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|        |             |           |         |                   |                       |       |
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| Cinematograph film | X      |           | X       |                   |                       |       |
| Sound & TV broadcasts | X     |           |         |                   |                       |       |
| Published edition | X        |           |         |                   |                       |       |

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**Literary work**

*Copyright Act 1968 (Cth) – s 10(1)*

- **Literary work** includes:
  - (a) a table, or compilation, expressed in words, figures or symbols; and
  - (b) a computer program or compilation of computer programs.
- **[Must be literary in essence; engage with it through reading]**

* Aristocrat Leisure v Pacific Gaming [2000] FCA 1273

**Essence of literary work;**

**Tamberlin J**

*Are the Aristocrat specifications original literary works? [40]-[44]*

- **Threshold of literary quality** prescribed by s 10 of the *CA* for a specification to be a literary work is not high
- **Concept of literary work** expressly includes computer programs and a table or compilation expressed in words, figures or symbols whether visible or not
- **Not appropriate** to approach the question on the basis of any preconceptions as to what is meant by literary work with respect to literary merit
- **Concept has been applied** to many diverse works such as railway timetables, street directories, novels, poetry, football coupons and gaming machine prize tables
- **Suffices to establish** only that the work is one intended to afford either information, instruction or pleasure in the form of visual enjoyment
  - Questions of high literary quality of style are not pertinent
- **Specifications for the Aristocrat Games** are a compilation, expressed in words, figures and symbols within the inclusive description of literary work
  - Same way as a bookmaker’s table (*Ladbroke (Football) v William Hill (Football)*) or a poker machine prize table (*Milwell*)
- **They are a precise expression** of an idea, and the result of work
- **Sufficient work and effort** reflected in the expression contained in the specification sheets in respect of each of the games to give rise to copyright
The work reflected in the specifications is the calculations, decisions, analysis and judgements made by Bennett and Fong (original authors) outlined in their evidence.

- In light of their employment relation, copyright in these specifications subsists in Aristocrat.
- Evidence does not establish that Aristocrat copied the games from other sources – satisfied that the specification embodied and were directly derived from independent work notwithstanding that some other games were looked at by Aristocrat employees.

### State of Victoria v Pacific Technologies (Australia) (No 2) [2009] FCA 737

#### Idea/expression dichotomy

**Emmett J**

- Under s 32(1) of the CA copyright subsists in an original literary work that is unpublished and of which the author was a qualified person at the time when the work was made or for a substantial part of that period.
- Under s 32(2), where an original literary work has been published, copyright subsists in the work, or if copyright in the work subsisted immediately before its first publication, copyright continues to subsist in the work.
  - However, such copyright subsists if and only if the first publication took place in Australia and the author of the work was a qualified person at the time when the work was first published.
- **CA** contains no definition of original literary work, although under s 10, the term literary work is to include a table or compilation expressed in words, figures or symbols, as well as computer program or compilation of computer programs.
  - Neither of those concepts applies to the Help Words.
- Question is whether the Help Words constitute a literary work.
  - It is not suggested that they constitute any other work that would receive protection under the CA.
- Copyright is concerned with the protection of the expression of ideas and not with the protection of ideas as such.
- Literary work comprises more than mere ideas.
- Many things that have no pretensions to literary style can be the subject of copyright.
- A literary work may be expressed in print or writing, irrespective of the question whether the quality or style is high ([University of London Press v University Tutorial Press](https://www.mondaq.com/au/1390327/copyright/university-of-london-press-v-university-tutorial-press)).
- However there must be some work involved in its production of a literary work, in the sense that it is necessary for the author to add something of substance in the form of the expression of ideas.
  - Whether or not what the author adds is sufficient may be a question of degree in any given case.
- Originality that is required concerns the expression of the idea or thought and not the inventiveness of the idea ([University of London Press v University Tutorial Press](https://www.mondaq.com/au/1390327/copyright/university-of-london-press-v-university-tutorial-press)).
- Whilst the required skill or labour necessary for the creation of a literary work in which copyright may subsist is not large, it must not be insubstantial.
  - E.g. as a rule, a title does not involve literary composition and is not sufficiently substantial to justify claims of copyright protection.
  - However, that does not mean that in a particular case the title may not be so extensive and of such a significant character as to attract the protection of copyright ([Francis, Day and Hunter v Twentieth Century Fox](https://www.mondaq.com/au/1390327/copyright/francis-day-and-hunter-v-twentieth-century-fox)).
- Copyright has been denied in advertising slogans, in the stringing together of commonplace sentences in and advertisement and in sentences of an instructive nature.
  - Generally, short sentences, including titles, slogans and other short phrases have consistently been refused protection.
  - Examples:
    - Magazine title: Belgravia
    - Title of a play: Where There’s a Will There’s a Way.
Short phrases, single sentences and the like are too insubstantial or too short to qualify as a literary work for the purposes of the CA
  - That is so even though skill and labour has been expended on their creation (Exxon Corporation v Exxon Insurance Consultants International)
  - The term literary work is intended to afford either information and instruction or pleasure in the form of literary expression

Current question may be stated as whether a piece of writing or collection of words is to be accorded the status of literary work, having regard to the kind of skill and labour expended and the nature of copyright protection and its underlying policy

Not correct to say that the purpose of the CA is to protect original skill and labour (Navitaire v Easyjet Airline Company)

Help Words are not a form of literary expression – but a setting down of several simple words in the nature of saying something in ordinary parlance
  - They are no more than a simple instruction
  - They do no more than state the obvious words for use in drawing attention to a taxi driver requiring urgent assistance
  - They are not words that should be afforded monopoly protection

Simply indicate a desire to convey the notion that a taxi driver in duress seeks urgent assistance
  - Do no more than state an idea

Expression is inseparable from the fundamental idea that is being conveyed by the words
  - Where the expression of an idea is inseparable from its function it forms part of the idea and is not entitled to the protection of copyright (Autodesk v Dyason)

Elwood Clothing v Cotton On Clothing [2008] FCAFC 197

Literal work comprehended through the process of reading; Not literary work, notwithstanding use of words and letters; Not an adequate account of the designs to say that they are meant to be read; Any meaning conveyed by the numerals and text is so obscure, subjective to the reader and subservient to the artistic aspect that the numerals and text do not amount to a literary work

Lindgren, Goldbert and Bennett JJ (Court)

(1) What were the designs and were they original artistic works? [44]-[62]
  - CO argues the designs were original literary works, rather than original artistic works
  - Definition of literary work suggests that literary works typically will be expressed in some form of notation or code (as in the case of computer programs) and that the information contained within them will be comprehended by a human addressee through the process of reading
  - Woodtree – Heerey J quoting Ricketson in relation to the concept of a drawing:
    - Essentially, a drawing is a two-dimensional work in which shapes and images are depicted by lines, often without colouring
    - Heerey J agreed with that definition above and continued: The Macquarie Dictionary gives us several definitions of the noun drawing
      - Representation by lines; delineation of form without reference to colour
      - A sketch, plan, or design, especially one made with pen, pencil or crayon
In the context of the visual arts, the traditional distinction has been between paintings, which are coloured, and drawings, which are monotone, usually, but not always, black upon white.

