

Examine the concept of “work of artistic craftsmanship” and critically analyse the rationale for this special protection.

I. Introduction

Copyright is a set of exclusive rights which are automatically assigned to an original piece of work for the purposes of protecting the creator’s skill, labor and judgment involved in the production of the work as opposed to any creative merit derived from the work¹. The underlying premise for copyright protection is the impartial grant of an exclusive property right to control the replication and dissemination of the author’s work in order to moderate the supply of these works. Evidently, this secures and rewards the author with a financial incentive to keep producing the works, and acknowledges the creative effort and talent in deriving such works². Thus, it is obvious that there is a positive correlation between the financial incentive derived from the work and the degree of community recognition in endorsing the work. The recognition which is achieved by the author in the production of such works naturally spurs society to demand more of the said works, and therefore continues to stimulate the creative process forward.

It was this chain process of events which allowed the first class of works to be protected by copyright to be works of artistic form. The class of artistic work was the first class to be protected by 1911 Copyright Act – although courts located in both the United Kingdom and Australia have had extreme difficulty in establishing a clear and definitive meaning for works encompassed within this class. This is predominately highlighted by the phrase ‘*works of artistic craftsmanship*’, which gathers no clear definition from the statute and relies entirely on guidance set out in rulings by the courts. Consequently, this paper endeavors to discover and explore the concept of ‘*works of artistic craftsmanship*’ and draw systemic comparisons between a number of critical cases which have been eminent in attempting to define this concept. It also seeks to explore the nature of dual protection under the Copyright and Designs Acts, and determine whether the creator of an artistic work should be afforded dual protection under copyright if they apply their artistic creation industrially. Finally, it will attempt to draw tentative conclusions

¹ *Sands & McDougall Pty Ltd v Robinson* (1917) 23 CLR 49

² Panel Three, *Beyond Napster: Debating the Future of Copyright* (2000), Viewed 12th January 2008

about whether Section 77 of the Copyright Act 1968 should be removed from the statute and replaced or if it should remain in its current form.

II. Concept of ‘Artistic Craftsmanship’

The first case in Australia which explored the meaning of ‘*work of artistic craftsmanship*’ was *Cuisenaire v Reed*³, and it could only draw modest guidance from a decision seen in *Burke & Margot Burke Ltd v Spicers Dress Designs*⁴ in respect to its correct meaning. The plaintiff in this case was a Belgian resident, who developed a system of teaching primary school mathematics with rods of various lengths and colors. In 1952 he published a book which consequently described his ‘*Cuisenaire method*’ of teaching mathematics, and he licensed it to a Victorian company which incorporated the method into Victorian schools. The defendant in the case began manufacturing and selling sets of rods which were in no way different to the Cuisenaire ones, and Cuisenaire sued for copyright infringement. Pape J at 729-32 questioned⁵ whether the works were considered ‘*works of artistic craftsmanship*’, and he concluded⁶ that the works were not of an ‘*artistic*’ nature and that the intention of the creator was never for them to be. Pape J also suggested in his summary remarks that it was “*craftsmanship which attracts copyright, and that copyright is in the person who exercises that craftsmanship provided it is artistic*”.

Another critical case in determining an accurate definition of ‘*artistic craftsmanship*’ was the more recent decision concluded in *Muscat v Le*⁷. In this case, a pair of trousers had become extremely popular among young girls and Ms Muscat sought copyright protection of the trousers in their own right in order to stop competitors from producing them. Finkelstein J at para 43 referred to Drummond J’s conclusion⁸ in the *Coogi Australia Pty Ld v Hysport International Pty Ltd*⁹ case and proposed to formulate his decision in the same manner. Finkelstein sought to

³ *Cuisenaire v Reed* [1963] VR 719

⁴ *Burke & Margot Burke Ltd v Spicers Dress Designs* [1936] Ch 400; [1936] 1 All ER 99s

⁵ *Ibid* 4

⁶ Pape also considered that “*It cannot be said, objectively, that these pieces of coloured wood present any indication of beauty or appear to the aesthetic feelings or emotions of the beholder, or that the person or firm who made them applied his skill and taste to the production of an article intending to produce something which would have a substantial aesthetic appeal or purpose.*”

