

COPYRIGHT AMENDMENT BILL

EXPLANATORY NOTE

THIS Bill amends the Copyright Act 1962. The Bill is based on the recommendations contained in the Report dated 20 February 1984, of the Industrial Property Advisory Committee to the Minister of Justice entitled "The Law of Copyright as it applies in New Zealand to Industrial Designs".

Clause 1 relates to the Short Title.

Clause 2 amends the definition of "artistic work" in section 2 (1) of the principal Act by inserting in paragraph (a), after the word "engravings", the word "models". A design expressed in 3 dimensional form (assuming it is not a sculpture or work of architecture) is not an "artistic work" and does not come within the scope of copyright protection unless it is a work of "artistic craftsmanship". A design expressed in the form of a drawing does, however, constitute an "artistic work" regardless of its artistic quality. Accordingly, whether a design is subject to the protection afforded by the Copyright Act 1962 depends on the form in which it is originally expressed. The insertion of the word "models" in paragraph (a) of the definition of the term "artistic work" means that copyright protection will be available in the case of all designs created in 3 dimensional form regardless of artistic quality.

Clause 3 inserts new sections 20A and 20B in the principal Act.

Copyright in any literary or artistic work (e.g. any drawing) is infringed if the designs embodied in the drawing are reproduced. The copying of a product which embodies a drawing in which copyright exists may itself be an infringement of the copyright in those drawings. This is so notwithstanding the expiry of any related patent or design registration.

The new section 20A accordingly provides that copyright in any literary or artistic work is not infringed by the doing of any act if, when the act was done, that literary or artistic work was or formed part of—

- (a) A specification laid open to public inspection in the Patent Office in respect of a patent granted in New Zealand which had expired, or been surrendered, or lapsed without being restored; or
- (b) A specification laid open to public inspection in the Patent Office in respect of which no patent had been granted in New Zealand; or
- (c) A specification laid open to public inspection in any other country in respect of which no patent had been granted in New Zealand; or
- (d) A representation or specimen of a design open to public inspection in the Patent Office, being a design the registration of which under the Designs Act 1953 had expired or been cancelled; or

- (e) A representation or specimen of a design open to public inspection at the Patent Office, not being a design registered under the Designs Act 1953; or
- (f) A representation or specimen of a design open to public inspection in any other country, not being a design registered under the Designs Act 1953.

The new *section 20A* applies in respect of the doing of any act after the commencement of the principal Act, unless before the commencement of the Bill proceedings for infringement of copyright in respect of that act have been commenced and the hearing of the substantive matters in issue in those proceedings has also commenced.

The new *section 20B* provides that the copyright in a literary or artistic work is not infringed by the doing of any act if, when that act was done, that literary or artistic work had been applied industrially in New Zealand or in any other country by or with the licence of the owner of the copyright more than 16 years before the act was done.

A literary or artistic work is applied industrially if—

- (a) More than 50 reproductions in 3 dimensions are made of it (other than by hand) for the purposes of sale or hire; or
- (b) It is reproduced in 3 dimensions in 1 or more articles manufactured in lengths (other than by hand) for the purposes of sale or hire.

For the purposes of the section 2 or more reproductions in 3 dimensions which are of the same general character and intended for use together are a single reproduction.

The new section comes into force on 1 October 1986.

Clause 3 also repeals section 20 (8) of the principal Act and abolishes what is referred to as the “non-expert test” in actions for infringement of copyright in artistic works.

Clause 4 substitutes a new *section 25* in the principal Act.

The new *section 25* is substantially similar to the existing section 25 except that it is now provided that where the infringement consists of a 3 dimensional reproduction of an artistic work or a reproduction in 2 dimensions necessary or incidental to the reproduction in 3 dimensions, the Court may only grant relief after it has had regard to—

- (a) The flagrancy of the infringement;
- (b) The benefit to the defendant from the infringement;
- (c) The sufficiency of damages for infringement as a remedy;
- (d) Any other matters the Court thinks fit.

The new section applies in respect of the conversion or detention of any infringing copy or of any plate used or intended to be used for making infringing copies, occurring after the commencement of the principal Act, unless before the commencement of the Bill, proceedings in respect of that conversion or detention have already commenced and the hearing of the substantive matters in issue in those proceedings has also commenced.

