

Rt Hon Gordon Brown MP
Chancellor of the Exchequer
11 Downing Street
London SW1

3 January 2006

Dear Chancellor

I am writing an open letter to you in response to the announcement made at the Enterprise Conference on 2 December 2005 regarding your invitation to Andrew Gowers to lead an Independent Intellectual Property Review. I understand this is to examine the UK's intellectual property framework with a commitment to "modernise copyright and other intellectual property so that they are appropriate for the digital age".

ACID (Anti Copying In Design) welcomes this and any other initiatives which will serve to highlight what we consider to be an escalating and serious problem within the creative industries in the UK. Government is already well aware of the scope of the problem having received, year on year, alarming statistics which demonstrate that last year, for example, a staggering 11 billion pounds was lost through counterfeiting, piracy and product plagiarism. I cannot emphasise more strongly the concerns of ACID's 1400+ membership (annual turnover 3 billion pounds) spanning 25 different industry sectors that this is one of the most serious problems they face in the 21st century.

To date, we have seen Lord Sainsbury's Innovation Report which puts the protection of innovation at the top table. We have also seen the Patent Office's IP report which, rather than describe it as a strategy, is more a good directory of stakeholders and an adequate starting point for a real strategy. One of the glaring omissions, however, in the IP Crime Strategy is that it did not include design right infringement and the UK Government still does not recognise the disparity between copyright and design right holders regarding criminal sanctions. Why should a furniture designer have fewer rights against a copyist than an artist, for example? Exemplary damages, too, are abysmal and offer no real deterrence to copyists and IP Crime is still considered a "soft" crime. It costs livelihoods, businesses and funds organised crime and, we are led to believe, at the more spurious end, funds terrorism.

What Government needs to achieve with the Gowers report is a real appraisal of the problem at hand and a sensible, achievable grass roots action plan to practically deal with these issues legally, commercially and morally. The retrieval of lost revenue to Government alone could fund the support of the growth of innovation in the UK. This would be of huge benefit to creative businesses whose focus is to use design and quality as a USP in their fight against cheap look-alikes appearing from the Far East. If nothing is done to remedy the levels of copying and dealings in pirated goods currently being experienced, the UK design industry will collapse and the Prime Minister's acknowledgement in the last DTI Innovation Report (December 2003) regarding creativity and inventiveness being one of the country's greatest assets will be undermined.

In 2005 both you and I were included in Design Week's prestigious "**HOT 50**" – **PEOPLE MAKING A DIFFERENCE IN DESIGN**. We clearly share similar objectives and I would welcome further discussion to ensure that the points I have raised in my letter to you are included for consideration in the Gower report.

I attach a bullet point list of the areas which ACID considers should receive a high priority in Mr Gower's terms of reference and I would welcome any approach for further input into this debate.

Yours sincerely

Dids Macdonald (Ms)
Chief Executive – ACID

Cc: ACID Membership
Andrew Gowers
George Osborne, MP
Vince Cable, MP



GENERAL QUESTIONS

1. How IP is awarded

(a) Are there barriers to obtaining IP rights due to system complexity? What could be done to improve this situation? For most SME innovators starting out, even though there is a reasonably simple explanation of the system and process provided by the Patent Office, obtaining a patent is still prohibitively expensive and when one obtains a patent it is very difficult to enforce because of the expense of hiring intellectual property lawyers. I think creative design could be implemented into presenting the information in a much more user friendly way. Most people with whom ACID communicates find the Patent Office website not to be user friendly.

(b) How easy is it to find out about obtaining IP rights? What could be done to improve awareness for businesses and innovators? Is there sufficient awareness of the need to protect IP internationally?

To increase patent awareness for businesses and innovators we need to start looking at the end user – the consumer and education needs to start from grass roots. Involving the end user in an innovative TV series, for example, involving some of the least well loved degree subjects in real case studies could not only encourage more graduates into the sciences but would also, by degrees, educate the consumer into actually what goes into creating a commercial invention.

I do not believe that there is sufficient awareness of the need to protect IP internationally. Although ACID has a few patent holders as members, there is still a general lack of awareness of the different framework of jurisdictions and the fact that it is necessary to apply for international protection. The question also has to be asked what is the incentive for most SMEs to go to the expense and time to get a patent if they cannot afford to enforce their rights. To access specialist IP help in another country is a) difficult to access b) prohibitively expensive and c) almost impossible in Far East countries. More pressure must be brought at political and international trade levels with the creation of international (enforceable) treaties to respect IP rights holders as well as a global network of grass roots support for enforcement access.

