
Simplifying Australian Copyright Law – the Why and the How*

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The reasons why and the means how Australian copyright law could and should be simplified are explored in detail in this article. It is argued that the current legislation is unnecessarily complex, unjustifiably discriminatory and technologically challenged. The key aspects of Part 2 of the Copyright Law Review Committee's 1998 Report on Simplification of the Copyright Act are summarised. Principles for simplification of the law are proposed, and an illustration of how those principles could be implemented is provided. In conclusion, the article explains why the proposed approach is more conservative than radical.

Introduction

Two ideas about change helpfully are borne in mind when considering the issue of reform of copyright law in the digital age. The first, by an esteemed Australian jurist, reminds us how the law advances inevitably with, albeit some distance behind, developments in medicine, science and technology.¹ The second, generally attributed to the Budget Director under United States President Jimmy Carter, advises one against fixing things that aren't broken.² The message to be gleaned from these two statements of distilled wisdom is that we

must embrace legal change, but not for the sake of change alone. Applying this message to Australian copyright law at the end of the twentieth century, it can be stated with a degree of confidence that the legislative framework is inevitably trailing the changes wrought by the digital revolution. Whilst it may be less self-evident, it is submitted that it is also true that aspects of the copyright legislative framework are broken, and hence in need of reform.

This article identifies those parts of Australian copyright law most in need of reform, in the light of the technological challenges of the digital age. It also proposes a set of principles for reforming the copyright legislative framework in response to those challenges, and describes a means by which those principles could be implemented. In doing so, the author will summarise the key aspects of the Copyright Law Review Committee's 1998 *Report on Simplification of the Copyright Act 1968*, especially the second part (CLRC Simplification Report Part 2) dealing with the categorisation of subject matter and exclusive rights.³ In addition, the

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¹ Windeyer J. in *Mount Isa Mines v Pusey* (1970) 125 CLR 383 at 395, in the context of the medical developments, adopts a description of "Law, marching with medicine but in the rear and limping a little, has come a long way ...".

² Bert Lance, in a May 1977 edition of *Nation's Business*, proposed that "If it ain't broke, don't fix it".

³ The Report is published in two parts: *Part 1 – Exceptions to the Exclusive Rights of Copyright Owners* (AusInfo, ISBN 0 642 20955, 3 September 1998)

author will provide his own view as to not only how the proposed principles for a simplified copyright law could be implemented, but also why the implementation of such principles would be advantageous.⁴

The article begins by arguing why reform through simplification is desirable. It does so by identifying those aspects of the Australian legislation that are problematic (that is, by showing which parts of the legislative framework are “broken”). It then describes how simplification could and should be achieved. It does so by proposing a set of principles by which the legislation could be made simpler and, it is argued, improved (that is, by showing how the legislation should be “fixed”). An implementation of these principles – the proposed approach – is then described in some detail. In conclusion it will be argued that the proposed approach is not “radical”. Rather, it is submitted, the proposed approach is fully consistent with Australia’s obligations under the Berne Convention and is the logical and desirable continuation of a trend which began in 1996 with the adoption of the World Intellectual Property Organization copyright and neighbouring rights treaties.

Why simplify – the parts of the current Australian legislation that are broken

At least three assertions can be made and, it is submitted, substantiated about why the current Australian copyright legislation, the *Copyright Act 1968* (Cth) (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

Australia’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

It cannot be denied that the Act is structurally complex. It is structurally complex in the senses both of form and of content. As a matter of form, the legislation is long, containing at least 1,126 subsections totalling more than 87,000 words.⁵ Related provisions are not always found in the same or even directly associated Parts of the legislation. Ad hoc amendment, amongst other things, has produced an unwieldy numbering system.⁶ Of course, an ugly form is really only a cosmetic issue, which invites change along the lines of cosmetic surgery. Many, including the author, see cosmetic surgery as appealing only to those more interested in style than substance. A stylistically unattractive Act is not, of itself, cause for reforming the law.

It can be shown, however, that the Act is, in addition, structurally complex as a matter of content. Depending on how one conceptualises the Act, it provides for eight or nine categories of protected subject matter,⁷ and for eight, nine or ten categories of exclusive rights,⁸ depending on how

⁵ These calculations are based on an analysis of the consolidated Act as at 1 January 1999. The count of subsections does not treat paragraphs and subparagraphs of a subsection as a separate provision. The word count is exclusive of the table of provisions.

⁶ If the Copyright Amendment (Digital Agenda) Bill 1999 is enacted in the form in which it was introduced into Parliament in September 1999, the Act will be graced with a sonorous and somnolent s 135ZZZE, and will have a total of 227 subsections between s 135 and s 136.

⁷ It is nine categories of subject matters if performances are considered as a subject matter protected by copyright, or eight categories if they are not. Certain rights of performers in their performances are provided in Pt XIA of the Act.

⁸ It is nine categories of exclusive rights if (i) the proposal to replace the rights to broadcast and to transmit to subscribers to a diffusion service with a right of communication to the public, as provided in the Copyright Amendment (Digital Agenda) Bill 1999, is assumed to be implemented; and (ii) the non-economic (ie, moral) rights of authors, taken as one, are considered to be an exclusive right provided by copyright. It is eight categories if

(http://www.law.gov.au/clrc/gen_info/clrc/ba.pdf); and *Part 2 – Categorisation of Subject Matter and Exclusive Rights, and Other Issues* (AusInfo, ISBN 0 624 20961. 8 February 1999) (http://www.law.gov.au/clrc/gen_info/clrc/Report%20Part%202/ReportHeadings2.html).

⁴ The author was a member of the Copyright Law Review Committee during its reference to Simplify the Copyright Act 1968, conducted from January 1995 to August 1998. However, the views expressed in this article are those of the author, and hence it should not be assumed that they reflect precisely those of the other members comprising the majority of the Committee in respect of its report on that reference. For the definitive view of the Committee, reference must be made to the Report.

the categories are constructed. This structure is encapsulated in the 9x9 matrix set out in Figure 1 (see p 60).⁹ 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.¹⁰ The presence of a "Y" in a cell indicates that the particular exclusive right does apply to the particular protected subject matter, whilst 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.¹¹

For the purpose of this article, what is important about the matrix is not the particular contents of each cell, but the fact 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.

