

Abstract

It is often claimed that the UK has a ‘closed list’ of works protected by copyright. While the Copyright Designs and Patents Act, 1988 does categorise works to determine their eligibility for copyright protection, does the very existence of categories make the list closed? Does it not depend on how open-ended each category is, before a conclusion on its exhaustive nature can be drawn? This article examines these questions taking a closer look at the textual aspects of the CDPA and explores using interpretive techniques what it means to use the inherent flexibilities within the CDPA to their fullest extent.

Does UK Really Have a ‘Closed’ List of Works Protected by Copyright?

- Dr Poorna Mysoor*

It is often claimed that the UK has a ‘closed list’ of works protected by copyright.¹ It is said that if a work cannot be brought squarely within one or the other category of works stated in the legislation, then protection is denied. While the Copyright Designs and Patents Act, 1988 (CDPA) does categorise works to determine their eligibility for copyright protection, does the very existence of categories make the list closed? Does it not depend on how open-ended each category is, before a conclusion on its exhaustive nature can be drawn? This article examines these questions taking a closer look at the textual aspects of the CDPA often ignored by the judges and demonstrates using interpretive techniques as to what it means to use the inherent flexibilities of the CDPA to their fullest extent within the statutory framework. In doing so, this article analyses some of the landmark cases which have engaged with the textual aspects of defining a work. Interpreted this way, and in the light of recent developments, this article queries whether the CDPA falls short of being able to protect works that are perhaps more readily protected by the ‘open’ regimes.

Before we proceed, the following clarification as to the scope of this article needs to be conveyed for good order: the focus of this piece is to ascertain the definitional scope of different kinds of works. Therefore, the requirements that need to be satisfied in addition to satisfying the definition are not discussed in detail. These include firstly, originality; it is acknowledged of course, that even where arguments for broader definition of authorial works is proposed, these works will only be protected if they are original. The second independent requirement is what is commonly called ‘fixation’. Though not a stated requirement in the CDPA, the question in relation to an artistic work in most cases is the need for permanence of the expression. If there were any doubts, it is now clear from the CJEU’s ruling that the expression does not need to be permanent.² The third are a whole host of requirements that go into the subject matter of protection other than the two above.³ For example, the need for artistic intent in artistic works. To the extent that these requirements are not borne out by the text of the CDPA, these requirement is not discussed. Thus, the focus of this article is not broadly all that goes into the subject matter of protection of copyright; but rather the textual definition of works eligible for copyright protection.

The very mention of a definition of a work might convey rigidity, which in itself makes some scholars think of a closed-list. However, the effort in this article is to find definition of works that are balanced between certainty and flexibility, to the extent possible. Certainty because the chief purpose of copyright subsisting in a work is to protect such work – meaning protecting it from infringement.

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¹ Some examples include William Cornish, David Llewelyn and Tanya Aplin, *Intellectual Property* (8th edn, Sweet & Maxwell, 2013) p. 435; Enrico Banadio and Nicola Lucchi, ‘Introduction’ in Enrico Banadio and Nicola Lucchi (eds), *Non-Conventional Copyright* (Edward Elgar Publishing, 2018) p. 3; Tanya Aplin, ‘Subject Matter’ in Estelle Derclaye (ed), *Research Handbook on the Future of EU Copyright* (Edward Elgar, 2009) p. 54-55.

² Case C-310/17 *Levola Hengelo BV v Smilde Foods BV* ECLI:EU:C:2018:899 at para 40. In *Abraham Moon & Sons v Thornber* [2012] FSR 17, at [105] Birss J had held obiter that ephemerality of artistic works should not matter.

³ For an account of what goes into the subject matter of copyright beyond originality and fixation, see Justine Pila, *The Subject Matter of Intellectual Property* (1st Edn, OUP, 2017) p. 161-67.