(c) Are there barriers to obtaining UK IP rights on grounds of cost? What drives these costs? In the 200 ACID settlements on behalf of members only three have reached a final Court hearing. Of these approximately 93% have been based on unregistered rights. ACID has created its own FREE design register for those relying on unregistered rights providing the necessary audit trail accessible from anywhere in the world. ACID has members from one man bands to multi nationals – there is a lack of desire to register rights because of a) lack of awareness b) cost per unit and c) the mentality that if copied the best route is to move on to the next thing. Hardly the right environment to foster creative continuance. Fashion is a classic example.

We are trying to raise awareness on an ongoing basis regarding the fundamental difference between enforcing a registered right and enforcing an unregistered right in terms of legal costs. Basically if you have your IP house in order it can also act as a deterrent by publicising, in a demonstrable way, that a) a company owns a right b) a company will take action and c) a company will pursue their rights ownership

vigorously. Coupled with the ACID brand used from every available communication platform this is beginning to have an effect, i.e. if a copyist sees an ACID member displaying a sign, they know that a) they may have insurance b) there is a heightened awareness of their IP rights ownership and c) ACID has a proven track record of successful settlements.

(d) How do these costs compare internationally in your organisation's experience? In terms of registered rights – design and trade mark registration - the UK is still not in line with Europe. As mentioned before our members generally are not patent holders. Design registration should be brought right down to encourage IP budgets to be included in a design management strategy. Many ACID members bring out literally hundreds of new products per year and even for medium sized companies it is still cost prohibitive. The EU idea of making 11 and over registrations in the same class affordable will, if this is made aware, educate innovators in taking out design registrations.

(e) Do you have any comments on the UK Patent Office fees structure for obtaining and renewing IP protection? This is covered above.

(f) Is lack of trust in the system a barrier? To what extent do you rely on other tools to bring innovation to the marketplace, such as being first to market, maintaining trade secrets, or using an open innovation model to generate value through reputation or network effects? Again, covered in an earlier question, at grass roots where ACID works, the current culture is very much if a design is copied, move on – this puts an enormous pressure on the creator who has spent time, effort and investment in bringing a product to market. 86% of copied products within ACID are discovered at the exhibition shop floor, usually the first market appearance. That is why we have introduced an on the spot mediation system. Out of over 1600 grass roots mediations, less than 30% have required further legal action. ACID has an Accredited exhibition organiser scheme. Organisers adhere to a strict set of criteria and publicly declare a zero tolerance of plagiarism. Deterrence and naming and shaming are key to its success. Exhibitors need to feel safe and secure if they have brought new product out so that it can reach its full market potential without being copied and mass-produced elsewhere. We have found that some of the biggest offenders are our own high street multiple stores.

In ACID's submission to the Gowers Report I have suggested that emphasis is placed upon a Corporate Social Responsibility statement on IP issues receiving high profile and government backing – something with real teeth which would change the culture in some high street retail buying departments where they consciously look for new successful product, change it so that it cannot be legally challenged and then source it cheaply in the Far East leaving the innovator and creator high and dry and disincentivised.

(g) Are there specific barriers to obtaining IP rights in your sector?
Expense, awareness and the cost of enforcement.

(h) Are there specific barriers to obtaining IP rights for small businesses or individuals? Same as above

(i) How well does the national system for awarding IP, administered by the Patent Office perform? How well do the international and European systems work? All need a strategic change of focus from administering a system i.e. being reactive, to being proactive in offering practical, workable solutions and frameworks for copying problem solving without the need to hire expensive IP lawyers.

2. How IP is used

(a) What types of IP does your organisation use and why? The majority of our 1400+ members are either individual designer makers or product designers and manufacturers. All have joined because they have copying issues. All are frustrated with the current inaccessible system which does not offer satisfactory exemplary

damages to deter committed copyists. It is easy for a major high street retailer with purchasing capability to free ride on the best design, have it manufactured elsewhere more cheaply and not reward the originator. ACID has an ongoing campaign aimed positively at retailers 'Commission it, Don't Copy it'. It is a simple way of ensuring that the end user, the consumer, gets good design and value for money, encouraging retailers to commission original design and reward the originator. In amongst this equation are the parameters for all to win. The retailer wins by acknowledging and financially rewarding the originator. The designer is incentivised to keep on designing because they are being paid and not going to be ripped off. Simple solutions to a complex subject. Why would retailers continually earmark deep legal budgets to defend themselves when they are being challenged when they could utilise this budget to keep innovation alive. All would win!

(b) To what extent do you seek multiple overlapping forms of IP protection?