Whilst 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 to both the application of the subsistence requirements which apply to the subject matter and 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 we 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: works,¹² subject matter other than works,¹³ and performances.¹⁴ 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 works be "original",¹⁵ whereas this is not the case in relation

moral rights are not considered to be a category of exclusive rights. It is ten categories if moral rights are considered to be a category of exclusive rights and the current separate rights to broadcast and to transmit to subscribers to a diffusion service are maintained. Part IX of the Act currently provides limited non-economic rights to certain authors. The government has confirmed its intention to enact more comprehensive moral rights, along the line of those provided for in Sched 1 of the Copyright (Amendment) Bill (No 1) of 1997, and which at the time of writing were awaiting re-submission to Parliament in a modified form, following the Report of the Senate Legal and Constitutional Legislation Committee.

⁹ Figure 1 is a conflation of Tables 1 and 2 in Appendix B of the CLRC Simplification Report Part 2. For a somewhat different perspective on the complex structure of the Act, see Barty and Christie, "Some Suggestions for Simplifying the Australian Copyright Legislation" (1997) 8 *Australian Intellectual Property Journal* 31, especially the "Master Matrix" at 59.

¹⁰ The exclusive rights include a single right of communication to the public as a replacement for the current rights to broadcast and to transmit to subscribers to a diffusion service, as provided for in the Copyright Amendment (Digital Agenda) Bill 1999.

¹¹ An explanation of the qualification is provided in the CLRC Simplification Report Part 2, Appendix B.

¹² That is, the copyright material to which Pt III of the Act applies.

¹³ That is, the copyright material to which Pt IV of the Act applies.

¹⁴ That is, live recitations of a literary work, and live performances of a dramatic work, a musical work, a dance, and a circus or variety act or similar presentation or show, as provided for in Pt XIA of the Act.

¹⁵ Sections 32(1) and (2). 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, eg. *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 All ER 465 (HL)), or it may require a degree of creativity beyond mere expenditure of resources (see, eg. *Feist*

to subject matter other than works and performances.¹⁶

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 four categories of subject matter other than works (sound recordings, cinematograph films, broadcasts, 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, the duration of protection of some artistic works (in particular, photographs) is less than that of literary, dramatic and musical works,¹⁷ and the duration of protection of published editions is less than that of the other categories of subject matter other than works.¹⁸ Also, different provisions on first ownership apply to the various categories and sub-categories of works.¹⁹

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 reproduction²⁰ – it applies to the sub-group of copyright material called works, but not to the sub-groups of subject matter other than works and performances. At the second level of categorisation (that is, 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 and cinematograph films, but not to broadcasts or 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 Australian 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 may be 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 Australia'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 work, not a subject matter other than a work, 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 that qualifies for protection under the Australian 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 works. To obtain the higher level of protection afforded by Pt III of the Act, 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 may have been the efforts of the person who created it.

Publications v Rural Telephone Services 499 US 340 (1991. US Sup Ct)).

¹⁶ The very act of making a subject matter other than a work, or of giving the performance, seems to be sufficient to attract protection.

¹⁷ See s 33(2), (3) and (6).

¹⁸ Contrast ss 93-95 with s 96.

¹⁹ See, eg, the different treatment of photographs, portraits and engravings in s 35(5).

²⁰ The "right of reproduction" referred to here is the right to make a non-exact reproduction, ie. a non-literal copy.

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*²¹ in the United Kingdom. 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 a 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 work under the United Kingdom *Copyright Act 1988*. In particular, the judge held that the scene was neither a dramatic work, nor was it one of sub-categories of artistic work alleged (these being a sculpture, a work of artistic craftsmanship or a collage).²² 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 United Kingdom *Copyright Act* (and the Australian legislation) 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 are two specific instances where the differential treatment of the current categories of copyright subject matter is particularly problematic. The first instance concerns the fact that the category of artistic work is not provided with the right of adaptation, unlike the other Pt III subject matters. This is despite the fact that Art 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" implies the changing of a work so as to enable it to fulfil a purpose other than that for which it was originally created,²³ and that in relation to Art 12 of the Berne Convention, the exclusive right of "adaptation" is the right to rewrite or remodel the work into another form.²⁴ 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.²⁵

It is, of course, the case that under s 21(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. Three examples are cited by the Copyright Law Review Committee in Part 2 of the Simplification Report: (i) a detailed literary description of an artistic work; (ii) the translation of a physical sculpture into x, y and z co-ordinates stored in a digital file which, using the correct

²¹ (1997) 39 IPR 1.

²² 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 'objets trouves'". 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: *ibid* at 4-5.

²³ Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986* (Centre for Commercial Law Studies, Queen Mary College/Kluwer, London, 1987), p 392.

²⁴ *Ibid*, p 398.

²⁵ *Ibid*, p 291.

software, could generate a three-dimensional image of the sculpture; and (iii) the creation of a picture using the same theme or style of another picture, but without directly copying its essential elements.²⁶ 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 Arts 1 through 21 of the Berne Convention.²⁷

A second instance where the current legislation unjustifiably discriminates against a category of protected subject matter is in the failure to provide cinematograph films with either of the exclusive rights of reproduction or adaptation. This must be considered in light of Article 14bis(1) of the Berne Convention, which provides that “the owner of copyright in a cinematographic work shall enjoy the same rights as the author of an original work, including the rights referred to in the preceding Article”. The preceding Article, Art 14, provides for, amongst other things, the right of cinematographic adaptation and reproduction, and the adaptation into any other artistic form of a cinematographic production derived from a literary or artistic work. In addition, Art 14bis(1) needs to be read together with Arts 9(1) and 12 of the Berne Convention, which expressly provide literary and artistic works with the right of reproduction in any manner or form, and the right of adaptation, respectively. It is clear that, in failing to provide cinematograph films with the reproduction and adaptation rights, the Australian legislation is in breach of both the Berne Convention and the TRIPs Agreement.

Technological specificity, and the technological challenge

More problematic even than the unjustifiable discriminatory treatment of protected subject matter is the 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, from the distinction drawn in those definitions between tangible and intangible embodiments, and from the requirement for Pt III subject matter to be identified with a human “author”. 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 an 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 are already uncertainty about the Act’s application and calls for ad hoc legislative amendment, is the so-called “multimedia entity”.²⁸ As is discussed in some detail in the CLRC Simplification Report Part 2,²⁹ it is unclear whether a multimedia entity per se, as distinct from its component parts, is protected at all under the Act. 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

²⁶ CLRC Simplification Report Part 2, para 5.76.

