

through the Parliament. On 17 August 2005 the Minister announced \$90m for a *Backing Indigenous Ability* initiative which would 'address phones, Internet and videoconferencing in remote Indigenous communities and improve Indigenous radio and television contingent on the passage of the sale of Telstra legislation.' No details were available but with the government casting around for projects to appease Barnaby Joyce and the Nationals who were seeking to maximize the size of the Future Fund and new regional telecommunications projects, the Minister announced on 1 September that the Telstra Sale was to benefit Indigenous Television and that \$48.5m of the \$90 m *Backing Indigenous Ability* funds were to be allocated to develop an Indigenous television service over four years to be used to

build on the existing ICTV service broadcast by Imparja.

On 8 September the *Telstra (Transition to Full Private Ownership) Bill 2005* was introduced into Parliament and on 14 September, the Bill passed through the Senate.

This was the right place at the right time for Indigenous Television and has created a unique opportunity to provide a new and innovative service that will reflect Aboriginal Australia to Aboriginal and non-Aboriginal Australians. Program genres will include children's programs and an Aboriginal AFL footy panel show.

The Foundation members of NITV are Imparja Television Pty Ltd, Indigenous Remote Communications Association,

Indigenous Community Television Ltd, Indigenous Screen Association Incorporated, Australian Indigenous Communications Association and the Federation of Aboriginal and Torres Strait Islander Languages Corporation. The service has offices in Alice Springs and Sydney.

The challenge now is to establish a service that entertains and informs audiences so brilliantly that the service must be continued beyond 2011.

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# High Court Takes The Wind out of Shipbuilders Sails

Marina Lloyd Jones reports on a recent decision in which the High Court considered the meaning of 'artistic craftsmanship' and the copyright / design overlap.

In April of this year, the High Court was required to consider the interplay between art and function, and between copyright and designs, in the context of a case involving the design of racing yachts. Its decision in *Burge v Swarbrick*<sup>1</sup> provides useful guidance on the meaning of "artistic craftsmanship", a term at the heart of the copyright / design overlap.

## Mr. Swarbrick and the JS9000

The respondent, Mr. Swarbrick, was a well-known naval architect who had designed and was involved in the manufacture of the JS 9000, a commercially successful racing yacht. After drafting plans for the boat, Mr Swarbrick had created a "plug", a full-scale model of the hull and decks. Moulds were formed around the plug, becoming an inverted reproduction of the plug, and then used to produce mouldings (parts of the boat itself) which themselves were exact replications of the plug. The resulting mouldings were then fitted out with the keel, rigging and other components to form the finished boat.

While the original plug had been destroyed, Mr Swarbrick had provided mouldings

to two of his employees, who later left to work for Boldgold Investments Pty Ltd ("Boldgold"). Boldgold began to manufacture a boat using the mouldings, and Mr Swarbrick applied for an interlocutory injunction alleging infringement of his copyright in the drawings, the plug, the mouldings and the boat itself. Mr. Swarbrick had not registered any designs relating to the JS9000 under the *Designs Act 1906* (Cth) (since replaced by the *Designs Act 2003* (Cth) ("Designs Act")) and admitted that the design for the plug and the mouldings had been industrially applied (in other words that he had manufactured more than 50 articles). As explained below, this admission and the failure to register required him to prove that the relevant works were "works of artistic craftsmanship" protected by copyright.

## The copyright / design overlap

Certain objects may qualify for "dual protection" if they are both as "artistic works" under the *Copyright Act 1968* (Cth) ("Copyright Act") and registrable as designs under the *Designs Act*. For instance, the visual features of the shape of a chair may be reg-

istered as a design, while the drawing of the plan for the chair, and the chair itself, may also be "artistic works" protected by copyright. Conversely, a designer may lose their ability to enforce copyright if they take certain action relating to a corresponding design.

Various legislative amendments have sought to establish appropriate boundaries between these two forms of protection, and a degree of overlap remains. The "overlap provisions" are set out in sections 74 to 77A of the Copyright Act, and following amendments made by the *Designs (Consequential Amendments) Act 2003* (which came into force on 17 June 2004, after the events considered in *Burge v Swarbrick*), the law as it currently stands is:

- a copyright owner who registers a design corresponding to the relevant artistic work (where that registration relates to the three-dimensional features of a product) will be prevented from enforcing their copyright against infringers and must rely on design law;
- a copyright owner who registers a design corresponding to the relevant artistic work (where that registration relates to the two-dimensional pattern on a product, such as a wallpaper design) will retain their copyright protection in the artistic work and enjoy "dual protection"; and

- a copyright owner who industrially applies a design corresponding to the artistic work by mass producing objects to the design will be unable to enforce their copyright (unless the work is one of artistic craftsmanship, in which case copyright will still be enforceable).