The description 'IP Protection' is a bit like the vanilla approach to IP. IP as we all know is a highly complex subject, the criteria that apply to certain areas do not apply to others, industry sectors vary, there is small versus large. There are threats that apply to the livelihoods of one innovation discipline that do not to the other. There are statistics that have relevance to some and not to others. The US Chamber of Commerce representing 3 million businesses states that in 20 years, unless something is done, two trillion dollars worth of revenue will be lost through counterfeiting, piracy and product plagiarism. Clearly this is a dynamic, global problem waiting to erupt. However, by treating IP as one subject merely dilutes and negates the prospect of real, tangible progress in the fight against those countries whose economies will thrive whilst ours declines. The strategy for survival should be elephant in clearly defined bite size pieces led, from the top, by a Cabinet Minister responsible for ensuring that the UK, at least, is ahead of the game in the protection of all the complexities, of all the stake holders, of all the creators and innovators, but probably most important of all, getting through to and changing the culture of the end users – that theft is theft whether it is a thing or an idea.

(c) To what extent are these decisions influenced by sector-specific considerations? I think I have outlined ACID's views above. For example, why should an artist have more rights than a furniture designer? Why should, at the very far end of the scale a copyright owner be able to rely on criminal sanctions and a design right owner only be able to rely on civil action?

(d) How does your company value its IP? Are there problems with raising finance against intangible assets based on IP? What improvements could be made in this area? ACID has instigated its own IP Audits whereby we look at the health of agreements that underpin a member's IP rights, what agreements are in place for their staff, are there restrictive covenants in standard terms and conditions of employment? Is there a document management system in place? At this point we will also go into specific areas of awareness regarding explanations of IP rights. Often we are surprised that companies with turnovers of more than 50 million pounds can have significantly less in place than, say, an SME with a turnover of less than 100K.

We are currently looking for funding to progress our Educate to Protect campaign to raise awareness about including IP protection and exploitation into a national design management strategy underpinned by our own relevant case studies which demonstrate what can positively be done, mostly at low cost or no cost.

(e) To what extent does the term of IP rights at the margin affect investment decisions? As awareness grows we believe that establishing a good design management strategy which includes budgeting for registration, enforcement and exploitation should be used as a tangible decision maker in the valuing of businesses in the 21st century. Accountants need to be much more aware of the intangible as well as the tangible assets. The investment made into a brand that can harness a successful product range is still difficult to quantify. For example, who could quantify brand UK for its innovation and creativity? There is clearly an unquantifiable value there but, looking

from the bigger picture of, say, Genetic being 'sold' to the US for a song and, nearer home, our own creativity flying out of the window to the Far East because we haven't done enough to protect what we are good at, nationally, being innovators!

3 Cross Cutting Review of the Knowledge Economy - Review of Government Information, July 2000:

http://www.hm-treasury.gov.uk/spending_review/spending_review_2000/associated_documents/

4 EU Directive 2003/98/EC on the Re-use of Public Sector Information, 17 November 2003:

http://europa.eu.int/eur-lex/pri/en/oj/dat/2003/l_345/l_34520031231en00900096.pdf

5 The Re-use of Public Sector Information Regulations 2005: <http://www.opsi.gov.uk/si/si2005/20051515.htm>

(f) How well does the UK IP system promote innovation? Not nearly enough, it is our biggest national asset. Look at the Design Council's 10 year study on 200 companies who included design as part of their strategy – they all outperformed the stock market by 200% It follows, therefore, that protection and full exploitation of design is paramount.

(g) To what extent does your organisation make use of other methods used by Government to encourage innovation, such as public funding? Like all funding, most is inaccessible or unknown. We have tried for many years to obtain funding from the UK Patent Office to enlist financial help to push forward our initiatives. The majority have fallen on stony ground – Commission it Don't Copy it, Educate to protect, Design = Value, A National Design Mediation scheme based on our own highly successful business model.

(h) Are data on the use of patents and other forms of IP useful as a means of measuring innovation? By whom?

(i) Do you have any evidence as to the static or dynamic costs that IP rights (as statutory monopolies) impose on the economy? None, other than the AACP figures of 10 billion lost to the economy through counterfeiting, plagiarism and product piracy in 2004. Basing decisions on statistics is very unreliable. I made my presentation to the Gowers Report team with the picture of an iceberg. Statistics probably account for the top ninth, the rest is unknown but they are there. Whilst we have 200 settlements this represents just a tiny fraction of the amounts lost by our members. I was amongst, now many thousands, who have or nearly lost their business and livelihoods as a direct result of copying. Just because I and others didn't go to Court does not mean that the problem does not exist?