²⁷ Article 9(1) of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement), being Annex 1C to the Agreement Establishing the World Trade Organization 1994 (WTO Agreement).

²⁸ For the purposes of this discussion, the term “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.

²⁹ CLRC Simplification Report Part 2, paras 7.05-7.17.

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. Uncertainty about the application of the current legislation lay behind the Copyright Convergence Group's 1994 recommendation for a new, broadly-defined right of transmission to the public, to replace the technology specific rights of broadcast by wireless telegraphy and transmission to subscribers to a diffusion service.³⁰ By 1996, developments in communication technology, and in particular the Internet, resulted in the adoption in both the WIPO Copyright Treaty³¹ (WCT) and the WIPO Performances and Phonograms Treaty³² (WPPT) of an even broader 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.³³ In September 1999, the Australian government introduced into Parliament the Copyright Amendment (Digital Agenda) Bill 1999 (Digital Agenda Bill 1999). The Digital Agenda Bill 1999, if passed, will implement this new right in the current legislation.

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 may be argued that the right of publication is, and even after passage of the Digital Agenda Bill 1999 will remain, confined to the first dissemination of a work

to the public by distribution of *physical* copies of it. Likewise, it may be argued that the right of rental in relation to computer programs and sound recordings does not extend to a commercial supply (not amounting to a transfer of ownership) of a digital copy of the program or recording made via the Internet. Yet the rationales of the publication right and the rental right suggest that they should embrace the first dissemination of a work to the public, and a commercial supply of a computer program or sound recording, respectively, by any means – including by distribution of intangible embodiments of the work, program or recording.

The Act's distinction between tangible and intangible embodiments of copyright material is problematic in a further way. Currently the legislation requires a work to be in a tangible embodiment to qualify for protection under Pt III.³⁴ As a result, material which only has an intangible embodiment, such as an *ex tempore* speech, is not protected,³⁵ even though it is arguably as deserving of protection as a speech that is written down prior to recitation. The requirement of tangible embodiment in relation to most of the Pt IV 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 television and sound broadcasts, which are defined to be the visual images and/or sounds transmitted by wireless telegraphy.³⁷ Those visual images and sounds are protected even though not in a tangible embodiment.

The author considers that developments in information technology will challenge the traditional notion that all protected subject matter other than broadcasts should be in a tangible

³⁰ Copyright Convergence Group, *Highways to Change* (Australian Government Publishing Service ISBN 0 642 20816 6, August 1994) (http://www.law.gov.au/clrc/gen_info/clrc/ba.pdf), para 1.3.

³¹ World Intellectual Property Organisation Copyright Treaty adopted by the Diplomatic Conference on 20 December 1996.

³² World Intellectual Property Organisation Performances and Phonograms Treaty adopted by the Diplomatic Conference on 20 December 1996.

³³ WCT Art 8; WPPT Arts 10 and 14.

³⁴ This requirement arises indirectly, pursuant to the references in s 32 to the "making" of a work and to the time when a work is "made". As a result of this requirement, protection is not available to literary, dramatic, musical or artistic material that does not have tangible embodiment.

³⁵ An express provision to this effect is contained in s 3(2) of the UK *Copyright, Designs and Patents Act* 1988. This provision is considered as merely codifying the law as it previously stood, as illustrated by cases such as *Walter v Lane* [1900] AC 539.

³⁶ A "sound recording" is defined to be the aggregate of sounds embodied in a record (s 10(1)), a "cinematograph film" is defined to be the aggregate of visual images embodied in an article or thing (s 10(1)), and a "published edition" is an edition of a literary, dramatic, musical or artistic work that has been published (s 92(1)).

³⁷ Section 10(1).

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 *ex tempore* music, the courts have generally accommodated such material within the framework of the legislation.³⁸ 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 works or other 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 light of the fact that subject matters not in a tangible form, such as broadcasts and performances, currently receive protection under the legislation.³⁹ Further, 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,⁴⁰ and that the copyright legislation of certain civil law countries clearly embraces material not in a tangible embodiment.⁴¹ Accordingly, there is good reason to believe that the current obsession in the Australian legislation with tangible embodiment is neither warranted nor desirable.

Need for human "authorship"

Also of concern is the ability of the current legislation to accommodate the increasing, indeed

almost ubiquitous, use of computers in the creation of copyright subject matter. The current legislation requires an original work to be the product of an "author" for it to be entitled to protection under Pt III of the Act. This requirement arises by virtue of s 32, which provides that copyright will subsist in an unpublished original work and in a published original work if the "author" of the work was a qualified person at the time the work was made.⁴² In this respect, the Act follows the terminology of the Berne Convention. The existence of an "author" is not, however, a requirement for protection of subject matter other than works under Pt IV of the Act. There the legislation makes reference to the "maker" of the relevant subject matter.⁴³

It is generally accepted that only a human can be the "author" of a work. This acceptance reflects the historical understanding that works are the products of the human intellect; in this sense it is said works are creations as distinct from artefacts of production. This acceptance also explains the application of moral rights to works but not to other subject matters protected by copyright; only authors need rights to protect their non-economic (that is, moral) interests. The fact is, of course, that the creation of all works involves the utilisation of tools by the author. In early times such tools were quills, paint brushes, chisels and the like. In later times the tools have included typewriters, cameras and printing presses. Most recently, information technologies, and especially the computer, have been utilised by authors in the creation of their works.

To date the courts have not had undue difficulty in assimilating computers to less sophisticated types of tools utilised by authors.⁴⁴ It must be recognised,

³⁸ A recent example is the decision in *Galaxy Electronics Pty Ltd v Sega Enterprises Ltd* (1997) 37 IPR 462, in which the Full Court of the Federal Court held that a computer video game was a "cinematograph film". It 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 Parliament intended to take a broad view and not tie copyright protection for this type of material to any particular technology.

³⁹ In the case of performances, this protection is under the provisions of Pt XIA of the *Copyright Act*.

⁴⁰ Article 2(2).

⁴¹ See, for example, Art 10, para 1 of the Spanish law on intellectual property of 11 November 1987.

