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INDUSTRIAL PROPERTY ADVISORY COMMITTEE

THE LAW OF COPYRIGHT AS IT
APPLIES IN NEW ZEALAND TO
INDUSTRIAL DESIGNS

Report to The Minister of Justice.

1 August 1983

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THE LAW OF COPYRIGHT AS IT APPLIES IN
NEW ZEALAND TO INDUSTRIAL DESIGNS

SUMMARY:

This report proposes some immediate amendments to the Copyright Act 1962. It recognizes that a more extensive review should follow to meet deficiencies exposed by the advance of technology; deficiencies which are also being studied internationally. The proposed amendments endeavour to modify the disproportionate benefits given to foreign copyright owners as compared with rights given to our nationals by other countries, and to remove conflict with New Zealand patent and design law and the uncertainties which arise therefrom. The interim recommendations include limiting the term of copyright protection for features of design applied industrially.

THE AREA OF STUDY

1.1 Even before the Committee was established, submissions had been made protesting at the operation of the law of copyright in New Zealand as it is applied by the courts in the area of the design of three dimensional products.

1.2 The current position, briefly stated, is that all original drawings enjoy the protection of copyright, irrespective of their artistic quality, and by virtue of New Zealand's adherence to the Berne Copyright Convention and the Universal Copyright Union, protection is accorded in New Zealand to original drawings made in most overseas countries. Such drawings are infringed if the designs embodied therein are reproduced in any material form including three dimensional form. This means in practice that the copying of a product might well give rise to allegations of infringement of copyright in a drawing on which the copied product is based even though the shape of the product is wholly functional. The imitative product is held to be an indirect reproduction of the drawing and so an infringement of the copyright therein. The existence of copyright arises automatically upon the creation of the work and the operation of the provisions for international reciprocity pursuant to the treaties. It is not possible to determine by consulting any official register whether or not a particular work is protected. Therefore the copying of any product whether originating in New Zealand or in overseas countries involves a risk that infringement of copyright may occur. This may be the case even though relevant New Zealand patent and design registrations have expired. If the copied product is not based upon drawings but on an original three dimensional prototype (not being an engraving or sculpture), copyright will only exist if the original work constitutes "a work of artistic craftsmanship". Accordingly, whether a work of design may enjoy the protection of the law of copyright can depend upon the form in which it is originally expressed.

The remedies for infringements include the payment of damages in conversion in respect of all infringing copies which Pritchard, J. said in a recent case are "calculated to produce manifestly, even monstrously, unjust results".

- 1.3 The development of the law in New Zealand giving rise to the current position goes back to the recommendations leading to the enactment of the Copyright Act 1962. This background has been helpfully summarised in a report prepared by an officer of the Department of Justice and made available to the Committee.

THE SUBMISSION CONTENT

- 2.1 The submissions received by the Committee fall into three main sectors, those originated by local manufacturers, submissions prepared by overseas manufacturers, and those contributed by the patent attorneys' and associated professional groups. An Appendix lists the names of persons, firms and organizations who made submissions to the Committee. The following summary of the submissions is in general form and is not exhaustive.

LOCAL MANUFACTURING SECTOR

- 2.2 The attitude taken by the N.Z. Manufacturers Federation Inc., is that the requirements to acquire copyright in industrial articles should follow more closely the requirements applicable to patents and designs. In particular it urges that (1) copyright in industrial articles should be acquired through registration, (2) strict reciprocity should be required of foreign countries, (3) infringement damages should be limited to profits, and (4) that statutory provisions should define the nature of drawings which can attract copyright and the degree of copying which must exist to constitute infringement.
- 2.3 Fisher & Paykel Ltd., submitted that (1) copyright should have regard for the state of the prior art and the degree of skill needed over that art to acquire protection, (2) there should be a better definition in the Copyright Act 1963 of infringement in the transfer of subject matter from two to three dimensions, (3) absolute reciprocity should be demanded before the Copyright Act is extended to foreigners or foreign corporations, and (4) conversion damages provided for in section 25(1) of the Copyright Act are excessive as compared with those damages available under the Patents and Designs Acts.