(j) Have you encountered patents or other IP rights being used defensively, i.e. obtained not to develop products, but only to prevent others from doing so? Under what circumstances do you consider this acceptable? I am unaware of this practice within ACID Membership.

3. How IP is licensed and exchanged

(a) How easy is it to negotiate licences to use others' IP for commercial or non-profit purposes? ACID has spent the last year and a half consulting with designers and manufacturers to produce a Licence Royalty agreement which we are promoting as an industry standard, creating a level field for both parties and encouraging acknowledgement of originators. It is based on court judgements so there is little an IP lawyer could challenge. It provides the innovator with a good, sound useful tool of self-help; it provides a safer commercial framework from which to fully exploit IP. It also enables the designer to appear to be more business like and in control of the innovation

they have created. All ACID's agreements are user friendly, light on legalese and are intended to give confidence to all users.

(b) What mechanisms do you use for finding potential licensing partners? Not applicable.

(c) How easy is it to use others' IP for research purposes? Have you experienced difficulty around research exemptions? ACID supports the Audi Foundation's objectives for a level playing field in clarification of the ownership of IP from an educational establishment and research fellow/graduate aspect. Unless there is a clear national framework for access and exploitation, a valuable resource will be under utilised.

(d) Are there specific barriers to licensing in the main forms of IP currently used: patents, copyright, trade marks, and designs?

(e) Are there barriers to licensing IP on grounds of cost? What drives these costs?

(f) Are there specific barriers to licensing IP in your sector?

(g) Does your organisation use methods to facilitate exchange of IP - such as cross-licensing or pooling IP rights with other firms or organisations? ACID provides basic agreements and tools of self-help to enable cross licensing or pooling of IP rights. Again, more could be done by the Patent Office with its independent legal resource to be championing these as industry standards.

(h) Are there specific barriers to licensing IP rights for small businesses or individuals - for example barriers to entry to patent pools? Access, understanding of the consequences of substandard legal clarification and cost.

(i) Are there barriers to trade and exchange of IP internationally? Same.

(j) Does your organisation consider renewing patents using "licence of right" provisions in patent law (which entitle any person to a licence under your patent and reduce your renewal fees by half)?

(k) What could be done to improve "licence of right" provisions and business awareness of them? Sector specific education, education, education.

(l) Do you have any experience of the compulsory licence provisions within current patent law? Are they effective? How could they be improved?

4. How IP is challenged and enforced

(a) Are there specific problems with enforcing the main different forms of IP: patents, copyright, trade marks, and designs? Design Right, for example, prohibitively expensive IP specialist legal help, lack of understanding and education for originators to provide an IP audit trail to support enforcement, a lack of, say, a national design mediation framework for complaint handling. This could be linked to a nationally commercially desirable corporate social responsibility within which a specific IP requirement would include, first of all, adhering to a Code of Conduct which necessitates going to a design mediation system initially. Often when an SME challenges a high street retailer it is standard practice to stonewall any legal challenge, thereby allowing product to reap commercial benefits by, often perpetuating litigation. At the end of the day the retailer's legal costs can be justified by the commercial gain of product running its course. In the meantime, the SME has had to fund expensive legal costs in pursuit of fair play.

(b) Are there barriers to challenging infringement and enforcing your IP rights on grounds cost? What drives these costs? IP lawyers who charge large fees whether they win or lose and a system for awarding costs based on little more than 80% if claimants are lucky. Exemplary damages are virtually non existent so what is the motivator for many to take legal action? Where is the deterrent? ACID has its own naming and shaming policy, which is reasonably effective, but that is not the answer. Easy access to affordable legal fees and a nationally 'compulsory' IP insurance. ACID has just introduced an IP insurance scheme after 6 years of research and development. We believe that with the ACID brand this will provide a real deterrence. We intend to publicise this from every available platform.

(c) To what extent does your organisation make use of other methods than litigation to resolve IP infringement cases, for example the Patent Office opinion service, mediation services, Alternative Dispute Resolution, or the Copyright Tribunal? None at the moment but I am looking forward to positive dialogue with the Patent Office to work in joint cooperation. ACID submitted details of its scheme for PO support way back in 2002. Unfortunately this was not forthcoming at the time.

(d) To what extent do you use IP litigation insurance? How effective is it? See above – time will tell.

(e) Are there barriers to using such methods to settle IP disputes without recourse to litigation? How might they be removed? In our experience we have found that many of the member to member complaints can be resolved in pre-mediation correspondence using ACID as an independent conduit for making a complaint known to the other party and negotiating a means by which both can continue to work within the same sector having agreed the parameters within which they acknowledge (or not) the alleged complaint.