⁴² "Qualified person" is defined in s 32(4) to mean an Australian citizen, an Australian protected person or a person resident in Australia. In relation to a published original work, copyright will also subsist if the first publication of the work took place in Australia. Pursuant to the *Copyright (International Protection) Regulations*, these territorial connecting factors are extended, so as to be satisfied by authors who are nationals, etc of Berne Union and/or World Trade Organization countries and by first publication in Berne Union and/or World Trade Organization countries.

⁴³ In relation to a sound recording or cinematograph film, the reference is to the "maker" of it: ss 89(1) and 90(1). In relation to a broadcast, the reference is to the entity responsible for making, or licensed to make, the broadcast: s 91. In relation to a published edition, the reference is to the "publisher" of it: s 92(1).

⁴⁴ See, eg, *Express Newspapers plc v Liverpool Daily Post and*

however, that developments in information technology will continue to change the role that computers play in the creation of certain types of copyright material. Many of those changes will be, by their very nature, not easily, or at all, foreseeable. The author believes that in the future it might not be sensible or even possible to continue the courts' current approach of analogising computers with the historical tools of authors. If the analogy were to break down, computer-created material will not receive the higher level of protection even though that material reflects significant intellectual effort by the person who undertakes its creation. That is an outcome which differentiates between creators on the basis of the tools used by them, and discriminates against those using the most advanced (that is, computer-based) tools. It would result, for example, in a lower level of protection being given to a "techno-artist" using computer media compared with a traditional artist using traditional media. Such differentiation and discrimination on the basis of tool technology is not appropriate.

How to simplify – the principles of the proposed approach to fixing the legislation

There are, of course, a number of ways in which the Australian copyright legislation could be amended so as to make it less structurally complex.⁴⁵ However, when account is taken of the other problems identified above – the unjustifiable discriminatory treatment of certain categories of subject matter 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 subsistence requirements and 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:

- (i) the use of broadly and inclusively defined categories of protected subject matter and of exclusive rights
- (ii) the maintenance of innovation thresholds based on the degree of creativity reflected in the protected subject matter
- (iii) the removal of the distinction between a tangible and an intangible embodiment of subject matter, and
- (iv) the abolition of the requirement of authorship.

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 Art 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

Echo plc [1985] FSR 306, where a UK court held that a 5x5 matrix of letters and two lines of 5 letters generated by computer was a literary work authored by the person who had written the relevant computer program.

⁴⁵ See, for example, the three other approaches considered by the CLRC, as described in Appendix B of CLRC Simplification Report Part 2. See also Barty and Christie, *op cit* n 9; and Ricketson, "The New Copyright Act 1997" (1997) 29 *Intellectual Property Forum* 14.

obligations. By virtue of Art 9(1), the TRIPs Agreement adopts the broad and inclusive categorisation of protected subject matter provided by Art 2 of the Berne Convention.⁴⁶

A similar approach to categorisation, this time in relation to exclusive economic rights, is evident in the recent WIPO treaties. Both the WCT and the 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.”⁴⁷

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.⁴⁸

It is not just the international treaties 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.”⁴⁹

The French Act also provides specific examples of what is included within this broad category, similar to the way Art 2(1) of the Berne Convention provides inclusive examples as to what falls within the broad category of “literary and artistic works”.

At least one other commentator has suggested the adoption of broad and inclusive definitions within the Australian copyright legislation. In his article entitled “The New Copyright Act 1997”,⁵⁰ 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”,⁵¹ 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”.⁵²

The approach to the definition of categories that is adopted in the international treaties, in the national legislation of civil law countries, and in Ricketson’s proposal is the basis for the model set out in the CLRC Simplification Report Part 2 and 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

⁴⁶ Article 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 6bis of that Convention or of the rights derived therefrom.”

⁴⁷ 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.

⁴⁸ It is also notable that the government’s approach to implementation of this right in Australian law is somewhat different. The government’s original proposal, as contained in its July 1997 Discussion Paper on “Copyright Reform and the Digital Agenda” (Australian Government Publishing Service, ISBN 0 642 20911 1, 1997) was to implement the right through two separate rights – the right of transmission and the right of making available – see paras 4.7-4.19. Although this was subsequently rejected in favour of an approach of one broader right of communication, the definition of “communicate” contained in the Digital Agenda Bill 1999 uses an *exclusive* definition, as follows (item 6):

“Communicate means make available online or electronically transmit (whether over a path, or a combination of paths, provided by a material substance or otherwise) a work or other subject-matter.”

⁴⁹ Article L. 112-1.

⁵⁰ Op cit n 45.

⁵¹ Ibid at 20.

⁵² Ibid. This general definition is followed by an inclusive listing of subject matters that “shall be regarded as” derivative productions.

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 on the one hand, and of productive subject matter in form of sound recordings, broadcasts 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,⁵³ the Geneva Convention,⁵⁴ the TRIPs Agreement and the WPPT; broadcasts are the subject matter of the Rome Convention, the Satellite Convention⁵⁵ 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 Australian legislation by the fact that sound recordings and broadcasts are dealt with in Pt IV of the Act, and performances in Pt XIA, and both are given significantly narrower exclusive rights than works are given in Pt III of the Act.

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 Convention⁵⁶ and express in the Australian legislation,⁵⁷ 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 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 CD, and audio-visual images stored in a computer chip). Further, 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.

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.

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

⁵³ International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, done at Rome, on 26 October 1961.

⁵⁴ Convention for the Protection of Producers of Phonograms Against the Unauthorised Duplication of their Phonograms, done at Geneva, on 29 October 1971.

⁵⁵ Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite, done at Brussels, on 21 May 1974.

⁵⁶ See CLRC Simplification Report Part 2, para 5.37.

⁵⁷ Section 32.

tangibility or otherwise of embodiment of the material being disseminated.

Abolition of the requirement of authorship

The final key feature of the simplified model proposed here is the abolition of “authorship” as a requirement for copyright material to be protected at the higher level. By so doing, the legislation can more easily accommodate the protection of creative material which has come into existence in circumstances in which computers or other information technologies have played a significant role.