Clause 5 inserts a new *section 27A* in the principal Act. The new section relates to proof in proceedings for infringement of copyright in an artistic work of which 3 dimensional reproductions have been made available to the public. It provides that where, in an action for infringement, it is proved that at the time each reproduction was made available (whether in New Zealand or in any other country) it was labelled or marked so as to indicate the following claims, namely—

- (a) That copyright existed in the artistic work of which the reproduction was made; and

(b) That the person named on the label or mark was the owner of the copyright or an exclusive licensee; and

(c) That the reproduction was made available to the public in a year specified on the label or mark,—

it shall be presumed, in the absence of evidence to the contrary, that the defendant had knowledge of those claims and that the reproduction was made in the year indicated on it. For the purposes of the clause a label containing, or a mark on the reproductions of, the symbol “©” together with the name of the owner of the copyright or the licensee and the year the reproduction was made is evidence that the reproduction was labelled or marked so as to indicate those claims.

The new section applies in the case of proceedings already commenced before the commencement of the Bill unless the substantive hearing of those proceedings has commenced.

Clause 6 amends section 28 of the principal Act by increasing the monetary penalties for offences against that section.

Hon. Geoffrey Palmer

COPYRIGHT AMENDMENT

ANALYSIS

Title	20B. Special exception where literary or artistic work applied industrially
1. Short Title	4. Rights of owner of copyright in respect of infringing copies, etc.
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20A. Special exceptions from protection of literary and artistic works	

A BILL INTITULED

An Act to amend the Copyright Act 1962

BE IT ENACTED by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows:

- 1. Short Title**—This Act may be cited as the Copyright Amendment Act 1984, and shall be read together with and deemed part of the Copyright Act 1962* (hereinafter referred to as the principal Act).
- 10 **2. Interpretation**—Section 2(1) of the principal Act is hereby amended by inserting in paragraph (a) of the definition of the term “artistic work”, after the word “engravings,”, the word “models,”.

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3. New sections inserted—(1) The principal Act is hereby amended by inserting after section 20 the following sections.

“20A. Special exceptions from protection of literary and artistic works—(1) No act infringes the copyright in a literary or artistic work if, at the time the act was done, that literary or artistic work was or formed part of— 5

“(a) A specification laid open to public inspection in the Patent Office in respect of a patent granted in New Zealand which had expired, or had been surrendered, or had lapsed without being restored; 10
or

“(b) A specification laid open to public inspection in the Patent Office in respect of which no patent had been granted in New Zealand; or

“(c) A specification laid open to public inspection in any other country in respect of which no patent had been granted in New Zealand; or 15

“(d) A representation or specimen of a design open to public inspection in the Patent Office, being a design under the Designs Act 1953, registration of which had expired or been cancelled; or 20

“(e) A representation or specimen of a design open to public inspection in the Patent Office, not being a design registered under the Designs Act 1953; or

“(f) A representation or specimen of a design open to public inspection in any other country in respect of which no design had been registered in New Zealand. 25

“(2) This section applies in respect of the doing of any act after the commencement of this Act unless, before the commencement of the Copyright Amendment Act 1984, proceedings for infringement of copyright in respect of that act have been commenced and the hearing of the substantive matters in issue in those proceedings has also commenced. 30

“20B. Special exception where literary or artistic work applied industrially—(1) No act infringes the copyright in a literary or artistic work if, at the time the act was done, that literary or artistic work had been applied industrially in New Zealand or in any other country by or with the licence of the owner of the copyright more than 16 years before the act was done. 40

“(2) For the purposes of **subsection (1)** of this section, an artistic work is applied industrially if—

“(a) More than 50 reproductions in 3 dimensions are made of it, other than by hand, for the purposes of sale or hire; or 45

“(b) It is reproduced in 3 dimensions in 1 or more articles manufactured in lengths, other than by hand, for the purposes of sale or hire.

5 “(3) For the purposes of **subsection (2)** of this section, 2 or more reproductions in 3 dimensions which are of the same general character and intended for use together are a single reproduction.

“(4) This section shall come into force on the 1st day of October 1986.”

10 (2) Section 20 (8) of the principal Act is hereby consequentially repealed.

4. Rights of owner of copyright in respect of infringing copies, etc.—The principal Act is hereby amended by repealing section 25, and substituting the following section:

15 “25. (1) Subject to the provisions of this Act, the owner of any copyright shall be entitled to all such rights and remedies, in respect of the conversion or detention by any person of any infringing copy, or of any plate used or intended to be used for making infringing copies, as he would be entitled to
20 if he were the owner of every such copy or plate and had been the owner thereof since the time when it was made.