- 2.4 Mason & Porter Ltd., complain that due to the absence of a registration system for copyright it is not possible to establish whether copyright exists particularly in respect of overseas material, that copyright should be withheld from the nationals of countries not giving full reciprocity to New Zealand, and that the term of protection should be more limited, possibly to the term of a registered design, and should commence from the first publication of the copyright article.
- 2.5 A.M. Bisley & Co. Ltd observes that the uncertainty of copyright inhibits competitive marketing of "original" and "substitute" parts and has led to the spare parts outcry which will not be restricted to the automotive field. It is claimed that the protected aspects of an article are ill-defined and the existence of a part in a machine is no assurance of the origin of design. It is asserted that the penalties for infringement can be ruinous and that the cost of securing information for a defence is enormous. The submission asserts that successive governments in New Zealand have been unable to curb the excessive mark-ups of spare parts, the yield from which is used by overseas manufacturers to meet the more severe competition encountered in other countries. It points out that due to the current copyright law importers are unable to use local competition as a counter against unreasonable pricing. Detailed instances are given of advantages flowing to foreign copyright owners in New Zealand as compared with the rights in their own countries and it is submitted that New Zealand copyright law must be clarified with at least an insistence on a reciprocal situation.
- 2.6 Glaxo N.Z. Ltd observes in its submission that 20 years ago manufacturers here possessed a good general rule that if a design was not registered or patented it could be copied. It is alleged that now the Copyright Act can protect the market of an article for up to 100 years. Glaxo applauds the attitude of the U.K. Government that purely functional devices should be unprotected if an industrial society is to have a substantial pool of experience freely available to stimulate competition. It urges that unless an article is itself a work of artistic craftsmanship protection should not be available. Glaxo submits that the registered design system should be retained to provide a searchable record and a legal basis for licensing. It expresses the view that, protection should not be extended to the functional, the term of design protection should remain at 15 years, and that overall copyright

protection should be available for purely aesthetic objects, registration of designs providing protection for industrial articles having aesthetic content, and patents providing protection for inventive functional innovations.

- 2.7 In a paper passed on to us by the Manufacturers' Federation, Faulkner Collins Ltd asserts that serious economic consequences flow from the automatic copyright protection of engineering drawings which occurs without registration or notification to competitors, and for excessively long periods. The copyright term in New Zealand is claimed to be excessively long as compared with the 15 years at present awarded in the United Kingdom and which may shortly be eliminated. Attention is drawn to the strong advantages which Australian manufacturers have against competing New Zealand manufacturers. Manufacture here of articles for local or export consumption is an infringement while the article may be freely sold in Australia if manufactured there. Comment is made on the deleterious effect on our employment opportunities. It is pointed out that a recent Australian review of copyright and design protection overwhelmingly recommended protection through the registration of designs and the avoidance of automatic protection of industrial articles through copyright as that would hamper Australian industry.

OVERSEAS MANUFACTURING INTERESTS

- 2.8 Automotive Products Ltd., a United Kingdom company, believes patent and copyright protection can co-exist, and that designers should not suffer because engineering drawings are used to supply "the best method" required by patent specifications. It favours maintaining copyright protection for industrial designs and claims that where a functional requirement does not dictate one design the selection of alternatives involves skill which should be protectable.
- 2.9 Ford Motor Co. of N.Z. which has made a submission on behalf of the Ford group, assembles vehicles from local and overseas parts. It points out that vehicle manufacturers are obliged to keep a full range of parts even although some are rarely required and the storage and other costs must be spread over the full range. It states that pirate manufacturers can select high demand parts for attention and sell at significantly lower prices without the need to maintain quality or reputation. It says that the protection afforded by the

Copyright Act is socially desirable and advantageous to the public in the long run. It opines that if any reduction of the copyright term is considered it is desirable that protection should cover the economic life of the vehicle which means 15 years from the date when the last vehicle bearing that part left the assembly line. It is submitted that any reduction in the scope or term of copyright would necessarily involve price increases for both parts and vehicles which would be detrimental to industry as a whole.

