A Proposal for Simplifying United Kingdom Copyright Law

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In February 1999, the Australian Government released the second part of a two-part report on simplification of the copyright legislation,[1] produced by its Copyright Law Review Committee.[2] That report recommended that the Australian copyright legislation be substantially amended, so as to provide for two categories of protected subject-matter and two categories of exclusive economic rights.[3] This article argues that a simplification of the United Kingdom copyright legislation along similar lines is both possible and desirable.

The article begins by showing why reform through simplification is desirable. It does so by identifying those aspects of the current United Kingdom copyright legislation most in need of reform, in the light of the technological challenges of the digital age. It then describes how simplification could and should be undertaken, so as to produce an appropriate response to those challenges. It does so by proposing a set of principles for reforming the copyright legislative framework. An implementation of those principles—the proposed approach—is then described in some detail. In conclusion it is argued that the proposed approach is not "radical". Rather, it is submitted, the proposed approach is fully consistent with the United Kingdom's obligations under the Berne Convention, and is the logical and desirable continuation of an international trend which began in 1996 with the adoption of the Work Intellectual Property Organization Copyright and Neighbouring Rights Treaties.[4]

The Arguments in Favour of Simplification of the United Kingdom Copyright Legislation

Three arguments can be made as to why the current United Kingdom copyright legislation, the Copyright, Designs and Patents Act 1988 ("the Act"), is in need of reform through simplification. First, the legislation is complex; in particular, it is structurally complex beyond the requirements of the purposes of categorisation. Secondly, it is unjustifiably discriminatory; in fact it is discriminatory in a manner that is in breach of the United Kingdom's obligations under international treaties. Thirdly, it is technologically specific; indeed, it is "technologically challenged" in the sense that it does not adequately deal with developments in the creation and exploitation of copyright material brought about by the digital revolution.

Structural complexity, and the purposes of categorisation

Structural complexity

A persuasive case can be made to the effect that the Act is structurally complex, in the senses both of form and of content. As a matter of form, the legislation is long. That part of it concerned with copyright consists of approximately 1,005 subsections containing about 62,431 words,[5] and related provisions are not always found in the same or even directly associated Parts of the legislation. Of course, a stylistically unattractive Act is not, of itself, cause for reforming the law.

It can be shown in addition, however, that the Act is structurally complex as a matter of content. Depending on how one conceptualises the Act, it provides for 10 categories of protected subject-matter,[6] and for 10 categories of exclusive rights.[7] This structure is encapsulated in the 10 × 10 matrix set out in Figure 1. In this matrix, the categories of protected subject-matter are represented down the left-most column, and the exclusive rights along the top-most row. The presence of a "Y" in a cell indicates that the particular exclusive right

1 Copyright Law Review Committee, *Simplification of the Copyright Act 1968, Part 2—Categorisation of Subject Matter and Exclusive Rights, and Other Issues* (February 1999, AusInfo, ISBN 0 624 20961 8) [http://www.law.gov.au/clrc/gen_info/clrc/Report%20Part%202/ReportHeadings2.html]. The first part of the report is *Simplification of the Copyright Act 1968, Part 1—Exceptions to the Exclusive Rights of Copyright Owners* (September 1998, AusInfo, ISBN 0 642 20955 3) [http://www.law.gov.au/clrc/gen_info/clrc/ba.pdf].

2 The author was a member of that Committee, which conducted the simplification reference from January 1995 to August 1998.

3 These recommendations are discussed in Ricketson, "Simplifying Copyright Law: Proposals from Down under" [1999] E.I.P.R. 537. See also Christie, "Simplifying Australian Copyright Law—the Why and the How" (2000) 11 *Australian Intellectual Property Journal* 40. As of November 2000, the Australian Government had not given a response to the report.

4 World Intellectual Property Organization Copyright Treaty adopted by the Diplomatic Conference on December 20, 1996; and World Intellectual Property Organization Performances and Phonograms Treaty adopted by the Diplomatic Conference on December 20, 1996.

5 These calculations are based on an analysis of the consolidated Act as at January 1, 2000. The count of subsections does not treat paragraphs and subparagraphs of a subsection as a separate provision. Also, it does not include ss.213–295 (dealing with the law relating to patents and designs), ss.297–300 (dealing with the law relating to broadcasting), s.302 (dealing with the law relating to trade marks), or any of the Schedules. The word count also is exclusive of these provisions.

6 It is 10 categories of subject-matter if performances are considered as a subject-matter protected by copyright. Certain rights of performers in their performances are provided in Pt II of the Act.

7 It is 10 categories of exclusive rights if the two non-economic (*i.e.* moral) rights of authors are considered to be an exclusive right provided by copyright. Chap. IV of Pt I of the Act currently provides two non-economic rights to certain authors—the right of attribution (s.77) and the right of integrity (s.80).

Exclusive Rights

Protected Subject Matter	Copy	Repro.	Dist.	Rent	Perf.	B/cast	C/cast	Adapt.	Attrib.	Integ.
Lit. work	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Dram. work	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Mus. work	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Art. work	Y	Y	Y	Y	N	Y	Y	N	Y	Y
Sound Rec.	Y	N	Y	Y	Y	Y	Y	N	N	N
Film	Y	N	Y	Y	Y	Y	Y	N	Y	Y
B/cast	Y	N	Y	N	Y	Y	Y	N	N	N
Cable Prog.	Y	N	Y	N	Y	Y	Y	N	N	N
Pub. Edit	Y	N	Y	N	N	N	N	N	N	N
Perf.	Y	N	Y	Y	Y	Y	Y	N	N	N

Figure 1 *Current structure of the Copyright, Designs and Patents Act 1988*

does apply to the particular protected subject-matter, while the presence of a "N" indicates that it does not. This table is reproduced in the Appendix, with a footnote providing reference to the relevant provision of the Act by way of explanation for every cell.

For the purpose of this article, what is important about the matrix is not the particular contents of each cell, but the facts that there are so many cells and that their contents are so varied. That is to say, the matrix is illustrative of the structural complexity of the Act, when viewed from the perspective of the legislation's content.

While it is clear the Act is structurally complex, it does not necessarily follow that it is inappropriately so; the appropriateness or otherwise of the Act's complexity is a matter separate from the fact of its complexity. Accordingly, an argument for reform of the Act's structure cannot be based on the fact of complexity *per se*. To justify reform, it is necessary to show that the complexity (or, at least part of it) is not warranted. To show that the structural complexity is not warranted, it is necessary first to ascertain the purposes of categorisation of subject-matter and of exclusive rights of copyright law.

The purposes of categorisation

The purpose of categorisation of copyright subject matter is clear—it is to allow the differential treatment of various subject-matters under the provisions of the legislation. This differential treatment is in relation both to the application of the subsistence requirements which apply to the subject-matter and to the application of the exclusive rights which attach to the subject-matter. This purpose can best be illuminated by asking the question: "why not have only one category of protected subject-matter?" If there was only one category of protected subject-matter—which one might call, for illustrative purposes, "copyright material"—then it would not be possible to treat sub-groups of copyright material differently when setting out the requirements for subsistence of copyright. Likewise, it would not be possible to grant certain exclusive rights to some but not all sub-groups of copyright material unless the sub-groups of copyright material—and, for that matter, the sub-groups of exclusive rights—were expressly identified by category in the Act. A few examples will serve to illustrate and support these assertions.

The Act currently has three basic sub-groups of protected subject-matter—"traditional works",[8] "neighbouring rights subject-matter",[9] and "performances".[10] At this first level of categorisation, the "innovation threshold" to protection which applies to works is different from that which applies to subject-matter other than works and to performances. It is an express requirement for protection that the traditional copyright works be "original",[11] whereas this is not the case in relation to the neighbouring rights subject-matter and performances.[12]

Within two of these sub-groups there is a further level categorisation—the Act expressly identifies four categories of works (literary, dramatic, musical, artistic) and five categories of neighbouring rights subject-matter (sound recordings, films, broadcasts, cable programmes and published editions). At this second level of categorisation, some of the other provisions of the Act on subsistence of copyright are applied differently. For example, a significantly shorter period of protection applies to published editions compared with the other neighbouring rights subject-matters, and even among those other subject-matters, the duration of protection varies.[13] Also, the provision on first ownership of copyright in traditional works and films is different from the provision on first ownership which applies to sound recordings, broadcasts, cable programmes and published editions.[14]

The differential application of the exclusive rights to the various categories of protected subject-matter provides a further clear illustration of the purpose of categorisation. As Figure 1 shows, not all the exclusive rights apply to all of the protected subject-matter. At the first level of categorisation, there is an obvious and fundamental difference in the application of the right of reproduction in a material form[15]—it applies to the traditional works sub-group of copyright material, but not to the neighbouring rights and performances sub-groups of copyright material. At the second level of categorisation (*i.e.* the level of categorisation within the sub-groups of copyright material), there is further differentiation in the application of the exclusive rights. For example, the adaptation right applies to literary, dramatic and musical works, but not to artistic works; and the performance right applies to sound recordings, films, broadcasts and cable programmes, but not to published editions.

In summary, it can be seen that the purpose of categorisation of subject-matter and exclusive rights is to produce differentiation of treatment within the copyright regime of protected material and the rights attached thereto. The United Kingdom legislation, with its large number of categories of subject-matter and rights, has a high degree of differentiation, resulting in significant non-uniformity of treatment. Some of this non-uniformity of treatment is justified and hence desirable. It is submitted, however, that aspects of this non-uniformity of treatment are neither desirable nor justified, and indeed some of the non-uniformity of treatment is contrary to the United Kingdom's international obligations.

Unjustifiable discrimination, and breach of the international treaties

Unjustifiable discrimination

A fundamental consequence of categorisation of protected subject-matters and exclusive rights is that there are "gaps" in the legislative framework of protection. These gaps occur in relation to materials that do not come within one of the categories of subject-matter, and activities that do not come within one of the categories of exclusive rights. Put simply, there is no protection under copyright legislation for material that is not a traditional work, not a neighbouring rights subject-matter, and not a performance. Likewise, there is no prohibition under the Act against the doing of an act that is not one of the exclusive rights of the copyright owner.

