

## Copyright in industrial design



The New Zealand Copyright Act 1994 offers protection against copying of industrial designs quite separately from any protection which may be offered under the Designs Act 1953.

Traditionally, copyright has protected artistic and literary works, along with musical and dramatic works. However, since 1975 the law has recognised that design drawings and prototype models are artistic works and that the copyright which subsists in these works may be infringed by making three-dimensional copies. This is not the case in most other countries.

### Obtaining copyright

Unlike patents, it is not necessary to apply to register a work for copyright. Copyright subsists automatically in design drawings as published works from the time the product carrying the copyright design is first released. The application of a copyright notice such as '© AJ Park 2007' is advisable for evidentiary and deterrent reasons, but is not mandatory.

### The subject matter of design copyright

Copyright subsists in the forms by which designers express their designs, namely drawings or models. It does not subsist in the actual articles which employ the design except in rare cases where the articles constitute works of 'artistic craftsmanship'.

The subject matter of drawings in copyright cases before the New Zealand courts has included coins, plumbing fittings, cable ties, filing cabinets, flying discs, toys, dresses, caravan windows, kiwifruit trays, pumps, computer cabinets and internal layouts, electrical connectors, nylon label attachments and animal ear tag applicators. In short, virtually anything against which an alleged copy can be visually compared.

### Originality

To attract copyright a drawing or model must be original. This does not mean novel in the patent sense, but simply that skill and labour have been applied in making the drawing or model and that the author has not copied.

### Infringement

An article will infringe the copyright in a drawing or model if it is a copy of a substantial part of that drawing or model. Independent design, however close the resemblance may be, will not infringe copyright.

It is not necessary for a copier to have seen the copyright work since indirect copying, by copying a production article for example, is still an infringement.

### Defences to infringement

Since 1985, copyright in a drawing or model is not infringed by three-dimensional reproduction if the copier can show that he or she has copied the drawings of a published New Zealand patent specification or registered design which has lapsed. Further, copyright does not protect ideas as such but rather the form in which they are expressed. A bare idea may be copied provided it is not the subject of a patent.

## Term

Copyright protection against reproduction in three dimensions subsists for 16 years from the date on which the design was first commercially applied anywhere in the world unless the design is embodied in a work of artistic craftsmanship in which case the term is 25 years.

## Ownership

Unless there is an agreement to the contrary, copyright will be owned by the author of the design (draughtsperson), or the author's employer (where the design was made in the course of employment) or the person who commissioned the design and agreed to pay for it.

## Enforcement

Copyright infringement is a civil wrong and therefore copyright owners must enforce their copyright themselves. Enforcement is usually by way of a proceeding in the High Court. Our firm is experienced in the specialist field of copyright litigation.

## Licensing

Apart from using copyright to protect one's own manufactured products, another mode of commercially exploiting design copyright is by licensing others to reproduce or use the design in return for royalties. Our firm specialises in the preparation of licence agreements.

## International aspects

The above notes reflect the law of copyright in New Zealand. The copyright law of other countries will often differ. Under one of two international conventions, to which most countries are signatories, countries confer the benefit of their national law on overseas copyright owners or on the owners of copyright works first published in overseas countries. Thus, a design conceived in Australia will attract New Zealand copyright which will be enforceable in New Zealand against any potential infringers.

The reverse situation does not necessarily apply. The owner of a design protected by copyright in New Zealand will not receive protection in most other countries. Their laws do not protect three-dimensional reproduction of industrial designs.

## Importation

Importation of unauthorised copies is an infringement of copyright.

However the importation into New Zealand of genuine products (which directly or indirectly attract copyright), even without the consent of the copyright owner as in parallel importation, will not constitute a breach of copyright.

## Border control

Under the Copyright Act imported pirated copies can be made the subject of detention by New Zealand Customs. Copyright owners or their agents simply have to file a notice with Customs and post a bond. After detention of the goods the copyright owner must commence a proceeding in the High Court within 10 days to avoid release of the goods.

## Criminal offences

It is a criminal offence to make, import or sell an object which is an infringing copy of a copyright work. However the person dealing with the object must have knowledge that it is an infringing copy. The penalty is a fine of up to \$5000 for each infringing copy and/or imprisonment of up to three months.