raise awareness about design's importance to the UK's growth which is rarely recognised and remains an unsung hero within the creative industries' significant contribution to the UK's GDP.

Evidence: Lack of IP policy on design issues – Gowers and SABIP. In 2008 £23 billion invested in design creation by UK businesses in 2008 (Nesta). Government and UKIPO dialogue tends to be patent and copyright led – “the lone inventor”, “the digital age” with a distinct lack of focus on the importance of trade marks (£16 billion invested annually in building brands in the UK) and design.

ACID's key objectives are;

- Education – raising awareness and increasing knowledge about intellectual property.
- Prevention – seeking ways in which micro enterprises can help to protect their intellectual property by adopting best practice through IP audits and creating a proactive IP strategy.
- Deterrence – building a strong brand which communicates an anti copying message. This helps members to communicate value in originality and the IP created by their tradable knowledge as a positive commercial force.
- Support, through IP specialist hotlines for initial free advice on all contentious and non-contentious matters.
- Lobbying, to raise awareness about the significant role that design plays in the UK.

Design is the catalyst for innovation and a key driver of competitive edge, its everywhere! Our mobile phones, our watches, the chair we sit on, the sofa we relax in, the clothes we wear, the trainers we run in, the cars we drive and the conduit for social change. We see how the Design Council's initiatives using design have made a significant impact i.e. Design out Bugs and Design out Crime campaigns. ACID members play a significant role in stimulating innovation, creating tradable IP and provide jobs for many thousands within the creative industries.

Evidence: There have been over 450 settlements on behalf of ACID members, over 3 million recovered in costs and damages and over 2000 grass roots mediations.

Whilst we agree in general that the current IP framework continues to deliver substantial opportunities for growth and innovation through these entrepreneurial champions, we feel that design issues have been sidelined and would like to re-assert our argument for parity with other unregistered rights. This would put unregistered design right on a par with copyright. Current strategy by many well known high street retailers and manufacturers is to take the fast track to market by copying those who are ill-equipped to fight their corner, the majority of micro firms and SME's who make up this sector.

ACID's makes the arguable point, through its own experiences of case studies, that if blatant design right infringement was treated in the same way as blatant copyright infringement, (major retail) board strategy may be influenced to support product design innovators, pay royalties and use their significant purchasing power to give the consumer original products which are not copies or look alikes. By commissioning and not copying, design buyers will be supporting UK designers who are, undoubtedly, some of the best in the world. The current culture, experienced by ACID and its members at grass roots, is that growth and innovation are impeded by the constant threats of being copied. What stifles growth amongst design right dependent SME's is having post publication revenue siphoned off by Goliath imitators (Primark against SUPERDRY and ASHLEY WILDE are recent examples) and that magistrates court fines and exemplary damages would do a lot to help those who are at the mercy of those with deep legal pockets.

Evidence: Out of 99 companies surveyed 85 out of 99 (89.7%) believed that infringement of unregistered designs was blatant rather than inadvertent, 3 said both blatant and inadvertent and 1 did not comment. This is a quote from a solicitor who wishes to remain anonymous, "I am ashamed to say that in the early part of my legal career I spent quite a lot of time defending very well known high street retailers from exactly this sort of lawsuit"

ACID does truly represent a very different and varied sector of membership nationwide and is a recognisable voice for British design interests. The majority of other IP stakeholders are central London focussed and, in the case of lobbyists for the film, music, computer and video games industries, the majority of persuasive lobbying interest emanates from US owned companies with London subsidiaries.



Other lobbying focus, in particular copyright – ex UK owned



ACID membership – majority UK owned, exporting globally

DESIGN, SOME FACTS AND RELATED FIGURES – general evidence of design’s importance to the UK economy

In September 2010 Dr Vince Cable stated that **£65** billion pounds had been invested in IP creation in the UK in 2009. In 2007 NESTA’S Report on Driving Economic Growth confirmed that **£22** billion was invested in design in the UK. A year later in 2008, this had increased by **£1** billion to **£23** billion. The UK’s 50+ design disciplines significantly contributed to this growth. In addition, **£16** billion is invested annually in UK brand building

In **2009**, approximately **30,825** registered intellectual property rights were granted in this country (patents, trade marks and design rights) by the UKIPO. (5428 were patents, 2111 designs and 23,286 trade marks) – reinforcing the point that the majority of UK’s businesses do not rely on patents or registered design rights.

There are approximately **2m** businesses in this country, in **2009** only **0.02%** of UK businesses registered any rights last year. This means that the vast majority of all businesses in the UK rely on unregistered intellectual property rights.

In 2009, **2111** designs were registered in the UK. There are approximately **232,000** designers in the UK indicating that a very small percentage, 0.009 designers register their rights and therefore they rely on unregistered rights such as unregistered design, copyright and unregistered trade marks. Many find it too expensive to register their rights and that legal costs deter and inhibit enforcement¹.

60% of design consultancies employ four people or fewer, a further **27%** have between 5 and 9 staff. The majority of SME’s find that costs deter enforcement. Nor can they access any of the legal benefits of copyright owners, in that deliberate copyright infringement is a crime.