As is discussed in more detail later, the range of activities covered by the various categories of exclusive rights is so broad as to leave very few gaps in the protection provided to subject-matter to which the Act applies. There are, however, significant gaps in the range of material which qualifies for protection under the United Kingdom legislation. It may be argued that some of these gaps constitute unjustifiable discrimination. Good examples are the gaps left by the four-fold categorisation of traditional works. To obtain the higher level of protection afforded by the Act to traditional works, material must come within the definition of a literary work, a dramatic work, a musical work or an artistic work. If it does not come within one of these categories, the material is not protected, no matter how creative

8 That is, literary, dramatic, musical and artistic works, as defined by ss.3 (1) and 4 (1) of the Act. They are here referred to as "traditional works", because they are subject-matter to which the Berne Convention applies. See the discussion below.

9 That is, sound recordings, films, broadcasts, cable programmes and published editions, as defined by ss.5A, 5B, 6, 7 and 8 of the Act. They are here referred to as "neighbouring rights subject-matter", because the international treaties that deal with this type of subject-matter—*e.g.* the Geneva Convention and the Satellite Convention—are often referred to as "neighbouring rights treaties". Apart from films, these are copyright subject-matters to which the Berne Convention does not apply.

10 That is, live performances of a dramatic work, a musical work, or a variety act or similar presentation, and live recitations of a literary work, and as provided for in Pt II of the Act.

11 s.1 (1) (a). The actual level of the threshold provided by the requirement of originality under the Act is debatable. It may mean as little as the work being the result of a degree of skill, judgment or labour being exercised by the author (see, *e.g.*, the House of Lords in *Ladbroke (Football) Ltd v. William Hill (Football) Ltd* [1964] 1 All E.R. 465, HL, or it may require a degree of creativity beyond mere expenditure of resources (such as, *e.g.*, the approach adopted by the U.S. Supreme Court in *Feist Publications v. Rural Telephone Services* 499 U.S. 340 (1991, U.S. Sup. Ct)).

12 The very act of making a neighbouring rights subject-matter, or of giving the performance, seems to be sufficient to attract protection.

13 Compare ss.13A, 13B, 14 and 15.

14 See s.11 (1), which makes provision for employee-created works in relation to the former but not the latter sub-group of copyright material.

15 The right of reproduction in a material form referred to here is the right to make a non-exact reproduction, *i.e.* a non-literal copy.

may have been the efforts of the person who created it.

One example will be offered in support of the argument that the gaps in the protection of creative material are not always justified. That example concerns the material that was the subject of the litigation in *Creation Records v. News Group Newspapers.*[16] In this case, one member of the popular musical group Oasis devised a scene to be photographed for inclusion on the cover of the group's forthcoming album. The key feature of the photo-shoot scene was a white Rolls Royce motor car half-submerged in a swimming pool in front of an hotel. Without authorisation, a freelance photographer engaged by the defendant newspaper took a photograph of this scene, and the resulting photograph was published in the newspaper and offered for sale by the defendant. In an action for an interlocutory injunction restraining further publication of the photograph, Lloyd J. held that no copyright subsisted in the photo-shoot scene, because it did not come within one of the categories of traditional work under the Act. In particular, the judge held that the scene was neither a dramatic work, nor was it one of the sub-categories of artistic work alleged (these being a sculpture, a work of artistic craftsmanship or a collage).[17] Yet the intellectual and manual effort which went into the creation of the photo-shoot scene was at least as, if not more, deserving of protection than that which went into any photograph, drawing or other representation of the scene that was or could have been made. Why, as a matter of policy, should (say) a quick preliminary sketch of the scene on a napkin or the back of an envelope obtain full protection under the Act as an artistic work (in particular, as a drawing), when the scene itself obtains no protection at all? It is submitted that there is no sound policy reason for this outcome, and accordingly that this is an example of the sort of unjustifiable discrimination that occurs when creative material fails to come within the definition of one of the categories of protected subject-matter.

Specific instances of discrimination in breach of the international treaties

There is clearly one specific instance where the differential treatment of the current categories of copyright subject-matter is particularly problematic.[18] The clear instance concerns the fact that the category of artistic work is not provided with the right of adaptation, unlike the other traditional works.[19] This is despite the fact that Article 12 of the Berne Convention provides that "authors of literary and artistic works shall enjoy the exclusive right of authorising adaptations, arrangements and other alterations of their works". Ricketson states that in general usage the term "adaptation" infers the changing of a work so as to enable it to fulfil a purpose other than that for which it was originally created,[20] and that in relation to Article 12 of the Berne Convention the exclusive right of "adaptation" is the right to rewrite or remodel the work into another form.[21] Ricketson refers to what he describes as an obvious example of an "adaptation", being the making of a three-dimensional version of a two-dimensional artistic work and vice versa.[22]

It is, of course, the case that under section 17 (3) of the Act, this activity (a trans-dimensional transformation) is deemed to be an exercise of the reproduction right which subsists in an artistic work. It can, therefore, be argued that the Act conforms with the Berne Convention in substance, if not in form. There remains, however, the possibility of other activities of an adaptive nature which may be carried out in relation to an artistic work and which do not come with the current reproduction right. Two possible examples are: (1) the translation of a physical sculpture into x, y and z co-ordinates stored in a digital file which, using the correct software, could generate a three-dimensional image of the sculpture: and (2) the creation of a picture using the same theme or style of another picture, but without directly copying its essential elements.[23] A strong case can be made, therefore, that by not providing artistic works with an express right of adaptation the Act currently fails to comply with the Berne Convention, and thus also with the TRIPs Agreement which obliges members to comply with Articles 1 through 21 of the Berne Convention.[24]

Technological specificity, and the technological challenge

More problematic even than the unjustifiable discriminatory treatment of protected subject-matter is the

16 [1997] E.M.L.R. 444; (1997) 39 I.P.R. 1.

17 The photo-shoot scene was not a dramatic work, because it was "inherently static, having no movement, story or action". It was not a sculpture, because no element in the composition had "been carved, modelled or made in any of the ways in which sculpture is made". It was not a work of artistic craftsmanship, because the composition did not "involve craftsmanship" but was "merely an assembly of 'object trouvés' ". It was not a collage, because that subject matter has "as an essential element the sticking of two or three things together"—a "collocation, whether or not with artistic intent, of random, unrelated and unfixed elements" is not a collage: (1997) 39 I.P.R. 1 at 4–5.

18 There is the *possibility* of at least one other instance where the current legislation unjustifiably discriminates against a category of protected subject-matter—namely the failure to provide films with either of the exclusive rights of reproduction or adaptation as required under Article 14*bis* (1) of the Berne Convention. It can be argued that the U.K. legislation is in breach of the Berne Convention (and also the TRIPs Agreement, which requires compliance with this aspect of the Berne Convention) because the reproduction and adaptation rights do not apply to the subject-matter category of films. In reply to this argument, however, it must be noted that the Court of Appeal in *Norowzian v. Arks Ltd* [2000] F.S.R. 363 has interpreted the category of dramatic work to be "a work of action, with or without words or music, which is capable of being performed before an audience": *ibid.*, at 367. Furthermore, the Court of Appeal held that a film "will often, though not always" be a dramatic work: *ibid.* The exclusive rights which apply to a dramatic work include the rights of reproduction and adaptation. In the light of the Court of Appeal's decision, a strong case can be made that in practice the U.K. legislation complies with the Berne Convention, by virtue of protecting many films as dramatic works.

19 s.21 (1).

20 Ricketson, *The Berne Convention for the Protection of literary and Artistic Works: 1886–1986* (1987), p. 392.

21 *ibid.*, p. 398.

22 *ibid.*, p. 291.

23 These examples are cited by the Australian Copyright Law Review Committee, in Pt 2 of its Simplification Report: CLRC Simplification Report Part 2, n. 1 above, at para. 5.76.

24 Art. 9 (1) of the Agreement on Trade-related Aspects of Intellectual Property Rights ("TRIPs Agreement"), being Annex

degree of technological specificity which results from the current Act's approach to categorisation of subject-matter and exclusive rights. This arises from the relatively narrow definitions used for both protected subject-matters and exclusive rights, and from the distinction drawn in those definitions between tangible and intangible embodiments. Technological developments have produced new means of creating copyright subject-matter, and new means of exploiting that subject-matter. Those new means are being utilised now, and are likely to be utilised with increasing frequency in the future, to produce subject-matter of a type, and to exploit subject-matter in a way, that does not easily or at all come within the existing categories. It can be argued that without a significant change in approach to categorisation of subject-matter and rights there will be increasing uncertainty in the application of the Act in the new information age, and in increasing pressure on the legislature to make ad hoc amendments to deal with these uncertainties.

Protection of "multimedia" and other new media subject-matters

One example of a new type of subject-matter arising from technological developments, for which there is already uncertainty about the Act's application and calls for ad hoc legislative amendment, is the so-called "multimedia entity".[25] It is unclear whether a multimedia entity *per se*, as distinct from its component parts, is protected at all under the Act.[26] Yet as a matter of policy there is good reason why a sufficiently creative multimedia entity should receive protection in its own right. Similarly, any other new media material, including material which has not yet been identified as such, should also receive protection if it is sufficiently creative. The current legislation, however, discriminates against creative material on the basis of its physical (or non-physical) form, and hence fails to protect material that, as a matter of policy, is deserving of protection.

The tangible v. intangible distinction

An example of a new act of exploitation of protected subject-matter arising from technological developments, for which likewise there is uncertainty about the Act's application and calls for its amendment, is dissemination to the public by computer network. The rapid developments in communication technology, and in particular the internet, during the 1990s led to the adoption in December 1996 of the WIPO Copyright Treaty[27] ("WCT") and the WIPO Performances and Phonograms Treaty[28] ("WPPT"). Both of these Treaties introduce into international copyright law a broad new right, the right of communication to the public by wire or wireless means, which is defined to include making available to the public by interactive means.[29] In May 1999, the Commission of the European Communities produced an Amended Proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society ("Information Society Copyright Directive"),[30] which, when finally adopted,[31] will oblige implementation of this new right in the United Kingdom Act.

