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# COPYRIGHT REFORM

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IT IS NOT A LEGAL ADVICE AND SHOULD NOT BE RELIED ON AS SUCH.**

## **Changes to copyright rights in packaging and labelling under Schedule 2\* of the *Copyright Amendment Act (No.1) 1998***

The Copyright Amendment Act (No.1) became law on 30 July 1998. Schedule 2 of the Act will reform copyright law as it relates to the importation of packaging and labelling, with effect from the end of January 2000. From then, parallel importation of '*non-infringing accessories*' will not be able to be prevented by using the copyright materials on, or with the accessories.

### **WHAT COPYRIGHT IS THERE IN PACKAGING AND LABELS?**

Drawings, photographs, paintings or text on packaging or labels, if original, are protected under copyright law in Australia. This is so, even though the goods to which the packaging and labelling are applied, such as toys, shoes, liquor, cosmetics and clothing, do not have copyright protection.

It should also be noted that not all labels can claim copyright protection. Single words, such as brand or company names, are, of themselves, unlikely to qualify for copyright protection.

### **POLICY OBJECTIVE**

The objective of the amendments is to provide the opportunity for better prices and greater availability of goods.

Without this change business with exclusive distribution rights for various non-copyright imported goods such as toys, shoes, liquor, cosmetics and clothing would continue to be able to use the copyright in the packaging and labelling of those goods to stop other businesses from

importing and reselling those goods. It was never intended that copyright be used for this purpose.

The right to prevent importation of a toy, or a pair of shoes, or a bottle of perfume, should not be made possible just because it comes in a box, or has a label, with an artistic work on it.

### **OTHER LEGISLATION**

**Consumer protection:** There are already laws that deal specifically with health and safety issues and consumer protection. Copyright law is irrelevant to these issues - it was never intended, nor is it formulated, to deal with health and safety issues and consumer protection.

However, it should be noted that each State and Territory has fair trading legislation (and the Commonwealth, the *Trade Practices Act 1974*) and health and safety legislation which can affect the legality of the importation of certain goods. Third party importers will need to ensure that they do not breach these or any other laws that may be relevant such as health, food, trade measurement and trade description requirements.

**Other intellectual property laws:** These amendments do not change the law regarding importation of patented goods, trade marks, designs and trade secrets. In some cases, especially in the case of trade-marked goods where the mark was applied by an entity different from the owner of the mark in Australia, the Australian owner may have a right to prevent the sale of the imported goods in Australia. Each situation depends on the particular facts.

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\* What is now Schedule 2 of the Act was Schedule 3 of the Copyright Amendment Bill 1997. The Bill as passed, deleted what had been Schedule 1 and thus Schedule 3 became Schedule 2 in the Act as passed.

## **WHAT ABOUT BUSINESSES WITH EXCLUSIVE ARRANGEMENTS?**

Some businesses relied substantially on this application of the law. The amendments to the Copyright Act were delayed for 18 months from the passage of the amending act, expiring at the end of January 2000, to allow those businesses to take account of the change in the law.

This reform does not prevent these and other businesses from entering into, and maintaining exclusive contractual agreements for supply.

They will still be able to enter into agreements with overseas distributors/manufacturers under which the overseas supplier agree to supply Australian businesses exclusively.

But where legitimate goods can be obtained through other channels, there will be greater pressure for the Australian exclusive distributor to supply the goods at a competitive price.

This is the normal environment in most trading situations and applies to markets within Australia for large numbers of goods.

Businesses in regional areas will particularly benefit. They will have a greater opportunity to source a wider range of goods from a wider range of suppliers - and probably at cheaper prices.

## **EFFECT ON CONSUMERS**

Consumers will have access to a wider range of goods at cheaper prices. Consumers will not have to put up with artificially inflated prices for foreign 'exclusive goods' where exclusivity is dependent on copyright packaging and labelling.

As new businesses are established consumers will have greater choice.

They will be able to 'shop around' more.

Many current distributors can be expected to lower prices and/or improve service in the face of real or threatened competition.

The Copyright Law Review Committee recommended in favour of the reforms contained in Schedule 2 and the Australian Consumers Association and the ACCC both agree that the reforms will lead to greater competition, lower prices, increased choice, and benefits for consumers.

The NZ Government commissioned an economic study into the consequences of parallel importation in 1998 which concluded

that there were net benefits for consumers arising from parallel importation.

## **WILL THE DECISION HURT DISTRIBUTORS' REPUTATIONS?**

These amendments will not affect distributors' reputations. The reforms will only allow parallel importation of legitimate copyright packaging and labels. It will not legalise importation of goods with pirated packaging and labelling.