(f) Are there specific barriers to challenging and enforcement of IP rights for small businesses or individuals? Cost, understanding of the complexity of information they need to gather in order to take legal action and a belief that they will see fair play by taking action. Often we have found that, despite investment of time, energy and expense, whilst there are settlements without going to Court, it rarely leaves the complainant feeling that it was worth taking action.

(g) To what extent is the risk of litigation a factor in your organisation's investment in innovation? Not enough creators and innovators include a legal contingency in their investment in innovation

(h) What are the principal barriers to efficient and successful challenge and enforcement internationally? Expensive lawyer-to-lawyer exchange, hampered by language barriers, different legal jurisdictions and in many cases not having the right IP registrations in place.

SPECIFIC ISSUES

• Current term of protection on sound recordings and performers' rights

Background: The Review will fulfil the Government's commitment to examine whether the current 50 year term of protection on sound recordings and performers' rights in sound recordings is appropriate, in the light of its extension to 95 years in a number of other jurisdictions.

(a) What are your views on this issue?

(b) Is there evidence to show the impact that a change in term would have on investment, creativity, and consumer interests?

(c) Are you aware of the impact that different lengths of term have had on investment, creativity, and consumer interests in other countries?

(d) Are there alternative arrangements that could accompany an extension of term (e.g. licence of right for any extended term)?

(e) If term were to be extended, should it be extended retrospectively (for existing works) or solely for new creations?

• Copyright exceptions - fair use / fair dealing

Background: There are a number of exceptions to copyright that allow limited use of copyright works without the permission of the copyright holder.

(a) What are your views on the current exceptions in copyright law?

(b) Could more be done to clarify the various exceptions?

(c) Are there other areas where copyright exceptions should apply?

(d) Are the current exceptions adequate or in need of updating to reflect technological change? For example copyright law in the UK does not currently

have a private “fair use” exception. Such an exception might allow individuals to copy music CDs onto their PC and MP3 player for their personal use. Should UK law include a statutory exception for “fair use”?

(e) How would you see content owners being compensated for such use?

(f) To what extent has technological change presented difficulties in use of copyrighted? material in the field of education?

(g) Are there issues concerning the archiving of material covered by copyright?

• **Copyright – digital rights management**

Background: Increasingly digital media content is distributed with digital rights management (DRM) technologies that can enable rights-holders to track usage and prevent unlicensed copying by technological means. However concerns have been raised about interoperability and that such technologies may impair the content consumer’s legal rights. For example they may be unable to take into account exceptions to copyright, the ultimate expiry of copyright term, or the future evolution of technology.

They may therefore undermine legitimate rights to access digital content, now and in the future. (NB: We are aware of all formal submissions that have been made to the All Party Parliamentary Internet Group on this issue.)

(a) Do you have a view on how the use of digital rights management technologies should be regulated?

• **Copyright – orphan works**

(a) Have you experienced any difficulties in identifying the owners of copyright content when seeking permission to use that content?

(b) Do you have any suggestions on how this problem could be overcome?

• **Copyright -licensing of public performances**

(a) Have you encountered problems with the system of licensing and paying royalties to collecting societies for public performance of music and/or sound recordings?

(b) Could the system be clarified or simplified, and if so how do you see this working?

• **Patents – utility models**

Background: Some countries, notably Germany, have a “utility model” system offering protection for simple inventions, usually subject to less examination and shorter terms than standard patents.

(a) Do you have a view on some sort of second tier patent system?

(b) Has your organisation encountered problems in protecting its IP internationally where such systems exist?

• **Pharmaceutical Supplementary Protection Certificates (SPCs)**

Background: SPCs are a “sui generis” IP right available in EU Member States for pharmaceutical products (as well as plant protection products). The standard patent term is 20 years. SPCs aim to compensate rights holders for the time required to obtain regulatory approval for their products. Where regulatory approval is issued more than five years after a patent is granted, SPCs may be granted to extend the term of protection on the active ingredient in the patented product. SPCs last for a term corresponding to the period elapsed between the five-year point and the point at which the product reaches market, up to a maximum term of 5 years.

(a) Does your organisation use SPCs?

(b) How fair and effective are they in delivering an incentive for investment?

(c) How could they be improved?

(d) Should the term of SPCs be more flexible - perhaps relating straightforwardly to the period between patent award and regulatory approval?