The author believes that these changes do not go far enough. In particular, the author considers problematic the fact that, even after these amendments, the provisions of the Act relating to exclusive rights will still distinguish between activities on the basis of whether they are carried out on a tangible or an intangible embodiment of protected material. For example, it is clear that the right of distribution is, and even after implementation of the Information Society Copyright Directive will remain, confined to the dissemination of a work to the public by the issuing of *physical* copies of it.[32] Similarly, it seems accepted that the right of rental in relation to literary, dramatic, musical and artistic works, films and sound recordings does not extend to a commercial supply (not amounting to a transfer of ownership) of an *intangible* copy of that subject-matter, such as a temporally-limited supply of a digital copy via the internet.[33] Yet the rationales of the distribution right and the rental right suggest that they should embrace

1C to the Agreement Establishing the World Trade Organization 1994 ("WTO Agreement").

25 For the purposes of this discussion, the phrase "multimedia entity" is used to mean a collection of copyright and/or non-copyright materials that are textual, aural and/or visual in nature, and which are accessible in a non-linear way by the use of a computer program. The non-linear accessibility of the content of a multimedia entity is referred to as its interactivity. It is this feature that distinguishes multimedia entities from other collections.

26 See, for example, Aplin, "Not in our Galaxy: Why 'Film' Won't Rescue Multimedia" [1999] E.I.P.R. 633. The criticisms made in this article of the inability of the Australian copyright legislation to provide adequate protection for multimedia entities apply equally to the U.K. Act.

27 World Intellectual Property Organization Copyright Treaty adopted by the Diplomatic Conference on December 20, 1996.

28 World Intellectual Property Organization Performances and Phonograms Treaty adopted by the Diplomatic Conference on December 20, 1996.

29 WCT Art. 8; WPPT Arts 10 and 14.

30 Brussels, May 21, 1999, COM (1999) 250 final (97/0359/COD).

31 The Council of Ministers reached agreement on the final form of the Directive on June 8, 2000. A formal common position on the Directive was adopted by the Council in September 2000. As of November 2000, the Directive was due to go to the European Parliament for a second reading under the co-decision procedure.

32 Recital 28 of the Information Society Copyright Directive makes clear that the exclusive right of distribution introduced by Art. 4 is concerned with "distribution of the work incorporated in a *tangible* article" (*emphasis added*). The current distribution right in the U.K. Act is discussed in Phillips and Bentley, "Copyright Issues: The Mysteries of Section 18" [1999] E.I.P.R. 133.

33 While neither the U.K. legislation nor the European Rental Right Directive which it implements (Directive on rental and lending rights on certain rights related to copyright in the field of intellectual property of November 19, 1992, 92/100) expressly state that the rental right is limited to rental of tangible copies, this is implicit in the light of the facts that (1) transfer of intangible copies of copyright subject-matter was not in contemplation at the time of the Rental Right Directive, and (2) para. IV.A.1. of the Explanatory Memorandum to the original Proposal for an Information Society Copyright Directive states that "the Rental Right Directive has already harmonized the distribution right (the right to authorize and prohibit the distribution of *tangible* copies) for four groups of related rightholders (performers, broadcaster, phonogram producers and film producers)" (*emphasis added*).

the first dissemination of all copyright material to the public, and a (non-transfer) commercial supply of a traditional work, a film or a sound recording, respectively, by any means—including by distribution of intangible embodiments of the copyright material.

The Act's distinction between tangible and intangible embodiments of copyright material is problematic in a further way. Currently the legislation requires a traditional work (other than an artistic work) to be in a tangible embodiment to quality for protection under the Act.[34] As a result, literary, dramatic or musical material which only has an intangible embodiment, such as *ex tempore* speech or improvised music, is not protected,[35] even though arguably as deserving of protection as a speech or composition that is written down prior to recitation or performance.

The requirement of tangible embodiment in relation to most of the neighbouring rights categories of subject-matter arises by way of the definitions of the particular subject-matters, all of which constitute tangible embodiments.[36] The exceptions are broadcasts and cable programmes, which are defined to be, respectively, a transmission by wireless telegraphy of visual images, sounds or other information,[37] and the visual images, sounds or other information (*i.e.* an "item") transmitted by means of a telecommunications system other than wireless telegraphy.[38] The transmission (in the case of broadcasts) and the visual images, sounds or other information transmitted (in the case of cable programmes) are protected even though not in a tangible embodiment. There is, of course, no requirement of tangible embodiment as precondition to protection of performances under Part II of the Act.[39] The author considers that developments in information technology will challenge the traditional notion that all protected subject-matter other than broadcasts, cable programmes and performances should be in a tangible embodiment. There exists the potential for material in the literary and artistic domain to come into existence and yet not have a tangible embodiment that fully corresponds with the current requirements of the legislation. To date, with the exception of spoken words and improvised music, the courts generally have accommodated such material within the framework of the legislation.[40] The author is concerned, however, that further technological developments may lead to the creation of material in the literary and artistic domain that is not so readily accommodated within the existing categories of traditional works or neighbouring rights subject-matter that require some form of tangible embodiment. Also, it is difficult to see the justification for tangible embodiment to be a precondition to protection, especially in the light of the fact that subject-matters not in a tangible form, such as broadcasts, cable programmes and performances, currently receive protection under the legislation. Furthermore, it is to be noted that the Berne Convention expressly provides that it is a matter for individual countries to determine whether or not tangible embodiment is a precondition to protection of copyright material,[41] and that the copyright legislation of certain civil law countries clearly embrace material not in a tangible embodiment.[42] Accordingly, there is good reason to believe that the current obsession in the United Kingdom legislation with tangible embodiment is neither warranted nor desirable.

The Principles of a Simplified Copyright Act

There are, no doubt, a number of ways in which the United Kingdom copyright legislation could be superficially amended, so as to make it less structurally complex. However, when account is taken of the other problems identified above—the unjustifiable discriminatory treatment of certain categories of subject-matter,

34 See s.3 (2), which provides that "Copyright does not subsist in a literary, dramatic or musical work unless and until it is recorded, in writing or otherwise; . . . ". s.178 defines "writing" to include "any form of notation or code, whether by hand or otherwise and regardless of the method by which, or medium in or on which, it is recorded, . . . ". It would seem that the reason s.3 (2) does not require an artistic work to be embodied in a material form for copyright to subsist is because it is assumed such embodiment is implicit in the definition of the subject-matter. An "artistic work" is defined exclusively to be a graphic work, a photograph, a sculpture, a collage, a work of architecture being a building, or a work of artistic craftsmanship: s.4 (1). The definitions of "graphic work", "photograph", "sculpture" and "building" in s.4 (2) all appear to require a material form of embodiment.

35 s.3 (2) is considered as merely codifying the law as it previously stood, as illustrated by cases such as *Walter v. Lane* [1900] A.C. 539.

36 A "sound recording" is defined to be a recording of sounds, or of the whole or any part of a literary, dramatic or musical work, from which the sounds, or sounds reproducing the whole or part of the work, may be reproduced: s.5A (1). A "film" is defined to be a recording in any medium from which a moving image may be produced: s.5B (1). A "published edition" is defined to be a published edition of the whole or any part of one or more literary, dramatic or musical works: s.8 (1).

37 s.6 (1).

38 s.7 (1). The transmission must be for reception at two or more places (whether or not simultaneously) or for presentation to members of the public, and not otherwise excepted by s.7.

39 Rights arise under Pt II of the Act in relation to a "qualifying performance". A "qualifying performance" is a "performance" that is given by a "qualifying individual" or that takes place in a "qualifying country": s.181. There is nothing in the s.206 definitions of "qualifying individual" or "qualifying country" relating to material form. Section 180 (2) defines a "performance" to be a dramatic or musical performance, a reading or recitation of a literary work, or a performance of a variety act or similar presentation, which is a "live" performance given by one or more individuals.

40 A recent example is the decision of the Full Court of the Federal Court of Australia, in *Galaxy Electronics Pty Ltd v. Sega Enterprises Ltd* (1997) 37 I.P.R. 462. This decision held that a computer video game was a "cinematograph film" under the Australian Copyright Act 1968, the definition of which is similar to the definition of "film" in the U.K. Act. The court so held, despite the fact that the game's visual images were not pre-existing images embodied in an article or thing in the traditional sense, but instead were created "on the fly" by the computer running the computer program. The court in *Galaxy v. Sega* stated that the definition of "cinematograph film" is expressed in terms of the result achieved (images shown as a moving picture), rather than the means employed to achieve that result. This definitional approach was consistent with the legislative history, which showed that Parliament intended to take a broad view and not tie copyright protection for this type of material to any particular technology. The case is discussed in Aplin, n. 26 above.

41 Art. 2 (2).

42 See, for example, Art. 10, para. 1 of the Spanish law on intellectual property of November 11, 1987. See further Gendreau, "The Criterion of Fixation in Copyright Law" (1994) 159 *Revue Internationale du Droit d'Auteur* 110.

and the challenges raised by the technological specificity of categorisation of subject-matter and of rights—a particular approach to reform through simplification is persuasive.

Under this particular approach, the legislation is structured so as to achieve two key objectives. The first objective is the minimisation of the differential treatment of protected subject-matter, in relation to both the subsistence requirements and the application of exclusive rights. The second objective is the reduction in the specificity of the definitions of the subject-matter and exclusive rights categories, and of the preconditions for subsistence of protection. These two objectives can be achieved by adoption of the following general features of a simplified copyright law:

> (1) the use of broadly and inclusively defined categories of protected subject-matter and of exclusive rights;
> (2) the maintenance of innovation thresholds based on the degree of creativity reflected in the protected subject-matter; and
> (3) the removal of the distinction between a tangible and an intangible embodiment of subject-matter.

Each of these features is described in some detail, as follows.

Broad and inclusive categories of subject-matter and rights

The use of broad and inclusive definitions of categories of protected subject-matter and of exclusive rights is not new. It is an approach adopted to a degree in the Berne Convention, echoed in the TRIPs Agreement and developed in certain respects in the WCT and the WPPT. It is also an approach which is evident in the implementation of the Berne Convention in some civil law countries. Furthermore, it is an approach which has been suggested in some recent academic writings.