Only genuinely labelled products meeting Australian regulatory requirements can be legally sold by third party importers or those supplied by them. These are generally the products that the current exclusive distributor also sells.

Goods produced for other markets may be of a different quality. However, responsible distributors have a range of options for distinctively identifying their products and distancing themselves from sub-standard service or supply by others. This is usual market practice.

## **WILL THE AMENDMENTS DESTROY BRAND-NAME VALUE?**

Businesses opposed to the amendments expressed concern about the impact on the reputation of their brands caused by 3rd party distribution of goods made for different markets or by them using a different marketing strategy.

However, the reforms will not stop businesses entering into contracts for exclusive supply to protect their arrangements with overseas suppliers. Businesses also already rely on price, advertising, labelling and service differentiation to maintain market share, and they can continue to use these means, and possibly trade mark law, for differentiating and protecting their brands.

It can be noted that brand-names and exclusive distributorships for foreign brands existed long before distributors began using copyright in packaging and labelling to protect exclusive distribution arrangements and many successful businesses that import goods from overseas do not use copyright to protect their businesses.

A number of our trading partners already have provisions similar to this reform. New Zealand, Singapore, Japan and Malaysia allow such parallel importation. The European Union does not permit labelling to be used to prevent the free trade of goods within its borders and the law in

the USA allows reimportation of goods sold out of the USA.

## **IS COPYRIGHT PROTECTION BEING DENIED?**

No. The amendments do **not** remove copyright protection from packaging and labelling that now qualify for such protection.

They simply remove the right to use the copyright in 'accessories' (ie packaging and labelling) to an article to control importation of that article.

The amendments will not make legal labelling that is counterfeit or packaging that is pirated. Importation of, and sale of, articles using counterfeit copies of works on the packaging or labelling will still be illegal and such material will remain liable to seizure at the border and in the market.

**Importation and sale of articles with counterfeit labelling will still be illegal and they will remain liable to seizure.**

## **BACKGROUND AND OPERATION OF THE AMENDMENTS**

The amendments on packaging and labelling are in Schedule 2 of the *Copyright Amendment Act (No 1) 1998*. The amendments give effect to the recommendations in the 1988 Copyright Law Review Committee (CLRC) report on *The Importation Provisions of the Copyright Act 1968*.

The CLRC invited submissions and held public hearings. The Report recommended that copyright packaging and labelling not be permitted to be used to control the importation of non-copyright articles such as liquor.

A Bill that included amendments to implement this recommendation was introduced in late 1992 with 3 months allowed for public comment. The Bill lapsed with the calling of the 1993 Federal election.

An Exposure Draft with provisions largely repeating the 1992 provisions was released by the then Minister for Justice in February 1996, just before the Federal election.

The Copyright Amendment Bill 1997\* was introduced into the House of Representatives on 18 June 1997, was passed and introduced into the

\* Now the *Copyright Amendment Act (No.1) 1998*

Senate on 27 June. It was referred to Senate Legal and Constitutional Legislation Committee which invited submissions from a wide range of organisations. Public hearings were held on 18 and 19 August and 2 September. Thirty-two submissions addressing the amendments in Schedule 2 were received.

The Committee reported on 27 October with the majority report favouring the passage of Schedule 2. No amendments to Schedule 2 were suggested.

The Bill was passed by the Senate on 11 July 1998 and by the House of Representatives on 15 July 1998. It became an Act on receiving Assent on 30 July 1998. Some items of Schedule 2 took effect on that date. The operative provisions relating to packaging and labelling take effect from the end of January 2000.

The text of Schedule 2 of the *Copyright Amendment Act (No.1) 1998* is contained in the Appendix to this information sheet. The definition of 'accessory' shows what is excluded from the control of the copyright owner in relation to importation of such items so long as they are 'non-infringing accessories'. This term is also defined.

In summary, the copy of the copyright material that is an accessory is 'non-infringing' if it was authorised to be made by the copyright owner where it was made and it was made in a country that is a member of the World Trade Organisation or the Berne Convention. This includes most major trading countries except Taiwan. Lists of the relevant countries can be found in the Schedules of the *Copyright (International Protection) Regulations*.

**Readers are reminded that this information is for general understanding of the amendments only, and the determination of the legality of any specific 3rd party importation is up to the person importing or selling the goods and they are urged to obtain their own legal advice.**

## APPENDIX

### Copyright Amendment Act (No.1) 1998 Schedule 2—Labelling and packaging etc. of imported goods etc.

#### Copyright Act 1968

##### 1 Subsection 10(1) (definition of *infringing copy*)

Omit all the words after “importer,”,  
substitute:

but does not include:

- (f) a non-infringing book whose importation does not constitute an infringement of that copyright; or
- (g) a non-infringing accessory whose importation does not constitute an infringement of that copyright.