According to a recent report by TERA Consulting, the creative industries alone account for **2.7m** jobs in the UK and contribute **£175bn** to the UK’s GDP². Ensuring that IP rights are protected and enforced provides industry with the certainty it requires to invest in the research and development that leads to growth and employment.

Unregistered rights in the context of ACID’s experience:

ACID has 1000+ members. Nearly all of them have joined because IP infringement is rife in the creative industries sector. 75% of ACID members who rely on unregistered rights (copyright and design right) send copies of their designs into our free Design Data Bank. Around 30,000 copies of designs are lodged with us annually. This does not add to their rights, but provides a valuable audit trail to substantiate their design ownership should their rights be subject to infringement. To date there have been 450+ settlements, many of them based on being able to provide their legal advisors with compelling evidence to prove design ownership. ACID membership represents the tip of the iceberg because the majority of our micro enterprises simply cannot afford to take legal action. Many ACID member cases have been against major high street retailers and manufacturers, who would appear to use as their defence “inadvertent” copying, despite the fact that in many cases thousands of look alike products are for sale on their shelves.

Conclusion: IP Protection generally for designers needs to be at a sufficiently high level to stimulate innovation and growth

¹Design Council Industry Insights 2010

²*Building a Digital Economy: The Importance of Saving Jobs in the EU’s Creative Industries* TERA Consulting March 2010 p17

DESIGN – THE CHALLENGES Design underpins the UK’s knowledge-based and manufacturing industries

Every successful product has been designed and intellectual property (IP) in design has great value for the UK economy – provided it is properly protected. The UK is increasingly earning more from designing successful products than from manufacturing them. This is particularly true for the creative industries sector, which contributes 8.2 per cent (£118 billion) of the UK’s GDP. This is expected to continue to grow by an average of four per cent a year. ^{CBI}

advertising, screen, product design, music, performing arts, publishing, software and engineering, architecture, art markets, computer & video games, crafts, fashion,

Design is a diverse profession with over 50 design disciplines, all underpinned by intellectual property rights (IPRs).

IMPROVING IP UNDERSTANDING TO MAINTAIN INTERNATIONAL COMPETITIVENESS

The UK has worldwide acclaim for its design and innovation excellence and British designers lead in socially responsible and environmentally sustainable innovation. There are about 2 million people working within the creative industries sector and an estimated 232,000 designers in the UK (with a combined income of £15b). ^{Design Council 2010} Communications design remains the dominant discipline in the UK, followed by digital and multimedia design. The majority of the UK’s design companies and designers are micro enterprises or SMEs with fewer than 4 employees.

There is a need to improve awareness and understanding of the potential of design and creativity among policy makers¹ and design customers – both private and public organisations.^{2,3} Currently, there are few Government support incentives for the creation of IP and there is a disturbing tendency to undervalue professional designers, as demonstrated by the practice of “free pitching” in public, corporate and Government procurement.^{dba} There is also a poor level of IP awareness among SMEs in the design sectors⁴. IP infringement is on the increase. 97% of businesses do not have an IP policy, according to a 2006 UKIPO report by Dr Robert Pitkethley.

RELEVANT LEGISLATION

Designers may rely on IP rights that arise automatically (copyright, UK and EU unregistered design right and goodwill in a trade name or get up) or registered rights (a patent, registered design or trade mark). UK and EU unregistered design right and registered designs are relatively new and they offer protection for the whole of the appearance of a product rather than just the 3D elements. Colours, materials, surface patterns as well as shape can all now be protected. The Digital Economy Act 2010 provides remedies for online copyright infringement and places obligations on Internet Service Providers (ISPs) to warn those using their services not to infringe copyright (such as illegally downloading music) and to hand over details to copyright owners, if requested. The Home Secretary can also order ISPs to take various technical measures, such as suspending services, against those infringing.

EVIDENCE AND LINKS FOR FURTHER INFORMATION

¹The Cox Review of Creativity – Sir George Cox http://www.hm-treasury.gov.uk/coxreview_index.htm

²“Design as a driver of user-centred innovation” EU Commission - on-line consultation about design and innovation http://ec.europa.eu/enterprise/policies/innovation/files/results_design_consultation_en.pdf

³ British Design Innovation - Turning Propositions into Profit through Collaboration, not Competition <http://www.auril.org.uk/media/BDI%20UCA%20Conference%20Summary.pdf>

⁴UK IP Awareness Survey 2006 Intellectual Property Survey 2006 Dr Robert Pitkethley <http://www.ipa.gov.uk/ipsurvey.pdf>
^{dba} Design Business Association www.dba.org.uk ^{Design Council} Design Council www.designcouncil.org.uk ^{CBI} www.cbi.org.uk

BRINGING DESIGN RIGHT INTO LINE WITH COPYRIGHT INFRINGEMENT

If an unregistered design is stolen no criminal offence has been committed. The designer's only recourse is under civil action. This gives rise to anomalies and inequality of treatment which are very damaging to hundreds of small businesses and designers across the UK.