The Berne Convention defines the subject-matter to which it applies—namely, "literary and artistic works"—in very wide terms. Article 2 of that Convention begins as follows: "The expression 'literary and artistic works' shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression . . . ". Thereafter Article 2 proceeds to list more than 25 examples of material within this definition. The notable features of this definition are that it is broadly defined, it is inclusive, and it identifies particular classes of items within its terms. The TRIPs Agreement is no less broad in the definition of subject-matter in respect of which it imposes obligations. By virtue of Article 9 (1), the TRIPs Agreement adopts the broad and inclusive categorisation of protected subject-matter provided by Article 2 of the Berne Convention.[43]

A similar approach to categorisation, this time in relation to exclusive economic rights, is evident in the WIPO Treaties. Both the WCT and WPPT introduce a right of communication to the public, which is defined in the following manner:

> the exclusive right of authorising any communication to the public of [the protected subject-matter], by wire or wireless means, including the making available to the public of [the subject-matter] in such a way that members of the public may access [the subject-matter] from a place and a time individually chosen by them.[44]

Again, it is notable that the definition of this category of exclusive right is broad, is inclusive, and identifies a particular instance of the activities which it embraces. The Information Society Copyright Directive implements this right in equally broad terms.[45]

It is not just the international treaties or European Directives which utilise broad and inclusive definitions of categories. The copyright laws of civil law countries tend not to attempt to define specifically the works protected by copyright, but instead utilise widely defined, open-ended categories of subject-matter. For example, under the heading of "Protected Works", the French Law on the Intellectual Property Code 1992 provides that: "the provisions of this code shall protect the rights of authors in all works of the mind, whatever their kind, form of expression, merit or purpose".[46] The French Act also provides specific examples of what is included within this broad category, similar to the way Article 2 (1) of the Berne Convention provides inclusive examples as to what falls within the broad category of "literary and artistic works".

The adoption of broad and inclusive definitions in copyright laws has previously been proposed by this author.[47] Furthermore at least one other commentator has suggested this approach to reform of copyright legislation. In his article entitled "The New Copyright Act 1997",[48] Ricketson proposes that there be only two categories of protected subject-matter—original literary and artistic works, and derivative productions. Both categories are broad and inclusive in their scope. The former is defined as "any production in the literary or artistic sphere which is the result of significant intellectual effort by its author",[49] and the latter as "any production which uses or embodies original literary or artistic works whether or not combined with other material and which is the result of the application of time, effort and resources by the maker".[50]

43 Art. 9 (1) of the TRIPs Agreement provides:
"Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. However, Members shall not have the rights or obligations under this Agreement in respect of the rights conferred under Article 6*bis* of that Convention or of the rights derived therefrom."

44 WCT Art. 8, in relation to "literary and artistic works"; WPPT Arts 10 and 14, in relation to "performances fixed in phonograms", and "phonograms", respectively.

45 Art. 3 (1).

46 Art. L. 112–1.

47 See Christie, "Reconceptualising Copyright in the Digital Era" [1995] E.I.P.R. 522.

48 (1997) 29 *Intellectual Property Forum* 14. This insightful article purports to discuss the contents of a "new" copyright Act for Australia. The legislation referred to in the article is, in fact, hypothetical. It is a draft of a revised and simplified Act, based on a presentation given by Ricketson and Lahore at the Tenth National Conference of the Intellectual Property Society of Australia and New Zealand, held in Canberra in June 1996.

49 *ibid.*, at 20.

50 *ibid.* This general definition is followed by an inclusive listing of subject-matters that "shall be regarded as" derivative productions.

The approach to the definition of categories that is adopted in the international treaties, in the European Directives, in the national legislation of civil law countries, and in the writings of some commentators is the basis for the model proposed in this article. In particular, the categories of both protected subject-matter and exclusive rights are defined in broad and inclusive terms, and with reference to particular examples included within the definitions.

Innovation thresholds based on degree of creativity

As discussed above, the purpose of categorisation of protected subject-matter is to allow the differential application of subsistence requirements and exclusive rights. The objective of minimisation of differentiation suggests that there be only one category of protected subject-matter, unless this would not achieve the policy objectives of the legislation. An examination of the international treaties and the current Act discloses a clear policy objective of a fundamental difference in treatment of creative subject-matter in the form of original literary, dramatic, musical and artistic works (*i.e.* traditional works) on the one hand, and of productive subject-matter in form of sound recordings, broadcasts, cable programmes (*i.e.* neighbouring rights subject-matter) and performances on the other hand. This difference in treatment is illustrated in the international arena by the fact that productive subject-matter is dealt with in treaties separate from the Berne Convention, and is given significantly narrower exclusive rights. Thus sound recordings are the subject-matter of the Rome Convention,[51] the Geneva Convention,[52] the TRIPs Agreement and the WPPT; broadcasts are the subject-matter of the Rome Convention, the Satellite Convention[53] and the TRIPs Agreement; and performances are the subject-matter of the Rome Convention, the TRIPs Agreement and the WPPT. This difference in treatment is illustrated in the current United Kingdm legislation by the fact that sound recordings, broadcasts and performances (as well as cable programmes and published editions) are given exclusive rights significantly narrower than those granted to traditional works.

Under the model for a simplified Act, it is proposed to continue to implement the fundamental policy which lies behind the differential treatment of creative and productive subject-matter. Accordingly it is proposed that there be two categories of protected subject-matter —one for creative material (which is protected at a high level) and another for productive material (which is given a lower level of protection). The maintenance of the distinction between creative and productive material requires the maintenance of different innovation thresholds for the two categories. The simplified model proposed here continues the use of innovation thresholds based on the degree of creativity which is reflected in the subject-matter. In particular, it is proposed that the essential nature of the innovation threshold for creative material be based on that which is implicit in the Berne Convention[54] and express in the United Kingdom legislation[55]—namely the originality of the material.

Removal of the distinction between tangible and intangible embodiments

Under the simplified approach proposed herein, tangible embodiment is not a precondition to protection under either category of protected subject-matter. Thus subject-matters lacking tangible embodiment (such as music performed *ex tempore*) are as capable of protection as subject-matters with tangible embodiment (such as music performed *ex tempore* that has been recorded on a tape). Furthermore the particular material form a tangible embodiment of a subject-matter takes is not determinative of the category of protection, if any, into which it falls.

It is acknowledged that a person seeking to enforce copyright in material that is not in a tangible embodiment may face substantial difficulties in satisfying the evidentiary burden of proof concerning existence of the material and subsistence of copyright in it. However, in cases where a person can prove those matters, there is no good reason why the lack of a tangible embodiment should of itself be a bar to protection where the material satisfies the requirements for protection. A similar point has been made by a commentator from a common law country, in the context of works which are fixed in a material form for a transitory period only:

> If there is a permanent recording of something it might be easier to establish whether it had been copied. But surely evidential problems are bridges that can be crossed when they have to be. If someone can overcome the obvious difficulties in establishing that a work that existed momentarily has been infringed why should they not succeed?[56]

Also, it is by no means the case that the task or proving the existence and subsistence of copyright in subject-matter not in material form is close to insurmountable. As Gendreau, speaking about copyright protection for spoken words, notes:

> That they are capable of being protected is unquestionable in countries where fixation is not required. Naturally, in such countries, legal decisions are to be found in which infringement of an oral work is analyzed with the

51 International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, done at Rome, on October 26, 1961.

52 Convention for the Protection of Producers of Phonograms Against the Unauthorised Duplication of their Phonograms, done at Geneva, on October 29, 1971.

53 Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite, done at Brussels, on May 21, 1974.

54 Under the Berne Convention a specific level of innovation is not explicitly required by Art. 2 (1). It was stated at the Brussels Conference, however, that requirement of an "intellectual creation" was implicit in the notion of "literary or artistic works": Documents 1948, 94–95 (report of Plaisant). Also, Art. 14*bis* (1) provides that a cinematograph film shall be protected as an "original work", and states that the owner of copyright in a cinematograph film shall have the same rights as the "author of an original work".

55 s.1 (1) (a).

56 McLay, "Wither the Shadow: The Copyright Protection of Concepts, Characters and Titles" (1991) 21 *Victoria University of Wellington Law Review* 335 at 345.

Exclusive Rights

Protected Subject-Matter	Reproduction	Dissemination	Attribution	Integrity
Creation	Y	Y*	Y	Y
Production	Y*	Y*	N	N

Figure 2 *Proposed model for a simplified United Kingdom Copyright Act*

> nuance that the nature of the work imposes. It is also striking to note that legal literature always mentions, though briefly, the difficulties caused, in the case of oral works, by the absence of fixation, difficulties which nevertheless are easily overcome.[57]

The proposed removal of the distinction between tangible and intangible embodiment also applies to the conceptualisation of the exclusive economic rights of the copyright owner. Accordingly, under the proposed approach it is no longer necessary to distinguish between publishing in print form and publishing electronically, or between rental by way of transfer of a physical embodiment of subject-matter and rental by way of electronic transfer of subject-matter. Both types of activities, involving as they do dissemination of material to the public, can be embraced within a broadly and inclusively defined exclusive right, with no need to refer to the tangibility or otherwise of embodiment of the material being disseminated.

An Illustration of the Implementation of the Principles of Simplification

The Australian CLRC Simplification Report Part 2 sets out a model by which the Committee majority envisages the proposed approach described above could be implemented in Australian copyright law.[58] As the Report makes clear, that model is illustrative only, and in particular is not thought of as the only means by which the proposed approach could be implemented. What follows in this article is an explanation of that model, and a modification and expansion of it, to apply to the situation in the United Kingdom. It is a model that this writer considers would provide a useful blueprint for a reformed United Kingdom copyright law, simplified to meet the challenges of the new information age.

Simplified structure

The proposed model provides for two categories of protected subject-matter, two categories of economic rights and two categories of moral rights. The two categories of protected subject-matter are identified, for illustrative purposes, as a "creation" and a "production". The two economic rights are the right of reproduction and the right of dissemination to the public. The two moral rights are the right of attribution and the right of integrity.