⁷ *Muscat v Le* [2003] FCA 1540, (2004) 60 IPR 276 (Federal Court of Australia)

⁸ *Coogi Australia Pty Ld v Hysport International Pty Ltd* (1998) 86 FCR 154, 164 – where Drummond J said “*the phrase ‘works of artistic craftsmanship’ is a composite phrase that must be construed as a whole and objectively*”

⁹ *Ibid* 8

define both ‘*artistic*’ and ‘*craftsmanship*’ separately such that ‘*artistic*’ was defined¹⁰ as “*a work (which) appeals to the aesthetic tastes of those who observe it, even if such an article is utilitarian.*” He also suggested that the court should decide on the level of aesthetic appeal by reviewing it objectively in combination with appropriate evidence. Finkelstein J then accepted the definition of ‘*craftsmanship*’ - with reference to Lord Reid at 77 and Lord Morris at 80-81 in *George Hensher Ltd v Restawile Upholstery (Lancs) Ltd*¹¹ - as “*a useful handmade object*”. Consequently, he defined a ‘*work of artistic craftsmanship*’ as a “*practical utility which (derives) its owner value because of its artistic character, as opposed to its commercial operation*”. Finkelstein rejected any notion that Ms Muscats garments were of an ‘*artistic craftsmanship*’ nature at para 49, because they “*were not created as a work of art...and they were never intended to be*”.

It is important to note that ‘*craftsmanship*’ does not necessarily require that the article in question is handmade. In *Cuisenaire*, *Hensher*, *Muscat* and *Swarbrick* all the items were distinctly and obviously handmade. However, in the previously mentioned *Coogi Australia Pty Ld v Hysport International Pty Ltd*¹² case, Drummond J of the Full Federal Court found that a computerized knitting machine could produce a garment which would be considered a ‘*work of artistic craftsmanship*’. His honor suggested that there was “*no difference between a skilled person who makes an article with hand-held tools, and a skilled person who uses those skills to set up and operate a machine which produces an article*”. Additionally, he also contended that any work which was jointly created by combining distinct elements of artistic creation and craftsmanship, could also be considered to be a ‘*work of artistic craftsmanship*’ through joint authorship.

It is evident from the decisions outlined by Pape J and Finkelstein J that the critical and deciding factor into whether a work is considered a work of ‘*artistic craftsmanship*’ is the original intention of the artist in creating the work. This has been explored most recently in the *Burge v Swarbrick*¹³ case whereby Swarbrick sought to copyright a handmade, full-scale model or ‘plug’ of a yacht. Swarbrick did not seek design registration under the Designs Act 2003 and sought

¹⁰ Ibid 7, Para 44

¹¹ *George Hensher Ltd v Restawile Upholstery (Lancs) Ltd*¹¹ [1976] AC 64 at 76

¹² *Coogi Australia Pty Ld v Hysport International Pty Ltd* (1998) 41 IPR 593

¹³ *Burge v Swarbrick* [2007] HCA 17; (2007) 234 ALR 204; 81 ALJR 950 (26 April 2007)

protection under copyright law. The Full Federal Court noted at Para 83 in defining whether a work is ‘*a work of artistic craftsmanship*’ that it must “*not turn (to) assessing the beauty or aesthetic appeal of a work or assessing any harmony between its visual appeal and its utility. The determination turns on assessing the extent to which the particular work’s artistic expression, in its form, is unconstrained by functional considerations.*” Thus, they concluded at Para 85 - in a similar manner to Pape J and Finkelstein J - that the ‘plug’ was not a ‘*work of artistic craftsmanship*’ because in designing it, Mr Swarbrick was “*not that of an artist-craftsman*”¹⁴ and therefore, he could have never had any intention to create a work of ‘*artistic craftsmanship*’.