Thus, a work should be defined in such a way that it should be possible to say when an infringement has occurred. There is no point finding that copyright subsists in a work that cannot be protected against infringement. Flexibility because copyright is meant to serve creative industries broadly defined, which by nature are given to cross boundaries. Rigid categorisation could be counter-productive leaving ‘unjustifiable gaps in protection.’⁴

***Harpbond* and its Legacy**

A good starting point for discussion on defining a work is *Merchandising Corporation v Harpbond*,⁵ the case where the facial make-up of a pop star was being considered for copyright protection. The case is significant for the astonishing reasoning of the Court of Appeal that the human face was not the kind of surface on which a painting could exist. This was an application for interim injunction and the trial judge, Warren J had to decide whether there was an arguable case. His hesitation to consider copyright protection in make-up in the absence of any case law supporting it, is evident when he said: ‘It seems to me that his (the counsel for the plaintiffs’) case on this point raises a question of an entirely novel nature, which, if it is to be established at all, deserves consideration by a very high court indeed.’⁶ However, even when the matter was appealed, sitting in a higher court Lawton LJ’s reaction was not much different in being struck by the novelty of the subject matter.⁷ It is important to note at this stage that this case was decided under the previous law, i.e., Copyright Act, 1956 (the 1956 Act), where s 3(1) stated:

In this Act ‘artistic work’ *means* a work of any of the following descriptions, that is to say, -
(a) the following irrespective of artistic quality, *namely*, paintings, sculptures, drawings, engravings and photographs...⁸

The words in italics convey clearly that the meaning and the manifestations that the artistic works could take under the 1956 Act were exhaustively defined. This is an example of an exhaustive list which gives no room for the judges to expand by inserting a similar kind of work. Furthermore, every other item in the list (sculptures, drawings, engravings and photographs) was defined under s 48 of the 1956 Act except painting. This does not in itself excuse the restrictive definition of painting adopted by Lawton LJ that ‘a painting must be on a surface of some kind’ and that ‘painting is not an idea: it is an object.’⁹ Many scholars have written about how Lawton LJ confuses the intangible property that copyright protects in a painting and the tangible property that painting itself is.¹⁰ But an important and a more relevant question is what if this case was to be decided under the CDPA?

The CDPA, similar to the 1956 Act, begins under s 4(1) by stating ‘In this Part ‘artistic work’ *means...*’ But where the CDPA parts ways with the 1956 Act is by introducing a new term ‘graphic work’ under s 4(1)(a), listing it together with ‘photograph, sculpture or collage, irrespective of artistic

⁴ Andrew Christie, ‘A proposal for simplifying United Kingdom copyright law’ [2001] EIPR 26, 28.

⁵ [1983] FSR 32.

⁶ [1983] FSR 32, 41.

⁷ [1983] FSR 32, 42.

⁸ Emphasis supplied.

⁹ [1983] FSR 32, 46.

¹⁰ See for example, Mary Vitoria, et al, *Laddie, Prescott and Vitoria The Modern Law of Copyright and Designs* (4th edn, vol 1, LexisNexis, 2011) para 4.21. In addition, in *Abraham Moon & Sons Ltd v Thornber* [2013] FSR 17 at [106], where Birss J also cautions against mistaking the art for the medium in which it is expressed.

quality.’ The more useful part of the definition is in s 4(2), where it says “‘graphic work’ *includes* any painting, drawing, diagram, map, chart or plan...” It is evident that ‘graphic work’ is not defined in any technical sense, but illustrations of what may go into a work of such description are enumerated. How might one use this to the advantage of the concerned artist?

‘Graphic Works’ and their Residual Quality

Let us begin with the plain reading of the words ‘graphic work includes any painting, ...’ under s 4(2)(a). It is a well settled rule of statutory interpretation that when a definition uses the word ‘includes’, it is an expansive definition.¹¹ Therefore, the word ‘includes’ opens up possibilities for the inclusion of those that do not necessarily fit within the stated illustrations. If any assurance was needed that the law makers did not use the word ‘included’ inadvertently, in the debates of the peers before the enactment of the CDPA, Lord Howie of Troon had raised the point that artistic works are defined using the word ‘means’, and graphic work is defined by using the word ‘includes’, and had sought to understand the difference.¹² Lord Beaverbrook responded by saying that ‘the word “means” is an exclusive definition which covers everything within it. “Includes” is a non-exclusive definition and the word in question has its natural meaning but includes other things.’¹³ Lord Beaverbrook reconfirmed the use of words ‘means’ in some provisions and ‘includes’ in some others again in subsequent discussions.¹⁴ Therefore, from the plain reading of s 4(2)(a), one should be able to argue that a graphic work not only includes paintings, but also those that are similar to paintings, but not quite paintings in the traditional sense. Face painting is similar to a painting and should be included within graphic works. By the same token, drawings that are not drawings on paper, but on the human body, such as tattoos, should also be included within graphic works.