The two categories of protected subject-matter receive different levels of protection. Material within the category of creation is given both of the economic rights and both of the moral rights. Material within the category of production receives only the two economic rights. In relation to both categories of protected subject-matter, the two exclusive economic rights are interpreted in ways which maintain the fundamental distinction in the current legislation between creative and productive material.

The relationship between the categories of protected subject-matter and the categories of exclusive rights under the proposed model is illustrated in terms of the 2×4 matrix set out in Figure 2. As with Figure 1, the categories of protected subject-matter are represented down the left-most column, and the categories of exclusive rights along the top-most row. The presence of a "Y" in a cell indicates that the particular exclusive right does apply to the particular protected subject-matter, while the presence of a "N" indicates that it does not. An asterisk after a "Y" indicates that the application of the exclusive right to the subject-matter is qualified in some manner, as explained in the section below, which discusses the application of the economic rights.

Protected subject-matters

A creation is defined as a tangible or non-tangible embodiment of subject-matter in the literary and artistic domain, which is the result of intellectual effort by the person who undertakes its creation. A production is defined as a tangible or non-tangible embodiment, other than a creation, of subject-matter in the literary and artistic domain which is the result of the application of labour and/or resources by the person who undertakes its production. Without limiting the generality of these definitions, it is proposed that a production be defined to include, and a creation be defined to exclude, a broadcast, a cable programme and a published edition, as those three subject-matters are defined under the current legislation.

Both a creation and a production encompass material that is within the "literary and artistic domain". It is intended that the concept of the "literary and artistic domain" reflect the wide scope of subject-matter embraced by the phrase "literary and artistic works" in the Berne Convention—namely "every production in the literary, scientific and artistic domain, whatever may

57 Gendreau, n. 42 above, at 130–131.
58 CLRC Simplification Report Part 2, n. 1 above, at paras 5.28–5.112.

be the mode or form of its expression"[59]—but interpreted in a flexible manner which takes account of the changing means by which this sort of material is created and the changing forms this sort of material may take.[60] The concept marks the boundary of material that is potentially capable of protection under the copyright legislation, subject to that material satisfying the various requirements for subsistence of protection, including one of the innovation thresholds.

In essence, the Berne Convention is directed towards expressions of textual, aural and visual material. Under the proposed model, the "literary and artistic domain" includes material that is considered to be a literary, dramatic, musical or artistic work under the current legislation. In addition, however, it is intended that the "literary and artistic domain" also include other expressions of textual, aural and visual material, including those that would not satisfy a narrow understanding of the phrases "literary" and "artistic" as they are used in the current Act. Thus, for example, a film under the current legislation and some other multimedia entity are both embodiments of material in the "literary and artistic domain" under the envisaged approach, because the film or multimedia entity is a tangible embodiment of textual, aural and/or visual material. Similarly, subject-matter that is a sound recording under the current legislation is an embodiment of material in the "literary and artistic domain" under the envisaged approach, because the recording is a tangible embodiment of aural material.[61]

Because the proposed model does not require tangible embodiment as a precondition to protection,[62] it follows that it is possible to incorporate a performance under either category (or both categories) of protected subject-matter—since a performance is an intangible embodiment of aural and/or visual material. The WPPT provides that the exclusive moral rights of attribution and integrity apply in relation to a performance.[63] This implies that a performance is conceptually similar to a traditional work, in that it embodies the intellectual contribution of the performer. It is thus consistent with international developments to consider a performance to be within the category of creation under the proposed model. As to whether a performance *should* in fact be given the high levels of protection afforded to a creation under the proposed model is a matter for the legislature to determine. The point to note is that the proposed model can provide protection for performances under copyright at the higher level, or alternatively can exclude performances from copyright protection altogether.[64]

Article 1 (1) of the E.C. Council Directive on the legal protection of computer programs,[65] Article 10 (1) of the TRIPs Agreement and Article 4 of the WCT require computer programs to be protected as literary works within the meaning of Article 2 of the Berne Convention. It follows that, under the proposed model, a computer program must be protected as a creation. For the sake of certainty, specific provision would be made in the implementing legislation to the effect that the category of creation includes a computer program.

Figure 3 provides a diagrammatic representation of how the current categories of protected subject-matter are included in the subject-matter categories of the proposed model. The boxes below the two proposed categories—stating "intellectual effort" and "labour and/or resources"—refer to the two proposed innovation thresholds, which are discussed in the next section. It must, of course, be borne in the mind that the subject-matter categories of the proposed model are defined inclusively, with the consequence that material not within categories of the current Act nevertheless will be protected under the proposed model, so long as one of the two proposed innovation thresholds is satisfied. Accordingly, the proposed model removes the "gaps" in protection that apply under the current legislation, and thus ceases the unjustifiable discrimination that currently occurs in relation to material which satisfies the innovation threshold but which does not come within one of the specified categories of protected subject-matter.

Innovation thresholds

The point of distinction between the two categories of protected subject-matter is the relevant innovation threshold. The innovation threshold for protection as a creation is that the material must result from the exertion of intellectual effort by the person undertaking its creation. The innovation threshold for protection as a production is that the material must result from the application of labour and/or resources of the person responsible for its production.

The innovation threshold which currently applies to subject-mater protected at the higher level—*i.e.* to literary, dramatic, musical and artistic works—is that

59 Berne Convention, Art. 2 (1).

60 In this respect the phrase "literary and artistic domain" is intended to perform a role similar to that performed by the phrase defining patentable subject-matter in the previous U.K. patents legislation—"manner of new manufacture". The Patents Act 1949, and its predecessors (Patents and Designs Act 1907 and Patents, Designs and Trade Marks Act 1883), utilised the phrase "manner of new manufacture" as a broad, technology-neutral definition of patentable subject-matter. It describes those types of innovation that are entitled to the grant of a patent, subject to the various requirements for protection, including in particular the innovation thresholds of novelty and inventive step, being satisfied in any particular instance. This is the same phrase, and indeed the same concept, used in the first statute enacting patent protection in the Anglo common law system, the Statute of Monopolies 1623 (21 Jac. 1 c. 3).

61 Whether a sound recording is protected as a creation or a production depends, of course, on which innovation threshold it satisfies. This issue is considered further, below.

62 See discussion below.

63 WPPT, Art. 5.

64 Of course, the United Kingdom is required to provide a certain level of protection to performances, by virtue of its obligations under the Rome Convention and various European Directives. However, it is not obligatory to provide these rights by way of copyright law. Thus it is open to the United Kingdom to exclude performances from a revised copyright law and instead provide the necessary protection under a *sui generis* scheme.

65 Directive 91/250 of May 14, 1991.

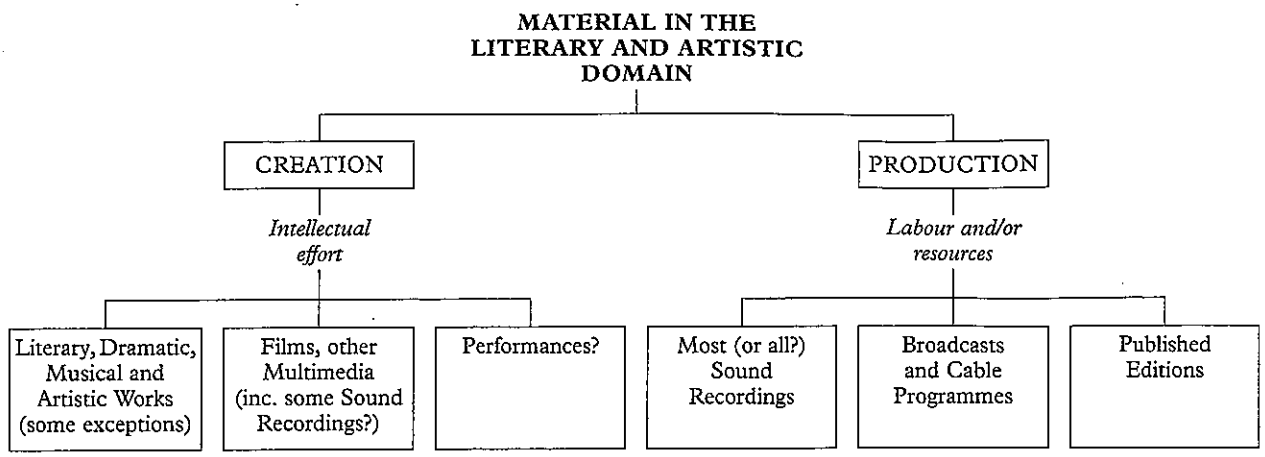

Figure 3 *Relationship between the current categories of protected subject-matter and the categories under the proposed model*

the work be "original".[66] There may be uncertainty in the United Kingdom as to precisely what is that level.[67] The phrase "intellectual effort" has been adopted as the essence of the innovation threshold under the proposed model, because it reflects the trend towards an international harmonisation of the understanding of what is the minimum level of creativity required to justify the grant of copyright protection, especially in relation to subject-matters that do not fall clearly within the traditional concept of a literary or artistic work. For example, both the TRIPs Agreement and the WCT oblige members to extend copyright protection to compilations of data or other material which by reason of the selection or arrangement of their contents "constitute intellectual creations".[68] Furthermore, the European Directive on the legal protection of databases,[69] and the provisions of the Act which implement the Directive,[70] both adopt the concept of "the author's intellectual creation" as the statutory test for originality. Other supranational treaties which provide that copyright material is original if it is "the author's own intellectual creation" are the European Directives on computer programs[71] and on duration of copyright.[72] Similar phrases are an established part of the jurisprudence on the originality requirement under U.S. copyright law.[73]

The author proposes that the phrase "intellectual effort" be given a meaning that equates with the concept of "intellectual creation" as that phrase is used in the TRIPs Agreement, the WCT, various European Directives, and the current provisions of the United Kingdom copyright legislation. In the light of this, it must be acknowledged that the proposed innovation threshold for a creation may be higher than the current requirement of originality for a work.[74] In the author's opinion, this outcome is justified by the principle that the higher level of protection which attaches to a creation should not apply to material which results from the investment of effort and/or money, but which is not an intellectual creation. It follows that the higher level of protection which arguably is now afforded to material such as timetables, directories and similar compilations not constituting "intellectual creations", would no longer apply under the proposed model. Such material would receive only the lower level of protection given to a production, and only then so long as it satisfied the innovation threshold for a production.