The statutory definition, particularly by its inclusion of maps, makes it clear that for the purposes of the Act something may be a drawing notwithstanding that it is coloured.

However, the essence of a drawing remains the concept of a representation of some object by a pictorial line.

- It is true that in many of the cases, drawings have been of things that already existed or were to be brought into existence.
- In our view, however, a drawing does not necessarily represent something that exists or is to exist in the real world.
  - There can be a drawing in the form of a pattern, using shapes, colours and other elements in order to give pleasure, or simply (as here) to attract attention and to convey a visual impression – a certain “look and feel”.
  - It is not inconsistent with Heerey J’s understanding of the meaning of a “drawing” expressed in Woodtree to suggest that the object represented by the pictorial line may be a shape, form or pattern that is not a recognisable image, and may be in an abstract style.

Thus adopt the following extract from primary Judge’s reasons: [There is] a body of case law, which establishes that:

1. Whether a work will be recognized as an artistic work such as a drawing is highly fact-specific, such that no bright-line rule can be drawn; and
2. The important principle in deciding whether the work is a “drawing” is whether the work at issue can be said to have a visual rather than “semiotic” function.

- **Miller & Lang v Polak** – concluding that decorative wording and designs on Christmas cards were drawings for the purpose of the Fine Arts Copyright Act 1862 (UK).
- **Roland Corporation & Anor v Lorenzo & Sons** – holding that two logos consisting of a single letter each, “R” and “B,” designed in a certain way were eligible for copyright protection as they were drawn with care and to obtain an effect.
- **Anacon v Environmental Research Technology** – suggesting that a circuit diagram depicting how components were to be connected together could be an artistic work because it is “a thing to be looked at in some manner or other [and] is to be looked at in itself”.
- **Lott v JBW & Friends** – finding that a “graphic bar” consisting of four words in a woodcut design or font that was selected from a computer program was a drawing within the meaning of the Act because it was not so simple that the time and effort in designing the graphic design could be ignored.
- **Australian Chinese Newspapers v Melbourne Chinese Press** – holding that a calligraphic rendering of a Chinese character used in a newspaper masthead was capable of constituting a “painting” under the Act because Chinese calligraphy is a visual art and played “an important cultural and aesthetic role in Chinese life of ancient origin.”
- **Woodtree v Zheng** – holding that a layout for a box label comprising a photograph and several short lines of explanatory text and numbers was not capable of constituting an artistic work.

- Boundary of the Elwood design is a notional circumferential boundary enclosing all of the symbols, numbers, words and images (and the space between them) that appeared on the front and back of the Elwood t-shirt.
- Unclear what meaning the words and numbers were intended to convey.
- Words conveying a semiotic meaning can form part of a drawing.

- **Miller & Lang v Polak** – the works held to be drawings included more meaningful words such as ‘Greetings’, ‘Friends ever’, ‘Good luck, ‘Lest we forget’ and ‘For old times sake’ in a distinctive form within an ornamental oval or circular scroll.
Lott v JBW & Friends – Mullighan J held that a graphic bar with the words ‘Opera in the Outback’ was a drawing:
- The graphic designer had to create a design and make choices about the layout, font, colour and dimensions of each part of the design
- Having perused the graphic bar, I do not regard it as so simple as to deny copyright
- As was the case in Roland Corporation, the graphic bar was designed and drawn with care to obtain effect
- The selection of the font from a computer program is no less creative than manual drawing

Roland Corporation v Lorenzo & Sons – Pincus J held to be drawings certain stylised representations of the letters ‘R’ and ‘B’

Woodtree – Heerey J thought it clear that a letter or letters of the alphabet can provide the subject matter of a drawing, and referred to the illuminated manuscripts of medieval works such as the Book of Kells – however, held that text itself did not constitute a drawing

- Has been recognised in two circuit diagram cases that the one work can comprise both an artistic work and a literary work (Anacon v Environmental Research Technology – Jacob J; Audrey Max Sandman v Panasonic UK – Pumfrey J; cf Electronic Techniques (Anglia) v Critchley Components – Laddie J)
- We prefer the view that in the present case there is a single artistic work of which the words and numbers, including their size, font, placement and spatial relationships with other elements, form a part
  - Such semiotic meaning as the words and numbers convey (they do convey such meaning to some extent, being well recognised symbols that "stand for" something else) is so insubstantial and vague that they do not constitute literary works
- Do not think it an adequate account of the designs to say that they are meant to be read
  - The expressions ‘Durable By Design’ and ‘Raging Bulls’ and the numerals ‘9’ and ‘6’ are meant to be read but that for which they stand is elusive and unimportant
  - Their importance is in the support they give to the look and feel
- CO submitted that the verbal messages include references to the Chicago Bulls basketball team and the film Raging Bull
  - Was argued that these references are intended to evoke a team concept that males are particularly desirous to have
  - The latter statement may be true, however this significance attaches to the words and numbers only when they are considered as part of the design as a whole
  - What meaning would they convey taken out of that context?
  - To the extent that the words and numbers evoke a team concept, they do so because they are elements in a layout which itself has the look and feel of college-style sporting team wear
- To the extent that the words and numbers convey some semiotic meaning, it is trifling when compared with, to use her Honour’s words, "the selection and arrangement of the various elements (text, colour, font, shape, and so on)"
  - The drawing, so constituted, makes a visual impression notwithstanding the presence of the words and numbers
  - Alternatively, the text may be appreciated visually
- Millar & Lang v Polak; Roland Corporation v Lorenzo & Sons – the literary elements were treated in such a way as to provide a visual effect which transcended the letters and figures involved
- There is a strong artistic element in the design
  - We refer, on the front of the shirt, to the size, style and separation of the digits "9" and "6" on the respective shoulders, the ellipse formed by the "Elwood", the "Raging Bulls" that surrounds the cursive "Durable By Design" and the bull’s head trademark; on the back of the shirt to the ellipse formed by the cursive "Raging Bulls" at the top and the two lines "Durable By Design" and "Elwood
Denims” at the bottom enclosing very large digits “9” and “6”, and the small bull’s head trademark; and to the overall "V" shape on the front and the less pronounced "V" shape on the back