THE PATENT ATTORNEY PROFESSION

2.10 The New Zealand Institute of Patent Attorneys classed this issue as one of major importance and comprehensively traversed the subject. It submitted that the Committee should have the utmost regard for the economic framework within which industrial property lies, and that a balance must be sought where property rights are available, just sufficient to ensure an adequate level of innovation without excessively compromising the competition needed to supply goods which are most needed at the lowest price. The Institute recommended removing primarily functional design from the ambit of the Copyright Act. It further submitted that if it is considered that protection for the disqualified designs is desirable outside the Patents Act then a searchable deposit registration system should be provided, and a requirement should be introduced for a copyright notice on goods as a precondition for injunction or damages in infringement proceedings. The term recommended is 15 years from registration. The suggestion is made that if it was found desirable to remove the conflict between "first importer" patents and copyright this could be achieved by amending the Patents Act 1953 to preclude this type of applicant from being defined as an "inventor".

2.11 The N.Z. Group of the Association Internationale pour la Protection de La Propriété Industrielle have not yet reached a final position on the present issue as an international study is being conducted by the Association. It has therefore made some preliminary observations and recommendations. It commented that the protected term provided by the Copyright Act in New Zealand is far in excess of the patent monopoly of 16 years, that the required originality is small as compared with that required by the Patents Act, that the damages obtainable under the Copyright Act are far in excess of these obtainable for patent infringement, and that the

registered designs provisions being limited to non-functional aspects offer no protection for skill and effort. Suggested solutions were (1) a reduction of the term of protection and available damages in the industrial area of copyright, or (2) removing the exclusion of designs dictated by function from registration under the Designs Act 1953, or (3) creating a new mode of monopoly protection such as Petty Patents, Utility models, or a registration where skill and expenditure of effort has been demonstrated. Recommendations were made that (a) a copyright register be created to enable the public to assess their proposed course of action, and (b) a limitation of foreign owners rights to those obtainable by our nationals in foreign countries.

2.12 J.D.Hardie submitted that the monetary penalties imposed under section 25 of the Copyright Act are quite unjust and he recommended that the Court should be given absolute discretion as to its application. He asked for urgent amendment. In regard to the conflict between the Designs and Copyright Acts he urged the elimination of restrictions on what could be registered under the former Act, and that the latter Act should not apply to designs registered or capable of registration under the former.

2.13. Baldwin, Son & Carey urged that if the Copyright Act is to continue to embrace industrial designs the term of protection must be reduced to provide competition in industry, the suggested term being 15 years. They assert that copyright in foreign designs should only be available where that nation provides reciprocal rights to our nationals and that a copyright marking claim on goods should be obligatory if relief in the Courts is to be obtainable. It is further suggested that patent applications in New Zealand should be limited to the actual inventor or his assignee, that protection for designs, whether functional or not, could be obtainable by a simple deposit of the article within a period of 12 months from the first sale, and that damages in copyright actions should be limited to the degree currently recoverable under the patents and designs legislation.

2.14 P.L. Berry & Associates complain that the infringement of drawings under copyright can occur even although they have never been seen by an alleged infringer and that defendants are at a very serious disadvantage in proving their innocence. It is asserted that the faking of drawings is quite simple and that where the drawings have not been seen it is very

difficult to prove that you have not seen an article as alleged, or that you took no interest in something seen casually. It is observed that most manufacturers and designers in specialised fields cannot be unaware of competitors products. It is claimed that while advice on infringement in the patent field can be given with reasonable certainty, due to the nature of the system advice in the copyright area is hindered by uncertainty and ends in a high proportion of cases in a Court action and undue expense. The submission states that the protected term for engineering drawings is ludicrously long under copyright and that large companies can financially afford to attack small companies under copyright, and that the efforts of the latter in innovation are paralysed by the threat of a copyright action. A copyright registration system including statements of novelty is sought and the opinion expressed that copyright should cease once artistic works are applied industrially. The alternative solution offered is that 'reproduction' of a 2-dimensional work should not under the Copyright Act 1962 include 3-dimensional versions which provision would remove the confusion over alleged copyright in patent drawings.