The innovation threshold for a production under the proposed model is the result of the application of labour and/or resources by the person responsible for its production. The author proposes that this innovation threshold equate to that which currently applies to neighbouring rights subject-matters under the Act. The very existence of a neighbouring rights subject-matter presupposes that some person has applied time, effort and resources to produce it. If no time, effort or

66 s.1 (1) (a).

67 For example, in relation to a literary work being a compilation, the courts have held that such material is not protected unless its creation resulted from a sufficient degree of "skill, judgment or labour" on the part of the creator: *Ladbroke (Football) Ltd v. William Hill (Football) Ltd*, n. 11 above. In relation to an artistic work derived from an earlier artistic work, the Privy Council on appeal from Hong Kong has required differences between the two works that are "visually significant" for the later work to be protected: *Interlego AG v. Tyco Industries Inc.* [1988] R.P.C. 343.

68 TRIPs Agreement, Art. 10 (2); WCT, Art. 5.

69 Directive 96/9 of the European Parliament and of the Council of March 11, 1996 on the legal protection of databases, Recital 16 and Art. 3 (1).

70 s.3A (2).

71 Council Directive 91/250 of May 14, 1991 on the legal protection of computer programs, Art. 1 (3).

72 Council Directive 93/98 of October 29, 1993 harmonising the term of protection of copyright and related rights, Recital 17.

73 The U.S. Supreme Court in *Feist Publications v. Rural Telephone Services*, n. 11 above, held that the originality requirement in relation to a compilation meant that the work must "display some minimal level of creativity" (at 359), such that there is some "intellectual production" (at 362).

74 For example, this requirement may be higher than the requirement that a compilation be the result of some skill, judgment or labour, and the requirement that there be "visually significant" differences between a later artistic work and the earlier artistic work on which it is based, as discussed above.

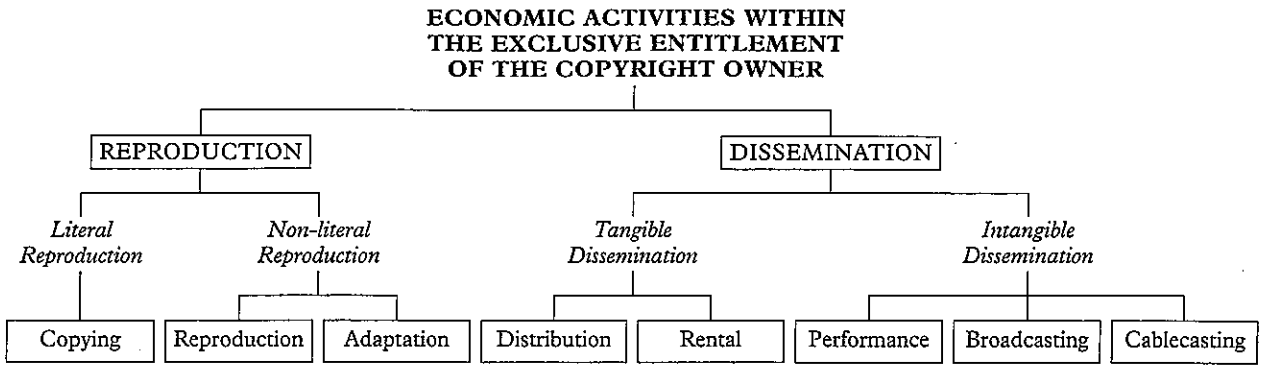

Figure 4 *Relationship between the current categories of exclusive economic rights and the categories under the proposed model*

resources have been applied, there could be no neighbouring rights subject-matter in which copyright subsists. This is because either that subject-matter does not exist, or that subject-matter was pre-existing and hence not produced by the person claiming to own copyright in it.

Material that satisfies neither the innovation threshold for a creation nor the innovation threshold for a production receives no protection under the proposed model, even though it may be material within the literary and artistic domain.

No requirement of tangible embodiment

Under the author's proposed model, tangible embodiment is not a precondition to protection as a creation or a production. Thus subject-matters lacking tangible embodiment (such as broadcasts, performances, and *ex tempore* speech and music) are as capable of protection as subject-matters with tangible embodiment (such as drawings on paper, recordings of sounds on a CD, and audio-visual images stored in a computer chip). Furthermore the particular material form a tangible embodiment of a subject-matter may take is not determinative of the category of protection, if any, into which it falls. So long as the material is within the literary and artistic domain and one of the innovation thresholds is satisfied, no particular form of tangible embodiment, or indeed any tangible embodiment, is required for the subject-matter to gain protection.

Exclusive economic rights

The two exclusive economic rights under the proposed approach are the right of reproduction and the right of dissemination to the public. The right of reproduction includes activities within the current right of copying (*i.e.* making a literal copy), the current right of reproduction in a material form (*i.e.* making a non-literal copy) and the current right of adaptation. The right of dissemination to the public includes activities within the current performance right, the current distribution right, the current broadcasting right and the current right of inclusion in a cable programme service. In addition, the right of dissemination includes the two broadly based rights contained in the Information Society Copyright Directive, namely the right of communication (including making available) to the public and the right of (physical) distribution to the public.

Figure 4 provides a diagrammatic representation of how the current categories of exclusive economic rights are included in the exclusive economic rights categories of the proposed model. As with the categories of protected subject-matters, it must be borne in mind that the categories of exclusive economic rights under the proposed model are defined inclusively. The consequence is that activities not within one of the categories of exclusive economic rights in the current Act nevertheless will be within the exclusive rights of the copyright owner under the proposed model, so long as those activities are in nature either a reproduction or a dissemination to the public of the protected material to which that respective right applies.

Application of exclusive economic rights

Both exclusive economic rights apply to each category of protected material under the proposed model, as previously illustrated in Figure 2. The proposed model thus generally harmonises the application of the activities that comprise the exclusive right to all the material within each category of protected subject-matter. There are instances, however, where it is not practicable or desirable to apply the exclusive economic rights equally to all protected subject-matter. These instances are considered below.

Application of the right of reproduction

Under the current Act, a major difference in the protection provided to traditional works compared with neighbouring rights subject-matter is the fact that neighbouring rights subject-matter does not receive either the exclusive right of reproduction in a material form (*i.e.* non-literal copying) or the exclusive right of adaptation. For neighbouring rights subject-matter, the equivalent exclusive right is limited to "copying" (*i.e.* literal copying) of the whole or a substantial part of the subject-matter. This lower level of protection provided to neighbouring rights subject-matter is justified by the fact that neighbouring rights subject-matter does not need to satisfy the requirement of originality which applies to traditional works.

Under the proposed approach, only the more limited right of literal reproduction (*i.e.* literal copying) will apply to a production. This outcome is achieved by making express provision to that effect, such as by way of an exclusive definition. For example, the legislation implementing the proposed model would provide that, in relation to copyright material being a production, the right of reproduction means only the right to make a literal copy in relation to the whole or a substantial part of the material.

The right of reproduction is not, however, limited in this way in relation to a creation. To make this clear, provision would be made to the effect that in relation to a creation, the right of reproduction includes making a non-literal reproduction (*i.e.* non-literal copying) and making an adaptation of the whole or a substantial part of the creation. Under the proposed approach to the categorisation of protected subject-matter, artistic works and films that satisfy the innovation threshold for a creation are protected as creations. It follows that both these subject-matters are afforded both the reproduction right and the adaptation right. The proposed approach thus ensures that the United Kingdom unarguably is in compliance with its obligations under the Berne Convention in relation to these two types of subject-matter.

Application of the right of dissemination to the public

The current exclusive rights of distribution, rental, performance, broadcasting and inclusion in a cable programme service ("cablecasting") are all activities within the right of dissemination to the public under the proposed model. It is useful to consider how, under the proposed model, these activities would apply to copyright material within the current categories of protected subject-matter.

The current legislation provides a right of distribution to the public in relation to all copyright subject-matter. That right is, more particularly, the right to put into circulation copies of the subject-matter not previously put into circulation; it does not include any subsequent distribution, sale, hiring or loan of copies previously put into circulation.[75] The current legislation also provides a right of rental in respect of all protected subject-matter other than broadcasts, cable programmes and published editions. This is the right to make a copy of the protected subject-matter available for use, on terms that it will or may be returned, either for commercial advantage or through an establishment accessible to the public.[76] Importantly, both the current distribution right and the current rental right apply only to tangible embodiments of copyright subject-matter—*i.e. physical* copies. It should be noted, however, that any act with copyright material in *intangible* form that is analogous to putting copies into circulation, or to making copies available for use on time-limited basis, will come within the exclusive right of communication to the public (including by making available) as set out in the WCT and the WPPT,[77] and as provided in the Information Society Copyright Directive.[78] That is to say, the current rights of distribution and rental are merely specific instances of the general acts of distributing a tangible embodiment, or communicating an intangible embodiment, of the material to the public. The proposed model reflects this fact by including the current rights of distribution and rental within a broadly defined right of dissemination to the public.[79]

The right of communication provided for in the WCT and the WPPT applies to traditional works, to films and sound recordings, and to performances fixed in sound recordings. The right of communication provided for in the Information Society Copyright Directive applies to these subject-matters and to broadcasts and items included in a cable programme service. Thus, under the Information Society Copyright Directive, the United Kingdom will be obliged to provide a broadly defined right of communication to the public in relation to all the categories of protected subject-matter under the current legislation other than published editions. It will thus be appreciated that the proposed model of applying the right of dissemination to the public to all subject-matter other than published editions is consistent with the recent legislative developments internationally and within the European Community.