III. Copyright and Design Overlap

While the preceding cases have highlighted the court’s consistently in reviewing the intention of the artist before deciding whether their work is to be considered a ‘*work of artistic craftsmanship*’ - it is obvious that a definitive test is needed. This has become increasingly important since the introduction of the s77A(1)(a) defense in the Copyright Act 1968 after the Copyright Amendments Act 1989. The principal area of confusion between the Copyright Act 1968 and the Designs Act 2003 has been caused by the subsequent amendments of s74 – s77 in Division 8 of the Copyright Act 1968. The introduction of these sections sought to remove copyright protection in the instances that a corresponding design was registered in accordance with s75¹⁵, or was applied industrially without registration as per s77¹⁶. Thus, the purpose of s74-s77 in the Copyright Act 1968 is to remove copyright protection for functional articles where design protection evidently overlaps. s77(1) seeks to uphold this protection for works of artistic craftsmanship, buildings and models and implies that any three-dimensional reproductions of these specific works will infringe copyright in this regard – unless these reproductions are corresponding designs registered under the Designs Act 2003.

It was broadly stated in the pre-1989 amending Act under s74, that a “*corresponding design*” included “*an artistic work*”, which subsequently encompassed the s10(1) Copyright Act 1968 definition of an ‘*artistic work*’. s10(1) of the Copyright Act defines a variety of works as ‘*artistic*

¹⁴ Ibid 12, Para 85

¹⁵ Copyright Act 1968

¹⁶ Ibid 15

works' which include "*drawings, engravings, sculptures and works of artistic craftsmanship*". This implied that anything which was not encompassed within the s4(1) definition under the Design Act 1906, would be awarded full copyright protection if it was considered an '*artistic work*' under the Copyright Act 1968 definition. Furthermore, the s77¹⁷ reference to '*applied industrially*' was not defined in the Copyright Act 1968 itself, but was instead defined in Reg 17 of the Copyright Regulations 1969. It was also defined in the regulations which were made under the Designs Act 1906¹⁸ and both definitions excluded the registration of designs which applied to '*articles that were primarily literary or artistic in character*'. This led to significant problems in the interpretation of this section and it was recommended in the subsequent DLRC Report¹⁹ that definitive changes were necessary.

The pre-1989 Amendment Act had no clear provision comparable to s77(1)(d) as amended by the Designs (Consequential Amendments) Act 2003 in referring to non-registrable designs. As suggested earlier, this implied that anything outside the s4(1) definition of the Designs Act 1906 would be afforded copyright protection if it fell within the definition of '*artistic work*'. In *Warman International v Envirotech Australia Pty Ltd*²⁰, Wilcox J held that drawings of the applicants pump parts were definitively not encompassed within the '*designs*' definition because they were a '*method or principle of construction*' – however, they were provided with copyright protection under the unamended Copyright Act 1968 because they fell within the '*artistic work*' definition. Clearly, this had obvious ramifications in that anything which was not a design, but which was considered within the scope of s77(1) would be afforded protection under the unamended Act.

It is apparent that there was obvious confusion in relation to the s77(1)(a) specific exclusion of a '*work of artistic craftsmanship*' due to the inference by this section in suggesting it meant something different to definition provided in s10(1) prior to the 2003 Amendments. Evidently, this created ambiguity in establishing a clear meaning as to how a '*work of artistic craftsmanship*' was defined, and more importantly – how it was considered when exploring the design-copyright law overlap. The implication of s77(1)(a) suggested that all previously explored

¹⁷ Ibid 15

¹⁸ It is noted that this was previously called Reg 20A, then Reg 11 of Design Regulations 1982

¹⁹ Designs Law Review Committee (DLRC), *Report on the Law Relating to Designs*, Canberra, 1973

²⁰ *Warman International v Envirotech Australia Pty Ltd* (1986) 6 IPR 578 at 596

case law was not applicable in the instance that there was a design-copyright law overlap, and the tests typically conducted for a *'work of artistic craftsmanship'* in general copyright law were not valid when examining a copyright-design law overlap. The apparent problem created by s77(1)(a) before the s10(1) par (c) amendment in 2003, was that it did not make it clear whether a work can be both a work of *'artistic craftsmanship'* and a *'artistic work'* under s10(1)(a) and (b) of the Act.