- 2.15 Finally it is important to record a communication from the New Zealand Copyright Council which recognises existence of conflict in the industrial area and which expresses its primary concern that in resolving this conflict copyright owners should be consulted, and that it should have notice of proposals for amendment so that they may be discussed and the erosion of rights be avoided.
- 2.16 Almost all of the submissions are critical of some aspects of the law as it stands at present. In particular there has been very strong criticism of the remedy available in respect of infringing copies under section 25 of the Copyright Act 1962 under which the copyright owner is entitled to damages in conversion in respect of all infringing copies. Such damages are determined by reference to the value of the copies irrespective of the merit of the copyright embodied therein. Similarly, there has been strong criticism that the law in New Zealand provides for foreign nationals greater protection than New Zealand nationals enjoy in overseas countries.

THE ISSUES AND THEIR CONTEXT

N 532

3.1 So far as concerns overseas countries, the extent to which the law of copyright has application in the industrial sphere varies widely. There are few countries where the situation is, in substance, the same as in New Zealand; the closest are Great Britain and South Africa. In Australia the position is quite different except perhaps in relation to wholly functional designs.

3.2 It is important to consider the overall problem in an appropriate context. It is not sufficient simply to compare the protection given by the copyright law in New Zealand with a protection given by the copyright law in other countries. It is necessary to compare the whole package of laws applicable to industrial designs and products in the various countries. For example, it is to be borne in mind that in Australia there have been introduced recently provision for petty patents and also a comprehensive trade practices law dealing with, and providing civil remedies for, deceptive practices. These provisions as yet have no counterparts in New Zealand and to some extent the courts have pressed the law of copyright beyond its traditional bounds in an effort to overcome problems of commercial piracy seen as undesirable.

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3.3 The law of Copyright is within the terms of reference of this Committee only insofar as it bears upon industrial property applications and, in that area, it is necessary to examine the effects of the law of copyright in relation to the protection traditionally available in the industrial area under patent law and the law relating to registered designs. In this respect the term of copyright which might be appropriate in relation to literary or "fine arts" works is anomalous when considered in the area of industrial designs. The patent term is 16 years, subject only to special extensions. The maximum period of protection for industrial designs is 15 years. This contrasts sharply with copyright protection for the life of the author plus 50 years.

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3.4 It must be emphasized however, that the protection given under the "monopoly" protection of patents and registered designs differs in an important respect from the protection under the copyright law. Copyright is infringed only where there is copying. Independent identity or similarity is not infringement. On the other hand, under the patent and design laws the protection extends to prevent infringements even if arrived at by independent conception and development. Accordingly, it

would be easy to say that the only persons who need have concern with the law of copyright are copiers, and that those who do not copy need have no concern. This is too simplistic. The courts have adopted a position under which the onus of proof shifts to a defendant once a plaintiff has established originality of the work relied upon, access to that work or a copy thereof by the defendant, and close visual similarity. Defendants then are required to prove that there has been no copying notwithstanding access to the plaintiff's work or reproductions thereof. This can be a very difficult task bearing in mind that the logical starting point for any industrial designer is a review of the products with which his design must compete.

3.5 The situation in the United Kingdom differs from that in New Zealand in that the protection of industrial design under the copyright law seems now to be limited in term to 15 years. This means that the copyright will expire at much the same time as any relevant patent or registered design protection. In New Zealand however, the generally held view that, upon the expiry of a patent or registered design, the subject matter is available to all to use, is seriously qualified by the fact that copyright in certain visual aspects of the subject matter may continue for a long period. This leads to a very serious question as to the status of the material in the Patent Office library. It is generally considered that this library is a valuable source of technical information which is available for consultation by industry in the course of its activities. That use of this material after the expiry of the appropriate patent or design protection might be precluded in some way by unregistered copyright, inevitably must render this valuable reference library a dangerous source of ideas.

