

The overlap between design and copyright law

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INTRODUCTION

The issues I want to cover in this paper were summarised in the Course Outline flyer as follows:

Will copyright always protect against people copying my artwork?

When do I need to consider registering my art as a design?

How do I register a design?

What legal reforms are likely?

I must have drafted the first question in a hurry, as no law has ever actually protected against people copying other people's artwork, just as no law has itself prevented people from stealing cars, taking drugs, breaching contracts or polluting the environment. Perhaps I should therefore rephrase the first question as follows: Will copyright always provide a remedy in the event that I catch people copying my artwork. A substantially different question, and in some contexts a somewhat less easy question to answer, but more of that later.

Firstly, it is important to lay some groundwork. In the first part of this paper, I will briefly discuss both copyright and design law, and then turn to the issue of how each of these areas of law relates to the other. In particular I will discuss how the overlap provisions in the Copyright Act operate. Lastly, I will look at reform issues in the area.

OVERVIEW OF COPYRIGHT LAW

How do you get it?

The fundamental principles of copyright law are easy: you create an artwork, it is immediately protected by copyright.

¹ The presenter gratefully acknowledges the assistance of Ms Gail Fulton of the Australian Copyright Council insofar as the discussion of reform issues is concerned.

There is no registration procedure for copyright; there are no fees to be paid; you do not need to send your painting or sculpture through the registered post in a self addressed envelope; and you do not need to get your JP to sign it.

What do you get?

If you own copyright in an artistic work, you have the following exclusive rights:²

- to reproduce the work in a material form;
- to publish the work (that is, make copies of the work available to the public for the first time);
- to include the work in a television broadcast; and
- “to cause a television programme that includes the work to be transmitted to subscribers to a diffusion service”.

Of these, the reproduction right is probably the most important insofar as artists are concerned. The reproduction right means that if anybody else wants to copy your artistic work (for example, by photographing, or by hand copying), they generally need your permission. For the purposes of the Copyright Act, making a two dimensional copy of a three dimensional work, or a three dimensional copy of a two dimensional work constitutes a “reproduction”.

There are a number of exceptions and qualifications to the circumstances in which permission is needed – for example in relation to dealings with artworks for purposes such as research or study and for criticism or review; and in relation to the copying of artworks within educational institutions. The purpose of this paper is not to explore those exceptions, but I mention these here just to give an indication of the types of limitations to which the rights of copyright owners are subject.

What do you need before you get it?

Copyright protects different categories of material, including “artistic works”. So before you get copyright protection, you need an “artistic work”.

An “artistic work” for the purposes of copyright law is any work which fits within one of the categories set out in the definition of “artistic work” within section 10(1) of the Copyright Act. That definition reads as follows:

² See section 31(1)(b) of the Copyright Act.

“artistic work” means:

- (a) a painting, sculpture, drawing, engraving or photograph, whether the work is of artistic quality or not;
- (b) a building or a model of a building, whether the building or model is of artistic quality or not; or
- (c) a work of artistic craftsmanship to which neither of the last two preceding paragraphs applies.

“Engraving” and “photograph” are themselves defined elsewhere in section 10(1). (For current purposes, those definitions are not, however, relevant.)

You note that the definition of artistic work is exclusive – a work has to fit into one of these somewhat 19th Century categories or it will not be an “artistic work” for the purposes of copyright law.

One might say that the values underlying the definition in the Copyright Act embody Romantic 19th Century conceptions of the categories of “Art”. However, one might say that the courts have shown themselves decidedly post-modern in the way they interpret the categories, taking as their cue the words “whether ... of artistic quality or not”. Thus, courts have generally given a wide meaning to each type of sub-category within the section 10(1) definition. For example, courts have held an “engraving” to include a frisbee; “drawing” to include designs for single letters; and “sculpture” to include industrial templates and moulds. You may or may not be pleased to hear, however, that English courts have declined to extend the concept of “sculpture” to toasted sandwiches.

For the purposes of copyright law, then, the phrase “artistic work” generally carries no requirement that the work in question have any aesthetic merit. I should emphasise here the word *generally*, because there is an exception to that “generally”.

The exception is the last category of artistic work, which is really a catch-all category: “works of artistic craftsmanship to which neither of the last two preceding paragraphs apply”. I shall go over what is implied in this third category in some detail, because an understanding of the phrase “work of artistic craftsmanship” as used within this catch-all category is of some significance in understanding the overlap between copyright and design law. Failure to understand or keep abreast of the way the overlap is dealt with in the Copyright Act may adversely affect your ability to protect your clients’ interests.