Scope of Protection

- Copyright is a property right subsisting inter alia in "artistic works" –see Section 1(1) (a) CDPA.
- Design right is a property right subsisting in original designs (S.213 (1) CDPA).
- **So copyright and design rights are exactly the same type of legal right**
- The copyright protection of artistic works is usually restricted to 2 dimensional works but it does also protect 3 dimensional works. Section 4 CDPA states that artistic works means

(a)-a graphic work (2D), photograph (2D), sculpture (3D) or collage (2D or 3D) *irrespective of artistic quality*

(b) a work of architecture being a building (3D) or model for a building (3D)

(c) a work of artistic craftsmanship (3D)

- Graphic work is further defined to include any painting, drawing, diagram, map, chart or plan (2D)
- Sculpture is defined to include a cast or model made for purposes of sculpture (3D)
- The case law on works of artistic craftsmanship (unsurprisingly) requires a number of criteria to be met before a work will be considered as one of artistic craftsmanship and mass produced articles will not qualify.
- Design Right only subsists in 3D. The word "design" means the design of any aspect of the shape or configuration (whether internal or external) of the whole or part of an article (S. 213 (2) CDPA).
- Some 3D objects are therefore protected by both artistic work copyright protection and design right, so long as they can be classified either as sculptures or as works of artistic craftsmanship, but most 3D objects will be protected by design right alone.

Offences

- Copyright infringement is in certain circumstances a criminal offence (see Ss 107-110 CDPA, S.198 CDPA. Trade mark infringement is also a criminal offence S. 92 TMA). These crimes are punishable by up to ten years imprisonment.
- **Infringement of design right is not a criminal offence and can be dealt with by way of civil proceedings only.**
- **This gives rise to anomalies and inequality of treatment.**
- For example 2D design drawings are protected by copyright as artistic works. If these drawings are copied or a 3D object is made from the design drawing in circumstances where the person making the object knows, or has reason to believe, that he is making an infringing copy of a copyright work a criminal offence is committed. But if that same person takes the 3D object and copies that rather than the design drawing then unless the 3D object qualifies for copyright protection as either a sculpture or as a work of artistic craftsmanship no criminal offence will be committed.
- In the first case an offence punishable by ten years imprisonment is committed and the infringer gets a criminal record. If the infringer is a company S.110 CDPA confers criminal liability on directors, managers, secretary and other similar officers. Police and Trading

Standards can be deployed to disrupt the business of the suspected criminal and to arrest and / or search premises. The suspect can be interviewed under caution.

- In the second case (on almost identical facts and certainly with no lesser harm caused to the victim) there is no criminal offence committed, neither the Police nor Trading Standards will be interested and disclosure of information and search of premises can only be obtained through expensive civil litigation remedies. This is unfair.
- Given that in nearly all cases the infringer will copy from the 3D design not from the 2D design document, and that this is perhaps a more serious problem for the design right owner, it is clear that weaker legal protection is currently provided for more serious infringing behaviour.

Why the inequality of protection?

- There is no obvious reason for the disparity of protection. This may have been overlooked during the frenzied last minute lobbying and amendments made to the CDPA in 1988 as it was passing through Parliament. Design right protection was a relatively late innovation in 1988 and at the time it was probably felt that it was a step too far to extend to design right the new improved protection introduced for copyright in 1988. **Certainly no rational basis for the inequality has been advanced by Government.**

Solution

- The legal solution is to introduce into the CDPA two new Sections to mirror S.107(1) and 110 CDPA. The wording would be pretty much identical to Sections 107(1) and 110 and would be designed to criminalise the infringement of the design right subsisting in 3D designs. This can be done very simply by replacing the word "copyright" every time it appears in Sections 107(1) and 110 with the words "design right" and the words "copyright work" with the word "design." It would then be necessary to make consequential amendments to mirror Sections 107 (4), 107 (5) 107A, 108 and 109 CDPA.
- It is necessary to specifically spell out what is required. Simply to point out the inconsistent treatment might lead to attempts to water down the protection available to copyright owners of artistic works rather than increase the protection for design right proprietors.

SME'S THE COST AND COMPLEXITY OF ENFORCING INTELLECTUAL PROPERTY RIGHTS WITHIN THE UK AND INTERNATIONALLY

The recently published UKIPO Report on IP Enforcement in SMEs serves to highlight the all too familiar chasm between research and reality and the delay in policy making caused by the laborious process of creating "unbiased" data and statistics. However, one of the most significant points of the report is that SME's find that costs deter enforcement. *"The costs of management time and of diverting other resources from the core business of any firm involved in an extended IP related dispute were significant and risked damaging the development of a firm as much as any financial costs"*.

The methodology of this particular research project is questionable (much which was based on data which was 5 years old and there were only 170 responses). Reports of this type simply do not make sense and only serve to highlight the fact that in the current culture of endless research projects and consultations, little attention is given to those who have historical and current experience of what happens at grass roots i.e. industry organisations. We are not social scientists, intellectual property academics nor are we paid researchers. However, ACID's CEO did have an interior design practice and then a small product design business for 15 years, i.e. a micro business within the creative industries and now represents many micro firms and SME's. So, for example, why wasn't ACID consulted?

