

How CA is broken up (Simplified version)

From Section 10(1):

- **Literary work** - includes: tables or compilation expressed in words, figures or symbols. (A computer program or compilation of computer programs)
- **Dramatic work** - includes: choreographic show or other dumb show.
- **Musical work** - no defn in CA, need to therefore persuade judge; scenario or script for cinematographic film (not the film itself).
- **'Artistic' means**: Painting, sculpture, drawing, engraving, photo, building, model of building, work of artistic craftsmanship: s 10(1). (exhaustive defn)

What kind of subject matter is protected? – Original Works

Works

- 'Works' includes literary, dramatic, artistic or musical works. Protection is available whether the works are published or unpublished. This is derived from s 31 of CA.

Original

- Not only must material fit certain categories, however; it must be original: s 32(1) ○ Subject to this Act, copyright subsists in an **original** literary, dramatic, musical or artistic work
- Originality requirement is important. Reason is the benefit of copyright protection should not be given to people not having earned it or not benefiting society by their production.
- The test for originality has been set very low by Courts, this is because many things have been influenced by things preceding them (i.e. cultural products and paintings). The only requirement being that the person claiming to be the author and the expression should not be directly copied from elsewhere.
 - *An original work does not necessarily require new ideas. In copyright context, it means the individuality of the way in which the idea is expressed. This will be done by the author, the person giving expression to the work itself.

Original literary works

- Writing not needed- s22(2), **must be in material form**, such as a sound recording
Originality needed = **if you need to show originality AND that copyright refers to one of the definitions of work in the act.**
- Notion of literary works does not carry any presumption as to the aesthetic value of the work but rather covers any type of 'document' or material representation ... which is capable of being comprehended by the human reader: Databases – Tool of the Information Age:
 - Current Protection under Australian and NZ Law.

- [Section 22\(2\)](#) indicates that a literary work can exist in the form of sounds embodied in an article; hence, speech recorded with audio equipment will be a literary work.
- Pursuant to [s 10\(1\)](#) defn for 'literary work', which is provided above.

Two issues generally arise here:

1. Where little doubt about work being 'literary', but [doubt surrounds its originality](#)
2. Doubt whether work is [actually 'literary' in nature](#) at all or policy reasons indicating it to not be considered a literary work.

1. This issue of originality was returned to recently in Aus by the HC. In *IceTV v Nine Network Australia*, the reasoning used in *University of London Press* was endorsed.

- Originality for purposes of copyright requires that the literary work in question originated with the author and that it was not merely copied from another work.
- **What is required is= independent intellectual effort** (joint authors creating the work), but not literary merit or novelty or inventiveness (like in Patent law).

2. Literary works refer to written and printed matter. A work is literary even if it has no pretensions to literary style – hence it was found exam papers had copyright protection; as do registered bills of sale etc. (*Uni of London Press Ltd v University Tutorial Press Ltd (UK)*).

- Exam tutor published university past exams, but university claimed literary works and infringed copyright. HELD: can be any format as long as in material form. Does it meet originality requirements? Yes as long as not copied from another work. Thus idea does not have to be original only idea. RULED- exams came from author and were copyrighted.
- *Is now possible for a copyright literary work to exist in the absence of writing, as long as it is in material form: [s 10\(1\)](#).
- The standard of originality is very low. The originality which is required relates to the expression of the thought. CA does not require that the expression must be in an original or novel form, but that the work must not be copied from another work. I.e. it should originate from the author: *University of London Press*.

Names, titles and headlines

- Titles (e.g. titles of books) are not likely afforded protection in their own right. However, may be protected to some extent as part of the larger book.
- Reasons include that a) not original (but usually are original cos require work) b) may not be literary works on the basis of not imparting information, instruction or pleasure c) on the basis of not being sufficiently substantial pieces of cultural production.

Exxon Corporation v Exxon Insurance UK:

- A literary work as something intended to afford either information and instruction or pleasure in the form of literary enjoyment. The Ct was not convinced that the word *Exxon* did either of these.
- Single words are not literary works

Kalamazoo (Australia) v Compact Business System HC: (following on from^)

- Names such as Exxon was not sufficiently substantial to be classified as a literary work. This is the 'true basis' of the rejection of copyright for some works that fail to provide information, instruction or pleasure.

Fairfax Media Publications v Reed International Books Australia [2010] FCA 984 [44]:

- Newspaper headlines do not sustain copyright. They, like titles, are too insubstantial and too short/ trivial to qualify for copyright protection as literary works. Headline is just a brief subject statement and distinct from the article, different process to create, but article can still have copyright.
- Further, the need to identify work by its name is a reason for the exclusion of titles from copyright protection in the public interest. Otherwise conventional bibliographic references to an article would likely infringe.
 - Headlines are not considered part of works (the article).

