

Designs

In August last year the Attorney-General gave the Commission a Reference to review the Designs Act 1906 (Cth). The Commission has to modernise and simplify the Act and to ensure that it adequately protects industrial designs. Michael Barnett, from the Designs team, gives a preliminary report.

Design deals with the appearance of a manufactured article. Design is not concerned with the article itself but with its shape, configuration, ornamentation or pattern. All manufactured goods have a design, including furniture, kitchenware, fabrics, industrial machinery and cars. A 'good' design can add to the efficiency, attractiveness and value of a product and it may therefore be crucial to its commercial success. The commercial success of an article may depend as much on its appearance as on its efficiency or reliability.

Purpose of design protection — balance

The most important rationale for designs protection is that it rewards and encourages innovators and creators by enabling them to achieve commercial value from the articles that they design. It is generally agreed, however, that a balance must be achieved between this policy and the need to ensure that the protection given to owners of designs does not unreasonably impede competition in the marketplace.

The current system

Protection for a design derives from registration. To obtain registration, a design must be new or original. It must be applicable to a manufactured article, and it must have features of shape, configuration, pattern or ornamentation which the eye can discern. A design that consists of, or includes, functional features may be registered. Certain designs which are primarily literary or artistic are excluded because they are more suitable for copyright protection. Registration of a design gives the owner a monopoly to apply that design to the article for which the design is registered. A person infringes the monopoly by, for example, applying the design or any fraudulent or obvious imitation of it to an article in respect of which the design is registered, without the owner's permission. The monopoly gives the owner personal property rights in relation to the design. The maximum period of protection is 16 years. Infringement of a design may result in a variety of remedies, including damages and injunctions.

Consultations

The Commission intends to consult widely with governmental bodies, designers, manufacturers, legal practitioners, patent attorneys and other persons with an interest in designs. Our final report is due in 1995, but the Commission will publish an Issues Paper in early 1993. The Issues Paper will not include recommendations or proposals. It will raise important issues in the field of design and it will call for submissions. On the basis of those submissions and the consultations we will publish a Discussion Paper 12 months later. It will contain specific proposals and probably also draft legislation.

The issues paper

The Commission is currently asking people and organisations in the designs industry what they consider the major issues to be. Without having had the benefit of responses to this request we would tentatively suggest the following as significant issues requiring further research:

- the form that design protection should take — should it be a monopoly right or only a protection against copying (Obviously this has implications for the existence of a registration system and leads to the next point)
- the advantages and disadvantages of a registration system
- whether current remedies for infringement are adequate in terms of speed, cost and effectiveness (In other words, if someone steals a design what can you do about it?)

Other issues requiring careful consideration would be:

- whether features which serve a purely functional purpose should be able to be protected by designs legislation
- the economic and social purposes of design protection

- whether there should be a definition of a design and, if so, what it should be
- whether novelty or originality should be required before a design is registrable, and if so, what level of novelty or originality and the best way to express it
- the duration of design protection, including whether there should be varying periods of protection depending on the nature of the design and the article
- whether there should be a new category of protection for purely functional designs
- the interaction with other intellectual property rights and remedies (eg to what extent, if any, dual protection under copyright and designs should be allowed)

- whether some designs are not accorded appropriate protection because of uncertainty as to whether designs law or copyright law should be applied
- whether the Designs Act and the designs system are suitable for modern society and modern industry.

Submissions and comments welcome

The Commission will be giving the Issues Paper wide distribution. We welcome submissions or comments from any person or organisation on issues arising out of the paper, or on any other aspect of the Designs Act or the designs system.