This expensive report (£65,000) only serves to confirm what ACID and many other organisations communicated to the UKIPO as long ago as 10+ years. The findings are not rocket science but it is worrying that SME innovators have had a 10 year gap in clear, IP enforcement policy which could have supported them and may have provided many more opportunities for growth. Not only that, but within Government, many would be more aware of the plight that SME's face in the protection of their intellectual property rights.

Some members of the audience at which the SME report was discussed in January 2011 were understandably unimpressed with the methodology. In total, 1,858 micro firms and SMEs were contacted in the online survey and this received 170 responses. Respondents to the survey gave information on **only 46 IP disputes**. ACID asked why trade associations weren't contacted for help, as they could have used their relationships to increase the response rate. The answer from the academics was that this may have biased their results. The research is also already rather old, as firms were interviewed in 2005, with the data compiled and research finished one year ago. Other points highlighted in the report were:

- IP rights are considered to be important by smaller firms
- Only a quarter have IP insurance
- 25% of firms have been involved in IP disputes
- Disputes were not disproportionately with larger firms. The IP disputes were as likely to be with firms of a similar or smaller size as they were to involve larger firms.
- Solicitors' letters often resolve disputes, and this was by far the most common High Court. Overall, when firms were asked whether they were 'satisfied' with the outcome of the dispute, 80% said they were. Only a third of firms expect an increase in disputes in the future.

Jeremy Phillips of IPKat spoke on the influence this report might have on policy. It was agreed that the report could be used as empirical evidence for submission to the Hargreaves review, but that unfortunately the reality of IP and SMEs in the UK will have changed markedly from when the report was written.

He praised organisations such as ACID for their work with SMEs but said that otherwise there was a 'deafening silence' from industry on the subject. Serving to reinforce the fact, in this instance, for example, the audience of interested parties were lawyers, IP academics, civil servants and not small businesses themselves.

The majority of designers who rely on unregistered rights cannot afford to take legal action nor can they access any of the legal benefits of copyright owners, in that deliberate copyright infringement is a crime. The fact that they can take action in a "Patent" County Court is a misnomer and does not serve to communicate that there is a county court to deal with ALL Intellectual property rights infringements. It should be renamed the Intellectual Property County Court and ACID understands that this has now happened, albeit in only one such court. Within this new judicial process more could be done to introduce access to alternative dispute resolution.

ACID will be writing to Mr Justice Colin Birss, the newly appointed Judge of the IP Court to suggest that mediation plays a more significant part in the process prior to going to Court. As with Divorce, it could be incumbent on the litigants to have been able to demonstrate that they have tried to mediate first. It would be encouraging to witness Professor Hargreaves acknowledgement of ACID's positive experience in mediation and endorse a recommendation to help SME's in this way which help to address the all too familiar David and Goliath imbalance between the legal purse of the micro versus that of the macro. The average cost of a letter before action is approximately £400 - £700 and at between £175 and £350 per hour for further letters which micro business can afford to pursue rights infringement indefinitely?

Evidence: ACID has undertaken over 2000 grass roots mediations. 70% needed no further action. Of the 30% which required further legal action the majority were resolved by a letter before action/undertakings. In some instances positive results included the brokering of licence/royalty relationships.

The BRIC, especially China countries are a real problem for SME's to do business with and many find that their IP is seriously at risk from local partners with little hope of redress because it is so difficult to take legal action. Why? Because of the expense of litigating and unless designs are registered in China, for example, it is not possible to take action. With the majority of SME designers having registered designs in the UK and Europe, there is little chance they will have registered designs in China, China has a completely opposite culture to copying the majority of Chinese companies do not think it wrong to copy. The problems in BRIC countries are twofold a) access to cost effective protection and enforcement and b) there is a deliberate strategy of some less reputable high street retailers in the UK (and worldwide) to watch the market place, identify innovative new products, change them slightly and go to China and other BRIC countries to have them reproduced in large quantities and imported into the UK and Europe.

1	UK
2	Germany
3	USA
4	Australia
5	Netherlands
6	Canada
7	Ireland
8	New Zealand
9	France
10	Singapore
11	Japan
12	Israel
13	Spain
14	South Africa
15	South Korea
16	Mexico
17	UAE
18	Italy
19	Turkey
20	Poland
21	Russia
22	Brazil
23	India
24	China

Evidence: A recent Taylor Wessing table (above) supports ACID's view that in the BRIC countries it is difficult to register, protect and enforce IP rights, starting with the most effective at the top of the table. ACID members' experience is of disreputable buyers who will scour the exhibition arena (usually the first point of market entry for new design led products) and then watch to see which products become successful. With such broad unregistered rights parameters, it can be relatively easy to change a product sufficiently enough so that it cannot be legally challenged under the current system. The only legal remedy is through "passing off". What chance does a small trade, niche-sector company have against a major well known name when it has to provide evidence of consumer confusion? (Example (1): ACID member Robert Welch against Marks & Spencer). With lookalike products, relying on passing off is almost impossible for the small, niche trade only SME against a well known high street name. As there are no criminal sanctions for blatant unregistered design infringement a risk analysis strategy would indicate that there is little chance of challenge. Usually these retailers have sold enough products to have the budget to stonewall any legal challenge and perpetuate litigation if they are pursued legally.