It is recognised, however, that it will continue to be necessary to be able to connect copyright subject matter with a human for a number of purposes, including determining which, if any, innovation threshold is satisfied, determining the duration of protection, and determining the first owner of copyright. The approach which is proposed under the simplified model is to conceptualise that connection not as one of “authoring” a work, but instead as one of “undertaking the creation or production of” copyright material. In proposing this approach, it is intended that the focus be moved from the issue of whether the computer utilisation can be analogised with traditional tool utilisation, to the more germane issue of which human should be the one identified as sufficiently associated with the creation or production of the material for the purposes of applying the innovation threshold, calculating duration and allocating ownership.

An illustration of the proposed approach to simplification

The 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, this 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 and an expansion of this model, being a model that this writer considers would provide a useful blueprint for a simplified copyright law in 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 2x4 matrix set out in Figure 2 (see p 60). 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, whilst the presence of an “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 a significant 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 time, effort and resources by the person who undertakes its production. Without limiting the generality of these definitions, it is proposed that a

⁵⁸ CLRC Simplification Report Part 2, paras 5.28-5.112.

Production be defined to include, and a Creation defined to exclude, a broadcast and a published edition, as those two 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 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. 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 Australian patents legislation – "manner of new manufacture".⁶⁰ A "manner of new manufacture" 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. In a similar manner, the "literary and artistic domain" 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, subject matter that is a cinematograph film under the current legislation or another "multimedia entity" are 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 of protected subject matter – since a performance is an intangible embodiment of aural and/or visual material. As to whether performances should in fact be protected under either category in the proposed model is a matter for the legislature to determine.⁶³ The point to note is that the proposed model can provide protection for performances at either level, or alternatively can exclude performances from copyright protection altogether. The proposed model can thus accommodate whatever decision is ultimately taken by the government on this issue.

Article 10(1) of the TRIPs Agreement and Art 4 of the WCT require computer programs to be protected as literary works within the meaning of Art 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 to the

⁵⁹ Berne Convention, Art 2(1).

⁶⁰ *Patents Act* 1990 (Cth), Sched 1 definition of "invention". This Act, like the previous patent legislation in Australia (*Patents Act* 1952 and *Patents Act* 1903) and its predecessors in the United Kingdom (*Patents Act* 1949, *Patents and Designs Act* 1907 and *Patents, Designs and Trade Marks Act* 1883), utilises a broad, technology-neutral definition of patentable subject matter, namely a "manner of new manufacture". 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 under the heading "No requirement of tangible embodiment", below.

⁶³ As the Copyright Law Review Committee majority note, the government is still considering whether, and if so how, to implement the rights provided by the WPPT to performers as regards their live performances and their performances fixed in phonograms. The Committee accordingly made no recommendation on this issue: CLRC Simplification Report, Part 2, para 5.64.

effect that the category of Creation includes a computer program.

Figure 3 (see p 61) 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 “significant intellectual effort” and “time, effort and resources” – refer to the two proposed innovation thresholds, which are discussed in the next section. It must, of course, be borne in 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 significant 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 time, effort and resources of the person undertaking its production.

The innovation threshold which currently applies to subject matter protected at the higher level, under Pt III of the Act, is that the work be “original”.⁶⁴ There is uncertainty in Australia, and in other countries including the United Kingdom, as to precisely what is that level.⁶⁵ 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”.⁶⁶ Similarly, the European Community Directive on the legal protection of databases, and the provisions of the United Kingdom copyright legislation implementing the Directive, both adopt the concept of “the author’s intellectual creation” as the statutory test for originality.⁶⁷ Other supranational treaties which provide that copyright material is original if it is “the author’s own intellectual creation” are the European Community Directives on computer programs⁶⁸ and on duration of copyright.⁶⁹

The innovation threshold for a Creation under the proposed model is “significant intellectual effort”, being the phrase used by Ricketson and Lahore for the definition of an “original literary and artistic work” in their model for a new copyright Act.⁷⁰ The author proposes that this phrase be given

In relation to an artistic work derived from an earlier artistic work, the courts in Australia have held that the later work will not be original unless it exhibits differences that make it “visually distinctive” from the earlier work: *Interlego AG v Croner Trading Pty Ltd* (1993) 25 IPR 65. This decision is to be contrasted with *Interlego AG v Tyco Industries Inc.* where the Privy Council on appeal from Hong Kong required differences between the two works which were “visually significant”.

⁶⁶ TRIPs Agreement, Art 10(2); WCT, Art 5.

⁶⁷ Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases. Recital 16 and Art 3(1); *Copyright, Designs and Patents Act* 1988 (UK), s 3A(2). The US Supreme Court in *Feist Publications v Rural Telephone Services* 499 US 340 (1991. US Sup Ct) 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).

⁶⁸ Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs. Art 1(3).

⁶⁹ Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and related rights. Recital 17.

⁷⁰ In Ricketson’s view, the phrase embodies a higher standard

⁶⁴ Section 32(2) of the Act provides that copyright subsists in a published “original” literary, dramatic, musical or artistic work that satisfies the specified territorial connecting factors. Section 32(1) provides similarly in respect of an unpublished “original” work.

⁶⁵ 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, judgement or labour” on the part of the creator: *Ladbroke (Football) Ltd v William Hill (Football) Ltd* 1 All ER 465 (HL).

a meaning that equates with the concept of "intellectual creation" under the TRIPs Agreement, the WCT, the various European Community Directives and the United Kingdom copyright legislation. In light of this, it must be acknowledged that the proposed innovation threshold for a Creation is probably higher than the current requirement of originality for a work.⁷¹ 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 the time, effort and/or money, but which is not an intellectual creation. It follows that the higher level of protection which is now afforded to material such as timetables, directories and similar compilations that do not constitute "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 time, effort and resources", again being the phrase proposed by Ricketson and Lahore for the definition of a "derivative production" in their model for a new copyright Act.⁷² The author proposes that this innovation threshold equate to that which currently applies to subject matter in Pt IV of the Act. The very existence of an alleged Pt IV copyright subject matter presupposes that some person has applied time, effort and resources to produce it. If no time, effort and resources have been applied, there could be no Pt IV 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.

than applies under the current legislation, and probably equates with the requirement of originality that was adopted by the US Supreme Court in the *Feist* case: Ricketson, op cit n 45, at 17.

⁷¹ 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 a later artistic work be visually distinctive from an earlier artistic work, as discussed above.