3.6 In the United Kingdom following the report of the Whitford Committee, there have been proposals for amendment to the law to overcome some of the anomalies which the New Zealand law shares. The current position is that a green paper has been published by the British Government, and submissions have been made thereon. The whole issue has been studied in depth but current indications are that draft legislation is still some distance away. In South Africa a law adopted relatively recently in the same field based upon the British law is in the course of amendment in an effort to overcome some of the anomalies already apparent. In other countries the trend is in the opposite direction with greater use of the copyright law in the commercial and industrial fields e.g. the protection of computer software.

- 3.7 Our Committee sees the problem of the application of copyright in the industrial field and the overlap with protection under the patents and designs legislation as extremely difficult and incapable of speedy solution. It seems that satisfactory laws are yet to be devised in other countries where the matter is under consideration. In these circumstances, the Committee is anxious that the matter should have the fullest consideration with the benefit of overseas developments before recommendations for long term solutions can be made here.

THE VIEWS OF THE COMMITTEE

- 4.1 The present view of the Committee is that while protection of drawings by two-dimensional reproduction might be appropriate for the copyright law, the protection for designs of three dimensional articles made industrially might better be the province of a separate law. The protection currently available in New Zealand under the Designs Act 1953 is unsatisfactory because of the number of designs excluded from protection by case law. Therefore at this time, simply to exclude industrially applied art from protection under the copyright law will not suffice.
- 4.2 In Australia a recent amendment to the definition of "design" in the Designs Act has been enacted in an effort to expand a range of designs capable of protection by registration under that Act. There every effort has been made to exclude the law of copyright from the industrial area. However such efforts have not yet been completely successful and it appears that wholly functional designs, incapable of registration under the amended Designs Act, still enjoy some residue copyright protection. It will be consistent with the line taken in Australia if further steps are taken to exclude this protection.
- 4.3 The New Zealand Designs Act 1953 is very similar in its terms to the Australian Designs Act before the amendment just referred to. It is our view that the amendment in Australia creates as many problems as it solves in the manner in which it seeks to define features of design which can be protected. We think it is preferable to start with the basic consideration of what protection should be accorded by the law to industrial designs and technical and engineering drawings. Much has been written on this subject overseas and in New Zealand and studies are continuing.

It seems attractive to draw the distinction between designs which have aesthetic or eye appeal on the one hand from those whose shape or configuration is dictated wholly by function on the other hand. Protection for the creativity in the former is easily justified. In the case of wholly functional designs however there is a strong argument that they should enjoy protection only if novel and inventive so as to be patentable, and that to give broader protection tends to defeat the objectives of the Patents Act, including the incentive to publicly disclose in this country new technology, and to prevent abuses by providing for compulsory licences.

An opposing argument is that the same or greater creativity, may be involved in developing the form of a wholly functional article (e.g. a turbine blade) as in devising an attractive kettle. It can be asked why the design of one should be protected and not the other. In this respect it should be borne in mind that copyright protects only the particular form and not the concept or principle involved.

Further, the difficulty in practice, in determining whether one or all features of a design are, or are not, dictated wholly by function is obvious. We consider that the test propounded by the House of Lords in Amp-Inc v. Uutilux [1972] R.P.C. 103 by reference to the definition of "design" in the Designs Act is unsatisfactory as a means of distinguishing between what should and should not enjoy protection. We prefer the general understanding of the position prevailing before that decision, although we note that no country seems yet to have found a satisfactory and workable dividing line between "non-functional" designs which should be protected and wholly functional designs which should not (except by patent or similar laws). Given this difficulty some of us presently favour protection for all new or original designs for a period more in line with the term of patent protection. Others hold the view that wholly functional designs should not enjoy protection except where patentable. Interestingly it is to be noted that in this area the Whitford Committee also could not find unanimity.

- 4.4 For those designs for which protection is considered to be justified, the form of protection also needs careful study. The desirability of some form of registration or deposit so that industry may know what designs are, or are not, protected has force. On the other hand, the provision for registration of designs on

any expanded scale might be expected to seriously tax the facilities of the New Zealand Patent Office as presently structured. Further, there is some support in industry for some automatic form of protection free of delays and expensive registration procedures.