This exact issue was raised by the Law Council of Australia in a submission to the Attorney-General²¹ in reviewing the unamended Act. It was commented by the council that *'two interpretations of the words a 'work of artistic craftsmanship' are possible. The first refers only to the matter within paragraph (c) of the definition of artistic work. The second interpretation, and we believe the correct interpretation, is that not only is matter falling within paragraph (c) included but also any matter set out in paragraphs (a) and (b) of the definition of artistic work'*. It is clear that the Law Council was inferring under the unamended Act that there was a lack of clarification in defining a *'work of artistic craftsmanship'* and if the *'second interpretation'* was correct, it would imply that s77 provided a wider level of uncertainty than under the *'first interpretation'*. The difficulty with the *'first interpretation'* was the inability to draw a distinction between a *'work of artistic craftsmanship'* and any other three-dimensional artistic work. Thus, it was suggested that either a change of wording in respect of the paragraph (c) in the definition of *'artistic work'* must occur, or the addition of a definition for *'artistic craftsmanship'* should be included in s10(1) of the Act. It was concluded that a change to the wording of paragraph (c) under s10(1) for *'artistic work'* would be implemented with the Designs (Consequential Amendments) 2003 Act rather than introduce a new *'artistic craftsmanship'* definition. The original words in paragraph (c) of the definition - *'to which neither of the last two preceding paragraph applies'* - were substituted with - *'whether or not mentioned in paragraph (a) or (b)'*.

It is noted that the redefined paragraph (c) for the *'artistic work'* definition in s10(1) of the Act sought to provide a broader level of scope for items which were not encompassed in paragraphs (a) or (b). Whether this subsequent change has assisted in clarifying the correct interpretation of a *'work of artistic craftsmanship'* is questionable – particularly in the event of a design-copyright

²¹ Law Council of Australia, Inquiry into Intellectual Property Protection for Industrial Designs, 1989, Appendix A

overlap. It was suggested by the Law Council²² that the phrase a ‘*work of artistic craftsmanship*’ be removed entirely from s74-s77 of the Act, however many bodies²³ argued that not having it in the statute would mean many copyright owners of works of artistic craftsmanship would lose their rights – an outcome that would entirely contrary to the fundamental purpose of the Act. The ALRC Report²⁴ agreed, suggesting that many “*craftspeople are unaware of the designs-copyright overlap and are unlikely to have the means to register their works*”. The Report did suggest that a definition of ‘*artistic craftsmanship*’ should be provided in the Act, so it could be definitively established that a work could be both a work of ‘*artistic craftsmanship*’ and an ‘*artistic work*’. This was rejected by the Governments in their Response²⁵ to the report which responded by stating that “*it is unlikely that this would provide any improvement in interpretation by the courts of the Copyright Act and could add uncertainty rather than clarity*”²⁶.

In examining the copyright-design overlap in s74-s77, it is important to recognize that during the primary creation of ‘*artistic craftwork*’ it is plausible that many copies of an original work are made. The obvious problem with the current statute in this regard, is that it could potentially render the work being “*an industrial application of a corresponding design*” in accordance with s77(1). This would subsequently remove the protection afforded to the artist by the Copyright Act 1968 regardless of whether there was intention to produce multiple copies of the work or not. Thus, it is recognized that systemic problems still exist within this section in respect of works which would fall into the category of being “*industrially applied*” but which are merely development works and a clear definition has not been provided by the courts or the statute in this regard. However, in suggesting that the removal of the phrase from s77 would assist in solving this issue for works of ‘*artistic craftsmanship*’ is unsubstantiated. It is obvious that any removal of the phrase ‘*a work of artistic craftsmanship*’ from s74-s77 would immediately render all artists who set out with the intention to produce a work of artistic craftsmanship with little or no protection under copyright or under the Designs Act 2003 if the work was not registered. It is

²² Ibid

²³ Australian Copyright Council, www.copyright.org.au/pdf/acc/Submissions/X9208ALRC.pdf, Viewed 17th January 2008

²⁴ Australian Law Reform Commission, Report No 74: Designs, Sydney, 1995, Paragraph 17.21

²⁵ Australian Law Reform Commission, Government Response to the ALRC Designs Review, <http://www.alrc.gov.au/inquiries/title/alrc74/response.htm>, Viewed 18th January 2008

²⁶ Ibid 25, Response to Reform 172

contended that this would be in direct conflict with the fundamental purpose of the Copyright Act 1968 – ‘to protect the creator’s skill, labor and judgment involved in the production of the work’. Any protection currently afforded under s77(1) is for the purpose of protecting the majority of ‘artistic craftsman’ whose produce a work of art with the intention of it appealing ‘to the tastes of those who observe it’²⁷. While the fundamental purpose of the Designs Act 2003 under s10(1) is to provide a monopoly right in respect of the registered design – the applicant must specifically file an application with the designs Registrar. Furthermore, this process is expensive and one which has extensive review and examination process which many artists find confusing and complex. Ensuring that ‘artistic craftsmanship’ remains in the design-copyright provisions contained within s74-s77 of the Act will make certain that a work is afforded intellectual property protection which it would otherwise not exist without Designs Act 2003 registration²⁸.