⁷² Ricketson states that this phrase focuses on "what is the true object of protection" for this category of protected subject matter: Ricketson, op cit n 45, at 18.

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 CD, and audio-visual images stored in a computer chip). Further, 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.

Relationship of protected subject matter to a human

Under the model proposed herein, the identification of a human who can be said to have "authored" the copyright subject matter is not a precondition to protection of that copyright subject matter. All that is required for copyright protection to arise is that one of the two innovation thresholds is satisfied. There remains, however, a need to connect copyright material with a human (or humans) for other purposes. These purposes are to determine whether an innovation threshold is satisfied, the duration of copyright and the first owner of copyright.

Under the proposed model, the necessary connection for these purposes is made by identifying the person who "undertakes the creation or production of" the copyright material. This approach has a degree of similarity to the approach of the United Kingdom copyright legislation to identifying (and then prescribing by deeming provision) the author of a "computer-generated work".⁷³ It is submitted that it is not only possible,

⁷³ *Copyright, Designs and Patents Act 1988* (UK), s 9(3), which

but in fact desirable to extend the concept of undertaking the creation or production of material beyond “computer-generated” subject matter, to all copyright subject matter.

In making a proposal to this effect, the author is mindful that the Copyright Law Review Committee, in its 1995 *Computer Software Protection* report, proposed that a distinction be drawn between “material created with the assistance of computer programs” and “material created by computer programs”.⁷⁴ The author considers that the use of computers in the creation of copyright material is now so widespread, and the types and degree of computer involvement in the creation of copyright material is so varied, that an approach which distinguishes between material created “with the assistance of” a computer and material created “by” a computer is likely to prove difficult to understand and apply in practice. The proposed approach avoids the need to identify which types of subject matter are “computer-generated” – a task that might require complex distinctions to be drawn between computer-generated, computer-assisted, and other degrees of computer-mediated involvement in the making of copyright subject matter.

The proposed approach is that the innovation threshold for all material within both categories of protected subject matter be related to the efforts of the human who undertakes the creation or production of the material. It is an approach that is applicable to all copyright material, not just computer-generated works. For example, in the case of an artist who utilises traditional tools in the creation of a work, that artist is clearly the person who undertakes the creation of the work.

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 exact reproduction (that is, literal copying),

the current right of non-exact reproduction (that is, non-literal copying) and the current right of adaptation. The right of dissemination to the public includes activities within the current performance right, the current publication right, the broadly-based right of communication to the public proposed in the Digital Agenda Bill 1999, and the right of distribution which is provided in Art 6(1) of the WCT and Arts 8 and 12 of WPPT but is not as yet implemented in the Act.

Figure 4 (see p 61) 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 will nevertheless be within the exclusive rights of the copyright owner under the proposed model, so long as those activities are in nature a reproduction or a dissemination to the public of 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 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 Australia with the enactment of the current Act, as a result of the Spicer Committee adopting a recommendation by the Gregory Committee in the United Kingdom. The Gregory Committee acted in response to a request from the

provides that the author of a computer-generated work is “the person by whom the arrangements necessary for the creation of the work are undertaken”. Section 178 of that legislation defines a work to be “computer-generated” when “the work is generated by computer in circumstances such that there is no human author of the work”.

⁷⁴ Copyright Law Review Committee. *Computer Software Protection* (Office of Legal Information and Publishing, Canberra. ISBN 0 642 20830 1, 1995), para 13.03.

Publishers' Association, which sought protection for the effort that went into the then new printing techniques.⁷⁵ The Australian government more recently has decided that the new right of communication to the public, contained in the Digital Agenda Bill 1999, should not extend to published editions. Whilst no reason for this decision is given in the Explanatory Memorandum accompanying the Bill, it seems clear that the policy is that the scope of copyright protection for published editions should be confined to the situations which gave rise to its inclusion in the legislation in the first place, that is, to situations involving a facsimile copy in hardcopy print form.

In light of this policy, the proposed model does not extend to published editions any greater exclusive rights than are currently provided in the Australian copyright legislation. In particular, the proposed model provides, in relation to subject matter that is a published edition, only the exclusive right to make an exact reproduction (that is, literal copy) of the whole or a substantial part of it.

Application of the right of reproduction

Under the current Act, a major difference in the protection provided to Pt III works compared with Pt IV subject matter is the fact that Pt IV subject matter does not receive the exclusive rights of non-exact reproduction (that is, non-literal copying) and of adaptation. For Pt IV subject matter, the equivalent exclusive right is limited to exact reproduction (that is, literal copying) of the whole or a substantial part of the subject matter. This lower level of protection provided to Pt IV subject matter is justified by the fact that Pt IV subject matter does not need to satisfy the requirement of originality which applies to Pt III works.

Under the proposed approach, only the more limited right of exact reproduction (that is, 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 an exact reproduction (that is, 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-exact reproduction and an adaptation of the whole or a substantial part of the Creation. Under the proposed approach to categorisation of protected subject matter, artistic works and cinematograph 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 Australia 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 performance, publication, broadcasting, transmission to subscribers to a diffusion service, and rental 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.

Performance

The Act currently does not afford a right of performance to artistic works, broadcasts 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.⁷⁶ 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

⁷⁵ CLRC Simplification Report Part 2, para 7.147.

⁷⁶ 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, op cit n 23, p 453.

moral rights.⁷⁷ The Spicer Committee considered the issue, and recommended that the performance right should not subsist in artistic works.⁷⁸ In the CLRC Simplification Report Part 2, the CLRC noted that the Spicer Committee had previously rejected a performance right for artistic works, and stated that beyond the general arguments made for equality of treatment between artistic works and other works, no specific case was made for an exhibition right to be granted to artists.⁷⁹ In light of the fact that there seems to be a valid policy reason for not granting an exhibition right to artistic works, the proposed model expressly provides that the right of dissemination to the public does not include exhibition of an artistic work.⁸⁰

The conceptual equivalent of a performance right in relation to a broadcast is causing a broadcast to be seen and/or heard by the public. The majority of the CLRC considered that there are valid policy reasons for this approach, and could see no reason for a change in this respect.⁸¹ Accordingly, the proposed model makes specific provision to the effect that the right of dissemination to the public does not include causing a broadcast to be seen or heard in public.

