Works of Artistic Craftsmanship in the High Court of Australia: The Exception as Paradigm Copyright Work

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In Burge v Swarbrick,1 the High Court of Australia delivered an important decision on the most elusive of works protected by copyright: the work of artistic craftsmanship (“WAC”). Drawing on the history and reasons for that protection, and adopting the analysis of Lord Simon in George Hensher Ltd v Restawile Upholstery (Lancs) Ltd,2 the Court affirmed the orthodox view that such works have “special status” in law on account of their “real artistic quality”.3 In its judgment, whether a work has that quality depends on whether it is a work of craftsmanship the artistic form of expression of which is sufficiently “unconstrained by functional considerations”.4

In the discussion below I consider that view, and other aspects of the Court’s decision. I suggest the requirement for artistic

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quality is simply a requirement for a WAC “not imaginary, unreal or apparent only”. Further, the properties of this type of work are better conceived in historical terms than the formal aesthetic terms of the Court. On this view, whether an object is a WAC depends on both its properties of form and the history of its individual production, meaning the (subjective) intent of its individual author and view of society with respect to its nature. The same view finds support in the reasoning in Burge, and is consistent, too, with the judgment in Hensher, as well as more recent United Kingdom ("UK") cases. As those cases reflect, even conceived in historical terms, WACs are not exceptional works but rather paradigmatic works, contrary to the orthodox view above. The fact that they are functional too does not lessen their need for artistic quality, undermining the support of previous cases, including Desktop Marketing Systems Pty Ltd v Telstra Corporation Ltd, for extending the statutory categories of works to ensure that functional considerations do not constrain the scope for legal protection.

Running through this discussion are general themes, also explored in other papers, of the role of history (including intent) and categories of works in copyright law. My suggestion has been that categories matter, not only on account of their statutory use, but also their impact on judicial perceptions (and sometimes conceptions) of individual works. Similarly with respect to history itself: the specific

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origins of an expressive object are part of what constitutes the object qua work, while that which the statutory categories denote are different authorial (expressive) traditions. The same view, it is submitted, is central to Hensher, and also to the High Court’s decision in Burge.

1. The Decision in Burge and Reasons For It

The respondent in Burge, Mr Swarbrick, was the designer of the “JS 9000” yacht, and principal of a company that manufactured the yacht for sale in Australia and elsewhere. The litigation concerned an allegation of copyright infringement arising from the unauthorised copying by the appellants of “a hand-crafted full scale model” of the hull and deck sections of the yacht (“the Plug”), and inverted copies of the Plug in the form of hull and deck moulds. According to the respondent, the Plug and moulds were works of artistic craftsmanship and sculptures in which copyright subsisted under the Copyright Act 1968 (Cth) (“the Act”). The appellants denied this, and further defended the claim with reference to the copyright/design overlap provisions contained in s 77 of the Act. According to that section, copyright in an artistic work other than a building, model of a building, or work of artistic craftsmanship, is not infringed where a corresponding design of the work is or has been applied industrially by or with the licence of the copyright owner in the place of industrial application, and products to which that design has been applied are

8 At the time of the appeal, 32 of the yachts had been constructed and 20 delivered to customers for a price of between AU$50,000 and AU$65,000 (Burge (2007) 232 CLR 336, 336). Images of the yacht can be viewed on the website of the Centre for Intellectual Property & Information Law (CIPIL): <http://www.cipil.law.cam.ac.uk/virtual_museum/burge_v_swarbrick_[2007]_hca_17.php> at 27 August 2008.

Works of artistic craftsmanship in the High Court of Australia: The exception as paradigm copyright work

sold, let for hire, offered or exposed for sale or hire in Australia or elsewhere, at a time at which the corresponding design is not itself registrable under the Designs Act 2003 (Cth) or has not been registered under that or its predecessor (1906) legislation.

At first instance Carr J rejected the appellants” s 77 defence and found them to have infringed the respondent’s copyright. An appeal to the Full Federal Court was unsuccessful, resulting in a further appeal to the High Court. That appeal was allowed, with the Court finding that neither the Plug nor moulds were works of artistic copyright at all.

The main issue in Burge, and the issue focused on here, was whether the model of the JS 9000 yacht was a work of artistic craftsmanship in law. The Court held it was not, for it manifested insufficient concern for “matters of visual and aesthetic appeal”:

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 [model]. 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.10

The implication of the Court’s reasoning is that for a work to be one of artistic craftsmanship it must reflect the values of the expressive tradition which that statutory category of work denotes.11 Specifically, it must defy the antithesis of function and art in furtherance of the utilitarian aesthetic that distinguishes the aim of

10 Burge (2007) 232 CLR 336, 364 (stating that “[t]he determination [of that quality] turns on assessing the extent to which the particular work’s artistic expression, in its form, is unconstrained by functional considerations”).

11 Ibid 359 (describing the language of the Act, derived from the Copyright Act 1911 (Imp), as needing to “be understood in the light of what was said in Hensher respecting the Arts and Crafts movement” and as “apt to carry forward the objects of that movement”). See also at 358–9, 363–4 (discussing the decision of Lord Simon in Hensher [1976] AC 64, including specifically his Lordship’s review of the history of the Arts and Crafts movement).
the Arts and Crafts movement from the aim of other artistic traditions. On the evidence of the author and witness, the model of the yacht failed that test; for while accepted as a work of craftsmanship, it was neither intended by Mr Swarbrick, nor understood by the expert witness Mr Warwick Hood, to possess the quality of artistic craftsmanship. Indeed, under cross-examination Mr Swarbrick agreed that his aim in creating the model of the yacht was to design “[a fast and] well mannered, easily balanced boat.” The result was confirmed by the evidence of Mr Hood, that artistic effort was contra-standard to this particular category of boat:

[The yacht is] 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.