Recommendation

One of the current problems for brand owners is the fact that the Trading Standards departments are being cut savagely and facing 17% cuts now. Another issue is that Trading Standards have a duty to enforce trade mark and copyright infringement but have no responsibility at all for design infringement. If private prosecutions were allowed, the UK's designers (approximately 99% of whom rely on unregistered rights) could help themselves. In the trade mark and copyright world rights owners can avail themselves of the right to prosecute privately under the provisions of the Offenders Prosecution Act 1985 because the underlying trade mark and copyright are criminal acts. Because design infringement is not a crime, they cannot prosecute or rely, in the most severe of cases, on police intervention. If the Prime Minister wants a Big Society then he can ensure that this is an opportunity for Government policy to allow businesses to help themselves and prosecute against blatant design theft.

Another major challenge is finding evidence of, "The dog that didn't bark". Does the fact that there are very few cases of design infringement leading to Court hearings mean there isn't a problem or that there is another major obstacle in pursuing what we see and hear about nearly every day of blatant design infringement. Certainly lack of finance, time for SME's to address IP infringement and a lack of exemplary damages which dissuade and deter the worst offenders are key factors.

ACID's own survey to which 99 companies replied, provides a summary which is self explanatory

No of Questionnaires:	99
No of employees:	1598
Turnover:	£249,635,000
Estimated Loss:	£12,924,000 (of these 6 said they could not quantify the amounts and a further 1 said "millions")
Does IP theft have a detrimental effect on employees numbers/No:	59
Does IP theft have a detrimental effect on employee numbers /Yes:	36
Effect on Employees /No Response:	4
No of New Products produced since 2000:	91,812
Do you have specific examples of where an inability to protect your rights has had a detrimental impact on you/or your company? No:	31
Do you have specific examples of where an inability to protect your rights has had a detrimental impact on you/or your company? Yes:	41
Do you have specific examples of where an inability to protect your rights has had a detrimental impact on you/or your company? No Response:	9
Do you believe IP infringement is blatant:	85
Do you believe IP infringement is inadvertent:	10
Both:	3
No Response:	1

IP INFRINGEMENT – THE CURRENT SYSTEM OF DAMAGES

ACID supports other organisations who are calling for a further review of the damages system and hopes that the current IP Review will reconsider the fact that under the current system of damages as described by the term "additional damages" in the Copyright, Design and Patents Act 1988 should be replaced by aggravated and restitutionary damages in addition to exemplary damages in relation to IP infringement for patents, designs, trade marks, passing off and copyright. Damages under the existing legal structure are woefully inadequate and serve no purpose in dissuading those who seek criminal gain from what is still considered a "soft crime" by continuing to make vast profits from the immoral, anti-commercial and criminal activities which they continue to pursue. Current estimates about the escalating cost of IP crime and its devastating effects on IP rights holders would be significantly improved if there was a capability within the Court system to use aggravated and restitutionary damages as a compelling deterrent in fighting what has become a serious threat to the UK's intellectual capital, its intellectual know-how and resultant IP rights.

At present it would appear that difficulty in addressing IP infringement through the Courts on what is, at best, is difficult to prove, there is a calculated gamble by those who seek the fast track to market through IP theft who will measure the risk involved and evaluate their position against being challenged or caught. If they are unlucky enough to be pursued and brought to trial, there is no disincentive in terms of appropriate aggravated or restitutionary damages to act as a deterrent to stop this practice and it is widely believed that this perpetuates deliberate board strategy employed by those who flaunt the law and, in particular, in ACID case studies, many well known UK importers, retailers and manufacturers.

Aggravated Damages

The mental distress and moral outrage of IP theft must be seen to be quantified and demonstrated by the award of aggravated damages – often it takes a tremendous amount of conviction, courage and huge financial cost to take action causing ensuing mental distress.

Evidence: An ACID member (SME) who took action against a well-known major high street retailer. After two years battling against powerful legal stonewalling and unnecessary perpetuation of litigation funded by deep legal pockets, he was, at the last moment before Court was the only option, able to settle by mediation. The defendant's lawyers had used every possible argument to prolong the proceedings. The debilitating effect on his family, his business and himself was enormous, it is doubtful whether he will fully recover from this and now has a very jaundiced view of ever attempting to address IP issues through the legal system. The existence of aggravated damages should most definitely be considered in any reform of the damages system in this country to act as a real and meaningful deterrent against IP theft and used to support designers and creative thinkers to continue and encourage innovation and original thought. Fiscal limitations for many of the UK's SME's limits access to the legal system to redress IP infringement but significant aggravated damages would contribute as a real deterrent factor. The well known retailer has a robust communicated anti counterfeiting policy on its own goods but on the other hand is well known to ACID members for its complete lack of IP respect and free rides on the back of micro innovators and SME's on a regular basis.