The more interesting question is how much more expansively one should be able to read the inclusive definition of graphic works under s 4(2)(a). One might put forward the principle of *ejusdem generis*, which states that where general words follow an enumeration of things falling into one genus, the construction of the general word is restricted to things of that genus, unless the context requires otherwise.¹⁵ This principle may be applicable more appropriately to s 4(2)(b) where the general words ‘or similar work’ follow a genus of things such as engravings, etchings, lithographs and woodcuts, and therefore, the words ‘or similar work’ should be restricted by the kind of things that the genus enumerates. This could mean that the works included under s 4(2)(b) should have material cut or scraped off a surface to create patterns.¹⁶ But s 4(2)(a) does not have these general words such as ‘or similar work’, that follow the genus made up of painting, drawing, map, chart or plan. S 4(2)(a) is simply an inclusive definition with an enumeration of things. Therefore, the things that can be included within s 4(2)(a) do not have to be of the same genus as paintings, drawings, maps, charts or plans.

The words ‘graphic work includes’ can be given potentially a broad interpretation so long as it fits in with the legislative intent manifest in the express words of the statute themselves.¹⁷ The most

¹¹ John Bell and George Engle, *Cross Statutory Interpretation* (3rd edn, Butterworths, 1995) 119-120; F R A Bennion, *Bennion on Statutory Interpretation* (5th edn, Lexis Nexis, 2008) p. 573.

¹² HL Deb 30 November 1987, vol 490, Col 854.

¹³ HL Deb 30 November 1987, vol 490, Col 854.

¹⁴ HL Deb 3 December 1987, vol 490, Cols 1158 and 1159.

¹⁵ Cross (n 11) p. 135.

¹⁶ See generally, *Hi-Tech Autoparts Ltd v Towergate Two Ltd* [2002] FSR 255

¹⁷ Bennion (n 11) p. 469, 863-64. Cross (n 11) p. 26.

obvious starting point is the broad category of ‘graphic work’. The dictionary meaning of the word ‘graphic’ is ‘relating to visual art, especially involving drawing, engraving, or lettering’.¹⁸ But the statute permits more than drawings, engravings and letterings to be included within graphic works due to the express mention of paintings, maps, charts and plans on one hand and etchings, lithograph and woodcut on the other. Therefore, one must consider the ordinary meaning of the word ‘graphic’ which is unparticularised in relation any specific form such as drawings, engravings etc. At its core, the resulting meaning conveys the significance of the visual. Accordingly, it should be possible to argue that it includes art that has visual significance (but regardless of its artistic quality, as the statute requires). This interpretation has been accepted at the High Court level.¹⁹ This is still a very broad definition. Even performing arts like dance have visual significance. Of course, it cannot be suggested that graphic works include all of these. While it is easy to say this depends on the facts presented for interpretation, a more fruitful exercise is to ascertain whether and the extent to which graphic works include works that (a) are three-dimensional; and (b) incorporate movement. To answer these questions, one must consider the interpretation of definitions not only of artistic works, but also of other works and the relevant case law.

Since the ordinary plain reading of the statute only takes us this far, to go further one may adopt purposive interpretation as the next tool²⁰ – what was the object and purpose of including the term graphic work and in giving it an inclusive definition? A good place to start looking for the purpose of a legislation is its long title.²¹ The long title of the CDPA states: ‘An Act to restate the law of copyright, with amendments; ...’ If the law of copyright is taken to include the 1956 Act and the case law thus far, the objective was not simply to restate this, but to go beyond. As regards artistic works, the abandonment of an exhaustive definition in the 1956 Act and the introduction of a new category that did not exist before, namely ‘graphic work’ indicates that the CDPA’s purpose was to expand the definition of artistic works. Further, giving graphic work an inclusive definition shows that the legislative purpose was to recognise the need for the inclusion of newer subject matter not specifically stated in the statute.