So, what is a “work of artistic craftsmanship”? Generally, the category would include works such as hand-made knitted garments, toys, pottery, glass work,

jewellery, lace-work, embroidery, tapestry, woodwork and découpage. Already, you can see that, in practice, there is likely to be some overlap between the categories. Pottery, for example, is really a species of sculpture, and therefore might more properly be categorised as belonging in the first category. Similarly, while wordwork such as marquetry and joining are likely to constitute “works of artistic craftsmanship”, woodwork that involves any turning and carving should be regarded as falling within the category of “sculpture”.³

It is unclear whether a work which can be categorised as being within either of the first two categories of the definition of “artistic work” in section 10(1) is thereby excluded from being a “work of artistic craftsmanship”. I personally can see no reason why works of artistic craftsmanship may only be protected under the Act if they fit only into the third category: recall that the third category protects “works of artistic craftsmanship *to which neither of the last two preceding paragraphs applies*”. In my view, it is likely that a court would accept that works of artistic craftsmanship can be formed, for example, by sculpting, or by drawing, and that the third category in the definition of “works of artistic craftsmanship” is there to catch those works of artistic craftsmanship which would not already fall within one of the types of works listed in categories (a) and (b) of the section 10(1) definition. As far as I am aware, this view, however, is not one that has yet been endorsed by a court.

The presence of the word “artistic” in the phrase “work of artistic craftsmanship” is important, and marks the distinction between the third category of artistic work and the preceding two. While the adjective “artistic” is the same, the interpretive implications are different. As noted above, the first two categories do not require the work to be “artistic” in the aesthetic sense. Not so with works of artistic craftsmanship. With these works, in addition to the work being hand-made, the adjective “artistic” has been interpreted as requiring *either* that the court finds the work artistic after a “purely objective” examination of the article *or*, that the maker or designer of the work intended the object to be “artistic” rather than purely functional.⁴

³ Generally, if a creative work is produced by either carving or fashioning some malleable substance, it is likely to constitute a sculpture: see Sam Ricketson, *The Law of Intellectual Property* (1984) at 118-119 and Dr John Phillips, *Protecting Designs: Law and Litigation* (Sydney, LBC, 1994) at 89-90).

⁴ In practice, it is not difficult to show that a work was intended to be artistic.

OVERVIEW OF DESIGN LAW

Section 4(1) of the Designs Act defines a design as follows: design means features of shape, configuration, pattern or ornamentation applicable to an article, being features that, in the finished article, can be judged by the eye, but does not include a method or principle of construction.

Subsections 4(1) and 4(2) contain definitions of “article” (in brief, with certain exceptions, it means any article of manufacture, and/or any set of articles, including the parts of the articles).

In other words, designs law protects the visual appearance of manufactured products. It does this by means of a registration system which may be applied for initially for a one year period, and then for three further periods of five years, making a total of sixteen years protection in all. Regulation 11 of the Designs Regulations lists categories of artistic works which are excluded from design registration. Apart from “medals”, the list is comprised of articles on which there is printing. The list includes bookjackets, calendars, certificates, greeting cards, labels, postcards, and stamps.

Designs Act registration gives you the right to take action against anyone who applies your registered design to an “article”.⁵

THE AREA OF POTENTIAL OVERLAP

Leaving aside the provisions in the Copyright Act which limit the scope of any potential overlap, and which I will come to in a moment, an industrial design or an industrial prototype has the *potential* to be protected both under copyright and designs law. Similarly, a crafted item such as a pottery vase or a fabric design has the *potential* for dual protection.

So how does the legislation react to this potential overlap?

Generally, governments have felt that not all functional and utilitarian items should receive the extensive protection generally given to artistic works under the Copyright Act. The Copyright Act has therefore come to include provisions which deny copyright protection to certain types of artistic works which are either themselves utilitarian articles, or are to be used in manufacturing utilitarian items.

⁵ Defined in part in section 4(1) of the Designs Act as “any article of manufacture”.

The types of “artistic work” which are of interest today (and which may be affected by this policy decision) are those which are crafted or sculpted, and which artists and manufacturers wish to produce or reproduce in quantities, or to merchandise either in association with a functional item, or as an item which has both function and visual appeal. Examples include all sculptural items and “works of artistic craftsmanship”, particularly items such as furniture, mouldings, jewellery, glass work and functional garden ornaments such as fountains, bird baths or planters.