Restitutionary damages

Under an assessment of damages, a rights owner can only recover the profit that it would have made on sales of their original articles if they can show that each sale made by the infringer would have been a sale made by the rights owner. Where the selling price of the infringing article is significantly lower than the original, which is almost always the case, given that the infringer bears no design, development or promotional costs, it is not possible for the rights owner to recover their lost profit on those sales. Instead, their remedy is limited to a reasonable royalty on each sale made by the infringer based on the unrealistic assumption that the rights owner would have entered into a licence with the infringer had the infringer approached the rights owner for permission to copy in the first place. Accordingly, under an assessment of damages, there is no reason whatsoever for an infringer to approach a rights owner for a licence in advance of its infringing activities when the only sanction which may be made against it should its infringing activities be discovered and pursued by the rights owner would be payment of what they would have to have paid anyway had they approached the rights owner upfront.

It is for this reason that the current system of damages under civil law provides no disincentive whatsoever to copiers and is a significant contributor to the extent of the copying problem currently being experienced.

Exemplary Damages

Punishing the wrong doer in a fair and just society rarely happens in IP infringement. IP crime is still not considered as "theft" nor is it promoted as "theft" clearly because of economic concerns and a lack of education and awareness by the consumer that they are doing anything wrong when they buy counterfeit, pirated or copied goods. In the case of copied goods many are completely unaware that, for example, a supposed reputable brand name has used the designs of an originator without permission, deliberately sent them to China to be produced at a fraction of the original cost and re-introduced them under their own name. The originator (if they are a design right holder) is rarely able to seek legal redress because the law of passing off does not provide an adequate legal remedy as usually they are unknown small brands, the retailer has changed the design sufficiently so that it is difficult to legally challenge, and it is almost impossible to provide evidence of consumer

confusion. Risk analysis ensures that this strategy makes economic sense for a retailer or manufacturer but possibly they may review this strategic approach if sufficient exemplary damages were introduced to challenge their financial risk analysis.

Clearly, one of the main disincentives to a copier or dealer in copies of pirated goods is the potential remedies available against them should action be brought. For design right holders, there are currently no criminal sanctions available. Furthermore, the current potential civil remedy against an infringer of an intellectual property right is either an assessment of the profit made by the infringer or an award of damages representing the lost profit suffered by the originator.

Under an account of profits, the infringer is only required to account for the profit that they have made in dealing with the infringing articles. The infringer is entitled to deduct all their expenses and overheads involved in those infringing activities. Consequently, there is no loss suffered by the infringer as a result of the infringing activities, and therefore no deterrent whatsoever against future infringing activities. It should also be noted that only a very small percentage of copies are ever pursued through the courts, so on most occasions, the infringer gets away with all their profit.

Evidence and Case Study - The following case study represents a typical example of a scenario that arose at the Decorative Interiors exhibition held at the Birmingham NEC. A designer/exhibitor specialised in the design and creation of hand painted, high quality throws and cushions. A typical throw would sell for in excess of £200. The exhibitor was showing their products for the first time in the UK at the exhibition, and their entire stand consisted of these handmade throws and cushions.

Another company a few stands away was exhibiting cushions that reproduced identical machine-made designs to those featured on the handmade originals. The copy cushions were sold for approximately £30. The rights owner became increasingly frustrated at the number of visitors to his stand who questioned the marketability of the rights owner's designs for £200 when the same designs were available on another stand in the same hall as the exhibitor for £30. The exhibitor could not sleep that night and returned to the exhibition the next day resigned to the decision that their entire business was no longer sustainable as a result of the presence of copies on the market. When approached, the exhibitor of the copies simply could not understand why both businesses should not continue to sell the same designs.

The European Enforcement Directive dealt with this problem in Article 13. In particular, Article 13.2(b) proposes an award of compensatory damages corresponding to the actual prejudice (including lost profits) suffered by the rights holder as a result of the infringement. This clearly takes into account the possibility of not only damages designed to compensate the loss suffered by the rights owner but includes the element of lost profit often missing under the current UK law and also damages representing other elements including in particular moral prejudice.

The design industry is a creative industry and all too often ACID hears of the emotional damage suffered by a designer when their designs are copied. This can have an extremely detrimental effect on their future ability and willingness to create new designs. Implementing the provisions of Article 13 has gone some way, but not nearly far enough, towards remedying the situation.

In December 2006 Andrew Gowers was commissioned to undertake a consultation on the UK's intellectual property and its fitness in the 21st century.

Gower's evidence/recommendation No 38: "The Government should review the issues raised in its forthcoming consultation paper on damages and seek further evidence to ensure that an effective and dissuasive system of damages exists for civil IP cases and that it is operating effectively. It should bring forward any proposals for change by the end of 2007". The Ministry of Justice did carry out a review but nothing has improved for SMEs

Recent consultations have failed to give due consideration to the creation of aggravated and restitutionary, as well as an increase in exemplary damages for IP civil cases and it is viewed as a grave oversight. It would appear to be in direct conflict to the contents of a recent innovation report regarding UK creativity and inventiveness. In this report, the UK's creativity and inventiveness was said to be one of the country's greatest assets. However, if nothing is done in the current recommendations to put pressure on the Ministry of Justice to remedy the levels of copying and dealings in pirated goods by creating judicial support via a set of damages which hurt the perpetrators sufficiently, the UK design industry is likely to be damaged irreparably.