A further linguistic tool of interpretation that would be useful here is the general principle of *noscitur a sociis*, which simply means a thing is recognised by its associates.²² The principle states that a word derives its meaning from the surrounding context.²³ This can also be viewed as an iteration of contextual interpretation, where the context can be internal or external.²⁴ From the way the legislature separated sculpture and photograph under the CDPA, and continued to maintain the categories of works of architecture and of artistic craftsmanship, one can discern an acknowledgment that these are

¹⁸ Online Oxford English Dictionary, <https://en.oxforddictionaries.com/definition/graphic> accessed 7 March 2019.

¹⁹ *Abraham Moon and Sons Ltd v Thornber* [2013] FSR 17 at [102]-[103].

²⁰ Cross (n 11) p.31; Bennion (n 11) p 943. See also *A-G’s Reference (No 5 of 2002)* [2004] UKHL 40; [2004] 4 All E R 901 at [31], where Lord Steyn states that ‘No explanation for resorting to a purposive construction is necessary. One can confidently assume that Parliament intends its legislation to be interpreted ...in a meaningful and purposeful way giving effect to the basic objectives of the legislation’.

²¹ *Black-Clawson International Ltd v Paperwerke Waldhof-Aschaffenberg AG* [1975] AC 591, where Lord Simon says that the long title is ‘the plainest of all guides to the general objectives of a statute.’ Ibid at 647. See also Bennion (n 11) pp 730-31, 959 and Cross (n 11) p. 125.

²² Bennion (n 11) pp 1125-25; Cross (n 11) p. 138.

²³ *A-G v Prince Ernest Augustus of Hanover* [1957] AC 436, per Viscount Simonds at 461 where he says ‘... words and particularly general words, cannot be read in isolation; their colour and their content are derived from the context’.

²⁴ Cross (n 11) p. 50.

categories of their own amenable to interpretation in their own way. This is further strengthened by separate efforts under s 4(2), CDPA to define sculpture and photograph, and word buildings in relation to works of architecture. As regards works of artistic craftsmanship, under the 1956 Act, s 3(1)(c) conveyed a sense that a work of artistic craftsmanship could only be brought under this section if it did not fall within either of s 3(1)(a) or (b). This was amended in the CDPA, giving works of artistic craftsmanship their own independent existence. As to the items that found their way into the definition of graphic work, in the 1956 Act, drawing and engraving both had an inclusive definition under s 48(1), where drawing included any diagram, map, chart or plan, and engraving included any etching, lithograph, woodcut, print or similar work, not being a photograph. In the CDPA, the new term ‘graphic work’ absorbed all these works scattered among the definitions of drawings and etchings, also incorporating drawing and etching as such. Further, ‘graphic work’ also absorbed painting within its purview, which had been separately mentioned without a definition under the 1956 Act, finishing up with making the definition of graphic work inclusive. Thus, the inclusive definition of graphic works indicates a ‘sweeping up’ of all that remains unclassified under other categories. For these reasons it can be strongly argued that the legislature intended for graphic works to have a residual character – meaning all that does not fit within any of the other categories of artistic works can be brought under graphic works. Accordingly, in addition to the two-dimensional objects that graphic works include, the three-dimensional objects not included in sculptures, works of architecture or of artistic craftsmanship can be included within graphic works.

It is worth noting that ‘graphic work’ does not find a mention even in Berne Convention (BC). In relation to the inclusive definition of artistic works within Art 2(1), BC, scholars argue that there is no reason why drawings or paintings should only take a two-dimensional form and not three-dimensional form, although they do acknowledge that this is left to national legislature to fashion within their laws.²⁵ It does indicate however, that the intention was to incorporate three dimensional artistic works not strictly within the terms described in art 2(1), BC. The items enumerated in s 4(2) are taken from the inclusive list of items under Art 2(1) of the BC, with an intention that the inclusiveness of the Art 2(1) of the BC be reflected in s 4(2).