For these reasons, the model was not a work of artistic craftsmanship: its artistic expression, in its form, was excessively constrained by functional considerations.

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12 On the antithesis between function and art (and utility and beauty) specifically, and its importance to the Arts and Crafts movement, see Burge (2007) 232 CLR 336, 359.
14 Ibid 361 (noting the brief he followed to that end, and the confirmatory promotional material and business plan, which the Court described as “not giv[ing] prominence to matters of visual and aesthetic appeal”).
15 The concept of features being “contra-standard” to a category of work is from Kendall Walton, “Categories of Art” (1970) 79 The Philosophical Review 344, 349; see also at 357–8 and text accompanying below n 60.
17 See ibid 364.
Two questions arise from this decision. First, what constitutes works of artistic craftsmanship, and how do they differ from other works? And second, what were the reasons given by the Court for conceiving the work in the way that it did?

2. The Constituent Properties of Works of Artistic Craftsmanship

In order properly to answer these questions it is necessary to consider the Court’s understanding of the place of the relevant category of work in the applicable copyright legislation; both in its copyright/design overlap provisions, and its definition of “artistic work”.

(a) The legislative place of works of artistic craftsmanship

Under the Act as it stood at the time of the suit, the protection given by copyright law was limited for certain industrial products with an exemption for works of artistic craftsmanship. In considering the reasons for that exemption, the Court traced its history through UK law, starting with the provisions of the Copyright Act 1911 (Imp) and focusing on the following main events.

i. The interpretation of the 1911 provisions by the House of Lords in King Features Syndicate Inc v O&M Kleeman Ltd (the “Popeye Case”), as denying protection to works of design on the basis in part of their authors’ intent.

ii. The later suggestion by the Gregory Committee that the 1911 provisions be amended to remove the reference to authorial intent; the reason being the Committee’s view that intent-based tests of copyright protection encourage
“subterfuge” by authors and others, and discourage the creation of artistic designs.22

iii. The legislature’s action on that suggestion in the Copyright Act 1956 (UK), and subsequent amendment of the new provisions (in the Copyright, Designs and Patents Act 1988 (UK)) so as to deny copyright protection to “ordinary functional commercial” works.23

iv. The decision by Australia in 1989 to amend its own overlap provisions in a manner consistent with UK reform, viz, “to remove copyright protection for essentially "industrial products””,24 with an exemption for certain categories of works “more appropriately protected” by copyright law, whether or not industrially applied.25

In Burge, two points were drawn from these events. The first was that authorial intent is an inappropriate basis for determining copyright; and the second was that the exemption of WACs from copyright/design overlap exclusion was due to their special status in law, as works of real artistic quality. The latter was consistent with the following observations of Drummond J in Coogi:26

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22 United Kingdom, Report of the Copyright Committee, Cmd 8662 (1952) [236], quoted in Burge (2007) 232 CLR 336, 349.

23 See Burge (2007) 232 CLR 336, 351 (quoting with approval the statement of Pumfrey J in Mackie Designs Inc v Behringer Specialised Studio Equipment (UK) Ltd [1999] RPC 717, 723 that “[i]t was clearly the intention of the framers of [the 1988 UK Act] that copyright protection was no longer to be available to what can be compendiously described as ordinary functional commercial articles”.


What may justify the special status conferred on works of artistic craftsmanship ... is recognition that the real artistic quality that is an essential feature of such works and the desirability of encouraging real artistic effort directed to industrial design is sufficient to warrant the greater protection and the accompanying stifling effect on manufacturing development that long copyright gives, in contrast to relatively short design-protection.27

In the view of the Court this passage was right, and explained the reason for the works’ special status, namely, that while any work might have artistic quality, that quality will not be what constitutes it specifically as an “artistic work”;28 a point confirmed by the statutory text:

Artistic work means:
(a) a painting, sculpture, drawing, engraving or photograph, whether the work is of artistic quality or not;
(b) a building or a model of a building, whether the building or model is of artistic quality or not; or
(c) a work of artistic craftsmanship to which neither of the last two preceding paragraphs applies;
but ... not ... a circuit layout within the meaning of the Circuit Layouts Act 1989 (Cth).29

The express neutrality of paragraphs (a) and (b) with respect to the works’ artistic quality — and omission in paragraph (c) of the phrase “whether the work is of artistic quality or not” — distinguishes clearly the categories of works, and evinces, too, a legislative intent that works of artistic craftsmanship be conceived as having artistic quality.30 In support of this the Court relied on the following passage by the Gregory Committee recommending insertion of an essentially identical paragraph (c) in the 1956 UK Act:

29 Copyright Act 1968 (Cth) s 10 (before its amendment by the Designs (Consequential Amendments) Act 2003 (Cth).
It is clear that some protection of this kind is required to cover works of art other than such things as works of painting, drawing and sculpture, which are mentioned by name. We are here concerned not with articles manufactured under conditions of ordinary industrial production (artistically meritorious as many of these are) ... but with the works of craftsmen working in many media (silversmiths, potters, woodworkers, hand-embroiderers and many others) in circumstances for which that Act does not provide appropriate protection. We do not think it will be questioned that original works of the kind we have in mind are fully entitled to protection and but for [the 1911 Act] this would be lacking. We believe that copyright provides the proper basis for protecting these works and to ensure this protection we believe that it is necessary to retain the term "works of artistic craftsmanship" in the Act.31

In the Court’s view, the reference here to inadequate protection anticipated the passage in Coogi above. Hence its conclusion, that

...the phrase “a work of artistic craftsmanship” was introduced by the 1989 Act into the “overlap” provisions of ... the Copyright Act upon a particular legislative view of the purpose it would serve. That view, as Drummond J indicated in Coogi, was the encouragement of “real artistic effort” in industrial design.32

Several results flowed from this.33 One was that encouraging “real artistic effort” might be constrained by an object’s functionality and the marketing imperatives for its production.34 Another was the need to be cautious when reading the Act, “lest too little weight be given to the need for a real or substantial artistic element” in establishing the existence of a WAC.35 And a third was the need for the Court, in light

33 Ibid.
34 Ibid.
35 Ibid.
of the Act, to qualify acceptance of Lord Simon’s speech in “the most significant judicial treatment” of WACs; the case of Hensher.\textsuperscript{36}

(b) Works of artistic craftsmanship and the requirements for artistic form and quality

In emphasizing each of these three results, the Court underlined the point above that works of artistic craftsmanship in law are a unique category of copyright work by reason of their essential artistic quality:

The genesis of the phrase “irrespective of artistic quality” in the 1956 UK Act was explained at the time as follows:

It was generally considered under [the 1911 Act] that the word “artistic” was merely used as a generic term to include the different processes of creating works set out in the definition section and that provided that a work was produced by one of such processes, and that its creation involved some skill or labour on the part of the artist, it was protected. The use of the word "artistic" was thought to be akin to that of the word "literary" which ... was held to refer only to the nature of the material being written or printed matter.\textsuperscript{37} In fact, under [the 1911 Act] merely commercial designs were protected. This matter is now clarified, as above mentioned.\textsuperscript{38}

\textsuperscript{36} Ibid 356–7.
\textsuperscript{37} See also Hensher [1976] AC 64, 94 (Lord Simon), stating as follows: It follows that the artistic merit of the work is irrelevant... Not only is artistic merit irrelevant as a matter of statutory construction, evaluation of artistic merit is not a task for which judges have any training or general aptitude. Words are the tools and subject matter of lawyers; but even in matters of literary copyright the court will not concern itself with literary merit... Since the tribunal will not attempt a personal aesthetic judgment ... it follows, again, that whether the subject is or is not a work of artistic craftsmanship is a matter of evidence; and the most cogent evidence is likely to be from those who are either themselves acknowledged artist-craftsmen or concerned with the training of artist-craftsmen — in other words, expert evidence. (citations omitted).
\textsuperscript{38} Copinger and Skone James on the Law of Copyright (9th ed, 1958) 65–6 (citations omitted).
In *Cuisenaire v Reed*, which turned upon the 1911 Act, Pape J said that the phrase “artistic work” was “a generic term or label”; this included subject matters not necessarily possessing any element of artistic quality at all, and so had a wider meaning than the word “artistic” in the phrase “works of artistic craftsmanship”. But the circumstance that a work falling within para (a) or para (b) of the definition of “artistic work” now found in the Australian legislation need not be of artistic quality does not deny that a particular work to which para (a) or para (b) applies may be of such quality.\(^39\)

According to this passage, what constitutes a work as an artistic work is its creation by one of the statutory methods, while what constitutes a work as a literary work is its presentation in writing or other notation.\(^40\) Thus, literary and artistic copyright works are constituted entirely by properties of form: in the case of the former, a mode of presentation; and in the case of the latter, a mode of creation, or more specifically, a combination of features of visual distinction added to raw (pre-existing) material by means of a statutory artistic method.\(^41\)

In *Burge*, it seems to have been accepted by the Court that works of artistic craftsmanship also possess this “generic” form, consistent with them being “artistic works”. Hence the reference to their form of expression, including their combination of visual features and particular mode of artistic creation.\(^42\) Indeed, according to the Court, a work of artistic craftsmanship in law is at base a work of craftsmanship in the following sense of Lord Simon in *Hensher*:\(^43\)

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\(^40\) Musical and dramatic works have been similarly conceived with reference to their form; see Pila, “Copyright and its Categories of Expressive Works”, above n 5.

\(^41\) Ibid.

\(^42\) See also *Burge* (2007) 232 CLR 336, 359 (rejecting the US requirement for separate identification of such features from the utilitarian aspects of the article concerned).