- **Trade Marks – international issues**

(a) To what extent does your organisation register its trade marks at the European rather than national level? Without statistics this is a very difficult question to answer. Again, education and awareness of the different access to trade mark protection is key. ACID promotes at every opportunity the benefits of registering a trade mark whether it is UK or at OHIM. More could and should be done to raise awareness of the existence of these rights. If one asked many SME's what OHIM is or what the Patent Office actually do, few would be able to answer. The Patent Office is a misnomer to many except, obviously stake holders and the patent office itself in that most believe that it concerns itself with 'patents' only. Again, few realise who OHIM are in terms of the European designs and trade mark registration authority. In our own, somewhat limited way, we believe that these organisations need to be brand led rather than deal within their own rather limited understanding of their own relevance to the end users.

(b) Could the UK trade mark system be improved to work better alongside the European system? Yes, however, characteristically we tend to veer towards a US 'litigation friendly/happy' way of dealing with the law rather than looking at our own national strengths which are creatively and innovatively dealing with Government agencies and getting key messages out to industry at large. Unless there is education and understanding of the key elements of the IP that relate to our own businesses we are going to fall behind in bringing ourselves into the 21st century with outdated, outmoded and draconian systems that do nothing to encourage maximum exploitation of IP rights but do everything to create laws in which there are few winners, only IP lawyers – the fastest growing legal specialism in the last 6 years.

- **Designs – registered designs and unregistered design rights**

(a) To what extent does your organisation rely on registered designs? And on Unregistered design rights? As quoted before, out of 200 settlements approx 93% have relied on registered rights. A simple communication from every relevant available platform of the benefit of obtaining a registered right 'You have a piece of paper, a certificate which says you OWN a design' is the same as, say, owning the title deeds of your own home. IP is about ownership and authorisation of its use. Simple messages, simple communications could educate and enhance the commercialism of our creative and innovative resources.

(b) To what extent does your organisation register its design at the European rather than national level? Already covered

(c) To what extent does your organisation rely on the European unregistered design right rather than the national UK unregistered design right? ACID believes that, because of lack of awareness of the existence of the RCD, it is relatively little used. The fact that there are so few registrations in relation to new product being brought to market is indicative of the fact that not enough is done to 'market' the RCD. ACID has lobbied for a recognised 'kite mark' or symbol, similar to the ©®™ being created for the RCD, so far, having fallen on deaf ears. It is only by marketing and communicating an internationally recognised symbol that an RCD will have significance in its deterrent value.

(d) Could the UK registered design be improved to work better alongside the European system? Not in its present format. Why would a designer pay 60 pounds for one design when they can get an RCD for 11+ products at 60 euros per design? The costs do not equate neither does the protection offered i.e. in 25 member states. Most ACID members market their products at least on a European wide level, if not internationally

(e) Could the UK unregistered design right be simplified to work better alongside the European unregistered design right?

(f) Do you see a useful role for the UK unregistered design right alongside the European design right? Not really – for the above reasons. However, I think it would be easier for the national policy makers to steer responsibility to Europe rather than working collaboratively along side and embracing a European registered design and supporting it at national level rather than trying to compete and waste valuable resource. Maybe this is why design right owners in this country have such a raw deal. Why should a furniture designer have fewer rights than an artist? ACID actively lobbies for support at national level for a right which is probably more effective at European level. The two do not equate on a competition level but on a recognition level.

• **Legal sanctions on IP infringement**

(a) Are you aware of any inconsistencies or inadequacies in the way the law applies legal sanctions to infringement of different forms of IP or to different circumstances? Passionately, for the reasons stated in my presentation to the Gowers report. There is no contemporary, intellectual, practical or legal reason for a disparity between copyright owners and design right owners in the 21st century, not least in the fact that we are one of the only two countries who do not adhere to Unfair Competition.

(b) For example, should criminal sanctions on online infringement be the same as those relating to physical infringement? Of course, theft is theft whether it is a thing or an idea. A Board of Directors of well known copyists would be appalled if one accused them of stealing a co-director's watch or wallet but many think it is fair game to steal ideas or product ideas. That's OK.

• **Coherence between competition policy and IP policy**

(a) Has your organisation experienced any activity linked to IP rights that you regarded as unfair competition? Yes, many times

(b) How did you deal with this problem? In 2002 we wrote to the Secretary for State & Industry The Rt Hon Patricia Hewitt and pointed the matter out. This is included in all dialogues in our main submission. We created a new law of unlawful imitation; we provided case studies to substantiate our claim. We were told that whilst our case had merits, by Peter Lawrence of the Patent Office, it would not receive legislative priority. No stone will be left unturned until we achieve our objectives.