- The work on the NewDeal T-shirt, front and back, is an artistic work
  - The artistic quality of the work consists of the layout, balancing, form, font, positioning, shaping and interrelationship of the various elements
  - Any meaning conveyed by the numerals and text is so obscure, subjective to the reader and subservient to the artistic aspect that the numerals and text do not amount to a literary work

Dramatic work

**Copyright Act 1968 (Cth) – s 10(1)**

- **Dramatic work** includes:
  - (a) a choreographic show or other dumb show; and
  - (b) a scenario or script for a cinematograph film;
  - but does not include a cinematograph film as distinct from the scenario or script for a cinematograph film.

- [Cases suggest that a dramatic work conveys an intention to be performed or presented]

Green v Broadcasting Corporation of New Zealand [1989] UKPC 26

Must have sufficient unity to be capable of performance; A stretch for ‘dramatic work’ to include repeated but unconnected use of set phrases and with aid of particular accessories (title, stock phrases, clapometer)

Lord Bridge of Harwich, Lord Ackner, Lord Goff of Chieveley, Lord Jauncy of Tullichettle, Lord Lowry

- NZHC – Ongley J: there was really no evidence that any part of the show was reduced to a written text which could properly be called a script
  - No writing has been produced in evidence in this action in which, in my view, copyright could subsist
- CoA differed from trial judge to the extent that they accepted that the evidence established the existence of scripts
  - But the evidence as to the nature of the scripts and what their text contained was exiguous in the extreme
  - Evidence from Greens:
    - I wrote the scripts of Opportunity Knocks shows, such as they were, because we would have what we would call the introductions and stock phrases
    - The other part of the writing dealt with interviews with the people and one could not really call it writing because you were really only finding out what the artists wanted to talk about
    - The script of OK has continuously been the same for the catch phrases, the interviews each week with the artists has differed, the script for the past 17 years and long before 1975 contained particularly the end of the show beginning with the words ‘make your mind up time’ using clapometer and bringing back the five people
  - On the basis of the above evidence, Somers J concluded that the scripts as they are inferred to be form the description given did not themselves do more than express a general idea or concept for a talent quest and hence were not the subject of copyright
- In the absence of precise evidence as to what the scripts contained, unable to dissent from Somers J’s view
- The alternative formulation of G’s claim relies upon the dramatic format of OK, by which their Lordships understand is meant those characteristic features of the show which were repeated in each performance
  - The features were, in addition to the title, the use of the catch phrases, the use of a device called a clapometer and the use of sponsors to introduce competitors
- It is stretching the original use of the word format a long way to use it metaphorically to describe the features of a television series such as a talent, quiz or game show which is presented in a particular way, with repeated but unconnected use of set phrases and with the aid of particular accessories
- Alternative terms suggested in the course of argument were ‘structure’ or ‘package’
• The difficulty in finding an appropriate term to describe the nature of the ‘work’ in which the copyright subsists reflects the difficulty of the concept that a number of allegedly distinctive features of a television series can be isolated from the changing material presented in each separate performance (the acts of the performers in the show) and identified as an ‘original dramatic work’

• The protection which copyright gives creates a monopoly and there must be certainty in the subject matter of such monopoly in order to avoid injustice to the rest of the world (Tate v Fulbrook – Farwell J)
  o The subject matter of the copyright claimed for the dramatic format of OK is conspicuously lacking in certainty

• Moreover, it seems that a dramatic work must have sufficient unity to be capable of performance and that the features claimed as constituting the format of a television show, being unrelated to each other except as accessories to be used in the presentation of some other dramatic or musical performance, lack that essential character

Aristocrat Leisure v Pacific Gaming [2000] FCA 1273

Requires identifiable with certainty sufficient elements or features which are of a dramatic nature and that those features or elements should be sufficiently linked or connected so as to be capable of performance; Not necessary to have something in the nature of a play by Shakespeare, but there is a minimum requirement of some type of performance; Need not be performance of human beings; Here, no apparent plot, choreography, script, characterisation or interaction between characters and there is a strong element of unpredictability and randomness; Weighed elements cumulatively

Tamberlin J

Does the specification amount to an original dramatic work? [56]-[62]

• "Choreography" is defined in The Macquarie Dictionary in these terms:
  o 1) the art of composing ballets, etc., and arranging separate dances.
  o 2) the art of representing the various movements in dancing by a system of notation
  o 3) the art of dancing

• "Scenario" is defined in the same edition to mean:
  o 1) an outline of the plot of a dramatic work, giving particulars as to the scenes, characters, situations etc.
  o 2) the outline or manuscript of a film, giving the action in the order in which it takes place, the description of scenes and characters, the printed matter to be shown on the screen etc.
  o 3) the outline of a general situation; a plan to be followed or observed

• Do not consider that the specifications fall within the meanings set out in the above definition

• Appropriate approach when determining whether there is a dramatic work within the meaning of s 10 is set out in Copinger:
  o In the case of subject matter which does not fall into any of the obvious types of dramatic work [eg a play or screen play], ... this requires not only that there should be identifiable with sufficient certainty sufficient elements or features in such subject matter which are of a dramatic nature in the sense discussed above, but also that those features or elements should be sufficiently linked or connected so as to be capable of performance
  o This ultimately turns on the facts of the particular case, but ...it has been held that a sports game did not constitute a choreographic work (and therefore not a dramatic work), even though parts of the game were intended to follow a predetermined plan
  o Similarly, it has been held that news and current affairs programs comprising video clips, interviews and discussions, lack the choreography required to constitute their dramatic works