##### 2 Subsection 10(1)

Insert:

*accessory*, in relation to an article, means one or more of the following:

- (a) a label affixed to, displayed on, incorporated into the surface of, or accompanying, the article;
- (b) the packaging or container in which the article is packaged or contained;
- (c) a label affixed to, displayed on, incorporated into the surface of, or accompanying, the packaging or container in which the article is packaged or contained;
- (d) a written instruction, warranty or other information provided with the article;
- (e) a record embodying an instructional sound recording, or a copy of an instructional cinematograph film, provided with the article;

but does not include:

- (f) any label, packaging or container on which the olympic symbol (within the meaning of the *Olympic Insignia Protection Act 1987*) is reproduced; or

- (g) a manual sold with computer software for use in connection with that software.

##### 3 Subsection 10(1)

Insert:

*non-infringing accessory* means an accessory made in:

- (a) a country that is a party to the International Convention for the Protection of Literary and Artistic Works concluded at Berne on 9 September 1886 as revised from time to time; or
- (b) a country that is a member of the World Trade Organization and has a law that provides consistently with the TRIPS Agreement for:
  - (i) the ownership and duration of copyright or a related right in works, sound recordings and cinematograph films; and
  - (ii) the owner of the copyright or related right to have rights relating to the reproduction of the work, sound recording or cinematograph film;

where:

- (c) the making of any copy of a work, or any reproduction of a published edition of a work, that is on, or is embodied in, the accessory; or
- (d) the making of any record embodying a sound recording, or any copy of a cinematograph film, that is the accessory;

was authorised by the owner of the copyright in that country in the work, edition, recording or film, as the case may be.

##### 4 Subsection 10(1)

Insert:

*TRIPS Agreement* means the Agreement on Trade-Related Aspects of Intellectual Property Rights set out in Annex 1C to the Marrakesh Agreement establishing the World Trade Organization, done at Marrakesh on 15 April 1994.

Note: The English text of the Marrakesh Agreement establishing the World Trade

**5 Section 37**

Omit “section 44A”, substitute “Division 3”.

**6 At the end of section 37**

Add:

- (2) In relation to an accessory to an article that is or includes a copy of a work, being a copy that was made without the licence of the owner of the copyright in the work in the country in which the copy was made, subsection (1) has effect as if the words “the importer knew, or ought reasonably to have known, that” were omitted.

**7 Subsection 38(1)**

Omit “section 44A”, substitute “Division 3”.

**8 After section 44B**

Add:

**44C Copyright subsisting in accessories etc. to imported articles**

- (1) The copyright in a work a copy of which is on, or embodied in, a non-infringing accessory to an article is not infringed by importing the accessory with the article.
- (2) Section 38 does not apply to a copy of a work, being a copy that is on, or embodied in, a non-infringing accessory to an article, if the importation of the accessory is not an infringement of copyright in the work.

**9 Section 102**

Omit “section 112A”, substitute “sections 112A and 112C”.

**10 At the end of section 102**

Add:

- (2) In relation to an accessory to an article that is or includes a copy of subject-matter in which copyright subsists by virtue of this Part, being a copy that was made without the licence of the owner of the copyright in the country in which the copy was made, subsection (1) has effect as if the words “the importer knew, or ought reasonably to have known, that” were omitted.

**11 Subsection 103(1)**

Omit “section 112A”, substitute “sections 112A and 112C”.

**12 After section 112B**

Add:

**112C Copyright subsisting in accessories etc. to imported articles**

- (1) The copyright in:
  - (a) a published edition of a work a reproduction of which is on, or embodied in, a non-infringing accessory to an article; or
  - (b) a cinematograph film a copy of which is a non-infringing accessory to an article; or
  - (c) a sound recording a record of which is a non-infringing accessory to an article;

is not infringed by importing the accessory with the article.

- (2) Section 103 does not apply to:

- (a) a reproduction of a published edition of a work, being a reproduction that is on, or embodied in, a non-infringing accessory to an article; or
- (b) a copy of a cinematograph film, being a copy that is a non-infringing accessory to an article; or
- (c) a record embodying a sound recording, being a record that is a non-infringing accessory to an article;

if the importation of the accessory is not an infringement of copyright in the edition, film or recording, as the case may be.

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+ Prepared by the Attorney-General’s Department  
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