It is the exception to the third part above, for "works of artistic workmanship", which may assist designers who have industrially applied a design but failed to register it (as with Mr Swarbrick). The High Court's analysis of the term (which is undefined in the Copyright Act) in *Burge v Swarbrick* remains relevant despite the overlap provisions having since been amended.

#### "Works of artistic craftsmanship"

Before the High Court, Mr Swarbrick submitted that the plug and the mouldings were "works of artistic craftsmanship" and that he should therefore retain his ability to enforce copyright in relation to them despite industrial application. Mr Swarbrick argued that he had intended to design a yacht of great aesthetic appeal, and that

the JS 9000 realised this intention. The respondents contended that Mr Swarbrick had set out to design a functional racing yacht to meet the practical demands of a specific market, and that visual and aesthetic appeal was simply one of a number of considerations. In endorsing the respondents' analysis the Court:

- rejected the idea that utility and beauty, or function and art, are mutually exclusive. A work could be one of artistic craftsmanship despite its form being partially dictated by functional considerations; and
- held that determining whether a work is one of artistic craftsmanship "turns on assessing the extent to which the particular work's artistic expression, in its form, is unconstrained by functional considerations" [at 83 to 84]. The greater the requirements in a design brief to satisfy utilitarian considerations, the less scope to encourage substantial artistic effort.

The High Court disagreed with the Federal and Full Federal Courts' view that the

plugs and mouldings were works of artistic craftsmanship. In designing the plug for the boat, Mr. Swarbrick's key aim was creating speed on the water, and in seeking to achieve it he was acting in the role of an engineer rather than an artist-craftsman. In other circumstances he may have fulfilled the latter role but that was not the case with this design brief.

The artistic craftsmanship exemption is significant for designers: if they can bring their work within its scope, they will be able to mass produce objects corresponding to the design while still being entitled to enforce their copyright against infringers. The High Court's judgment in *Burge v Swarbrick* has usefully clarified this scope. However, once a copyright owner has registered an artistic work as a design, a separate section of the overlap provisions will apply and the artistic craftsmanship exemption will not assist.

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#### (Endnotes)

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## A Very Expensive Lobster:

Jennifer Lusk revisits *Blue Angel Restaurant v John Fairfax and Sons Ltd (1989)* and the mutual dislike that exists between defamation law and restaurant reviewers.

One would think that the very purpose of a review is to offer the critical opinion of the reviewer on any given subject. One might also think that a reviewer who constantly lied about that opinion would soon find him or herself on the scrap heap due to complaints. Leo Schofield, whilst known for being highly critical, is also a well respected journalist, commenting on and critically reviewing the arts and food for over thirty years. In 1984, he reviewed the *Blue Angel Restaurant* for the *Sydney Morning Herald*, with, according to him, the same critical eye with which he had reviewed many other establishments across the country. But in this case, a harsh but honest opinion created one of the most well known and controversial defamation cases in Australian history. The restaurant and its owner, Mr Marcello Marcobello, sued for defamation and won, receiving over \$100,000 from John Fairfax and Sons Ltd and Leo Schofield.

On May 21<sup>st</sup>, 1984, Mr Schofield dined at the Blue Angel Restaurant with the

intention of reviewing it. He took note of the tank of live lobsters, a trend that was only just beginning at the time, and the appearance of the restaurant and staff for comment in the review. He and his companion ordered and dined, Mr Schofield forming a critical opinion of his meal for the pending review. The pair finished their meal, left a tip and Mr Schofield's card and left. The review which appeared in the *Sydney Morning Herald* on May 29<sup>th</sup> was not particularly favourable and was written in Schofield's satirical and flamboyant style, prefaced with a reworded version of Lewis Carroll's Lobster Quadrille. He drew attention to the live lobsters and the polyester shirts of the waiters. With regard to the meal, he claimed the lobster was overcooked, a culinary crime against such an expensive creature, and that the garlic prawns and lemon sole 'suffered from the same over-enthusiastic exposure to heat'<sup>1</sup>.

Mr Marcello Marcobello, the owner of the Blue Angel Restaurant took offence to Mr

Schofield's review, claiming that it was 'all lies'<sup>2</sup> and that the review carried defamatory imputations. The restaurant and Mr Marcobello sued both Schofield and his publishers for defamation, the case coming before Justice Enderby and a four person jury in 1989. The claim was that the article imputed that the plaintiff:

- Was a cruel and inhumane restaurateur in that [the restaurant] killed live lobsters by boiling them alive;
- Was an incompetent restaurateur in that [the restaurant] broiled lobsters for 45 minutes contrary to accepted culinary methods;
- Was a restaurateur that charged a price for excellent fresh lobster which when later cooked incompetently... did not then represent good value,
- Was an incompetent restaurateur in that [the restaurant] served lobsters with charred husks of shells, meat destroyed as to quality and claws containing white powder;
- Was an incompetent restaurateur in that [the restaurant] served severely overcooked garlic prawns and lemon sole that was severely overcooked and slimy with oil.<sup>3</sup>