• While it not necessary to the concept of dramatic work to have something in the nature of a play by Shakespeare or Moliere, there is a minimum requirement of some type of performance
  o This performance need not in my view be that of human beings
• E.g. a script of an animated cartoon, such as "South Park" or "The Simpsons", may well be a dramatic work because it calls for performance by characters

• While it is possible that the video races, taken in isolation could be described as cinematograph films the specifications for the Aristocrat Games lack the element of performance by characters, and are insufficiently predetermined, to amount to "dramatic works"
  - No apparent plot, nor is there any choreography, script, characterisation or interaction between characters and there is a strong element of unpredictability and randomness
  - None of these elements are essential or individually determine the question but, weighing them cumulatively, I am led to the conclusion that the specifications do not give rise to any dramatic work

### Musical work

- **Copyright Act 1905 (Cth)** defined a *musical work* as any combination of melody and harmony, or either of them

- **Musical work** is not defined in the current **Copyright Act 1968 (Cth)**

- Seems clear that the lyrics of a song do not fall within the scope of a musical work

- Need some intentional composition of sound?
  - Can't be random

- Single sounds, non-substantive are not musical works

- Require some substance

- **EMI Songs Australia v Larrikin Music Publishing**
  - That concept of musical work may be indicated or evidenced by a notated musical score or a sound recording
  - However, the musical score or sound recording is not the musical work

### Artistic work

**Copyright Act 1968 (Cth) – s 10(1)**

- **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 whether or not mentioned in paragraph (a) or (b);

  but does not include a circuit layout within the meaning of the Circuit Layouts Act 1989.

- **Painting** – no definition
  - Markings made using paint or paint-like substance on a surface and humans objectively engage with it in as an artistic work
  - Requirement of substantiality?
  - No requirement to be able to decode or interpret a message?
  - Does not include face paint on a face (**Merchandising Corporation v Harpbond** UKCA 1983)
    - Interlocutory injunction hearing – so don’t place too much weight
    - Don’t engage with the face paint as an artistic work, and probably not substantial enough
    - Judge had trouble with the fact that he’d just wipe it off, and reapply later, and that the surface was skin

- **Sculpture** includes a cast or model made for purposes of sculpture
  - **Essence:** *has to be sculpted — cast, constructed, carved, chiselled — creating a 3D object through removing things or forming things or putting things together*
  - **Has to be perceived or received as a sculpture**

- **Drawing** includes a diagram, map, chart, or plan.
- **Essence**: Markings made on a surface; don’t have to be monochromatic, but largely so (?)
  - Need not be the work of an artist
  - Design drawings for an exhaust pipe (British Leyland v Armstrong – HL 1986)
  - Stylised letters (Roland Corporation v Lorenzo – FCA 1992)
  - See Elwood Clothing v Cotton On Clothing

- **Engraving** includes an etching, lithograph, product of photogravure, woodcut, print or similar work, not being a photograph.
- **Photograph** means a product of photography or of a process similar to photography, other than an article or thing in which visual images forming part of a cinematograph film have been embodied, and includes a product of xerography, and photographic has a corresponding meaning.
- **Building** includes a structure of any kind.
- **Work of artistic craftsmanship** – no definition
  - **Artistic**: that which pertains to an artist, i.e. one who cultivates one of the fine arts (Burke v Spicers Dress Designs) – i.e. must be artistic; having substantial appeal to aesthetic tastes (Cuisenaire v Reed)
  - **Craftsmanship**: product of craft, i.e. of a calling requiring special skill and knowledge especially a manual art – a handicraft – an artisan (Cuisenaire v Reed)

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**Elwood Clothing v Cotton On Clothing [2008] FCAFC 197**

*Drawings essentially a 2D work in which shape and images depicted by lines, often without colouring; Need not represent anything that exists – Can simply give pleasure, attract attention, convey visual impression; A visual function is necessary*

**Lindgren, Goldbert and Bennett JJ (Court)**

(1) What were the designs and were they original artistic works? [44]-[62]

- **Woodtree** – Heerey J quoting Ricketson in relation to the concept of a drawing:
  - Essentially, a drawing is a two-dimensional work in which shapes and images are depicted by lines, often without colouring
  - Heerey J agreed with that definition above and continued: The Macquarie Dictionary gives us several definitions of the noun drawing
    - Representation by lines; delineation of form without reference to colour
    - A sketch, plan, or design, especially one made with pen, pencil or crayon
  - In the context of the visual arts, the traditional distinction has been between paintings, which are coloured, and drawings, which are monotone, usually, but not always, black upon white
  - The statutory definition, particularly by its inclusion of maps, makes it clear that for the purposes of the Act something may be a drawing notwithstanding that it is coloured
  - However, the essence of a drawing remains the concept of a representation of some object by a pictorial line