Publication, distribution and communication

The current legislation provides a right of publication in relation to works, but not subject matter other than works.⁸² It might therefore be thought curious for the proposed model to apply the right of dissemination to the public to all subject matter under the current legislation other than published editions.

It must be noted, however, that any act with copyright material in tangible form which currently

comes within the exclusive right of publication would also come within the right of distribution set out in the WCT and the WPPT. It must also be noted that any act with copyright material in intangible form that is analogous to publication would also come within the exclusive right of communication to the public (including by making available) as set out in the WCT and the WPPT, and as provided in the Digital Agenda Bill 1999. That is to say, the act of publication of copyright material is merely a more limited instance of the general acts of distributing a tangible, or communicating an intangible, embodiment of the material to the public.

The right of distribution and the right of communication provided for in the WCT and the WPPT both apply to subject matter within Pt III of the Act,⁸³ to cinematograph films,⁸⁴ to sound recordings,⁸⁵ and to performances fixed in sound recordings⁸⁶ - that is, to all the categories of protected subject matter under the current legislation other than broadcasts and published editions. The right of communication provided for in the Digital Agenda Bill 1999 applies to all subject matter protected under the current legislation except published editions.⁸⁷ 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 generally consistent with the recent legislative developments internationally and in Australia.

It is the case, however, that the international conventions do not oblige Australia to provide the right of distribution to tangible embodiments of a broadcast. There would seem to be good policy reasons for not providing exclusive rights beyond those required under international obligations. Accordingly, under the proposed model, specific provision would be made to the effect that the right of dissemination does not include distribution of a tangible embodiment of subject matter that is a broadcast.

⁷⁷ Lahore, *Copyright and Designs* (looseleaf service, 1996), Vol 1, para 48,065.

⁷⁸ *Report of the Copyright Law Review Committee* (1959), para 490.

⁷⁹ CLRC Simplification Report Part 2, para 5.83.

⁸⁰ *Ibid.*

⁸¹ CLRC Simplification Report Part 2, para 5.84.

⁸² This right has been held by the High Court to be a right to put into public circulation a tangible embodiment of a work for the first time; it does not include any subsequent distribution: *Avel Pty Ltd v Multicoin Amusement Pty Ltd* (1991) 18 IPR 443. According to the High Court, it does not include any distribution beyond first putting into public circulation, because that interpretation would be inconsistent with the law which operated prior to the Act and would render superfluous s 38 of the Act which provides that sale or distribution is an infringement only if a knowledge requirement is satisfied.

⁸³ WCT, Art 6(1).

⁸⁴ WCT, Art 6(1).

⁸⁵ WPPT, Art 12.

⁸⁶ WPPT, Art 8.

⁸⁷ Items 35-37 and 81-83 of Sched 1, Copyright Amendment (Digital Agenda) Bill 1999. The government has yet to decide whether, and if so how, the right of distribution provided for in the WCT and the WPPT should apply under Australian copyright law.

Rental

Under the current legislation, an exclusive right to prevent rental applies in relation to embodiments of certain copyright material, namely a computer program, a sound recording, and a literary, dramatic or musical work reproduced in a sound recording. Article 11 of the TRIPs Agreement and Article 7 of the WCT both provide a right to authorise commercial rental to the public of the originals or copies of a cinematograph film. However, the obligation to provide for such a right is conditional upon commercial rental having led to the widespread copying of films such as to materially impair the exclusive right of reproduction.⁸⁸ The majority of the CLRC saw no reason to extend the right of rental beyond the circumstances in which it currently applies.⁸⁹ A right of rental can continue to apply in its current form under the proposed approach, by the making of express provision to that effect. For example, the legislation implementing the proposed approach would state that the right of dissemination does not include rental of copyright material, except only where the copyright material is a computer program, a sound recording, or a literary, dramatic or musical work reproduced in a sound recording.

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 Act currently provides little in the way of moral rights to the authors of works,⁹⁰ and Australian copyright law arguably is not in compliance with the obligations set forth in Art 6bis of the Berne Convention.⁹¹ The issue of whether,

and if so how, Australian law should provide for the moral rights of authors has been the subject of a number of deliberations in the past decade.⁹² As a result of those deliberations, the government in 1997 introduced amending legislation to provide a right of attribution and a right of integrity to the authors of works, and to the directors of cinematograph films. The legislation was referred to the Senate Legal and Constitutional Legislation Committee, which in 1998 by majority recommended certain changes to the proposed amendments.⁹³ As at September 1999, amended legislation had not been introduced into Parliament.

The CLRC, in Part 2 of its Simplification Report, recommended that the moral rights of attribution and integrity, as provided in the Berne Convention and proposed in the Australian 1997 amending legislation, be part of the rights granted under the simplified model. In particular, the Committee proposed that the rights of attribution and integrity be granted only in relation to subject matter that is a Creation. This approach clearly is consistent with Australia's obligations under the Berne Convention and with the policy decision of the Australian government reflected in the proposed 1997 amendments.

Conclusions

A number of commentators have described the approach to simplification of the copyright legislation elaborated in this article as "radical".⁹⁴

⁸⁸ For example, Art 11 of the TRIPs Agreement provides:

"A Member shall be excepted from this obligation in respect of cinematographic works unless such rental has led to widespread copying of such works which is materially impairing the exclusive right of reproduction conferred in that Member on authors and their successors in title."

A rental right currently does not subsist in cinematograph films in, among other countries, Australia and Canada.

⁸⁹ CLRC Simplification Report Part 2, para 5.89.

⁹⁰ Part XIA of the Act merely imposes statutory duties not to falsely attribute the authorship of a work, of an altered work or of a reproduction of an artistic work.

⁹¹ Article 6bis of the Berne Convention provides:

"Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory treatment in relation to, the said work, which would be prejudicial to his honour or reputation."

⁹² See Copyright Law Review Committee, *Report on Moral Rights* (January 1988) (http://www.law.gov.au/clrc/gen_info/clrc/moral/index.html); Discussion Paper, "Proposed Moral Rights Legislation for Copyright Creators" (Office of Legal Information and Publishing, Attorney-General's Legal Practice, ISBN 0 642 208107, June 1994).

⁹³ The main recommendations related to the extension of moral rights to the screen writers of a film script, and the ability of a holder of moral rights to waive them by contractual provision.