\(^43\) See ibid 358; *contra Hensher* [1976] AC 64, 77 (Lord Reid, describing “work of craftsmanship” as suggesting to him “a durable useful handmade object”)

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.44

The question remains what else it is; when does a work of craftsmanship become a work of artistic craftsmanship? According to Lord Simon, the answer lies in the author’s intent, and the general history of the work’s production. Specifically, for a work of craftsmanship to be a WAC it must manifest an artist’s aim and impact:

It is probably enough that common experience tells us that artists have vocationally an aim and impact which differ from those of the ordinary run of humankind. Given the craftsmanship, it is the presence of such aim and impact — what Stewart J called “the intent of the creator and its result” — which will determine that the work is one of artistic craftsmanship.45

In Burge the Court accepted this view, replacing the emphasis on artistic intent with an emphasis on artistic quality instead. The result was the following two-stage test: is there a work of craftsmanship; and does it possess the artistic quality essential for a work of artistic craftsmanship, ie, is its “artistic expression, in its form, [sufficiently] unconstrained by functional considerations”?46 By locating the quality of a work in its properties of artistic form, the Court supported a formalistic conception consistent with the statutory definitions above.47 Its method for determining that quality, however,

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45 Hensher [1976] AC 64, 95.
46 Burge (2007) 232 CLR 336, 364 (see below n 48 and accompanying text).
47 As noted, the Court regarded “artistic” in the phrase “work of artistic craftsmanship” as having special linguistic significance in denoting a requirement for artistic quality that distinguished WACs from other works. How to reconcile this with the formalistic understanding of artistic works in general seems to have been a central issue for the Court, and to have been resolved through the definition outlined: a work of artistic craftsmanship in
reveals a very different conception in keeping with that of Lord Simon himself:

The thread running through [Lord Simon’s] discussion [in *Hensher*] 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. 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” within the meaning of the *Copyright Act* as it stood after the 1989 Act. However, 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. The determination turns on assessing the extent to which the particular work’s artistic expression, in its form, is unconstrained by functional considerations. To decide this appeal it is sufficient to indicate the following.

The more substantial the requirements in a design brief to satisfy utilitarian considerations of the kind indicated with the design of the [yacht], the less the scope for that encouragement of real or substantial artistic effort. 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.48

This passage betrays an important assumption, namely, that works are perceived — in law as in art49 — in relation to a category of work. This explains the approach of the Court in *Burge*, following the approach of Lord Simon in *Hensher*, of anchoring its analysis to

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49 The insight regarding the importance of categories in perceptions of art is due to Walton, above n 15.
“works of craftsmanship”, and the sub-categories of works of 
glaziers, etc.50 The result was a division of the statutory phrase to 
support the two-stage test above, focused on identifying a work of 
craftsmanship, and determining, then, its artistic quality.51 That this 
division contradicted the Court’s own view, that “work of artistic 
craftsmanship” is a composite phrase supporting a single legal 
enquiry,52 speaks, it is submitted, to the importance of categories in 
judicial (and other) perceptions of works.

Outside of law that importance has been noted, and made the 
basis for a theory of art.53 According to that theory, one cannot 
correctly perceive a work without perceiving it in relation to a 
category of work, meaning perceiving the gestalt of the category in 
the work.54 The same is supported by the judgment in Burge, not only 
in its reasoning from categories themselves, but also in its emphasis 
on the gestalt of WACs: the harmonious combination of function and 
beauty in the form of the works’ artistic expression. That this is the

50 See Burge (2007) 232 CLR 336, 363–364 (accepting the suggestion of Lord 
Simon in Hensher [1976] AC 64, 91–92 that works of craftsmanship occupy a 
spectrum defined at one end by the “ordinary glazier” (“a craftsman, but … 
not properly [able to] claim that his craftsmanship is artistic”) and at the 
other by the maker of stained glass windows (who “could properly make 
such a claim”), with woodworkers and cabinet-makers in a “straddling 
class” (“some of their work would be generally accepted as artistic 
craftsmanship, most not”).

51 See above n 46 and accompanying text.

52 See Burge (2007) 232 CLR 336, 357. Note the parallel that exists between the 
Court’s reasoning here and the reasoning in Exxon v Exxon Insurance Corp 
[1982] Ch 119 (CA), where the Court of Appeal also emphasised the 
composite nature of the expression “literary work” to support a similarly 
non-formalistic conception of that work (as a subject matter “intended to 
 afford instruction, or information, or pleasure in the form of literary 
enjoyment” (Stephenson LJ, others agreeing, quoting from Hollinrake v 
Truswell (1894) 3 Ch 420 at 428 (Davey LJ)).

53 See Walton, above n 15. For an analysis of the significance of Walton’s 
theory for Anglo-Australian copyright law see Pila, “Copyright and its 
Categories of Expressive Works”, above n 5.

54 Walton, above n 15, 340.
aesthetic of the Arts and Crafts movement underlines another point about categories: they denote a particular authorial tradition, of sculpture, painting, architecture, etc. The same can be seen from the judgment in Burge, not only in its view that the Arts and Crafts movement defines the boundaries of the category of WACs, but also its acceptance that those boundaries change, reflecting change in the movement itself.55

Recognition of that which the categories denote, at least in the context of copyright law, is important for a variety of further reasons. Above all, it underlines the importance of history in copyright, in conceiving and identifying individual works. As Walton says, while what ultimately matters about a work may be its particular form of expression, it is nonetheless true that perceptions of works are affected by their specific origins.56 Given this, what constitutes a work as a work of art is best conceived in non-formalistic terms — as including its properties of artistic form, but also the history of its production: the intent and expectation of its author, and view of society with respect to its nature. That the same is true in copyright law is apparent from the method of the Court in Burge. According to that method, whether a work of craftsmanship has the quality of a work of artistic craftsmanship depends on two central things: whether the category into which it falls allows for “real or substantial artistic effort” on the part of the work’s author;57 and whether the admissible evidence as a whole shows that such effort was in fact expended.