It should not be forgotten that s 1(1), CDPA states that copyright is a property right, and therefore, certainty of the definition of a work is important.²⁶ Categorisation and the ability to recognise newer subject matter are not mutually incompatible, and this is what the CDPA has tried to achieve. It names the broad categories for certainty, but elaborates them with an inclusive definition for flexibility. Any fear one may have in graphic work being a residual category potentially opening up to an uncontrollable list could be allayed by the argument that if a subject matter is inherently incapable of being infringed due to its protean or unstable nature, then such subject matter will not be included within the definition of graphic work. In this sense, the underlying property narrative serves to ring fence the definition of graphic works.

Three-dimensional artistic works - *Creation Records* and beyond

²⁵ Sam Ricketson and Jane Ginsburg, *International copyright and neighbouring rights: the Berne Convention and beyond* (Vol 1, 2nd Edn, OUP, 2006) para [8.43].

²⁶ There are scholars who are uncomfortable with the emphasis of property in copyright, especially for art. See Anne Baron, ‘Copyright law and the claims of art’ [2002] IPQ 368. But one cannot deny what the statute says and how copyright as a statutory right displays characteristics of property.

The next case which is often referred to by scholars to argue that the UK has a closed list of subject matter is *Creation Records Limited v News Group Newspapers Limited*.²⁷ It is unfortunate that although this case was decided under the CDPA, the flexibilities in the provisions of the CDPA were not utilised. The main issue was whether the preparatory set up for a photograph on its own can be regarded a work for copyright protection. Lloyd J considered various possibilities within the existing categories and held that since ‘no element of the composition was carved, modelled or made in any of the other ways in which sculpture is made’, it is not a sculpture.²⁸ It appears from the judgment that the counsel for the defendant presented arguments as to how newer subject matter is included in the CDPA and that the meaning of sculpture has evolved to include forms like installation art.²⁹ However, the Lloyd J did not want to take heed of any such arguments. It may well be that since there were human participants in the preparatory set up, one can see why there may have been hesitation to regard human body itself as part of a sculpture, given the restrictive meaning adopted for the process that goes into making a sculpture. For Lloyd J, ‘the process of assembling these disparate objects together with the members of the group’ could not amount to sculpture.

Sculpture has an inclusive definition under s 4(2), if it can be called a definition at all. It ‘includes a cast or model made for purposes of sculpture.’ This does not mean that sculpture must be defined as only those that can be made from a cast or a mould. The inclusive definition should open it up to other possibilities. Lloyd J does recognise that it can also include carving, which is not expressly stated in the definition.³⁰ If there was originality in the selection and arrangement of different objects, as is the case normally with installation art, there is no reason why the process of selection and arrangement itself cannot make it a sculpture. Since the work lies in the selection and arrangement, if a potential defendant replaced the objects or human beings of different proportions or features, substantial similarity could be assessed by the extent to which the original expression of the plaintiff’s selection and arrangement is taken.³¹ Thus, a sculpture can be a collection of ordinary objects.

As far as collage was concerned, although Lloyd J was presented with two definitions, one requiring an adhesive and another requiring only a collection of unrelated things, he chose the more restrictive version.³² Collage itself is a new item included in the CDPA, which has no definition within the statute, much less, an inclusive definition. As such, Lloyd J’s conservatism in adopting a traditionalist definition is explicable, if unfortunate. In collage, more so than in sculpture, the originality of the work is assessed in relation to selection and arrangement of disparate objects. The use of the adhesive should not have been central to this work. The general tenor of an expanded definition of artistic works in the CDPA in comparison with the 1956 Act could have prompted Lloyd J to adopt a more liberal definition of collage. As stated above, a work defined along the lines of selection and arrangement can stand the test of substantial similarity, thus not endangering the ‘property’ nature of a work and in particular, the certainty of the subject matter.

²⁷ [1997] EMLR 444.

²⁸ [1997] EMLR 444, 449. Reliance was placed on *Breville Europe Plc v Thorn EMI Domestic Appliance Limited* [1995] FSR 77, 94, which held sculpture to mean art made by ‘chiselling stone, carving wood, modelling clay, casting metal, or similar processes...’

²⁹ [1997] EMLR 444, 449-50.

³⁰ [1997] EMLR 444, 449.

³¹ *Designers Guild Ltd v Russell Williams (Textiles) Ltd* [2000] FSR 11, 113.