⁹⁴ For example, Mr John McPhail, speaking at a Copyright Society of Australia seminar in Sydney on 20 April 1999; Professor Sam Ricketson, speaking at an Intellectual Property Society of Australian and New Zealand seminar in Melbourne on 22 April 1999; and Professor Jim Lahore, speaking at a Copyright Society of Australia seminar in Melbourne on 29 April 1999.

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 and in the legislation of other countries.

This fact can be seen particularly clearly in relation to the proposals to simplify the exclusive rights of the copyright owner. The proposal in relation to moral rights merely adopts the simple two-right approach of the Berne Convention, an approach already accepted in principle by the Australian government. The proposal to simplify the economic rights of the copyright owner needs to be read in the context of the adoption in December 1996 of the WCT and the WPPT. These two treaties, containing as they do a broadly and inclusive defined right of communication to the public, heralded an international approach to copyright reform based on simplification and technological neutrality. This right of communication to the public 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.

The approach to simplification of exclusive economic rights described in this article reflects the approach adopted in the WCT and the WPPT, 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.

Whilst 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 amongst all Berne Union countries. Furthermore, as the use of the phrase “manner of new manufacture” in the Australian 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 Australian 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.”⁹⁵

Less than half a decade later, it is submitted that such consolidation of subject matter categories and

⁹⁵ *Intellectual Property and the National Information Infrastructure*, the Report of the Working Group on Intellectual Property Rights (Office of Legislative and International Affairs, USPTO, ISBN 0 9648716 0 1, 1995), p 45.

corresponding harmonisation of exclusive rights is indeed the appropriate means of ensuring that Australian copyright law can continue to provide

adequate copyright protection for deserving subject matter in the digital age.

Exclusive Rights										
Protected Subject Matter		Copy	Repro.	Publish	Perform	Comm.	Adapt	Rent	Dist.	Moral
	Lit. work	Y	Y	Y	Y	Y	Y	Y*	Y*	Y*
	Dram. work	Y	Y	Y	Y	Y	Y	Y*	Y*	Y*
	Mus. work	Y	Y	Y	Y	Y	Y	Y*	Y*	Y*
	Art. work	Y	Y	Y	N	Y	N	N	Y*	Y*
	Sound Rec.	Y	N	Y*	Y	Y	N	Y	Y*	N
	Cin. Film	Y	N	Y*	Y	Y	N	N	Y*	Y*
	Broad -cast	Y	N	N	N	Y	N	N	N	N
	Pub. Edit.	Y	N	N	N	N	N	N	N	N
	Perf.	Y	N	Y*	N	Y*	N	N	Y*	Y*

Figure 1 – Current structure of the *Copyright Act 1968*

Protected Subject Matters	Exclusive Rights			
	Reproduce	Disseminate	Attribute	Integrity
	Creation	Y	Y*	Y
Production	Y*	Y*	N	N

Figure 2 – Proposed model for a simplified Copyright Act

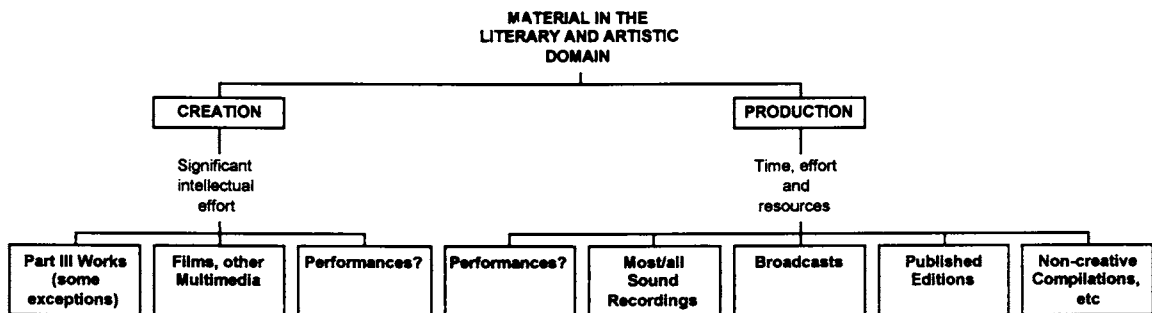


Figure 3 – Relationship between the current categories of protected subject matter and the categories under the proposed model

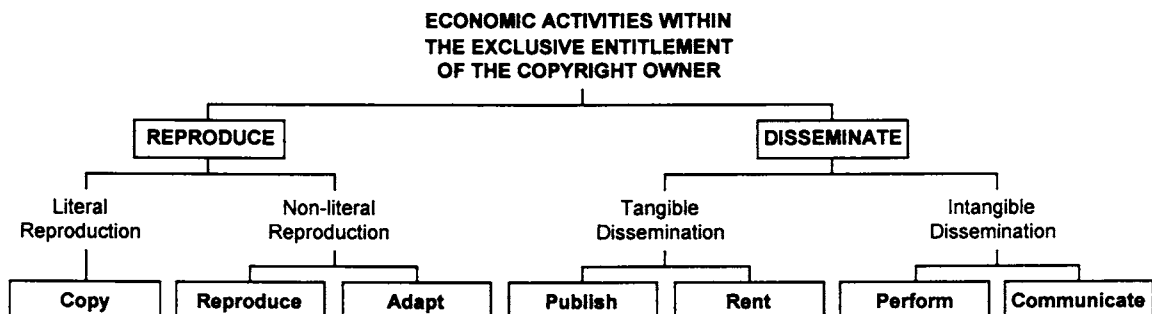


Figure 4 – Relationship between the current categories of exclusive economic rights and the categories under the proposed model

Exclusive Economic Rights

		REPRODUCE			DISSEMINATE			
		Copy	Repro	Adapt	Perf	Publ	Rent	Comm
Protected Subject Matters	CREATION							
	Films, other multimedia	Y	Y	Y	Y	Y	N	Y
	Part III works (some exceptions)	Y	Y	Y	Y*	Y	Y*	Y
	?							
	Performances	?	?	?	?	?	?	?
PRODUCTION	Most/all sound recordings	Y	N	N	Y	Y	Y*	Y
	Broadcasts	Y	N	N	N	Y	N	Y
	Published editions	Y	N	N	N	N	N	N
	Non-creative compilations	Y	N	N	N	Y	N	Y

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