55 See Burge (2007) 232 CLR 336, 358 (emphasising that the “the statutory expression is "artistic craftsmanship", not "artistic handicraft", notwithstanding that the aesthetic of the Arts and Crafts movement may have been that of the living artisan in his workshop").
56 Walton, above n 15, 337.
57 An alternative way of expressing this is might be by asking whether artistic effort is standard, variable or contra-standard to the relevant category (see Walton, above n 15, 339 and accompanying text).
This method is compatible with the method of Walton for categorizing correctly artistic works. In his theory, the correct categorization of a work of art depends on assessing the following factors.\textsuperscript{58}

i. The presence in the work of a relatively large number of features standard with respect to the relevant category. (In \textit{Burge}, the model of the yacht contained several features standard with respect to works of artistic craftsmanship, in particular, the addition of properties of visual distinction to raw (pre-existing) material by means of a method of craftsmanship. The fact that the model was not made entirely by hand, and was a prototype for mass production, was not relevant, for such matters are variable with respect to works of artistic craftsmanship.)

ii. The fact that the work is better or more interesting when perceived in the relevant category of work than when perceived in alternative ways. (In \textit{Burge}, the Court clearly regarded the model as better perceived as a work of design than as a work of artistic craftsmanship because of the predominance of function in its combination of functional and artistic features.)

iii. The fact that the work is recognised by the society in which it was created as falling within the relevant category. (In \textit{Burge}, the suggestion of the expert, Mr Hood, was that the model was not recognised by art-regarding society as a work of artistic craftsmanship.)

iv. The fact that the author of the work intended or expected it to be perceived within the relevant category of work. (In \textit{Burge}, the evidence of the yacht’s promotional material and Mr Swarbrick’s business plan suggested that Mr Swarbrick neither intended nor expected that the model would be perceived as a work of artistic craftsmanship.)

\textsuperscript{58} Walton, above n 15, 357–8.
It is submitted that presenting the reasoning of the Court in this way coheres and clarifies its disparate strands, and grounds those strands in a theory of the work convincing on normative and analytical grounds.\textsuperscript{59}

One question that remains is the reason for the shift from intent to quality in the judgment in \textit{Burge}. The reason suggested by the Court itself was the need to be mindful of the legislative aim of encouraging artistic effort in industrial design.\textsuperscript{60} However, a more compelling explanation is the Court’s own view with respect to the inappropriateness of authorial intent as a determinant of artistic copyright protection:

The answer to the question whether the Plug is a “work of artistic craftsmanship” cannot be controlled by evidence from Mr 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 of 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 when there is litigation, may be unavailable. Indeed, as Pape J noted in \textit{Cuisenaire}, the author may be dead. Again, 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, it may be expected, will few alleged authors of works of artistic craftsmanship be heard readily to admit the absence of any necessary aesthetic element in their endeavours.

This is not to deny the admissibility of such evidence, nor to disparage the good character of such witnesses, and certainly not that of Mr

\textsuperscript{59} See also Pila, “Copyright and its Categories of Expressive Works”, above n 5

\textsuperscript{60} See above ns 32, 34, 35 and accompanying text.
Swarbrick; it is to reaffirm the well-recognised dangers of hindsight which are present in various fields of intellectual property law, as in many other disputes that come to litigation.

The various aspects of the definition of "a work of artistic craftsmanship" which are discussed above with reference to Hensher have particular significance here.\(^{61}\)

It could be said that the Court’s comments here sit uneasily with its reliance on Mr Swarbrick’s evidence in deciding his model was not an artistic work. As seen above, that evidence established his paramount concern with function and commerce over beauty and art, and was central to the conclusion of the Court that the model lacked artistic quality.\(^{62}\) Nonetheless, it clearly did not “control” the issue, for the evidence of the expert was also important, and the Court in any case described the question as one for “objective determination” on the basis of all the admissible evidence.

There are two ways of interpreting this description: as a statement that the subjective intent of an author is relevant (not determinative) of the existence of a work; or as a statement that the only intent which counts is the intent which the Court attributes to an author on the basis of all the admissible evidence. The latter seems to be what the High Court meant. It is certainly what Lord Simon meant, along with Lord Morris and Viscount Dilhorne in Hensher.\(^{63}\)

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\(^{62}\) See also ibid 364 (“In the present case, notwithstanding what Mr Swarbrick later said on the matter after litigation was on foot, the earlier statements in the promotional material and in the business plan, with the evidence of Mr Hood, should have led the primary judge to conclude that the Plug was not “a work of artistic craftsmanship” because the work of Mr Swarbrick in designing it was not that of an artist-craftsman”).

\(^{63}\) In this respect the Court’s view may be closest to that of Viscount Dilhorne in Hensher. See Hensher [1976] AC 64, 87: So, in my view, it is simply a question of fact whether a work is one of artistic craftsmanship. Questions of fact are often difficult to decide but juries have to decide them. … This question of fact in relation to copyright is decided not by a jury but by a judge sitting alone. Evidence may be called with regard to it. Expert witnesses may testify. At the end of the day, it will
In contrast is the approach of Lord Kilbrandon, whose reasoning is worth extracting at length:

In my opinion, the first essential of a work of art (which I think an artistic work must be) if it is to be distinguished from a work of craftsmanship – a distinction upon which Parliament insists – is that it shall have come into existence as the product of an author who is consciously concerned to produce a work of art. The work either is or is not a work of art before anyone except the author has seen it; it does not depend for its artistic character upon the criticism, whether favourable or unfavourable, of other people who may make value judgments about it. It must be possible to deduce the conscious purpose of artistic creation from the work itself or from the circumstances of its creation, but this act arises only when the question whether it is a work of art becomes one for discussion or decision by others than the author.