Translations

- A translation will be an original literary work. This is based on the skill, judgment and labour that has gone into the choice of words and sentence structures.
 - Original= yes, intellectual effort in choosing the form of expression.

A translation is a species of adaptation of a work: [s 10\(1\)](#).

- The owner of copyright in the original work carries exclusive rights and the translator requires permission to produce an adaptation.
- If translator makes translation breaches or does not breach the owner's copyright, the translator is considered the author of the translation: *Byrne v Statist Co UK*
- HELD to be original copyright work ○ -So if translate work without authority, infringe original copyright owner and create your own new copyright at the same time.

Compilations

- A compilation- is included in literary works and may take the form of a digital database or a text book. Raises issue with originality as compilations derive from other works. As long as they are expressed in words figures or symbols, they are literary works pursuant to [s 10\(1\)](#).

- **Copyright TEST:** must be demonstrated the skill, judgment, concentration and analysis used to form them are qualities which give rise to originality: *Kalamazoo*.
- However, *IceTV v Nine Network (HC)* provides that for material to be original it **must originate with an 'author' who has expended 'independent intellectual effort'** in 'expressing' it.
 - HELD: idea intellectual effort is part of authorship, if no author identified, then no copyright
 - ✦ T. V, guide was not copyrightable, information was not protected. Can't express the name and type of T.V. show in many different ways- information and expression inseparable.
 - In *Telstra v Phone Directories* (FC and FFC), no copyright in telephone directories, due to no identifiable author.
 - ✦ Work has to come from individual intellectual human effort in order to be the author.
 - Employees who enter data for a phone book are not authors.
- *Although copyright protection may be afforded to compilations, does not protect the compilation from an action brought on behalf of the owner of copyright in the works from which the compilation is derived.
 - ✦ This is similar to translations in the sense that copyright subsisting in the work will not prevent it from being an infringing work in the correct conditions.
- Hence, person making compilation needs authorisation from owner of copyright in original work to do so. As does the person copying the compilation, etc..
- Government may, in future seek to legislatively protect databases- may in future won't require independent intellectual effort from a human

Original dramatic and musical works

- Types of material that may be defined as a dramatic or a musical work and whether it has sufficient originality again, to gain copyright protection.
 - Material form needed, but can be in the form of sound.

Dramatic works

- **Section 10(1)** provides that a dramatic work includes a choreographic show, other types of dumb shows and a scenario or script for a cinematographic film, but does not include a cinematographic film as distinct from the scenario or script for it.
 - Material form is needed, but can be in the form of diagrams, written or recorded instructions or film
 - E.g. ice skating routine would be dramatic work.

Green v Broadcasting Corp of NZ:

- Format for TV talent show. Claimed infringement in format and script of talent show.
- Held: No copyright in the script, just a concept and loose running sheet. No sufficient certainty in subject matter. Nothing capable of performance. Not a work under the definition. Features of the show were unrelated to each other and lacked essential characteristic.
 - Need certainty in subject matter or else cannot identify what the monopoly intended to be protected is. To avoid injustice to the world at large → *Tate v Fullbrook* [1908] UK.
- However some other talent T.V. shows could be copyright protected if a lot more scripted such as the bachelor.

Nine Films v Ninox: did copyright subsist in TV series?

- Claim that 'the block' infringed the copyright of a NZ T.V. show.
- Not discussed/questioned that copyright was lacking in such a format.

Seven Network v Endemol Australia Pty Ltd [2015]:

- Possibility that Seven could prove it had copyright in a TV series and this was infringed by a rival network. Would be interesting to see how Seven would prove it is the owner of 'dramatic works'.
- Difference in characteristics, contests being amateurs as opposed to professionals and channel 7 had a reasonably arguable case but not strong enough to grant an interlocutory injunction.
- My kitchen rules was not inventive or original and copyright unlikely- groundless threat.
- Example: A dramatic script is a dramatic work in material form.

Musical works

- Are not defined in CA. However, to be protected they must be reduced to material form. This is usually done by musical notation or recording.
- Originally in an arrangement= creational composition
- Can't divide songs into vocals and backing (both are part of the music), but lyrics and music from 2 different copyrights, a literary work and a musical work.
 - Mere improvisations or traditional music cannot be protected in this way.
- **TEST-** whether adaption of original music protected: must be sufficiently different from the original as to achieve its own originality and copyright protection, depending on criteria of skill, labour and judgement being used to establish originality.