“(2) Where, by virtue of section 5 (2) of the Limitation Act 1950 (which relates to successive conversions or detentions), the title of the owner of the copyright to such a copy or plate
25 would (if he had then been the owner of the copy or plate) have been extinguished at the end of the period mentioned in that subsection or corresponding provision, he shall not be entitled to any rights or remedies under **subsection (1)** of this section in respect of any thing done in relation to that copy
30 or plate after the end of that period.

“(3) Notwithstanding **subsection (1)** of this section, a plaintiff shall not be entitled to the rights and remedies referred to in that subsection in respect of infringing copies which are reproductions in 3 dimensional form of any artistic work, or
35 which are reproductions in 2 dimensions necessary or incidental to the making of the reproduction in 3 dimensions, unless the Court orders otherwise having regard to—

“(a) The flagrancy of the infringement:

40 “(b) Any benefit shown to have accrued to the defendant by reason of the infringement:

“(c) The sufficiency of the remedy of damages for infringement:

“(d) Any other matters the Court thinks fit.

“(4) A plaintiff shall not be entitled by virtue of this section to any damages against a person who at the time he came into possession of infringing copies or infringing plates was not aware and had no reasonable grounds for supposing they were infringing copies or plates, but the plaintiff shall have the following rights: 5

- “(a) The right to delivery up of infringing plates, on notice, without compensation to the person who innocently held them, or damages if they are not so delivered;
- “(b) The right to delivery up of infringing copies upon payment to the person who held them of the cost of those copies; 10
- “(c) The right to leave the copies in the hands of the person holding them on the basis that that person may lawfully dispose of them; and 15
- “(d) The right to the profits earned by the innocent infringer, whether before or after he had notice that the copies were infringing copies, and to an account of those profits.

“(5) This section applies in respect of the conversion or detention by any person of any infringing copy, or of any plate used or intended to be used for making infringing copies, occurring after the commencement of this Act unless, before the commencement of the Copyright Amendment Act 1984, proceedings in respect of that conversion or detention have already commenced and the hearing of the substantive matters in issue in those proceedings has also commenced. 20 25

“(6) Any proceedings in respect of the conversion or detention of any infringing copy, or of any plate used or intended to be used for making infringing copies in which the hearing of the substantive matters in issue has commenced at the date of the commencement of the Copyright Amendment Act 1984, shall be heard and determined as if this section had not been enacted.” 30

5. Proof of facts in action for infringement of copyright in artistic work— 35
 (1) The principal Act is hereby amended by inserting, after section 27, the following section:

“27A. (1) This section applies to any action for infringement of copyright in any artistic work of which reproductions in 3 dimensions have been made available to the public by or with the licence of the owner of the copyright in that artistic work. 40

“(2) Where, in any action to which this section applies, it is proved that at the time the reproductions were made available to the public, whether in New Zealand or in any other country, every such reproduction was clearly and legibly labelled or marked so as to indicate the following claims,— 45

“(a) That copyright existed in the artistic work of which the reproduction was made; and

“(b) That the person named on the label or mark was the owner of the copyright or a person who held an exclusive licence granted by the owner of that copyright to make the reproduction; and

“(c) That the reproduction was made available to the public in a year specified on the label or mark—

it shall be presumed in the absence of evidence to the contrary—

“(d) That at all material times the defendant had knowledge of each of the claims specified in **paragraphs (a) to (c)** of this subsection; and

“(e) That the reproduction was made available to the public in the year specified.

“(3) For the purposes of **subsection (2)** of this section, evidence that the reproduction was labelled or marked with the symbol “©” together with the name of the owner of the copyright in the artistic work or a person who holds an exclusive licence granted by the owner of that copyright to make the reproduction and the year the reproduction was made, is evidence that the reproduction was labelled or marked so as to indicate the claims specified in **paragraphs (a) to (c)** of **subsection (2)** of this section.

“(4) Nothing in this section limits or affects section 27 of this Act.”

(2) All proceedings for infringement of copyright commenced before the commencement of this Act and which are pending at the commencement of this Act, shall be heard and determined—

(a) If the hearing of the substantive matters in issue in those proceedings has commenced, as if this section had not been passed; and

(b) If the hearing of the substantive matters in issue in those proceedings has not commenced, in accordance with **section 27A** of the principal Act as enacted by this section.

6. Penalties and summary proceedings in respect of dealings which infringe copyright—Section 28 (3) of the principal Act is hereby amended—

(a) By omitting from paragraph (a) the expressions “\$4” and “\$100”, and substituting the expressions “\$50” and “\$1,000” respectively; and

(b) By omitting from paragraph (b) the expression “\$100”, and substituting the expression “\$1,000”.