Merit is another matter altogether. It has been said that the courts will be reluctant to make aesthetic appreciations, and that is right, not because so to do is for a judge difficult or unseemly, but because it is a decision which, in this context, is not required. I do not think it is possible to add, as it were, some artistic character to an object, and by so doing to justify a conclusion that the object is not only a work of craftsmanship but artistic to boot. To do so is almost certainly to make an aesthetic value judgment. An example was given in the course of the argument – the five-barred gate made by a craftsman, blacksmith or carpenter. It was suggested that a gate might be regarded as an artistic work if its proportions were right. But what does “right” mean? It only means “I like them,” unless it means no more than that the gate will be effective for controlling stock, which is the requirement demanded of the “mere” craftsman. The conscious intention of the craftsman be for the judge to decide whether it is established that the work is one of artistic craftsmanship. If that is not established, the claim to copyright on that ground will fail. I do not think that it suffices to show that some section of the public considers the work to be artistic, though that fact will be one for the judge to take into account, for the decision has to be made by the judge and cannot be delegated.

Compare also the view of Lord Reid, that a work of artistic craftsmanship in law is a durable, useful handmade object valued by its owner for its artistic character. (Hensher [1976] AC 64, 77).
will be the primary test of whether his product is artistic or not; the fact that many of us like looking at a piece of honest work, especially in the traditional trades, is not enough to make it a work of art.\textsuperscript{65}

The tension in this passage between the intent of the author in creating the work, the view of society with respect to the work, the formal dimensions or properties of the work, and the judgment of the Court on the merits of the work, is, it is submitted, an unnecessary one; for as the analysis above has sought to make clear, all are (or ought to be) essential to the enquiry into the existence of a copyright work. Once this is recognised, the concerns in \textit{Burge} ought to dissipate, along with the concerns of the Gregory Committee.\textsuperscript{66} If they do not — ie, if the well-known problems created for law by rights that depend on subjective intent are thought to outweigh the virtues of a test that properly reflects the nature of works — then one must settle for the proxy of \textit{objective} intent. In that case, however, it is particularly important for the law’s coherence, as well as the integrity of its future development, that methods of determining the existence of a work be articulated clearly, as suggested above. The risk otherwise is that authorial intent will eclipse all else, and become a

\textsuperscript{65} Hensher [1976] AC 64, 96–97.

\textsuperscript{66} See above n 22 and accompanying text. This is consistent with the preparedness of other courts to consider the subjective intent of the author in conjunction with expert opinion as to the success or otherwise of that intent. See, eg, \textit{Merlet v Mothercare plc} [1984] 10 FSR 358 (requiring an intent to produce a work of art, and a judgment that the author had not manifestly failed in that intent; and suggesting that the former will be easier to show for an artist-craftsman with an established reputation as such); \textit{Vernaat & Powell v Boncrest Ltd} [2001] FSR 43 (approving the view of Tipping J in \textit{Bonz Group Pty Ltd v Cooke} [1994] 3 NZLR 216 ("\textit{Bonz Group}") that an author may intend to produce a work of artistic craftsmanship but fail, in which case the resultant work will not be a work of artistic craftsmanship on the basis merely of the author’s intent); \textit{Lucasfilm Ltd v Ainsworth} [2008] EWHC 1878, [131] (implying some support for the approach of Tipping J in \textit{Bonz Group}).
euphemism in copyright law for a general discretion on the part of the courts to decide whether a work deserves copyright protection.\textsuperscript{67}

3. Works of Artistic Craftsmanship as Paradigm (Not Exceptional)

Copyright Works

The High Court in Burge affirmed the exceptional nature of works of artistic craftsmanship by reason of their real artistic quality. It is submitted however that while the category of WACs is unique, it is only in the way that all categories are unique: they denote a different expressive tradition. On this view, the particular “quality” of the work of artistic craftsmanship is only the quality of being such a work. If this sits uneasily with Anglo-Australian legislation, on account of its formalistic definitions of works, then that, it is submitted, serves only to underline the inadequacy of those definitions themselves.\textsuperscript{68} The same is recognised by the courts, in refusing to concede the existence of a work on the basis entirely of properties of form.\textsuperscript{69} However, recognising that things such as

\textsuperscript{67} Compare in this context the role of intent — or rather, consent — in the law of contract, the objective conception of which creates a similar tension between ensuring respect for personal autonomy and ensuring that ascriptions of legal liability are reasonable in the circumstances; on which see Hugh Collins, The Law of Contract (1st ed, 1986), especially chapters 4 & 5.

\textsuperscript{68} For a detailed discussion of the inadequacy of the formalistic definitions of works see Pila, “Copyright and its Categories of Expressive Works”, above n 5.