³² [1997] EMLR 444, 449.

It is worth revisiting here the consequences of interpreting ‘graphic works’ as having a residual character. Scholars have suggested that the preparatory set-up in *Creation Records* qualifies as a tableau vivant. How does one go about reading a tableau vivant into artistic works generally? If it is accepted that graphic works have residual character in that they include three-dimensional works not included in sculptures, works of architecture or of artistic craftsmanship, then it should be possible to argue that graphic works include a tableau vivant. If human participants make judges shy away from defining a work like in *Creation Records* as either sculpture or collage, then a tableau vivant should be able to capture it, and the inclusive definition of graphic works in turn should extend to it.

In the celebrated case of *Abraham Moon*, Birss J held that the fabric ticket stamps which only had words and numbers detailing the way a fabric is to be manufactured, are graphic works. His reasoning was that these ticket stamps had details sufficient for the experts in the field to visualise the end product, namely fabric, and therefore the ticket stamps themselves had visual significance.³³ Visual significance, therefore, can take any form, so long as it creates a clear visual image among the persons relevant to the infringement claim. Although Birss J did not attribute his interpretation to the residuality of graphic works, the flexibilities within the definition of graphic work must have prompted this interpretation.

Abraham Moon can be seen as providing the right kind of traction for expanding graphic work to include entirely new subject matter. In this vein, it has been suggested that ‘culinary art’ – presentation of food in a visually significant manner (without reference to its olfactory or taste significance) can be brought within the definition of graphic works.³⁴ In this regard, one scholar has presented arguments to fit culinary art within graphic work, painting, sculpture and work of artistic craftsmanship.³⁵ Although he recognises the open nature of the definition of graphic works, his arguments could be further strengthened by asserting the residual nature of graphic works.

Works of action – *Norowzian* and beyond

A question arises – if an artistic work has an element of action in it, such as a fireworks show or a laser show, should it be classified as an artistic work or a dramatic work? In other words, does the residual definition of graphic work encapsulate works of movement too? Or are all works of action necessarily regarded dramatic works? One may note that dramatic works are also inclusively defined. Lord Beaverbrook during the House of Lords debate does say that dramatic work is so defined because it is clear that it also includes play and opera, but it may not be clear that it also includes dance and mime.³⁶ Unlike artistic works, the court’s interpretation of dramatic work recognises this inclusive definition. In *Norowzian v Arks Ltd (No 2)*, Nourse LJ specifically recognised that the definition of dramatic work, unlike literary or musical work under s 3(1), CDPA is ‘at large’.³⁷ This led him to give a broad definition of dramatic work as ‘a work of action, with or without words or music, which is capable of being performed before an audience.’³⁸ As such, he held that a film itself can be a dramatic

³³ *Abraham Moon & Sons v Thornber* [2012] FSR 17 at [102]-[103].

³⁴ Neil Yap, ‘The proof is in the plating: copyright protection of culinary arts and reform for the categories of authorial works’ [2017] EIPR 226,

³⁵ *ibid* pp 229-32.

³⁶ HL Deb 3 December 1987, vol 490, Cols 1158 and 1159.

³⁷ [2000] FSR 363, 366.

³⁸ [2000] FSR 363, 366-67

work if it is a work of action, as it can be performed before an audience.³⁹ Defined thus, a dramatic work may or may not have human beings acting to produce action, as Nourse LJ does state obiter that a cartoon film can be a dramatic work.⁴⁰ Thus, a dramatic work does not have to be capable of being performed physically by the actors themselves in front of an audience. The performance can be using mechanical means such as a projector, for example.

However, even with the residual nature of the definition of graphic works, it might be difficult to argue that works that did not fit into dramatic works can fit into graphic works. This is especially the case when dramatic works are themselves subject to an inclusive and expansive definition. Since both fireworks show and laser show involve action and can be performed before an audience, these are better classified as dramatic works. It does however, mean that these shows will have to be recorded, in writing or otherwise, for copyright to subsist, as per s 3(2), CDPA, whereas if they had been classified as artistic works, the fireworks themselves or the laser patterns themselves would have been artistic works. If fireworks or laser shows are to have a meaningful copyright protection and be able to approach a court for infringement, then these are better of being classified as dramatic works.