The Act currently does not afford a right of performance to artistic works and published editions. The application of a performance right to artistic works is not supported by the main commentators, on the ground that an artistic work cannot be performed.[80] The issue cannot be so easily dismissed, however. The conceptual equivalent of a performance right in relation to an artistic work is the right of "public exhibition" of the work. Although the Berne Convention does not require such a right, a few countries in the Berne Union have expressly provided a public exhibition right in their domestic laws, in some cases as a component of an artist's moral rights.[81] Whether or not a performance right should be granted to artistic works is a fundamental policy issue, for determination by the national legislature. Should the United Kingdom Government wish to maintain the current position, legislation implementing the proposed model would expressly provide that the right of dissemination to the public does not include exhibition of an artistic work.

75 s.18. The precise effect of s.18 is rather more complicated, and in particular distinguishes between putting into circulation within the EEA and outside of the EEA. For a detailed consideration of s.18, see Phillips and Bentley, n. 32 above.

76 s.18A.

77 WCT, Art. 8; WPPT, Arts 10 and 14.

78 Information Society Copyright Directive, Art. 3.

79 Should the legislature wish to maintain the current position of not providing an exclusive right of rental in relation to broadcasts and cable programmes, specific provision to this effect could be made in the implementing legislation—for example, by stating that in relation to a production that is a transmission to the public of images and/or sounds, the exclusive right of dissemination does not include a temporally limited supply of that subject-matter.

80 Stewart states that "for obvious reasons", the public performance right extends only to those works that are capable of being performed, namely literary, dramatic and musical works: Stewart, *International Copyright and Neighbouring Rights* (2nd ed., 1989), p. 65. Similarly, Ricketson states that "public performance rights make little sense as far as an artistic work is concerned": Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works*, n. 20 above, p. 453.

81 Lahore, *Copyright and Designs* (1996), vol. 1 at para. 48,065.

			Exclusive Economic Rights							
			REPRODUCTION			DISSEMINATION				
			Copy	Repro.	Adapt.	Dist.	Rent	Perf.	B/cast	C/cast
Protected Subject Matters	CREATION	Lit., Dram., Mus., Art. Works (some exceptions)	Y	Y	Y	Y	Y	Y	Y	Y
		Films, other Multimedia (inc. some Sound Recs?)	Y	Y	Y	Y	Y	Y	Y	Y
		Performances	Y	Y	Y	Y	Y	Y	Y	Y
	PRODUCTION	Most (or all?) Sound Recs	Y	N	N	Y	Y	Y	Y	Y
		Broadcasts, Cable Progs	Y	N	N	Y	N	Y	Y	Y
		Published Editions	Y	N	N	Y	N	N	N	N

Figure 5 *Application of the proposed exclusive economic rights to protected subject-matter within the current categories*

Application of the economic rights to published editions

The protection of the current category of protected subject-matter called published editions is not required under any of the international conventions. The subject-matter was first given protection in the United Kingdom with the enactment of the Copyright Act 1956, as a result of a recommendation by the Gregory Committee. The Gregory Committee acted in response to a request from the Publishers' Association, which sought protection for the effort that went into the then new printing techniques.[82] In the absence of a justification as to why this right should be extended beyond the situation giving rise to its introduction into the Act, it is submitted that the scope of copyright protection for published editions should be confined to the situation which gave rise to its inclusion in the legislation in the first place—that is, to the making of a facsimile copy in hardcopy print form.

In the light of this policy, the proposed model does not extend to published editions any greater exclusive rights than are currently provided in the United Kingdom copyright legislation. In particular, the proposed model provides in relation to subject-matter that is a published edition only the exclusive right to make a facsimile reproduction (*i.e.* literal copy) of the whole or a substantial part of it[83] and the exclusive right to disseminate to the public tangible copies of such a reproduction.[84]

The particular application of the exclusive economic rights to the current categories of protected subject-matter, under the proposed model as discussed above, is illustrated in the matrix set out at Figure 5.

Exclusive moral rights

The model for a simplified copyright law proposed herein provides for the two moral rights set out in the Berne Convention and implemented in the current Act—the right of attribution and the right of integrity. Under the proposed approach, these two rights would apply only to subject-matter that is a creation. Putting aside the question of whether or not performances should be treated as a creation, this approach results in no change over the position which applies under the current legislation.

Conclusions

A number of commentators have described the approach to simplification of the copyright legislation elaborated in this article as "radical".[85] The author begs to differ. In fact, the author submits that in certain respects the proposed model is conservative. In particular, the proposed model is conservative in that it generally adopts and occasionally extends developments that have already occurred at the international level. In certain other respects, the proposals merely reflect fundamental principles already well established in international treaties, European Directives and in the legislation of other countries.

This fact can be seen particularly clearly in relation to the proposals to simplify the exclusive economic rights of the copyright owner. These proposals need to be considered in the light of the adoption in December

82 Cmnd 8662, paras 306–310.

83 This outcome is achieved by the definition of the right of reproduction provided to a production, as discussed above.

84 This outcome would be achieved by making express provision to that effect in the legislation implementing the proposed model; for example by providing that in relation to a production that is a typographical arrangement of a published edition, the right of dissemination to the public means only the right to put into circulation copies of the subject-matter not previously put into circulation.

85 See, for example, the references cited in fn. 94 in Christie, n. 3 above.

1996 of the WCT and the WPPT, both of which contained a broadly and inclusively defined right of communication to the public. This new right embraces all means of making a work available to the public in intangible form. The previous distinctions between the various means by which a work could be communicated to the public, as drawn by the Berne Convention, were effectively abolished by the introduction of this simplified, and essentially technology-neutral, right. It can thus be seen that the WCT and the WPPT heralded an international approach to copyright reform based on simplification and technological neutrality, an approach subsequently adopted in the Information Society Copyright Directive.

The approach to simplification of exclusive economic rights described in this article reflects the approach adopted in the WCT and the WPPT (and subsequently in the Information Society Copyright Directive), and extends it one stage further. It does so by removing the distinction between making a work available to the public in tangible embodiment versus in intangible embodiment. Under the proposed approach, the right of dissemination to the public encompasses making protected copyright subject-matters available to the public in either embodiment. In the context of the general trend towards intangible embodiment of copyright material in the new information age, such a proposal is hardly radical.

While the proposals in relation to simplification of the categories of protected subject-matter may not yet have a parallel with recent international developments, it is submitted that these too are not radical. Since 1886 the Berne Convention has described the realm of material capable of copyright protection in broad and inclusive terms. While most common law countries have chosen to implement the Berne Convention principles by way of a category-specific legislative structure, this approach is not universal among all Berne Union countries. Furthermore, as the use of the phrase "manner of new manufacture" in the previous United Kingdom patent legislation shows, there is a long history in Anglo common law countries of using a broad, flexible and technology-neutral definition of subject-matter protectible by an intellectual property regime.

The approach to simplification of protected subject-matters proposed herein adopts the Berne Convention approach of defining the boundary of protectible subject-matter in broad and inclusive terms. This is an approach not without precedent in the national copyright legislation of Berne Union countries. Indeed, it is an approach not without precedent in the United Kingdom intellectual property law legislation.

Put simply, the proposed model for a simplified Copyright Act should not be seen as out of step with either the history or the recent international developments of copyright law. Rather, it is a model which builds on the international foundations of copyright law principles, and does so in a manner which can accommodate the challenges raised by the digital revolution. As the Intellectual Property Rights Working Group of the United States Information Infrastructure Task Force noted in September 1995:

> The somewhat strained analysis needed to find a category for multimedia works and the increasing "cross-breeding" of types of works demonstrate that categorization may no longer be useful or necessary. Whilst the Working Group does not recommend at this time the consolidation or elimination of categories (and harmonization of the differing application of rights and limitations on those rights), it is likely that such consolidation or elimination will be appropriate in the future.[86]

Half a decade later, it is submitted that such consolidation of subject-matter categories and corresponding harmonisation of exclusive rights is indeed the appropriate means of ensuring that United Kingdom copyright law can continue to provide adequate copyright protection for deserving subject-matter in the digital age.

86 *Intellectual Property and the National Information Infrastructure—The Report of the Working Group on Intellectual Property Rights* (1995, Office of Legislative and International Affairs, USPTO, ISBN 0 9648716 0 1), p. 45.

Appendix: Current Structure of the Act Explained

Exclusive Rights

Protected Subject Matter	Copy	Repro.	Dist.	Rent	Perf.	B/cast	C/cast	Adapt.	Attrib.	Integ.
Lit. work	Y[87]	Y[88]	Y[89]	Y[90]	Y[91]	Y[92]	Y[93]	Y[94]	Y[95]	Y[96]
Dram. work	Y[97]	Y[98]	Y[99]	Y[1]	Y[2]	Y[3]	Y[4]	Y[5]	Y[6]	Y[7]
Mus. work	Y[8]	Y[9]	Y[10]	Y[11]	Y[12]	Y[13]	Y[14]	Y[15]	Y[16]	Y[17]
Art. work	Y[18]	Y[19]	Y[20]	Y[21]	N[22]	Y[23]	Y[24]	N[25]	Y[26]	Y[27]
Sound Rec.	Y[28]	N[29]	Y[30]	Y[31]	Y[32]	Y[33]	Y[34]	N[35]	N[36]	N[37]
Film	Y[38]	N[39]	Y[40]	Y[41]	Y[42]	Y[43]	Y[44]	N[45]	Y[46]	Y[47]
B/cast	Y[48]	N[49]	Y[50]	N[51]	Y[52]	Y[53]	Y[54]	N[55]	N[56]	N[57]
Cable Prog.	Y[58]	N[59]	Y[60]	N[61]	Y[62]	Y[63]	Y[64]	N[65]	N[66]	N[67]
Pub. Edit	Y[68]	N[69]	Y[70]	N[71]	N[72]	N[73]	N[74]	N[75]	N[76]	N[77]
Perf.	Y[78]	N[79]	Y[80]	Y[81]	Y[82]	Y[83]	Y[84]	N[85]	N[86]	N[87]