Suggestions have been made to us that a mandatory "marking" or "notice" requirement as a condition for copyright protection might overcome the element of ambush inherent in the present law. However, such a requirement seems to be precluded by New Zealand's obligations under the Berne Convention (Article 4(2) of the Rome text to which New Zealand adheres). It can be added however, that there is no such constraint if protection is provided by means other than the copyright law.

Whether protection accorded to industrial designs should be a "monopoly" protection or merely a protection against copying will need to be determined. There seem to be few instances where alleged infringements of registered designs have arisen in circumstances where the alleged infringer has conceived the design completely independently so that, in practice, little may turn on the distinction.

To be borne in mind is the fact that since 1962 when the present Copyright Act was passed, and certainly since 1975 when the first court decision was given in New Zealand clarifying the application of the copyright law in the industrial area, designers may well have chosen to rely upon the law of copyright in preference to seeking protection by registration under the Designs Act. It is to be expected that, just as there is protest at present at the application by the courts of the law of copyright in the field of industrial design, so there would be protest if such protection were arbitrarily removed before more satisfactory means of protection for features of design are in place.

- 4.5 The strength of the submissions made to the Committee emphasizing the anomalies and the urgency with which the problem is perceived, have led the Committee to recommend a two stage approach. We believe that in the long term further study is necessary in the light of overseas developments with a view to arriving at laws for the protection of industrial designs which will serve the interests of designers in all fields and also the interests of the public at large.

4.6 We believe that the serious anomalies arising under the law at present can be ameliorated by relatively simple amendments to the present law which should hold the position while the more comprehensive study is continued. In this respect we have endeavoured to identify the areas of the industrial application of the copyright law which are generally regarded as unsatisfactory. In doing this we acknowledge that the urgency and strength of criticism of various features of the law differ among those who have made submissions and among members of the Committee. Nevertheless there seems to be a general acceptance that some areas of the law require early amendment and that this should be done without waiting to find a long term solution to all the problems.

4.7 Those areas where some amendment seems generally to be desired are as follows:

1. The term of protection for designs applied industrially should be no more than 16 years to equate more closely with registered designs and patents.

Even this view is not without a contrary argument. Certain highly distinctive and original designs for consumer products serve more in the nature of trade marks (which may be protected perpetually) and can form part of the goodwill of the proprietor's business. The obvious example is the well known Coca Cola bottle. That such a design should fall into the public domain is open to question.

2. The remedy of conversion damages in respect of infringing copies should not follow as of course but should be available only in the discretion of the Court and when it is considered that damages for infringement are, in the circumstances, insufficient remedy to a successful plaintiff.

We do not favour, complete abolition of damages in conversion in respect of infringing copies. Overseas the trend is in the opposite direction with more extensive remedies being provided under the copyright law to deal with video and sound recording piracy.

3. The position as regards published patent drawings and representations of registered designs should be clarified to ensure that there is no copyright protection therein after the registered protection ceases, or where there has been no registered protection.

We believe that if amendments were made to the Copyright Act to make these changes, present criticism of the law will be overcome in large measure.

4.8 It was proposed to the Committee by the Department of Justice that, by way of temporary measure, the Copyright (International Conventions) Order 1964 be amended to limit rights enjoyed under the copyright law in New Zealand for foreign nationals to equate with the rights enjoyed by New Zealanders in overseas countries. This course had initial attraction because of the greater speed with which it might be carried out, but after consideration, the Committee does not favour this course and prefers amendment to the Copyright Act. There are a number of reasons for this-