SME'S THE COST AND COMPLEXITY OF ASSESSING SERVICES TO HELP THEM PROTECT AND EXPLOIT THEIR IP RIGHTS

The most recent study on IP awareness in the UK, provides depressing statistics according to the Dr Pitkethley study (2006) on awareness of IP issues for SMEs in the UK (commissioned by the UKIPO), 97% did not have an IP strategy. Given the amount of funding/income that the UKIPO has had, and currently has, at its disposal to raise education and awareness this does not represent a compelling outcome. However, presumably as a result of this review, the UKIPO are now championing some very useful IP initiatives on a countrywide basis which is encouraging for micro firms and SME's, many of whom work in isolation without proper access to vital information and self help tools. Whilst the UKIPO website is now much more use-friendly in our experience an IP specialist support hotline where one can actually speak to a person via telephone can provide valuable on-the-spot coaching, training and help in practical aspects of bringing tradable IP to market and finding routes to full exploitation and commercialisation.

Evidence: The UKIPO Master Class is an excellent example of an excellent initiative which aims to train small business advisors who have to deal with IP issues. Having attended the course personally so that ACID could comment from a position of strength, I feel that it is patent-led in dialogue, there is too much focus on the law and lawyers with very little content that relates to self-help tools and education for micro firms, or the use of case studies of SME's who have used and created IP as a positive commercial force. Inspirational case studies of those who have made IP work for them in practical ways are far more compelling than PowerPoint presentations churning out the machinations of IP law. Yes, have an overview of IP law but focus should be made on encouraging industry to help itself and on the provision of IP tools which can enable that. The focus is to point entrepreneurs to lawyers and not to self help. Yes, it is vital for IP specialists to craft sound agreements for IP clarity, yes, IP lawyers are needed to take effective legal action against infringement but education, prevention, deterrence support (the four cornerstones of ACID) are the basic ingredients of a strategy which will encourage growth by innovation.

Recommendation

We believe there is a need for a wider variety of 'hands-on' courses which are sector led. What applies to an inventor or patent holder is completely different to a product designer; equally what applies to online digital business does not apply to design in engineering. There is no vanilla approach to IP education and training. ACID would welcome the opportunity of providing a Master Class for the design sector. The current cost of approximately £1800 per person does not represent good value for money.

The language and dialogue generally in IP rights' communication is patent/invention-led. The perception of IP and SME's as "the lone inventor" is light years from the reality. 21st century innovators, IP entrepreneurs and creators, referred to by some as "ideapreneurs" are the inspirational zeitgeists of innovation. One of the most common questions ACID is asked at exhibitions is, "Where can I patent my design?"

To date ACID has completed 408 day long IP clinics in this country since 1998. We canvassed a wide number of designers at grass roots and through our IP specialist hotlines and below are the most common misconceptions about IP in design, mainly product design. All are very simple but basic “need to know facts” about IP:

Some IP myths - the 10 most frequently asked WRONG questions or statements.

How do I register my copyright?

You can't because in the UK copyright arises automatically upon the creation of a work in a tangible form (e.g. a design drawing); there is no requirement for registration. However, in the USA you can register a copyright.

Where can I patent my design?

You can't unless you have created a new and inventive product or process. The relevant form of protection for most designs is UK design right which protects the shape and configuration of the design and unregistered Community design right which protects the shape, contours, lines, colours, texture and ornamentation of a design. Design rights arise automatically but, for stronger protection, a Registered UK or Community design can be obtained for a payment of a fee. www.ipo.gov.uk www.oami.europa.eu

If someone makes seven changes or a certain percentage change to a design it becomes a new design!

Wrong! It is not the number or percentage of changes that somebody makes to your design but the importance of the elements which they have taken from your design which is important in deciding whether they have infringed your rights in your design. This will always vary from case to case.

Registering designs is useless because if you make one slight percentage change in the design the registration is invalid.

Wrong! Because the test for whether a design infringes a registered design is whether it creates a 'different overall impression on the informed user.' It is not simply about counting the number of elements of the design which have been reproduced or changes which have been made to it.

I want to register my design to protect the way it works.

You can't because you would have to apply for a patent rather than a design registration. However, to obtain a patent you would have to demonstrate that the way that your design works is novel and inventive.

I have protected the name of my business because I have registered the name at Companies House.

You haven't because a registered company name does not give you rights in the name which you can enforce against third parties – for this you need a registered trade mark.

My freelance designer doesn't have any claim to the rights in my design!

They might, because if they produce a design for you, you will only own any UK unregistered design right which might subsist in the design. There may be other IP rights in the design which you do not own, such as copyright and unregistered Community design right. If you want to own all the intellectual property rights, the best plan is to ask the freelance designer to assign these to you in a written agreement, preferably before they do any work.

If I do not include the © (+ your name and year e.g. © acid 2011) notice on my work I will not benefit from copyright protection.

Not true! In the UK copyright arises automatically when you record your original work in a tangible form. However, it is wise to include such a notice because it notifies others that you are claiming copyright in your work.

If I register a copy design before the originator I own the design.

You don't necessarily because whilst you will technically be the owner of the registration, the originator would be able to seek a declaration of invalidity of your registration.

I applied for a registration for my design because I own the company.

Wrong! Because if you created the design in the course of your employment, even with your own company, the company alone has the right to register the design.