Flexibilities within works of architecture

A work of architecture is also subsumed within artistic works under s 4(1)(b), and is defined as ‘a building or a model for a building’. But the flexibility arises within the inclusive definition of a building under s 4(2), which ‘includes any fixed structure, and a part of building or fixed structure.’ One may be able to argue that a landscape garden itself is a fixed structure if such structure is not defined by the natural shape of growth of the plants and trees within it, but by something that is more defined in shape, such as a distinct network of paved paths. It may be possible to also include the trees if the pruned shape of the tree is an element of the landscape design, to the extent that trees as living beings must be fixed to the ground (subject, of course, to the originality requirement). A fountain or a flowing water feature can be a fixed structure, including the aspects of the structure that determine the manner of flow of water (excluding the flowing water itself and the functional elements such as the pipes). Since a building also includes a part of fixed structure, it is possible that the work called ‘The Pont Neuf Wrapped’ by Christo and Jeanne-Claude,⁴¹ made up of silky fabric covering a bridge in Paris, could also be protected as a work of architecture, even though the bridge itself is in public domain.⁴²

New Subject Matter beyond Existing Categories?

Even if we can point to the categories themselves being open-ended, one might argue that to the extent that the CDPA protects predominantly, works that are either visual or aural (a noted exception being the object code of a software, which despite being a literary work, may neither be visible nor be heard), the categories of work is exhaustive. In other words, to the extent that the CDPA has a list or categories at all is itself sufficient to argue that it is closed, because it prevents works that engage other sensory perceptions such as smell, taste or touch from gaining protection.⁴³ However, the CJEU has

³⁹ Not all scholars approve of such broad definition of dramatic works. See Aplin (n 1) p. 71.

⁴⁰ [2000] FSR 363, 367.

⁴¹ See <https://christojeanneclaude.net/projects/the-pont-neuf-wrapped?view=info> for a description of the work. Accessed 13 March 2019.

⁴² See Aplin (n 1) p. 58 for a contrarian view.

⁴³ Lionel Bently and Brad Sherman, *Intellectual Property* (5th edn, OUP, 2018).

ruled recently against granting protection for the taste of cheese.⁴⁴ One of the most important aspects of the decision is that the sense of taste cannot be objectively ascertained, and we currently lack technology to be able to do this.⁴⁵ A similar logic should apply to the sense of smell, making it not eligible subject matter for copyright protection. As such, there will be an issue of compatibility with EU law more with some jurisdictions which do recognise copyright in smell,⁴⁶ than with the CDPA which inherently is incapable of protecting such subject matter. No jurisdiction within the EU thus far has considered the possibility of the sense of touch being the subject matter of copyright protection. Once these subject matters are excluded anyway at the EU level, leaving visual and aural works, the existence of categorisation in the statutory framework for subject matter of protection under the CDPA itself can no longer be argued to be exhaustive.

Conclusion

In conclusion, it is accepted that the UK has a system of categories for protection of different subject matter. However, this does not in itself mean that these categories are exhaustive. As the foregoing arguments show, there are many categories that are open-ended, bringing in possibilities of newer works being protected. One could have said that the existing categories within the CDPA in themselves are an exhaustive group since these exclude the olfactory, taste or tactile subject matter to be brought within the protectable subject matter. However, now that the CJEU has ruled that taste cannot be a subject matter of copyright protection, it does not make the UK categories any more exhaustive than other EU member states.

⁴⁴ Case C-310/17 *Levola Hengelo BV v Smilde Foods BV* ECLI:EU:C:2018:899.

⁴⁵ Case C-310/17 *Levola Hengelo BV v Smilde Foods BV* ECLI:EU:C:2018:899 at para [42].

⁴⁶ Some jurisdictions recognise fragrances as protectable, such as the Netherlands in *Kecofa v Lancome* [2006] ECDR 26 (Hoge Raad), and conflicting views expressed between *Bsiri-Barbur v Haarmann & Reimer* [2006] ECDR 28 (French Cour de Cassation) and *L'Oreal SA v Bellure* [2006] ECDR 16 (Cour d'appel de Paris).