87 s.17 (1) provides that the copying of the work is an act restricted by the copyright in every description of copyright work.
88 s.17 (2) provides that copying, in relation to a literary work, means reproducing the work in any material form.
89 s.18 (1) provides that the issue to the public of copies of the work is an act restricted by the copyright in every description of copyright work.
90 s.18A (1) provides that the rental or lending of copies of the work to the public is an act restricted by the copyright in a literary work.
91 s.19 (1) provides that the performance of the work in public is an act restricted by the copyright in a literary work.
92 s.20 provides that the broadcasting of the work is an act restricted by the copyright in a literary work.
93 s.20 provides that the inclusion of the work in a cable programme service is an act restricted by the copyright in a literary work.
94 s.21 (1) provides that the making of an adaptation of the work is an act restricted by the copyright in a literary work.
95 s.77 (1) provides that the author of a literary work has the right to be identified as the author of the work in specified circumstances.
96 s.80 (1) provides that the author of a literary work has the right in specified circumstances not to have the work subjected to derogatory treatment.
97 s.17 (1) provides that the copying of the work is an act restricted by the copyright in every description of copyright work.
98 s.17 (2) provides that copying, in relation to a dramatic work, means reproducing the work in any material form.
99 s.18 (1) provides that the issue to the public of copies of the work is an act restricted by the copyright in every description of copyright work.
1 s.18A (1) provides that the rental or lending of copies of the work to the public is an act restricted by the copyright in a dramatic work.
2 s.19 (1) provides that the performance of the work in public is an act restricted by the copyright in a dramatic work.
3 s.20 provides that the broadcasting of the work is an act restricted by the copyright in a dramatic work.
4 s.20 provides that the inclusion of the work in a cable programme service is an act restricted by the copyright in a dramatic work.
5 s.21 (1) provides that the making of an adaptation of the work is an act restricted by the copyright in a dramatic work.
6 s.77 (1) provides that the author of a dramatic work has the right to be identified as the author of the work in specified circumstances.
7 s.80 (1) provides that the author of a dramatic work has the right in specified circumstances not to have the work subjected to derogatory treatment.
8 s.17 (1) provides that the copying of the work is an act restricted by the copyright in every description of copyright work.
9 s.17 (2) provides that copying, in relation to a musical work, means reproducing the work in any material form.
10 s.18 (1) provides that the issue to the public of copies of the work is an act restricted by the copyright in every description of copyright work.

11 s.18A (1) provides that the rental or lending of copies of the work to the public is an act restricted by the copyright in a musical work.
12 s.19 (1) provides that the performance of the work in public is an act restricted by the copyright in a musical work.
13 s.20 provides that the broadcasting of the work is an act restricted by the copyright in a musical work.
14 s.20 provides that the inclusion of the work in a cable programme service is an act restricted by the copyright in a musical work.
15 s.21 (1) provides that the making of an adaptation of the work is an act restricted by the copyright in a musical work.
16 s.77 (1) provides that the author of a musical work has the right to be identified as the author of the work in specified circumstances.
17 s.80 (1) provides that the author of a musical work has the right in specified circumstances not to have the work subjected to derogatory treatment.
18 s.17 (1) provides that the copying of the work is an act restricted by the copyright in every description of copyright work.
19 s.17 (2) provides that copying, in relation to an artistic work, means reproducing the work in any material form.
20 s.18 (1) provides that the issue to the public of copies of the work is an act restricted by the copyright in every description of copyright work.
21 s.18A (1) provides that the rental or lending of copies of the work to the public is an act restricted by the copyright in an artistic work other than a work of architecture in the form of a building and a work of applied art.
22 The right of performance in public provided by s.19 (1) does not apply to an artistic work.
23 s.20 provides that the broadcasting of the work is an act restricted by the copyright in an artistic work.
24 s.20 provides that the inclusion of the work in a cable programme service is an act restricted by the copyright in an artistic work.
25 The adaptation right provided by s.21 does not apply to an artistic work.
26 s.77 (1) provides that the author of an artistic work has the right to be identified as the author of the work in specified circumstances.
27 s.80 (1) provides that the author of an artistic work has the right in specified circumstances not to have the work subjected to derogatory treatment.
28 s.17 (1) provides that the copying of the work is an act restricted by the copyright in every description of copyright work.
29 The s.17 (2) extension of the copying right to include reproduction in a material form does not extend a sound recording.
30 s.18 (1) provides that the issue to the public of copies of the work is an act restricted by the copyright in every description of copyright work.
31 s.18A (1) provides that the rental or lending of copies of the work to the public is an act restricted by the copyright in a sound recording.
32 s.19 (3) provides that the playing of the work in public is an act restricted by the copyright in a sound recording.
33 s.20 provides that the broadcasting of the work is an act restricted by the copyright in a sound recording.
34 s.20 provides that the inclusion of the work in a cable programme service is an act restricted by the copyright in a sound recording.
35 The adaptation right provided by s.21 does not apply to a sound recording.
36 The right of attribution provided by s.77 (1) does not apply to a sound recording.
37 The right of integrity provided by s.80 (1) does not apply to a sound recording.
38 s.17 (1) provides that the copying of the work is an act restricted by the copyright in every description of copyright work.
39 s.17 (4) provides that copying, in relation to a film, includes making a photograph of the whole or any substantial part of any image forming part of the film. The non-literal reproduction right provided by s.17 does not extend to a film.
40 s.18 (1) provides that the issue to the public of copies of the work is an act restricted by the copyright in every description of copyright work.
41 s.18A (1) provides that the rental or lending of copies of the work to the public is an act restricted by the copyright in a film.
42 s.19 (3) provides that the playing or showing of the work in public is an act restricted by the copyright in a film.
43 s.20 provides that the broadcasting of the work is an act restricted by the copyright in film.
44 s.20 provides that the inclusion of the work in a cable programme service is an act restricted by the copyright in a film.
45 The adaptation right provided by s.21 does not apply to a film.
46 s.77 (1) provides that the director of a copyright film has the right to be identified as the director of the film in specified circumstances.
47 s.80 (1) provides that the director of a copyright film has the right in specified circumstances not to have the film subjected to derogatory treatment.
48 s.17 (1) provides that the copying of the work is an act restricted by the copyright in every description of copyright work.
49 s.17 (4) provides that copying, in relation to a broadcast, includes making a photograph of the whole or any substantial part of any image forming part of the broadcast. The non-literal reproduction right provided by s.17 does not extend to a broadcast.
50 s.18 (1) provides that the issue to the public of copies of the work is an act restricted by the copyright in every description of copyright work.
51 The rental right provided by s.18A (1) does not apply to a broadcast.
52 s.19 (3) provides that the playing or showing of the work in public is an act restricted by the copyright in a broadcast.
53 s.20 provides that the broadcasting of the work is an act restricted by the copyright in a broadcast.
54 s.20 provides that the inclusion of the work in a cable programme service is an act restricted by the copyright in a broadcast.
55 The adaptation right provided by s.21 does not apply to a broadcast.
56 The right of attribution provided by s.77 (1) does not apply to a broadcast.
57 The right of integrity provided by s.80 (1) does not apply to a broadcast.
58 s.17 (1) provides that the copying of the work is an act restricted by the copyright in every description of copyright work.
59 s.17 (4) provides that copying, in relation to a cable programme, includes making a photograph of the whole or any substantial part of any image forming part of the cable programme. The non-literal reproduction right provided by s.17 does not extend to a cable programme.
60 s.18 (1) provides that the issue to the public of copies of the work is an act restricted by the copyright in every description of copyright work.
61 The rental right provided by s.18A (1) does not apply to a cable programme.
62 s.19 (3) provides that the playing or showing of the work in public is an act restricted by the copyright in a cable programme.
63 s.20 provides that the broadcasting of the work is an act restricted by the copyright in a cable programme.
64 s.20 provides that the inclusion of the work in a cable programme service is an act restricted by the copyright in a cable programme.
65 The adaptation right provided by s.21 does not apply to a cable programme.
66 The right of attribution provided by s.77 (1) does not apply to a cable programme.
67 The right of integrity provided by s.80 (1) does not apply to a cable programme.

68 s.17 (1) provides that the copying of the work is an act restricted by the copyright in every description of copyright work.
69 s.17 (5) provides that copying, in relation to the typographical arrangement of a published edition, means making a facsimile copy of the arrangement. This does not include a non-literal reproduction of the arrangement.
70 s.18 (1) provides that the issue to the public of copies of the work is an act restricted by the copyright in every description of copyright work.
71 The rental right provided by s.18A (1) does not apply to a published edition.
72 The public performance right provided by s.19 does not apply to a published edition.
73 The broadcasting right provided by s.20 does not apply to a published edition.
74 The right to include a work in a cable programme service provided by s.20 does not apply to a published edition.
75 The adaptation right provided by s.21 does not apply to a published edition.
76 The right of attribution provided by s.77 (1) does not apply to a published edition.
77 The right of integrity provided by s.80 (1) does not apply to a published edition.
78 s.182 (1) provides that a performer's rights are infringed by the making of a recording of the whole or a substantial part of a performance directly from the live performance, or directly from a broadcast of or cable programme including the live performance.
79 The exclusive right, provided by s.182 (1), to make a recording of the whole or any substantial part of a performance does not include a non-literal reproduction of a recording of the performance.
80 s.182B (1) provides that a performer's rights are infringed by a person who issues to the public copies of a recording of the whole or any substantial part of the performance.
81 s.182C (1) provides that a performer's rights are infringed by a person who rents or lends to the public copies of a recording of the whole or any substantial part of the performance.
82 s.183 provides that a performer's rights are infringed by a person who shows or plays in public, or broadcasts or includes in a cable programme service, the whole or any substantial part of the performance by means of a recording made without the performer's consent.
83 s.182 (1) provides that a performer's rights are infringed by a person who broadcasts live the whole or any substantial part of the performance.
84 s.182 (1) provides that a performer's rights are infringed by a person who includes live in a cable programme service the whole or any substantial part of the performance.
85 The exclusive right, provided by s.182 (1), to make a recording of the whole or any substantial part of a performance does not include making an adaptation of a recording of the performance.
86 Pt II of the Act does not provide a performer with a right to be identified as the performer of the performance.
87 Pt II of the Act does not provide a performer with a right to object to the derogatory treatment of a recording of a qualified performance, of a broadcast of a qualified performance, or of a cable programme service in which the performance is included.