- It is true that in many of the cases, drawings have been of things that already existed or were to be brought into existence
- In our view, however, a drawing does not necessarily represent something that exists or is to exist in the real world
  - There can be a drawing in the form of a pattern, using shapes, colours and other elements in order to give pleasure, or simply (as here) to attract attention and to convey a visual impression – a certain "look and feel"
  - It is not inconsistent with Heerey J’s understanding of the meaning of a "drawing" expressed in Woodtree to suggest that the object represented by the pictorial line may be a shape, form or pattern that is not a recognisable image, and may be in an abstract style
• Thus adopt the following extract from primary Judge's reasons: [There is] a body of case law, which establishes that
  o (1) whether a work will be recognized as an artistic work such as a drawing is highly fact-specific, such that no bright-line rule can be drawn; and
  o (2) the important principle in deciding whether the work is a "drawing" is whether the work at issue can be said to have a visual rather than "semiotic" function
  o Miller & Lang v Polak – concluding that decorative wording and designs on Christmas cards were drawings for the purpose of the Fine Arts Copyright Act 1862 (UK)
  o Roland Corporation & Anor v Lorenzo & Sons – holding that two logos consisting of a single letter each, "R" and "B," designed in a certain way were eligible for copyright protection as they were drawn with care and to obtain an effect
  o Anacon v Environmental Research Technology – suggesting that a circuit diagram depicting how components were to be connected together could be an artistic work because it is "a thing to be looked at in some manner or other [and] is to be looked at in itself";
  o Lott v JBW & Friends – finding that a "graphic bar" consisting of four words in a woodcut design or font that was selected from a computer program was a drawing within the meaning of the Act because it was not so simple that the time and effort in designing the graphic design could be ignored
  o Australian Chinese Newspapers v Melbourne Chinese Press – holding that a calligraphic rendering of a Chinese character used in a newspaper masthead was capable of constituting a "painting" under the Act because Chinese calligraphy is a visual art and played "an important cultural and aesthetic role in Chinese life of ancient origin"
  o Woodtree v Zheng – holding that a layout for a box label comprising a photograph and several short lines of explanatory text and numbers was not capable of constituting an artistic work
• Boundary of the Elwood design is a notional circumferential boundary enclosing all of the symbols, numbers, words and images (and the space between them) that appeared on the front and back of the Elwood t-shirt
• Unclear what meaning the words and numbers were intended to convey
• Words conveying a semiotic meaning can form part of a drawing
  o Miller & Lang v Polak – the works held to be drawings included more meaningful words such as ‘Greetings’, ‘Friends ever’, ‘Good luck, ‘Lest we forget’ and ‘For old times sake’ in a distinctive form within an ornamental oval or circular scroll
  o Lott v JBW & Friends – Mullighan J held that a graphic bar with the words ‘Opera in the Outback’ was a drawing:
    ▪ The graphic designer had to create a design and make choices about the layout, font, colour and dimensions of each part of the design
    ▪ Having perused the graphic bar, I do not regard it as so simple as to deny copyright
    ▪ As was the case in Roland Corporation, the graphic bar was designed and drawn with care to obtain effect
    ▪ The selection of the font from a computer program is no less creative than manual drawing
  o Roland Corporation v Lorenzo & Sons – Pincus J held to be drawings certain stylised representations of the letters ‘R’ and ‘B’
  o Woodtree – Heerey J thought it clear that a letter or letters of the alphabet can provide the subject matter of a drawing, and referred to the illuminated manuscripts of medieval works such as the Book of Kells – however, held that text itself did not constitute a drawing
• Has been recognised in two circuit diagram cases that the one work can comprise both an artistic work and a literary work (Anacon v Environmental Research Technology – Jacob J; Audrey Max Sandman v Panasonic UK – Pumfrey J; cf Electronic Techniques (Anglia) v Critchley Components – Laddie J)
We prefer the view that in the present case there is a single artistic work of which the words and numbers, including their size, font, placement and spatial relationships with other elements, form a part. Such semiotic meaning as the words and numbers convey (they do convey such meaning to some extent, being well recognised symbols that "stand for" something else) is so insubstantial and vague that they do not constitute literary works.

Do not think it an adequate account of the designs to say that they are meant to be read. The expressions ‘Durable By Design’ and ‘Raging Bulls’ and the numerals ‘9’ and ‘6’ are meant to be read but that for which they stand is elusive and unimportant. Their importance is in the support they give to the look and feel.

CO submitted that the verbal messages include references to the Chicago Bulls basketball team and the film Raging Film. Was argued that these references are intended to evoke a team concept that males are particularly desirous to have. The latter statement may be true, however this significance attaches to the words and numbers only when they are considered as part of the design as a whole. What meaning would they convey taken out of that context? To the extent that the words and numbers evoke a team concept, they do so because they are elements in a layout which itself has the look and feel of college-style sporting team wear.

To the extent that the words and numbers convey some semiotic meaning, it is trifling when compared with, to use her Honour’s words, "the selection and arrangement of the various elements (text, colour, font, shape, and so on)". The drawing, so constituted, makes a visual impression notwithstanding the presence of the words and numbers. Alternatively, the text may be appreciated visually. Millar & Lang v Polak; Roland Corporation v Lorenzo & Sons – the literary elements were treated in such a way as to provide a visual effect which transcended the letters and figures involved.

There is a strong artistic element in the design. We refer, on the front of the shirt, to the size, style and separation of the digits "9" and "6" on the respective shoulders, the ellipse formed by the "Elwood", the "Raging Bulls" that surrounds the cursive "Durable By Design" and the bull’s head trademark; on the back of the shirt to the ellipse formed by the cursive "Raging Bulls" at the top and the two lines "Durable By Design" and "Elwood Denims" at the bottom enclosing very large digits "9" and "6", and the small bull’s head trademark; and to the overall "V" shape on the front and the less pronounced "V" shape on the back.

The work on the NewDeal T-shirt, front and back, is an artistic work. The artistic quality of the work consists of the layout, balancing, form, font, positioning, shaping and interrelationship of the various elements. Any meaning conveyed by the numerals and text is so obscure, subjective to the reader and subservient to the artistic aspect that the numerals and text do not amount to a literary work.

Burge v Swarbrick [2007] HCA 17
Impossible and unwise to attempt any exhaustive and fully predictive identification of what is a work of artistic craftsmanship; Determining whether a work is "a work of artistic craftsmanship" does not turn on assessing the beauty or aesthetic appeal of work or on assessing any harmony between its visual appeal and its utility; Determination turns on assessing the extent to which the particular work's artistic expression, in its form, is unconstrained by functional considerations; The more substantial the requirements in a design brief to satisfy utilitarian considerations, the less the scope for that encouragement of real or substantial artistic effort; Questions of fact and degree inevitably arise. Gleson CJ, Gummow, Kirby, Heydon and Crennan JJ (Court)
Artistic works and the place of works of artistic craftsmanship [45]-[98]
The plaintiff Hensher asserted infringement of copyright in artistic works, being the chairs which were components of a suite of furniture marked as the Bronx.

- The artistic copyright relied upon was that in respect of works of artistic craftsmanship as provided in the 1956 UK Act.
- There were no design registrations relied upon and the issue was a threshold one of whether, in any event, copyright subsisted in respect of any original artistic work.

It was conceded that there was no dispute that the prototype from which the Bronx suite was constructed and produced was a work of craftsmanship – the only issue was whether the craftsmanship involved was artistic.

However, Lord Simon of Glaisdale regarded that works of artistic craftsmanship was a composite phrase that was to be construed as a whole.

- The concession above thus distorted the meaning.
- Lord Simon’s approach is that which should be adopted in dealing with the present appeal.