I. Conclusion

It is clear that there is still a gaping divide in attempting to establish a clear and definitive set of provisions within the Copyright Act 1968 for the purposes of the phrase - a ‘work of artistic craftsmanship’. It is clear the phrase has been difficult to define in not only general copyright law, but also in relation to the provisions which encompass the design-copyright overlap. The Act does require a more substantive definition of this phrase as the reliance on the courts to deliver a clear meaning have thus far proven difficult. While Pape J and Finkelstein J in *Cuisenaire v Reed*²⁹ and *Muscat v Le*³⁰ respectively, did attempt to define the correct interpretation of a ‘work of artistic craftsmanship’ – it is clear that neither provided true and uncompromising clarity of the phrase, and nor did they propose a test to definitively establish how to test whether a work was considered one. This was consistent with the decision in the most recent case of *Burge v Swarbrick*³¹ where the court generally agreed with the conclusions offered by Pape J and Finkelstein J, such that it viewed a ‘work of artistic craftsmanship’ objectively - with the

²⁷ Ibid 10

²⁸ For example, without s74-s77 it would be increasingly difficult to defend the copyright of a two-dimensional work being copied to a three-dimensional form.

²⁹ Ibid 3

³⁰ Ibid 7

³¹ Ibid 13

intention of the creator in producing the work playing a critically important part in deciding an outcome.

The inability to accurately define a '*work of artistic craftsmanship*' has exacerbated the difficulties that arise when correctly interpreting s74-s77 of the Copyright Act 1968. It is evident that despite numerous revisions to the Act, many difficulties still exist in providing adequate protection to genuine '*artistic craftsman*' under these sections. While the redefinition of para (c) for '*artistic work*' in s10(1) has attempted to limit the degree of confusion as to what is a '*work of artistic craftsmanship*' is, the revision has not definitively assisted in resolving the problem. This was discussed in the ALRC Report which suggested that systemic problems existed in the Copyright Act 1968 unless a definition for '*artistic craftsmanship*' was provided. While this was subsequently rejected by the Governments Response to the Report, the reasoning was inconclusive, and it is hoped that future amendments to the Act will provide clearer guidance.

While it was contended that the '*work of artistic craftsmanship*' phrase be removed from s74-s77 of Act, it is nonsensical to do so based on the current provisions outlined in both the Copyright Act 1968 and the Designs Act 2003. The obvious issue in removing the phrase from s74-s77 is that it would remove a substantial amount of protection for a large number of copyright owners who own works of artistic craftsmanship. Additionally, it would cause significant confusion within the community as most artists which produce works of artistic craftsmanship do not have an adequate or detailed understanding of the law. While it is easy for policy writers and commentators to propose and enact substantial changes to the Copyright Act 1968, it is often overlooked that the majority of artists relying on Copyright or Design Law for protection do not have a detailed understanding of it. To suggest that an artist would be able to interpret and comprehend the latest amendments to s74-s77 of the Act would be irrational, and therefore it is critical that as much protection is offered to artists where possible.

As it was suggested in the introduction of this paper – "*copyright law is designed to protect the creator's skill, labor and judgment in the production of a work as opposed to the creative merit derived from the work.*" It is obvious that any removal of the phrase '*work of artistic craftsmanship*' from the Act in relation to s74-s77 would only cause additional confusion and significantly reduce copyright protection for artistic craftsman. While it is accepted that reform of s74-s77 must continue in order to clarify many of the outstanding problems discussed in this

paper, it is the view of the author that reform is more effective than repeal. If more clarification is provided in respect of *'artistic craftsmanship'*, then many of the current issues can be resolved which will ensure that the protection of artists under these sections and the Copyright Act 1968 continue.

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