

Case Note  
Artist Craftsmanship:  
*Merlet v. Mothercare P.L.C.*<sup>1</sup>

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Copyright protection under the Copyright Act 1968 (Cth) is afforded to owners of literary, dramatic, musical and artistic works, the last category being defined in s.10 of the Act to include, inter alia, a work of artistic craftsmanship. In an article in a previous volume of this Journal,<sup>2</sup> this writer discussed the interpretation of the term 'artistic craftsmanship'. Subsequently, in *Merlet v. Mothercare P.L.C.*<sup>3</sup>, Walton J. in the Chancery Division of the High Court in the United Kingdom had opportunity to further define the scope of the term as it appears in s.3 of the Copyright Act 1956 (U.K.), which is identical to the Australian provision.

The plaintiff, who had previously been involved in the design and manufacture of clothing items, produced a prototype of an item of clothing, basically a cape with a hood, designed to hold a baby and to protect it from the weather. The design was simple and, upon commercial application, became a success on the British market. The garment, called a 'Raincosy', found its way into the hands of the defendant who copied it and marketed it as a 'Carry Cape'. The plaintiff brought an action for infringement of copyright and, in order to be successful, had to show that the prototype of the cape was a work of 'artistic craftsmanship'.

After analysing the various approaches which had been utilised previously in defining the term, particularly those expressed in the House of Lords decision of *George Hensher Ltd. v. Restawile Upholstery (Lancs.) Ltd.*<sup>4</sup> Walton J. concluded that the initial and predominant consideration was the intention of the artist-craftsman. Although this constituted the primary test, the artist's intention was not conclusive of the issue. Additionally, the object in question must be capable of being viewed as a thing in itself a work of art. Consequently, His Honour proposed a two stage test. It will be a work of 'artistic craftsmanship' if the artist's intention was to create a work of art and if he has not manifestly failed in that intention.<sup>5</sup> On the facts, it was necessary to refer only to the first limb of this test because His Honour found that Mme. Merlet did not have in her mind when making the Raincosy the creation of a work of art "in any shape or form".<sup>6</sup> Rather, she was concerned with "the utilitarian consideration of creating a barrier between the assumed

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1. (1984) 2 I.P.R. 456.

2. Artistic Craftsmanship: The Copyright Act 1968 13 U.Q.L.J. 206.

3. (1984) 2 I.P.R. 456.

4. [1975] R.P.C. 31.

5. (1984) 2 I.P.R. 456, 465. For a similar formulation see *Cuisenaire v. Reed* [1963] V.R. 719.

6. *Ibid.*

rigours of a Highland summer and her baby in such a manner as to afford him complete protection . . . ”<sup>7</sup>

While the case is of assistance in more clearly formulating the test for determining ‘artistic craftsmanship’, it does little to assist in revealing how that test is to be applied, particularly in a case where, differently from the facts, the maker of the item had the necessary intention to satisfy the threshold test. Some guidance is given with respect to this element of intention in that, where the craftsman is already a recognised artist, his claim that he intended to create a work of art will be more readily recognised.<sup>8</sup> However, the real difficulty in assessing ‘artistic craftsmanship’ arises through the application of the second part of Walton J.’s test: Has the artist manifestly failed in his intention to produce such a work? With the House of Lords in *Hensher’s* case, Walton J. agrees that it is not the role of courts to make value judgments and His Honour declined to indicate the nature of the evidence which should be properly admitted on the question of whether the artist had succeeded in his aim of creating a work of art. Because of his finding that Mme. Merlet did not so intend, it was not necessary for His Honour to consider that further question. As was pointed out by this writer in the article referred to above, that second inquiry must involve the balancing of evidence of experts in the field and, in the evaluation of such evidence, it is submitted that the making of value judgments by the court is an inevitable part of this process. In the end result, it must depend upon an aesthetic analysis by the court, as assisted by expert evidence.

The case also illustrates a distinction between the scope of protection provided by the respective English and Australian Copyright Acts. By s.77<sup>1</sup> of the Copyright Act 1968 (Cth.), where copyright subsists in an artistic work, where a corresponding design is applied industrially and where articles to which the corresponding design have been applied are sold, let for hire or offered for sale or hire in Australia, copyright protection is lost if the corresponding design has not been registered under the Designs Act 1906 (Cth.). Reg. 17(1)(a) of the Copyright Regulations deems the design to have been applied industrially if it has been applied to more than 50 articles. Consequently, if such a number of Raincosies had been produced in Australia, copyright protection under the Australian legislation would have been lost. However, the position is different in the United Kingdom, where the legislation provides for dual protection.

7. Ibid.

8. Ibid.