Lord Simon also noted that there was no relevant distinction between the phrase used in the 1956 Act and the 1911 Act.

Referred to activities of Ruskin and Morris and the foundation of the Arts and Crafts Exhibition Society and the Central School of Arts and Crafts, and other events in the period 1862 to 1910:

- These are no more than a handful of key events; but they put beyond doubt what it was that prompted Parliament in 1911 to give copyright protection to 'works of artistic craftsmanship' – namely, the Arts and Crafts movement with its emphasis on the applied or decorative arts.

In that regard, the biographer of William Morris writes:

- In a totally convincing way he showed the wrong-headedness in separating off the design process from making: one was a necessary stage towards the other; the designer and maker could be one and the same person, the person who came to be defined as artist-craftsman.
- Another false perception he attacked was that the fine artist had no role in industrial production.
- Morris had designed for many factories and workshops, on varying scales and in different materials, and had proved this to be patently untrue.

Also important to note the statutory expression is artistic craftsmanship, not artistic handicraft – Lord Simon:

- The Central School of Arts and Crafts, though foremost a school of handicrafts, had as a declared aim to encourage 'the industrial application of decorative design'.
- So, although 'works of artistic craftsmanship' cannot be adequately construed without bearing in mind the aims and achievements of the Arts and Crafts movement, 'craftsmanship' in the statutory phrase cannot be limited to handicraft; nor is the word 'artistic' incompatible with machine production (see Britain v Hanks Brothers and Co).

Further, whilst not denying an enduring distinction between fine arts and useful or applied arts, in dealing with artistic craftsmanship there is no antithesis between utility and beauty, between function and art – Lord Simon:

- A work of craftsmanship, even though it cannot be confined to handicraft, at least presupposes special training, skill and knowledge for its production.
- 'Craftsmanship', particularly when considered in its historical context, implies a manifestation of pride in sound workmanship – a rejection of the shoddy, the meretricious, the facile.
- Even more important, the whole antithesis between utility and beauty, between function and art, is a false one – especially in the context of the Arts and Crafts movement.
- 'I never begin to be satisfied,' said Philip Webb, one of the founders, 'until my work looks commonplace'.
- Lethaby's object, declared towards the end, was 'to create an efficiency style'.
Artistic form should, they all held, be an emanation of regard for materials on the one hand and for function on the other.

Was the Plug a work of artistic craftsmanship? – The evidence

- Cannot be controlled by evidence from Swarbrick of his aspirations or intentions when designing and constructing the Plug
  - His evidence was admissible but the operation of the statute does not turn upon the presence or absence of evidence that nature from the author of the work in question
  - The matter, like many other issues calling for care and discrimination, is one for objective determination by the court, assisted by admissible evidence and not unduly weighed down by the supposed terrors for judicial assessment of matters involving aesthetics
- The statute does not give to the opinion of the person who claims to be the author of "a work of artistic craftsmanship" the determination of whether that result was obtained; still less, whether it was obtained because he or she intended that result
  - Given the long period of copyright protection, the author, at the stage where there is litigation, may be unavailable or dead – there, intentions may fail to be realised
  - Further, just as few alleged inventors are heard to deny the presence of an inventive step on their part, so will few alleged authors of works or artistic craftsmanship be heard readily to admit the absence of any necessary aesthetic element in their endeavours
  - Not to deny the admissibility of such evidence, nor to disparage the good character of such witnesses – it is to reaffirm the well-recognised dangers of hindsight which are present in various fields of intellectual property law
- Promotional material and business plan are relatively contemporaneous evidence
  - They are confirmatory of the design brief to which S referred to in evidence but, it should be noted, do not give prominence to matters of visual and aesthetic appeal
- Evidence from other witnesses was equivocal – suggested that yacht design requires engineering skills and that the problems overcome as S progressed had been predominantly to do with matters of function
- Experienced yacht designer – Hood
  - Described the JS 9000 as an example of a popular class of yacht, known as a "sports boat", designed to sail as fast as possible within the constraints of an overall length of about 9 metres
  - Speed was said to be the overriding consideration in the design of "sports boats" and all other factors were of secondary importance
  - Mr Hood said the design of "sports boats" was not substantially or mainly governed by considerations of appearance or pleasing aesthetics
- Taken as a whole and considered objectively, the evidence, at best, shows that matters of visual and aesthetic appeal were but one of a range of considerations in the design of the Plug
  - Matters of visual and aesthetic appeal necessarily were subordinated to achievement of the purely functional aspects required for a successfully marketed "sports boat" and thus for the commercial objective in view

Conclusions respecting the Plug

- With wallpaper, a tapestry, stained glass window, piece of jewellery or Tiffany artefact, there is considerable freedom of design choice relatively unconstrained by the function or utility of the article so produced
  - But, as the evidence disclosed, that was not the case with the design constraints upon a class of yacht such as the JS 9000
- General considerations in play appear from Professor Denicola:
  - Referred to the statement by Brank Lloyd Write in 1894 challenging designers to use the machine to best advantage rather than to produce with murderous ubiquity forms born of other times
  - The dominant feature of modern industrial design is the merger of aesthetic and utilitarian concerns
It is the influence of non-aesthetic factors, the nexus between what the product must do and how it must look, that distinguishes true industrial design from other artistic endeavours.

The industrial designer as engineer – a perspective no less valid than industrial designer as artist – is subject to the functional constraints inherent in each undertaking.

During his cross-examination, Mr Swarbrick agreed that yacht design was a very specialised branch of naval architecture and that a naval architect was "basically an engineer".

Mr Hood referred to a number of works on the practice of naval architecture and the design of yachts.

He described as the main and essential requirements of yacht design the application of mathematical and engineering principles together with the relevant principles of physics.

In cross-examination, Mr Hood was taken to a number of books written by yacht designers and agreed that there was a substantial body of opinion that yacht design is an art or involves creative ability and artistic ability.

Some of these authors Mr Hood did not hold in high regard because he saw them as influenced by a poetic view of a vocation that was basically concerned with engineering.

Naval architects who held themselves out as accepting design briefs to produce beautiful vessels for the rich and famous were regarded by Mr Hood as "stylists".

If a client told Mr Hood that he wanted a beautiful boat, Mr Hood would be unable to proceed further with the brief without going into matters of purpose and function, of what must be always a significant piece of engineering.