\textsuperscript{69} In the UK context see, eg, Exxon v Exxon Insurance Corp [1982] Ch 119 (CA) (deciding that a work might be presented in literary form but not be a literary work for the purpose of copyright, and deciding that “exxon” was not a literary work, despite possessing the formal properties of one); Metix (UK) Ltd v G H Maugham (Plastics) Ltd [1977] FSR 718 (Ch) (“Metix”) (rationalising the Court’s refusal in Davis (Holdings) Ltd v Wright Health Group Ltd [1998] RPC 403 (Ch) to treat dental impression trays as sculptures for copyright purposes with reference to the nature of sculptures as objects
collections of letters, cartridge moulds and combinations of noises, are not literary, artistic and musical works despite possessing the form of those works,\textsuperscript{70} has been easier than explaining why they are not. A case in point is Merchandising Corp of America v Harpbond,\textsuperscript{71} where the Court denied copyright in makeup on the basis it was not “a painting” in law. The Court said: a painting requires paint on a surface; paint on a face is paint without a surface; and paint without a surface is an idea and not a work. Cases such as this are problematic for law, for while the end result has intuitive force — it is difficult to think of makeup as painting, and of people having rights in respect of their look — it is based on the entirely unconvincing reasoning that a

created “by an artist’s hand with a view in part to non-functional aspects of shape or appearance”; affirming that three-dimensional objects created to serve as the step in a commercial production process and having no significance independent of that process are not sculptures); Sawkins v Hyperion Records Ltd [2005] RPC 32 (CA) (distinguishing music from noise as “intended to produce effects of some kind on the listener’s emotions and intellect”). For a more recent example see Lucasfilm Ltd v Ainsworth [2008] EWHC 1878, delivered on 31 July 2008. In that case Mr Justice Mann at [118] affirmed Laddie J’s view in Metix that “not every three dimensional representation of a concept can be regarded as a sculpture”, and that for a work to be a “sculpture” “it should have, as part of its purpose, a visual appeal in the sense that it might be enjoyed for that purpose alone, whether or not it might have another purpose as well”. The Judge also affirmed that the decisions in Breville Europe Plc v Thorn EMI Domestic Appliance Ltd [1995] FSR 77 (Ch) (that plaster shapes made for the production of die-casting moulds for toasters were “sculptures”, despite their purely mechanical or functional nature) and Wham-O Manufacturing Co v Lincoln Industries Ltd [1985] RPC 127 (NZ CA) (that a model of a mass-produced Frisbee was a “sculpture”) were wrong in UK law. He stated at [118]:

The purpose [of a sculpture] is that of the creator. This reflects the reference to "artist’s hand" in the judgment of Laddie J in Metix, with which I respectfully agree. An artist (in the realm of the visual arts) creates something because it has visual appeal which he wishes to be enjoyed as such. He may fail, but that does not matter (no judgments are to be made about artistic merit). It is the underlying purpose that is important.

\textsuperscript{70} See cases cited ibid.

\textsuperscript{71} [1983] FSR 32 (CA) (“Harpbond”).
painting is any image fixed in paint, and a body incapable of supporting such an image.

In effect, my suggestion is that any exegesis of the copyright work must explain why the decision in *Harpbond* above may have been right, but may equally have been wrong on different facts, for example, had the maquillage been on the body of an indigenous dancer. The reason is not that the body of the latter qualifies as a surface where the body of Adam Ant did not, but that paintings are not constituted entirely by their form, but also by the history of their individual production. It follows that that history ought to be part of what constitutes “a painting”. As already suggested, the premise of this view is an understanding of authorship as a shared and evolving expressive tradition; a socially and institutionally situated practice that informs the way in which works are perceived without detracting from their expressive significance *per se*, including as

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72 Or, to use the example offered in *Lucasfilm Ltd v Ainsworth* [2008] EWHC 1878, [118], any such exegesis must explain why a pile of bricks on temporary display at the Tate Modern is capable of being a sculpture, but the identical pile of bricks dumped temporarily at the end of a driveway is not.

73 See also Pila, “An Intentional View of the Copyright Work”, above n 7, 558; Pila, “Copyright and its Categories of Expressive Works”, above n 5, text accompanying n 97.
forms of autonomous expression. The same understanding, it is submitted, motivates Burge.

4. Functional and Commercial Considerations and Copyright Protection

The last aspect of Burge to be considered here is its suggestion that functional and commercial considerations might legitimately constrain the ability of an object to fulfil the requirements of copyright protection.

This suggestion contradicts the decision in Desktop Marketing Systems, that the statutory category of compilations extends beyond compilations proper to include industrious collections of facts. In explaining the reasons for that decision, Finkelstein J of the Federal Court, with whom the Full Court later agreed, appealed to

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74 On the idea of works as products of autonomous expression see Jane Ginsburg, “The Concept of Authorship in Comparative Copyright Law” (2003) 52 DePaul Law Review 1063, 1092 (suggesting that “in copyright law, an author is (or should be) a human creator who, notwithstanding the constraints of her task, succeeds in exercising minimal personal autonomy in her fashioning of the work”). Justifications of copyright with reference to personal autonomy strengthen the analogy with contract law (see above n 67). Note however with respect to Ginsburg's definition, that if it is accepted that works are authorial objects, then any definition of authorship needs to stand independent of the concept of “the work” to avoid circularity.