The earlier approach in the Copyright Act 1968

As an example of approaches which governments have taken in relation to the overlap between the two areas of law, the 1968 version of the Copyright Act contained provisions for dealing with the overlap under which you lost copyright protection if you either registered an artistic work under the Designs Act, or if you had an artistic work which you “applied industrially”.

A fairly blunt instrument approach – an all-or-nothing approach. This approach was brutal in its operation, being particularly harsh to artists who agreed to having their work merchandised. People working within the design world were likely to be aware of the need to register a design to protect it before it was industrially applied. Not so artists, coming from a copyright mind-set of automatic protection. One commentator summed up the operation of this system as “copyright – use it and you’ll lose it”.⁶

The current overlap provisions

Eventually, the legislature took steps to ameliorate the unfair operation of these overlap provisions insofar as those we would regard as artists are concerned. The Act was amended and the provisions currently in place were enacted.⁷ The amendments were designed to ensure copyright protection for essentially “artistic” uses of artistic works, while at the same time providing a defence to possible actions for copyright infringement arising from the copying of functional products based on drawings or prototypes which are “artistic works” in the sense required under the Copyright Act.

⁶ Michael Hall, “Artistic Works Used as Designs”, (1988) Vol 6 No 5 *Copyright Reporter* 3 at 3.

⁷ Copyright Amendment Act 1989; effective on 1 October 1990. The relevant provisions of this amending Act were re-enacted in the *Copyright Amendment (Re-enactment) Act* 1993, following the decision of the High Court in *Australian Tape Manufacturers Association Ltd v Commonwealth of Australia* (1993) 25 IPR 1. The commencement date for the provisions remains 1 October 1990.

As we will see, the amendments created their own problems.

The current overlap defences apply in relation to "corresponding designs", as defined in section 74 of the Copyright Act. Essentially, a "corresponding design" is a reproduction of an artistic work as the shape or form of an article. The use of a two dimensional artistic work as pattern or ornament on a surface of an article is excluded from the definition. One commentator has stated that:⁸

This distinction between two-dimensional and three-dimensional designs has no inherent merit, but is used because there is a loose correlation between an artistic or aesthetic purpose when two dimensional designs are applied to a surface and an industrial purpose when designs are applied as the shape of products. The distinction is also relatively easy to apply and involves no subjective assessment of intention or purpose.

A design which isn't within the definition of "corresponding design" retains full copyright protection. This means that two dimensional designs which are applied to articles in two dimensions retain full copyright protection. However, if an artistic work *does* have a "corresponding design", two defences may be raised by people copying your client's work. You need to take these defences into account if you will be merchandising or manufacturing an artistic work, where the artistic work is applied as the shape or form of a manufactured article.

Section 75: effect of registration upon copyright

Section 75 of the Copyright Act deals with what happens if you register a design under the Designs Act. If the corresponding design is registered, copyright in the artistic work is not infringed by applying that corresponding design, or any other corresponding design, to an article.⁹

In other words, the section removes the possibility of dual protection under the Copyright Act and the Designs Act once a design is registered. However, as noted above, as a result of the definition of "corresponding design", two-dimensional artwork applied to the surface of an article retains copyright protection even if it is also registered as a design. Such an artistic work may therefore be simultaneously protected under the Copyright Act and the Designs Act, if the copyright owner chooses to register the work as a design.¹⁰ Insofar as designs to be applied to three

⁸ Gail Fulton, "Designs/Copyright Overlap: ALRC Proposals for Reform", (1995) Vol 12 No 3 *Copyright Reporter* 15.

⁹ Section 75 (this section only applies to designs registered after 1 October 1990).

¹⁰ Subject, of course, to the design meeting the Designs Act requirements for registrability.

dimensional items are concerned, registration means loss of copyright insofar as application of the design to articles is concerned.

Section 77: industrial application of an unregistered design

In addition to the above, copyright is partially lost if a corresponding design of an artistic work is "applied industrially"¹¹ and articles are sold, hired or offered for sale or hire; the section provides a defence whereby copyright in the artistic work is not infringed by applying that corresponding design or any other corresponding design to an article.¹²

This defence applies in relation to corresponding designs which have not been registered or are not registrable under the Designs Act.

However, the defence in section 77 does *not* apply to corresponding designs of buildings, models of buildings and works of artistic craftsmanship. Thus, for example, works of artistic craftsmanship which are also registrable designs will not lose copyright protection if they are mass produced. However, if a copyright owner chooses to register a work of artistic craftsmanship as a design this will be at the expense of copyright protection.¹³

Areas of uncertainty

There are a number of areas of uncertainty insofar as the current overlap defences are concerned. These areas of uncertainty are somewhat alarming, given the policy objective in the provisions of keeping works which are essentially artistic within the protective mantle of copyright law.