This evidence adds force to the further statement by Professor Denicola in his article:

The designer cannot follow wherever aesthetic interests might lead.

Utilitarian concerns influence, and at times dictate, available choices.

Indeed, aesthetic success is often measured in terms of the harmony achieved between competing interests.

Concluded that the cumulative influence of such matters can render the designer’s task quite unlike that confronting the painter or sculptor – [that was true of the design of the Plug].

Hensher – Lord Simon

Referred to aim and impact.

The works of a cobbler or dental mechanic, and a wheelwright were not works of artistic craftsmanship.

At the other extreme, the work of the maker of hand-painted tiles would be so regarded.

In between lie a host of crafts some of whose practitioners can claim artistic craftsmanship, some not – or whose practitioners sometimes exercise artistic craftsmanship, sometimes not.

In the former class, for example, are glaziers.

The ordinary glazier is a craftsman, but he could not properly claim that his craftsmanship is artistic in the common acceptation.

But the maker of stained glass windows could properly make such a claim; and, indeed, the revival of stained glass work was one of the high achievements of the Arts and Crafts movement.

In the latter class is the blacksmith – a craftsman in all his business, and exercising artistic craftsmanship perhaps in making wrought-iron gates, but certainly not in shoeing a horse or repairing a ploughshare.

In these intermediate – or rather, straddling – classes come, too, the woodworkers, ranging from carpenters to cabinet-makers: some of their work would be generally accepted as artistic craftsmanship, most not.

Similarly, printers, bookbinders, cutlers, needleworkers, weavers – and many others.

In this straddling class also fall, in my judgment, the makers of furniture.

Some of their products would be, I think, almost universally accepted as 'works of artistic craftsmanship'; but it would be a misuse of language to describe the bulk of their products as such.
• The thread running through this discussion is the significance of functional constraints, extreme for a dental mechanic, less so for a glazier or blacksmith, and depending upon the nature of the particular design brief
  o A horseshoe is one task; the Tijou gates, screens and grilles wrought for St Paul’s Cathedral, Hampton Court and Chatsworth by the French Huguenot ironmaster were in a very different category
• It may be impossible, and certainly would be unwise to attempt any exhaustive and fully predictive identification of what can and cannot amount to a work of artistic craftsmanship
• Determining whether a work is "a work of artistic craftsmanship" does not turn on assessing the beauty or aesthetic appeal of work or on assessing any harmony between its visual appeal and its utility
  o The determination turns on assessing the extent to which the particular work’s artistic expression, in its form, is unconstrained by functional considerations
• The more substantial the requirements in a design brief to satisfy utilitarian considerations of the kind indicated with the design of the JS 9000, the less the scope for that encouragement of real or substantial artistic effort
  o It is that encouragement which underpins the favourable treatment by the 1989 Act of certain artistic works which are applied as industrial designs but without design registration
  o Questions of fact and degree inevitably arise

The hull and deck mouldings
• The conclusion expressed earlier in these reasons that the Plug was not a work of artistic craftsmanship has as a necessary corollary that the hull and deck moulds made from it were not works of that character
• Counsel for S explained that a spray gel coat was applied to the moulds, a skin layer was hand-laid using derecane resin and the remainder of the laminate, skin and core was applied using a vacuum infusion process
  o This was not the work of an artist-craftsman in the sense discussed earlier in these reasons
• The upshot is that the primary judge correctly described, for present purposes, the hull and deck mouldings as manifestations of the Plug
  o Put another way, they might well be regarded as reproductions in a material form of the Plug within the meaning of s 31 of the Copyright Act
• Thus, the statement of Lord Reid in the following passage in Hensher applies here:
  o It is common ground that we must consider the prototype and not the furniture put on the market by the appellants
  o Apparently this is because the articles put on the market were not works of craftsmanship
  o But if there was copyright in the prototype then the furniture put on the market by the appellants was copied from it, and the respondents' products were copied from the furniture which the appellants put on the market – this would be infringement of that copyright
• There is no substance in the claim that the hull and deck mouldings are to be supported independently as works of artistic craftsmanship, thereby obviating the obstacle placed by s 77 of the Copyright Act in the path of Mr Swarbrick

Works of sculpture
• Appellants submitted that
  o (i) the Plug and hull and deck mouldings were original artistic works, being sculptures within the meaning of par (a) in the definition of artistic work
  o (ii) the primary judge so held;
  o (iii) therefore, these works do not fall within par (c) of the definition – "a work of artistic craftsmanship to which neither of the last two preceding paragraphs applies" – because one of the preceding paragraphs, par (a), applies;
  o (iv) as a consequence of (iii), neither the Plug nor the hull and deck mouldings is "a work of artistic craftsmanship" within the sense of par (a) of s 77(1);
(v) the exception in par (a) of s 77(1) of the defence to the action of copyright infringement therefore cannot apply in the present case

- Step (iv) in this chain of argument does not follow from step (iii)
  - It has been remarked earlier in these reasons that some works within par (a) and par (b) of the definition of "artistic work" in s 10 may, and others may not, be of "artistic quality"
  - Further, the text of the definition of "artistic work" accommodates, in par (c), the readily apparent proposition that, for example, at least some sculptures will be works of artistic craftsmanship
  - Paragraph (c) of the definition sweeps up works of artistic craftsmanship which fall outside pars (a) and (b)
  - Paragraph (c) does not exclude as works of artistic craftsmanship those works which also happen to answer the specific criteria of par (a) or par (b)
  - Thus, par (a) of s 77(1) removes any work of artistic craftsmanship from the scope of the defence for infringement provided by s 77(2)

- Amendment of the Act during the course of this litigation
  - From par (c) of the definition of "artistic work", the words "to which neither of the last two preceding paragraphs applies" are now omitted and in their place the paragraph reads, "whether or not mentioned in paragraph (a) or (b)"

- Explanatory Memorandum:
  - This amendment clarifies that a work can be both a work of artistic craftsmanship and an artistic work under paragraph (a) or (b) of the definition of 'artistic work'
    - For example, a sculpture can be a work of artistic craftsmanship notwithstanding that it is also an artistic work under paragraph (a)
  - This amendment is intended to remove uncertainty as to the meaning of the term 'work of artistic craftsmanship' for the purposes of section 77
  - Section 77 provides a defence to copyright infringement where a corresponding design is applied industrially and the design is not registered or is not registrable under the Designs Act
  - Section 77 does not operate where the artistic work that relates to the corresponding design is a work of artistic craftsmanship
    - If a sculpture is a work of artistic craftsmanship, it will retain copyright protection after being applied industrially (but copyright protection is lost if a corresponding design is registered as a design)