CBS Records v Gross (IPR)

- CBS owned the copyright in the song and in Australia there was an arraignment made.
HELD:
- Originality of music lies in a myriad of differences, not in any specific feature, and therefore in the performance as a whole and not in any special or particular feature.
 - Further, when 'creational composition' occurs
- Copyright existed but no infringement, as only lyrics of original song was used and different music was used not the instrumental provided by Gross.
- At most, as the song was formed via collaboration, Gross was a joint proprietor of the copyright in the Trackdown version.
 - Example: Sheet music would be a musical work in material form.
- Can have more than one copyright owner in the work.
- Cannot divide a song into vocals and backing tracks as both form the music itself.
 - Further, lyrics and music form 2 copyrights; a literary work and a musical work.
 - But can divide ownership in lyrics and music.

Original artistic works

'Artistic works' are defined by s 10(1) CA exhaustively, as follows:

- (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*.

Artistic quality is irrelevant to the rights given under copyright law unless it is a work of artistic craftsmanship.

- **Paintings: Not defined in Act** (but has been known to include paint on rice paper; *Australian Chinese Newspaper v Melbourne Chinese Press*)
- **Sculpture:** includes cast or model made for purposes of sculpture.
- **Drawing:** includes a diagram, map or chart or plan.
- **Engraving:** includes an etching, lithograph, product of photogravure, wood-cut, 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 cinematographic film have been embodied, and includes xerography.
- **Building:** includes structure of any kind.

Section 10 contains these definitions.

- TEST: whether work has requisite originality to afford itself protection and whether it is a type which fits under a category given under the Act.

- *Cts pay particular attention to the techniques used in which artefacts are created in order to assign them to one category or another.

Original paintings

- The meaning of the term 'painting' is relatively easy to define. It is not further defined in CA. The court will turn to the common usage of the term in deciding difficult cases.
- Use of special Chinese brush pen on traditional Chinese rice paper was considered to bring into being a 'painting' for the purposes of copyright protection: *Australian Chinese Newspapers v Melbourne Chinese Press FCA*.

Original sculpture

- Aus courts have not given the issue as to what is a sculpture, any substantial attention.

Lucasfilm Ltd v Ainsworth UK- sculpture guidelines:

- Some regard must be had to the original use of the word 'sculpture'.
- Inappropriate to stray too far from normal definitions and go beyond what ordinary members of the public would consider, but can go beyond what is seen in an art gallery.
- Sculpture should have, as part of its purpose, a **visual appeal** in the sense that it might be enjoyed for that purpose alone: *Mann J in Lucasfilm Ltd v Ainsworth*.
 - Function must be beyond merely practical; 'an artists hand'
 - Something the sculptor thought about in visual appeal
- The purpose is that of the creator, the fact that the object has some functionality or it being a toy does not disqualify it from being a sculpture.
- The method of fabrication relevant, but is not determinative.
- No judgement is to be made about artistic worth. vii. Not every three-dimensional representation can be regarded as a sculpture.

HELD: The Stormtrooper helmet was not deemed to be a sculpture, due to its lacking of artistic purpose- not copyrightable.

Wildash v Klein (2004) IPR:

- 'Sculpture' to be given its ordinary meaning; citing Laddie J in *Metix* where he referred to the need not to extend the meaning of the word beyond the ordinary public's perception and the reference to the artist's hand.
- A sculpture should in some way express in three-dimensional form an idea of the sculptor'.

Original engravings

- Process of engraving involves cutting into a surface and or taking a print of the image that has been cut. Injection moulding process not deemed as a sculpture.

Wham-O case NZ

- A tool was used to cut into a rotating piece of metal on a lathe and shape it into a mould so that Frisbees could be made.

Held:

- This process was capable to be defined as engraving and the Frisbees were then engravings/prints.
- Carved in the way you expect a sculpture to be, thus a sculpture. Had to be more than mere injection, had to be carving and cutting in order to put the sculpture together.
- The actual Frisbee was not a sculpture, but the mould was.

*Not certain that this would be applicable to Aus law; and Frisbees are unconventional concepts of engravings.

Original drawings

- Drawings include diagrams, maps, charts and plans: s 10(1).
- A drawing has been described as a two-dimensional work in which shapes and images are depicted by lines, often without colouring: *Heerey J in Woodtree v Zheng*.
 - Can include words which have no 'semiotic meaning'; *Elwood v Cotton On* ○ A t-shirt was claimed to infringe copyright- court said that its possible for words to be part of a copyright as long as not being used for literal meanings
 - Essentially, words can be part of a drawing as long as they give the drawing a particular 'look and feel'.
- Ruled there was infringement by cotton on copying Elwood t shirt.
- Tracing an old drawing does not give the new drawing copyright- no originality..