These areas of uncertainty may be summed up in the following questions:

- can a work which is sculpted, or which otherwise may fall within the list of items in definitions (a) and (b) of the section 10(1) definition of "artistic work", still be a "work of artistic craftsmanship"?
- is the design of an item which has no function other than decorative "applied" to an "article of manufacture"?

¹¹ Section 77. Under Regulation 17, a design is deemed to be "industrialised" if more than 50 articles are made from it, or if it is made into an article manufactured in lengths or pieces (except if it is a hand made article).

¹² Section 77.

¹³ Section 75; see above.

- should designs which are created, for example, by etching or weaving, be regarded as two or three dimensional for the purposes of the overlap defences?
- is a design incorporated within an item (for example, a design for a stained glass window) applied to a surface, so as to retain copyright protection in all circumstances?
- when is an item “industrially applied”?

These areas of uncertainty raise uncertainties in relation to the following types of artistic work:

- any handicraft item which is sculpted;
- any sculptural design which is to be applied to an item with a function;
- any artistic work about which there is some uncertainty as to whether it should properly be regarded as two or three dimensional for the purposes of the overlap provisions; and
- any design applied to fewer than fifty items;¹⁴

If you are uncertain as to how the overlap provisions might apply, it is a question of lining up the uncertainty in not registering with the absolute, but more limited and more expensive, protection available under designs law. If you don't register, you run the risk of a court finding that the overlap defences protect a person copying your work. On the other hand, if you do register, you run the risk of having been overcautious, and of having unnecessarily limited the period of protection to which your work was entitled insofar as application to articles is concerned.¹⁵

¹⁴ Although there is a deeming provision which provides that a design will be taken to have been industrially applied where it has been applied to more than fifty items or applied to an article (other than handmade items) manufactured in lengths or pieces (Regulation 17 of the Designs Regulations), there remains considerable uncertainty as to when a design will be taken to have been industrially applied where fewer than fifty items have been produced. See *Safe Sport Pty Ltd v Puma Pty Ltd* (1985) 4 IPR 120; *Kevlakat Pty Ltd v Trailcraft Marine Pty Ltd* (1987) 11 IPR 77; *Press-Form Pty Ltd v Henderson's Ltd* (1993) 26 IPR 113.

¹⁵ I leave aside here Regulation 11 items, which remain within the province of copyright protection. As the preamble to the regulation states, these items are “primarily literary or artistic in character”. Hence, rather than the limited protection available under designs law, these types of artistic work can take full advantage of the protection given under the Copyright Act.

Marketing and manufacturing designs which incorporate or apply artistic works overseas

While copyright protection is all but global, you will need to check with relevant legislation if you will be marketing or manufacturing designs which incorporate or apply artistic works in countries other than Australia. Specifically, you will need to check whether there are any overlap provisions or defences which may act to inhibit your ability to rely upon copyright protection in that country.

WILL COPYRIGHT ALWAYS PROTECT AGAINST PEOPLE COPYING MY ARTWORK?

By now it should be clear that the short answer to this question is “no”.

If you or your clients merely deal with physical artwork – that is, individual, one-off pieces of original artwork (insofar as any artwork is original) – then this paper will be somewhat outside what you need to know. You will be able to rely upon copyright law to take action against people copying your work.

However, if you start making multiples of an artwork, then you need to ensure that the above defences and overlap provisions do not interfere with your ability to rely upon copyright to provide a remedy in the event that you catch people making copies of your work.

WHEN DO I NEED TO CONSIDER REGISTERING MY ART AS A DESIGN?

In short, you or your clients *need* to consider registering an artwork under the Designs Act if you want to “industrially apply” it to articles of manufacture.

You may wish to *consider* registering an artwork under the Designs Act if you want to “industrially apply” it, and the artwork is:

- a two-dimensional work which is going to be applied to the surface of an article;
- a work of artistic craftsmanship; or
- a building or a model of a building.

As noted above, you will also need to consider obtaining separate advice if you intend merchandising artworks overseas, as the interaction between design and copyright law varies from country to country.

WHAT SHOULD I CONSIDER IF I HAVE A CHOICE?

If you have a choice, what do you consider in making up your mind whether to register artwork as a design?