1. A "reciprocity provision" would seem to be contrary to the "equal treatment" provision in the Berne Convention. (Article 4(1)).
2. Such amendment to the Conventions Order would be required either to designate the countries in respect of which reciprocity would be denied, or in general terms, simply to indicate that reciprocity would not be available unless appropriate protection is available in the copyright claimant's home country. In the first case, to designate the countries would require an exhaustive analysis of the laws bearing upon the protection of features of design in all overseas countries parties to the international treaties. A recent comparative study indicates that this would be a major task which would defeat the expedition sought. The second course would mean that in any litigation it would be necessary to prove laws of the relevant foreign country as a prerequisite to establishing the existence of copyright in New Zealand and this appears to be one of the procedures that the Conventions were designed to avoid.
3. The terms of the present Order are the subject of litigation and will be considered shortly by the New Zealand Court of Appeal. It would seem undesirable to undertake any amendment of the Order until the outcome of that litigation is known.
4. There is also the problem that in overseas countries certain other forms of protection may be available for designs which are not accorded in New Zealand and these would require evaluation in addition to the law of copyright itself.

We believe that the criticism that unreciprocated protection is given to foreign nationals will substantially reduce if the amendments we propose are made - particularly if there are borne in mind the forms of protection for features of design beyond the copyright law available in many countries.

- 4.9 Similarly we believe that another of the major criticisms, that the existence of copyright protection is incapable of ascertainment by searching, will be less of a problem if the term of the protection in the area of industrial products is limited as we propose.

SPECIFIC INTERIM RECOMMENDATION

- 5.1 Accordingly, by way of an interim measure which we believe is substantially consistent with the longer term proposals which the Committee will evolve after further study, we recommend that section 20 (8) of the Copyright Act 1962 be amended by the addition of further sub-paragraphs providing defences along the following lines:

"The making of an object of any description which is in three dimensions [and any two-dimensional matter incidental thereto] shall not be taken to infringe the copyright in an artistic work in two dimensions if -

- (a) The object would not appear, to persons who are not experts in relation to objects of that description to be a reproduction of the artistic work or,
- (b) The artistic work was applied industrially more than 16 years prior to the making of the object or,
- (c) The artistic work or a reproduction thereof formed part of a patent specification or representation of a registered design which has been published in New Zealand and any registered protection has ceased."

It will of course be necessary to determine when a design is "applied industrially" but assistance can be gained from the law in Australia where the copyright law employs the same concept.

It must be recognized that the recommended limitation of the term of protection might result in three-dimensional reproduction of such works as cartoon characters becoming available to all traders 16 years after the making of the first such reproduction.

- 5.2 We are conscious that the part of the existing Section 20(8) set as sub-paragraph (a) in the suggested new provision has been the subject of considerable difficulty and seems likely to be repealed in England. We favour its repeal as part of the amendment to the section.
- 5.3 In addition, Section 25(1) of the Copyright Act should be amended by inserting a further proviso that in respect of infringing copies which are three dimensional reproductions of two dimensional artistic works the owner of the copyright shall not be entitled to damages for conversion unless the Court so orders by reason of the fact that, in the circumstances, damages for infringement of copyright are insufficient remedy to the Plaintiff.
- 5.4 While we apprehend the proposal now made on this interim basis generally will be welcomed, we believe it is desirable that interested parties be given a short period to comment upon them before legislation is drafted.

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APPENDIX

LIST OF PERSONS, FIRMS AND ORGANIZATIONS
MAKING SUBMISSIONS ON THE LAW OF COPYRIGHT
AS IT APPLIES IN NEW ZEALAND TO INDUSTRIAL DESIGNS

AUTOMOTIVE PRODUCTS LIMITED.

BALDWIN, SON & CAREY.

BISLEY, A.M. & Co. LTD. (2)

BUCHANAN, ELSPETH.

COLYER, J.N. LIMITED

FISHER & PAYKEL LIMITED.

FORD MOTOR CO. OF NEW ZEALAND LIMITED.

GLAXO NEW ZEALAND LTD.

HARDIE, J.D. & Co.

MASON & PORTER LIMITED.

NEW ZEALAND GROUP OF THE ASSOCIATION INTERNATIONALE POUR
LA PROTECTION DE LA PROPRIETE INDUSTRIELLE.

NEW ZEALAND COPYRIGHT COUNCIL.

NEW ZEALAND MANUFACTURERS' FEDERATION INC.

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