Photographs

- Author is person who takes the photo: s 10(1). Hence, copyright will, generally, belong to that person initially.
- 'Photograph' is defined in s 10 and has been outlined above. Photograph does not include one frame from a film.
- What is a photo: 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 (photocopy).

*Issue as to whether an x-ray or ultrasound are photographs within the definition.

Original buildings and models of buildings

- A building is defined in s 10 to include a 'structure of any kind'. It is of no consideration whether the building or model of a building is of artistic quality or not: s 10(1).
- A structure has been deemed to be **something of substance**, which is usually erected upon or constructed upon or in the ground.
 - It need not be a fixture, a prefabricated building is ok and the structure can be temporarily unattached to soil.

- A plug and mould have not been classified as a structure, however, a pool, built into the ground has been deemed a structure.
- A half-sized tennis court made of a concrete slab with special marking on it and with net posts set into the concrete was considered to be an artistic work: *Half-Court Tennis Pty Ltd v Seymour*.
- A garden, containing various steps, walls, ponds and other structures in stone was considered capable of protection as a building/structure. The issue of originality will depend on the usual tests of skill and labour exercised by the author.
- 'Model of a building' and 'structure of any kind' were discussed in *Darwin Fibreglass v Kruhse Enterprises (NT Supreme Ct)*
 - The case concerned moulded fibreglass swimming pools. The negative cast/mould was made from a positively shaped swimming pool (the 'plug'), then the new swimming pool was made using that model.
- 'Structure of any kind' was defined using normal statutory interpretation to mean something of substance, which is usually erected or constructed upon the ground permanently. Although not being a fixture, a prefabricated building designed to be removed or is left temporarily unattached to soil may be a structure; *Darwin Fibreglass v Kruhse Enterprises*
 - The case above: mould or plug were not deemed to be a 'structure'.
 - A caravan can also not be a building.
 - ✦ Can be copyrighted under works

'Model of a building' includes:

1. Includes representation of some structure already build or to be built showing its proportions, shape, design and the arrangement of parts.
2. Includes three-dimensional image which is a copy of an object or which is to be copied to make the actual object itself, so would include a mould.
 - The case above: mould and plug would fit the second definition of 'model of a building'.

Works of artistic craftsmanship (WAC)

- Are products of the combination of artistry and craftsmanship, including carefully pieces of furniture. Fulfil a certain need and copyrightable.
- NB with other artistic works listed above: require artistic taste and craftsman-like skill to go into their production.
 - Authority suggests against that the abovementioned attributes must be done by the person who physically makes the object/product at issue

Hensher v Restawile:

- 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 (showy) etc.

- Can be protected by two parts of the act, may have a work of artistic craftsmanship which is also a sculpture, thus be protected by both.
- Relevant to look at the intention of the builder and whether they intended for it to be functional, but not always conclusive although helpful.

Burge v Swarbrick HCA:

- Functional constraints are prevalent. Whether it is a work of craftsmanship the artistic form of expression of which is sufficiently 'unconstrained by functional considerations'.
- The boat hulls were not considered works of artistic craftsmanship, as only the 'means to end' of creating the yacht.
- The more substantial requirements in a design brief to satisfy utilitarian consideration of the kind indicated with the design of the 'JS 9000' (the yacht), the less the scope for that encouragement of real or substantial artistic effort.
 - Boat was dictated by functionality only, for speed and functionality, no work of artistic craftsmanship allowed with function requirements.

HELD:

- The plug was not a WAC because the work done in designing it was not of character of that of an artist/craftsman.
 - A work of artistic craftsmanship doesn't have to be made by hand, can also be made by machine or a group of people, so long as element of craftsmanship. Must be something over and above the necessary functional appearance of the article. It was purely functional.
- *A stealth fighter wing would likely be found to be also not a work of artistic craftsmanship as, similar to above, not a WAC.
- 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.

Issue: could the hull and deck mouldings be a WAC if the plug was not?

- A work can be a WAC even though it is classified as another form of artistic work (i.e. building, sculpture, model of a building).
 - This is expressed by the wording of the 'artistic work' definition in s 10.
 - Paragraph (c) 'a work of artistic craftsmanship whether or not mentioned in paragraph (a) or (b)';
- Further, the Explanatory Memorandum for the Amendment Bill provides that 'this amendment clarifies that a work under paragraph (a) or (b) of the defn of 'artistic work'.
 - I.e. a sculpture can be a work of artistic craftsmanship notwithstanding that it is also an artistic work under paragraph (a)': *Designs (Consequential Amendments) Bill 2002 (Cth)*.