Remember again that copyright owners in two dimensional artistic works have the choice both to register *and* continue to receive copyright protection, while owners of copyright in works of artistic craftsmanship, buildings, and models of buildings have the ability to choose either one form of protection *or* the other.

It is therefore important to recognise the differences in these two forms of protection. Some of the differences are:

- Copyright protects works for a longer period (usually 50 years after the artist's death) while design registration gives a maximum of 16 years protection from the date of registration.
- Design registration gives a monopoly style protection to the design. This means that articles made from a registered design will be protected against similar articles whether or not actual copying is involved. By contrast, copyright will only be infringed where actual copying (conscious or subconscious) has taken place. If two artists independently arrive at the same design this will not by itself amount to infringement of copyright in the first artist's design.
- Copyright protection is automatic and costs nothing whereas registration under the Designs Act costs money and may be prohibitively expensive if a number of different designs are involved.

It is important to register a design before articles made from it are sold. As discussed above, this is because designs cannot be validly registered unless they are novel and unpublished.

Works of artistic craftsmanship

As noted above, an owner of copyright in a work of artistic craftsmanship has a choice as to whether they want to register the work as a design for functional articles, or whether they wish to continue to rely upon copyright protection.

I emphasise again that if a work of artistic craftsmanship is registered, copyright protection is lost. This means that a person who copied the articles may be subject to

legal action under the Designs Act, but would have a defence to an action for infringement of copyright in the work of artistic craftsmanship.

Two dimensional works to be applied to the surface of an article

As noted above, a two dimensional design which is to be applied to the surface of articles can in most cases be registered as a design under the Designs Act without losing copyright protection,¹⁶

HOW DO I REGISTER A DESIGN

So, lets assume:

- you have a two dimensional work which is to be applied to the surface of an article; *or* a work of artistic craftsmanship; *or* a building or a model of a building, and
- you wish to apply your design to articles; and
- you decide that you want to register the design under the Designs Act.

What do you do and where do you go?

In Australia, design registration is administered by the Australian Industrial Property Organisation (AIPO). AIPO's head office is in Canberra, but it also has branches in most capital cities. (The contact details for the Sydney and Canberra offices of AIPO are as follows:

Sydney: Level 1
45 Clarence St
Sydney NSW 2000
(phone: (02) 9262 6304)

Canberra: PO Box 200
Woden ACT 2606
(phone: (06) 283 2311)

(I have been told that it is sometimes quicker to ring the Canberra office than the Sydney branch.)

The points to bear in mind about design registration are as follows:

¹⁶ Note however, the types of item to which a two dimensional design is to be applied which fall within the list of articles in Regulation 11 of the Designs Regulations.

- only the “owner” of a design can apply for design registration;
- the application consists of:
 - an application form;
 - a Statement in Support; and
 - seven copies of representations of the design; and
- the lodgement fee must accompany the application, and is currently set at \$90.00, with an additional fee of \$90.00 if you want expedited consideration of the application.

The regulations under the Designs Act are full of arcane requirements as to the size of paper to be used, the type of ink, and the manner in which representations of designs must be supplied – all no doubt for good administrative effect. A solicitor may often be of assistance in facilitating applications, as well as in advising whether registration is desirable or necessary insofar as any particular design is concerned.

WHAT LEGAL REFORMS ARE LIKELY?

In my view, there is a clear distinction between what legal reforms are likely, and what legal reforms are necessary. In this section I will first discuss the problems with the current overlap provisions, and then move on to what the Australian Law Reform Commission recommended in relation to the problem of the interaction of copyright and design law.

As noted above, the copyright/design overlap provisions were last amended in 1989. The 1989 amendments removed the main inequities of the previous provisions and gave effect to the policy objectives which underlie those amendments. However, as discussed, there are still a number of problems with the way these provisions currently apply. As indicated earlier, insofar as the overlap provisions are presently drafted, an artist may unwittingly create a defence to infringement by authorising essentially artistic reproductions of a work. In addition to the difficulties discussed earlier, no transitional provision were introduced in the Copyright Amendment Act 1989.¹⁷ The absence of such provisions has created some uncertainty about the application of the defences in ss 75 and 77 to:

¹⁷ No transitional provisions were introduced when the Amendment Act was subsequently re-enacted in the Copyright Amendment (Re-enactment) Act 1993.