75 It also motivates recent UK cases; a notable example being LucasFilm Ltd v Ainsworth [2008] EWHC 1878 (see above ns 66, 69, 72; [2008] EWHC 1878, [118]–[121] (regarding sculpture), [133]–[135] (regarding works of artistic craftsmanship)).


constraints of commerce and function on a work’s entitlement to copyright protection:

It is by no means clear that O’Connor J [in Feist Publications Inc v Rural Telephone Service Co Inc78] was correct when she said that limiting the copyright in compilations to those where there has been an exercise of judgment will not affect many publications. So far as selection is concerned, there will be difficulty whenever the amount of data available for selection is small because necessarily there will be little selection. So also if the volume of data that is selected is small, for the doctrine de minimis non curat lex may apply. More significant will be cases where functional considerations or commercial reasons limit the area of discretion. For example, where all facts of a particular kind have been recorded, there will be no “selection” at all. So far as arrangement is concerned, Feist would seem to deny originality to obvious methods of grouping or listing data, such as alphabetically, chronologically, or sequentially.79

The implication of this passage is that where functional and/or commercial considerations constrain a work’s eligibility for protection, legal standards ought to be relaxed lest they discourage the creation of valuable works. This view is undermined by the reasoning in Burge:

[A]s the facts of this case demonstrate, encouragement of “real artistic effort” to industrial design may be constrained by the nature of the functional purposes to be served by the object to which industrial design is applied and by the marketing imperatives for mass production. The evidence of the marketing of the JS 9000 class of racing yacht, described in the first part of these reasons, is illustrative of these constraints. It is these constraints which make it difficult to support the Plug as a “work of artistic craftsmanship”.80

79 Telstra Corporation Ltd v Desktop Marketing Systems Pty Ltd [2001] FCA 612, [74].
The idea that copyright might encourage “real artistic effort” to the detriment of functionality was not considered problematic by the Court. Whether the reason was the High Court’s understanding that the question what ought copyright to encourage? is a question for the legislature responding through the categories of works, or its understanding that copyright is not concerned with encouraging functionality per se, is unclear. Whatever the case, the Court’s view seems to have been that the constraints on copyright subsistence deriving from the nature of a particular category of work are just that, constraints, and not to be gotten around by extending the category in the manner above. While such extensions are not new in copyright — Anglo-Australian courts have long been prepared to redraw the boundaries of a category of work in order to ensure an object protection, particularly in the absence of non-copyright protection — they are counter to the approach of the Court in Burge, which recalls the decision in Feist above, expressly rejected by the Federal Court:

Originality is a constitutional requirement. ... It is this bedrock principle of copyright that mandates the law’s seemingly disparate treatment of facts and factual compilations. "No one may claim originality as to facts" ... because facts do not owe their origin to an act of authorship. The distinction is one between creation and discovery ... Factual compilations, on the other hand, may possess the requisite originality [if they involve choices as to the facts’ selection and arrangement that are] made independently by the compiler and entail a minimal degree of creativity ... This inevitably means

81 Notable examples from UK law include Walter v Lane [1900] AC 539 (HL) (where the House of Lords extended the category of “book” to ensure protection for the literary record of unwritten speeches) and Norwizian v Arks Ltd (No 2) [2000] FSR 363 (CA) (where the Court of Appeal extended the category of “dramatic work” to ensure protection for a cinematographic work). Examples of courts contracting the boundaries of a category of work to deny a subject matter protection also exist; one being Interlego AG v Tyco Industries Inc [1989] AC 217 (PC) (where the Privy Council restricted the sub-category of “graphic work” to deny protection for drawings adapted around new technical specifications in order to prevent the plaintiff from obtaining extended intellectual property rights in its lego blocks).
that the copyright in a compilation is thin. Notwithstanding a valid copyright, a subsequent compiler remains free to use the facts contained in another’s publication to aid in preparing a competing work, so long as the competing work does not feature the same selection and arrangement … It may seem unfair that the fruit of the compiler’s labour may be used by others without compensation. As Justice Brennan has correctly observed, however, this is not “some unforeseen byproduct of a statutory scheme” [but] rather, “the essence of copyright” [which] assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work. This principle, known as the idea/expression or fact/expression dichotomy, applies to all works of authorship. … The result is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art.82

5. Conclusion

In Burge, the High Court of Australia affirmed the orthodox view that works of artistic craftsmanship are exceptional in law by virtue of their requirement for artistic quality. My suggestion is that this is not right, that what constitutes a work of artistic craftsmanship is the same as what constitutes other works — their properties of form and the history of their individual production. It follows that rather than being exceptional, works of artistic craftsmanship are paradigmatic of the Anglo-Australian copyright work.

In a similar vein of legal orthodoxy, the Court affirmed that the functional nature of an object might legitimately constrain its entitlement to copyright. This is important, for it suggests that it is not appropriate for the courts to re-conceive categories of copyright works to ensure protection for an individual object it regards as deserving of copyright. Indeed, it is precisely the risk of such judicial pragmatism that leads to my caution on conflating the two aspects of a work’s history into a single requirement for objective intent.

The premise of my analysis here is the same non-formalistic theory of the work developed in earlier papers. That theory builds on the insights of Kendall Walton regarding the psychology of art appreciation, and the role of categories in perceptions of works. The decision in Burge is further evidence that that theory holds in law. This is important, not only in suggesting the value of the theory in the particular context of copyright jurisprudence, but also in underlining the need to ensure that statutory conceptions of copyright works properly account for the realities of perception: the way in which works are perceived by the courts.

83 See especially Pila, above ns 5, 7.