- The outcome in this Court thus is consistent with the more explicit provision later made by the 2003 Act but has not been dictated by the existence of the subsequent amendment

- Reference in the Explanatory Memorandum is also made to recommendations in the ALRC's Designs Report – recommendation 172:
  - Works of artistic craftsmanship produced in multiple quantities should continue to be protected by copyright
  - 'Artistic craftsmanship' should be defined in the Copyright Act
  - The Copyright Act should make clear that a work can be both a work of 'artistic craftsmanship' and an artistic work under s 10(1)(a) and (b)

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Part IV subject matter – Other than works

Sound recording

*Copyright Act 1968 (Cth) – s 10(1)*

- **Sound recording** means the aggregate of the sounds embodied in a record.
  - See below exception
  - A recording of sounds, not the sounds themselves that have been recorded
- **Record** includes a disc, tape, paper, electronic file or other device in which sounds are embodied.
Sound-track, in relation to visual images forming part of a cinematograph film, means:
  o (a) the part of any article or thing, being an article or thing in which those visual images are embodied, in which sounds are embodied; or
  o (b) a disc, tape or other device in which sounds are embodied and which is made available by the maker of the film for use in conjunction with the article or thing in which those visual images are embodied.

**Copyright Act 1968 (Cth) – s 23(1)**

For the purposes of this Act, sounds embodied in a sound-track associated with visual images forming part of cinematograph film shall be deemed not to be a sound recording.

**Cinematograph film**

**Copyright Act 1968 (Cth) – s 10(1)**

- Cinematograph film means the aggregate of the visual images embodied in an article or thing so as to be capable by the use of that article or thing:
  o (a) of being shown as a moving picture; or
  o (b) of being embodied in another article or thing by the use of which it can be so shown;

  and includes the aggregate of the sounds embodied in a sound-track associated with such visual images.

- Examples: video games (Galaxy v Sega); slot machine game – no (Aristocrat)

**Aristocrat Leisure Industries v Pacific Gaming** [2000] FCA 1273

There is no element of progression; Do not embody a moving picture

Tamberlin J

Do the games constitute a cinematograph film? [63]-[67]

- Aristocrat contends that the second screen features in Top Gear and Diamonds in the Sky are cinematograph films
  o Also submits that the simulated images of the spinning reels can also be classified as moving pictures

- The s 10 definition requires an aggregate of visual images embodied in an article or thing so as to be capable by use of that article or thing to be shown as a moving picture
  o The aggregate of visual images also includes the aggregate of sounds included in a sound track associated with the visual images

- It is appropriate to adopt a liberal interpretation to intellectual property legislation and to avoid a literal approach specific to a particular technology or unduly limited to the state of the art as at the date when the relevant provisions were passed (Sega Enterprises v Galaxy Electronics – Burchett J; upheld on appeal in the FFC)
  o In adopting this approach it is also important to ensure that the result contended for reasonably arises from the language selected by Parliament

- Decisions in Sega concerned two video games which presented a series of images resembling a traditional movie film
  o Games involved police officers who carried out a series of investigations
  o Involved sound effects, music and dialogue
  o Court held that they were cinematograph films

- It is possible that an argument could be made that the second screen features in Top Gear and Diamonds in the Sky which respectively simulate a drag car race and a space ship in expedition, constitute cinematograph films
  o However the characteristics that could be said to make this part of the games cinematograph films, are not the calculations underlying the specifications but the visual images of the two races
In relation to the features as films, there is no question of infringement – the case is concerned with infringement of copyright of the specifications (not the feature films)

- Visually, although these second screen features both depict races, once is concerned with cars, the other with spaceships
  - They are visually very different
  - Their only common feature is the idea of a race

- Have not found any authority which assists in resolving the question of whether the simulated spinning which constitutes the base game can be said to be a cinematograph film

- However on my reading of the definition, the better view is that the basic games do not embody a moving picture
  - It is literally true that the specific symbols appear to rotate on the reels but there is no element of progression or movement in the symbols themselves as there is in a traditional movie film, which is comprised of a series of marginally different pictures, which when repeated quickly, give the impression of motion

- I appreciate that the language is not to be restricted by any static view anchored to previous technology but there is a real difficulty in accepting that the aggregate of the symbol images in the present case constitutes a moving picture

### Sound broadcast and television broadcast

**Copyright Act 1968 (Cth) – s 10(1)**

- **Sound broadcast** means sounds broadcast otherwise than as part of a television broadcast.
- **Television broadcast** means visual images broadcast by way of television, together with any sounds broadcast for reception along with those images.
- **Broadcast** means a communication to the public delivered by a broadcasting service within the meaning of the Broadcasting Services Act 1992. For the purposes of the application of this definition to a service provided under a satellite BSA licence, assume that there is no conditional access system that relates to the service.

**Note**: A broadcasting service does not include the following:

- (a) a service (including a teletext service) that provides only data or only text (with or without associated images); or
- (b) a service that makes programs available on demand on a point-to-point basis, including a dial-up service.

- **Broadcast itself, not the sound or the TV that is broadcast; i.e. electromagnetic waves/signal is the subject-matter not what the waves are carrying**

- **Note**: By virtue of a 2000 ministerial declaration under the Broadcasting Services Act 1992 (Cth), communications using the Internet (webcasting or variants such as podcasting) fall outside the scope of a broadcast signal for the purposes of subsistence of copyright

*Network Ten v TCN Channel Nine* [2004] HCA 14

**Protected interest is the cost and skill in assembling or preparing and transmitting programmes to the public**

**McHugh ACJ, Gummow and Hayne JJ**

**What is a television broadcast? [67]-[78]**

- **Hely J** concluded:
  - Here the interest protected by the copyright is the visual images broadcast by way of television and any accompanying sounds
  - It is the actual images and sounds broadcast which constitute the interest protected
  - The interest protected is not defined in terms of some larger 'whole' of which the visual images and sounds broadcast are but a part