- an artistic work for which a corresponding design was registered prior to 1 October 1990;¹⁸
- an artistic work for which a corresponding design was industrially applied before the commencement of the new defences but which has been copied after 1 October 1990;¹⁹
- a two dimensional design which was caught by the definition of "corresponding design" in force before 1 October 1990 but is not covered by the new definition.²⁰

Different defences apply to artistic works made before 1 May 1969.²¹ For these works there are transitional provisions in the Act.²²

THE AUSTRALIAN LAW REFORM COMMISSION RECOMMENDATIONS IN RELATION TO THE OVERLAP PROVISIONS

Clearly, the overlap provisions are both complicated and messy. The question is whether they need be so.

To answer this question it is worth reminding ourselves that the line which the overlap provisions are attempting to draw is the line between what material should get the rather generous scale of protection given under the Copyright Act (life of the creator of the Work plus fifty years), and what material should be given protection enough to encourage innovation but not to prevent competition. Again, it is a balancing of two public interests: the public interest in encouraging and rewarding people for creative effort both in the fields of art and applied design, and the public interest in utilitarian items being quickly passed into the public domain.

Clearly there is a scale, at the extreme ends of which it is easy to identify what sort of protection is warranted, given the above public interests. For example:

¹⁸ The new s 75 defence only applies to design registered after 1 October 1990.

¹⁹ Note the discussion of this issue in *Ametex Fabrics Inc v C & F Fabrics Pty Limited* (1992) 38 FLR 415 per Wilcox J, obiter at 458-459.

²⁰ This issue has already arisen: see *Ametex Fabrics Inc v C & F Fabrics Pty Limited* (1992) 38 FLR 415; cf *Roland Corporation v Lorenzo & Sons Pty Ltd* (1991) 105 ALR 623; 33 FLR 111; 22 IPR 245.

²¹ Section 218 (2)

²² Section 218 (1)

- motorcycle parts belong firmly in designs law; a John Coburn painting belongs firmly in copyright law;
- industrial moulds belong firmly in designs law; a Robert Klippel sculpture belongs firmly in copyright law, albeit they often incorporate industrial items.

But the difficulty is in the middle area – in relation to applied design which has some sort of artistic integrity, rather than a merely utilitarian design – where should the legislation draw the line with a Philip Starck coathanger; or a BANG design table?

Essentially, it appears inevitable that the Copyright Act will have overlap provisions under which making industrial articles does not infringe copyright. The trick is ensuring that copyright protection for essentially “artistic” uses of artistic works is maintained.

The Australian Law Reform Commission (the ALRC) was requested to report on designs law in 1992 by the then Attorney-General, the Hon. Michael Duffy. A discussion paper was issued by the ALRC in 1994.²³ The report was published in 1995.²⁴ The Report contains some important reform proposals in relation to the copyright designs overlap.

This is neither the time nor the place to examine the ALRC Report in detail. Nonetheless, I make the following comments.

The ALRC recommended that the operation of the overlap be simplified, with the current provisions being repealed. In their place, the ALRC recommended that an adaptation right for artistic works be introduced as part of copyright protection. The Report also recommended that the Copyright Act should provide that it is not a reproduction of a work in a two dimensional form to make a version of the work in a three dimensional form.

One might be forgiven for thinking it inappropriate for the ALRC to recommend fundamental alterations to copyright in the course of an inquiry into a separate piece of legislation. If such a recommendation were to be seriously considered by the ALRC, much wider consultation would be required as the ramifications of such a recommendation extend far beyond the narrow scope of the industrial application of certain artistic works. Further, although the ALRC states that it is not its intention in these proposals to fundamentally change the policy which underlies the existing

²³ ALRC, *Discussion Paper No 58: Designs*, 1994.

²⁴ ALRC, *Report No 74: Designs*, 1995.

provisions but rather to attempt to give effect to that policy in a simpler way it is not clear that this objective is achieved.

The ALRC's recommendations also included the following:

- a change to s 77(1)(b) to clarify that the phrase “a corresponding design is applied industrially” means that the design has been applied industrially *before or after* 1 October 1990 (when the section came into effect), rather than that the design has been applied industrially after 1 October 1990;
- an amendment to s 77(2) so that the reproduction of an artistic work in the course of, or for the purposes of, industrial application would also be covered by the s 77 defence;
- the introduction of specific transitional and savings provisions to clarify the operation of the Act;
- clarification that incidental reproduction of an artistic work in two dimensions in the course of or for the purposes of industrial application be a non-infringing act (this amendment is aimed at removing copyright protection for plan-to-plan copying where a design is industrialised); and
- clarification that a work may be both a work of artistic craftsmanship *and* a work listed in (a) or (b) of the definition of artistic work in s 10(1);

It is now a question of waiting to see whether the recommendations in the Report are implemented.