(c) Was competition law effective at controlling this behaviour? No

(d) Should competition law have a greater role to play in regulating IP? Yes, for the reasons stated in all our arguments over the past 4 years

(e) How would you see the system working? The introduction of a new law of unlawful imitation to bring the UK in line with its European counterparts.

• **Parallel Imports / International Exhaustion**

Background: European law does not allow firms to use trade mark or copyright law to prevent their goods sold in one EEA Member State from being imported and resold in another Member State – i.e. they are not able to segment the EU market. However European law does allow the use of trade mark and copyright law to restrict the imports to EU Member States of goods sold outside the EEA. It also specifically inhibits EU Member States from legislating to remove such import restrictions at the national level

–
so called “international exhaustion” of trade marks or copyright. There has been a good deal of debate, both here in the UK and at EU level, about the costs and benefits of removing restrictions on parallel imports. There is a further issue of firms taking advantage of variations in prices on pharmaceutical products across the EU and repackaging drugs bought cheaply elsewhere within the EEA to resell within the UK.

(a) Has your company been affected by parallel trade? Yes, our members have.

(b) What would be the impact on your organisation of a change in the current rules? One has to look at the subject from a positive rather than a negative stance. In all legislative advances there are those who will benefit from taking advantage but there

are the majority who would benefit from embracing fair play. This is one of the examples where clear cross border legislative frameworks could be developed to embrace legitimate IP trade and usage and impose deterrent trade sanctions on those who choose not to obey the rules

(c) What evidence is there of the costs and benefits, both for consumers and firms of the current rules? I would imagine impossible to quantify - on what criteria are you analysing the statistics?



ACID's list of Intellectual Property priorities to be considered in the preparation of the Gowers Report

- **Addressing the disparity between copyright and design right owners with the introduction of criminal sanctions for design infringements.**
- **The expansion of legal remedies available for design infringement.**
- **The introduction of a new law of unlawful imitation to bring the UK in line with many other European countries on Unfair Competition.**
- **“Educate to Protect” – the introduction of a national intellectual property educational and awareness scheme within schools and universities.**
- **Intellectual Property Insurance – the introduction of a Government backed and endorsed national scheme for the creative industries.**
- **Design Mediation Court – the provision and introduction of a Government backed and endorsed national low cost scheme, accessible to all.**
- **The Appointment of a Government Minister – Managing Intellectual Property. A dedicated Minister who will ensure that there is a coordinated effort to place intellectual property and exploitation as a national priority.**

Addressing the disparity between copyright and design right owners with the introduction of criminal sanctions for design infringements

Virtually all three-dimensional products are now protected solely by unregistered or registered design rights. Copyright will only protect a very narrow range of three-dimensional products which fall within the definition of “works of artistic craftsmanship”.

Similarly, trade marks only protect a very limited number of three-dimensional products, all of which have to be well known products. Accordingly, design law today has a far greater importance in terms of protecting new designs than it has ever done in the past.

The definition of pirated goods under Council Regulation (EC) No 3295/94 amounts to any goods which are or which embody copies made without the consent of the holder of the design right (registered or unregistered). Products within the design industry which are often pirated include plush toys, clothing and jewellery. On top of that, the four most copied industries within ACID's membership are the furniture, textiles, interior accessories and giftware industries. A visit to any major High Street retailer will clearly demonstrate the importance of these sectors of the design industry to the UK economy.

ACID is extremely concerned that there are currently no criminal sanctions whatsoever under the UK unregistered design right, the UK registered design right, the unregistered Community design or the registered Community design. Accordingly, anyone dealing in pirated goods that are protected by one of the design rights rather than by copyright or trade marks are at no risk of criminal proceedings being brought against them.

Since ACID was formed in 1996, it has seen a huge escalation in the amount of copying taking place within the design industry. This has been particularly noticeable in the last two years. ACID firmly believes that the introduction of criminal sanctions for design right infringements, coupled with the improvements in damages recoverable (as discussed below), will have a significant effect on the reduction of copying and dealings with pirated goods in the UK, consequently strengthening the British design industry.

The expansion of the remedies available for design infringement.

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. As discussed above, 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.

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.

The proposed Directive deals with this problem head on in Article 17. In particular, Article 17.2(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 experiences 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.

Case study

The following case study represents a typical example of a scenario which arose at the Decorative Interiors exhibition held at the Birmingham NEC in January 2004.

An 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 hand made throws and cushions.