IP AND THE DIGITAL ECONOMY

The 21st century IP framework has allowed consumers to have access to products and digital content in a way that have never occurred before. This in itself provides a positive trading platform for online businesses to grow and develop at a rate which they otherwise could not do. This involves most industries from music, film and TV to video games and products and the proliferation and availability of academic and educational material. This digital explosion has offered consumer choice but at the same time has created an easy fast track to market to those who do not believe or understand about IP ownership or the R & D that goes into the creation of online platforms. What has now become the norm in many cases has led to a massive loss of jobs in the UK and worldwide. Consumer groups would appear to have done little to educate those who illegally download music or share content that this infringes property rights in the same way as the infringement of physical property.

Short termism in providing an adequate system of IP enforcement to meet this new business model leaves a chasm in the trust necessary to develop commercial and creative business models which can serve the consumer on the basis of confidence. The protection afforded by the Digital Economy Act is necessary to keep the status quo but more should be done to find an enforcement model which will provide a level playing field for all stakeholders. Clear doubts have been expressed from many quarters about the haste in which the DEA became law.

The protection of the generation of ideas into tradable intellectual property will only be possible if there is a robust enough policy supported through new global agreements, cooperation and liaisons. "Ideapreneurs" should be given the opportunity for all of the IP they create to reach its full market potential.

The increase in counterfeiting and piracy activity globally has grown at a rate that no one could ever have envisaged. There is no reason to assume that this will not increase at an accelerated rate unless major international action is taken. President Obama would appear to have taken the bull by the horns by making it an absolute priority for his administration at the highest possible level. Ultimately the threats posed by an increase in counterfeiting and piracy will have an effect on national security apart from the individual harm caused by dangerous goods, fake medicines and faulty engineering parts. The publicly declared and proven links to organised crime and terrorism are not an insignificant factor.

It will be a challenge for the IP Review Team to get the right balance between Prime Minister, David Cameron's plans behind London's East End becoming a centre of technological innovation to rival Silicon Valley and the fact that companies like Google saying they could never have started their company in the UK under current European copyright law. The significant influence of Google, Facebook and Intel and a promise to invest in the long-term future of the area already becoming known as Silicon Roundabout will bring these opportunities but the fact remains that the predominant reason is that the service they provide depends on taking a snapshot of all the content on the internet at any one time and they are able to do this with the US copyright system which they believe is user- friendly to this sort of innovation.

According to Jonathan Band, "Google is one of the most visible and successful UK companies in the new millennium. Its success is in its search engine which is heavily reliant on the fair use doctrine which is in direct contrast to Europe's opposing view on copyright issues. The US view is part of the constitutional fabric of the copyright law. Fair Use harmonizes the IP clause with the First Amendment and promotes the progress of science and the useful arts by allowing new authors to build on the work of earlier authors". The critical argument being whether "the fair use doctrine excuses Google's copying". It is said, therefore, that it is no accident that global search engines are all based in the US and fair use provides a far more fertile legal environment for innovation than other IP regimes". However, an opposing view is that of US IP Tsar Victoria Espinall in her 2010

Annual Report on IP enforcement. “Lack of intellectual property enforcement in the digital environment, by contrast, threatens to destabilize rule-of-law norms with severe effects on jobs and economic growth”.

Recommendation

ACID believes that the current tried and tested IP framework for copyright, should not be changed to suit current political and commercial aspirations which protect certain industries over others. Historically and contemporaneously, as a result of the Statute of Anne, copyright was established as a property right so that tradable knowledge from the brain is seen as real property in the same way as goods and chattels. If physical goods and chattels are stolen there are legal consequences. In the same way, if intellectual property goods and chattels are stolen there should be equivalent consequences.

Jeffrey Warner in his excellent article in the Telegraph sums it up very succinctly, “Britain is not America, with its vast internal market, and for the UK's content industry to punch above its weight on the international stage, as it consistently does, requires that someone pays for it. The trouble with Google, and its would be variants, is that the business model is constructed on the premise of not paying for anything. Like a leviathan, Google grows by destroying others”

ACID submission to Hargreaves Review on Intellectual Property © Dids Macdonald and Nick Kounoupas March 2011

THIS SUBMISSION IS SUPPORTED BY:

ACID members 1000+ mainly from micro to macro representing £6 turnover

ACID is a member of The Alliance Against IP Theft

ACID is a member of the All Party Group on Design & Innovation

The British Confederation of Furniture, British Contract Furniture Association supports this submission, (UK furniture manufacturing is a substantial industry. It contributes £8.3 billion to the country's GDP, which equates to almost 2% of manufacturing output, and employs 112,000 people within 8360 companies. In addition to this, it is estimated that the industry comprises 18800 self employed individuals and an estimated 25000 interior designers generating an annual value of £2 billion.

ACID Trade Association Partners, Lighting Association, British Interior Design Association, Shop & Display Equipment Association, BCFA British Contract Furnishing Association

Sebastian Conran

Billings Jackson

Richemont (owns some of the world's most prestigious luxury goods including Cartier, Chloe, Baume & Mercier, Mont Blanc, Alfred Dunhill)

British Design Innovation