Another company, a few stands away, was exhibiting cushions that reproduced identical machine-made designs to those featured on the hand made 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 evening 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 introduction of a new law of unlawful imitation to bring the UK in line with many other European countries on Unfair Competition. The proposed new law - "any act which takes unfair advantage of the distinctive character or repute of a design or designs"

- Unlawful Imitation – Lobbying progress and history. August 2002 – current

ACID (Anti Copying In Design) Member awareness campaign - grass roots rallying amongst members to write to their MPs. Approx 20 members wrote to their MPs and many MP replies were received and forwarded to ACID. Dids Macdonald (DM) wrote to them all and met with Michael Portillo who pursued the issue on ACID's behalf. The majority of replies from the Minister Rt. Hon Patricia Hewitt, were along the following lines:

“Further extension of the scope of IP protection must be looked at in the broader balance between competition advantages for consumers and those of rights holders. For instance, expanding what constitutes an infringement of rights

would raise concerns about possible anti-competitive effects of IP rights if these were to extend beyond the expression of a particular designer. As you have pointed out, there is already the possibility of taking action for “passing off”. We have not been provided with evidence to suggest that “passing off” does not provide an adequate solution for so called “free-riding” on the design of products” She continued “I fully support the thinking behind the ACID campaign to encourage retailers and manufacturers to sign up to a voluntary code of conduct. This should be a useful way forward”

Grass roots campaign halted – no point in wasting MPs time to keep receiving the same responses

Dids Macdonald (CEO – ACID) - DM sourced who she believed to be the drafter of the Minister’s replies and requested a meeting and an informal discussion was held between DM and Peter Lawrence – then Director of Trade Marks at the Patent Office on 11 February 2003.

Reasons given by Peter Lawrence for negative Government response

Pressure on parliamentary time - priorities
Similarity to major brand look-alike issue, already rejected

DM explained that this is a totally different issue. The fundamental difference that many SME’s face is that it is difficult (almost impossible), if relying on the remedy of “passing off”, to establish a reputation in the market place. The majority of companies experiencing these problems are trade only and niche market. PL indicated that he would like to see the examples to give ACID an opportunity to persuade Government to alter their position.

April 2003 - DM and Simon Clark (ACID Associate Lawyer and Head of IP, Berwin Leighton Paisner) met Peter Lawrence (PL) to present six case studies to substantiate their argument. Peter Lawrence acknowledged that the current remedy of passing off was insufficient to offer a legal remedy in these cases.

April 2003 – December 2003 DM wrote to PL to ask him confirm his verbal acknowledgement.

December 2003 – Reply from PL at the Patent Office agreeing that on the basis of the ACID case examples, passing off would not provide an appropriate remedy. A meeting took place between ACID LOBBY, DTI and the Patent Office to progress this issue. May 2004 confirmation that whilst the examples demonstrated a loophole in current legislation this would not receive parliamentary priority. ACID is determined to pursue this issue, regardless.

“Educate to Protect” – the introduction of a national intellectual property educational and awareness scheme within schools and universities.

The introduction of a national IP education scheme for all final year university students encompassing user friendly communication of what rights are available, what practical steps can be taken to protect and fully exploit IP rights.

Intellectual Property Insurance – the introduction of a Government backed and endorsed national scheme for the creative industries.

A National Scheme to allow rights holders to take action against infringement. ACID has such a scheme which will be launched to members in 2006.

Based on ACID's existing model both at grass roots and at ACID mediations, lasting no longer than three hours with an IP barrister. Cost and time effective. Intellectual property lawyers are the fastest growing specialism within law firms. To most the cost of taking action it is prohibitive. Of the 200 settlements for ACID members only 3 have reached a final court hearing. The rest have been settled through process of mediation. Of the 1600+ mediations at grass roots, only 28% had to take further legal action.

The Appointment of a Minister – Managing Intellectual Property

IP theft costs UK businesses billions of pounds and weakens the economy. The appointment of a Minister will ensure that there is a coordinated effort to place IP protection and exploitation as a national priority. Let's take intellectual property to the heart of Government so that strategic decisions can be taken at the very top level to protect our innovation both at home and abroad for this generation and the next.



ACID – Unlawful Imitation – Status Report

The proposed new law - “any act which takes unfair advantage of the distinctive character or repute of a design or designs”

HISTORY August – December 2002

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January 2004 – ACID LOBBY launched. Key Objectives: 1) Unlawful Imitation – revive grass roots lobbying and achieve our objectives. 2) Design = VALUE. 3) “Educate to Protect” – a national scheme. 4) National Design Mediation – an alternative to litigation. ONGOING.

November 2005 – ACID re-launches initiative within membership to raise Unlawful Imitation with their MP's to make this a legislative priority for 2006

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