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Runway models, runway performers? Unravelling the *Ashby* jurisprudence under UK law

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This article: At a time when the working conditions of fashion models are receiving the attention of policy-makers and key industry players in the UK and beyond, this article proposes to revalorise models' rights to legal protection using intellectual property (IP) law. More specifically, it argues that it is possible to extend performers' rights to runway models by taking advantage of flexibilities in current legislation and case law. This analysis goes back to the basics of intellectual property law by re-examining the definitions of protected performances under national and international law. Noting the fact that both sets of definitions, national and international, define protected performances as those which are the interpretations of a 'work', this article considers whether runway models can be seen as performers, building on the recognition of fashions shows as 'copyright works' in *Ashby* (2013). As a result, *Ashby* has opened new avenues for the application of performers' rights to runway modelling due to the connection between the subsistence of a copyright 'work' and the subject matter covered by performers' rights.

1. Introduction: runway models, on the centre stage yet invisible

Fashion is a thriving multi-billion pound industry in the UK.¹ As such, national policy-makers have emphasised the need to ensure adequate protection and remuneration of the industry's hidden hands, *i.e.* low-profile creative professionals, to maintain the competitiveness of the sector on the eve of Brexit.² Whilst it may seem contradictory to liken runway models to the industry's hidden hands given the intrinsic visibility of their profession, their precarious position has long been acknowledged on many levels, not only economic. Sector-wide changes to address this situation are notable as principles of best practice ensuring decent working conditions are being endorsed,³ but the question of models' remuneration is a central issue that is yet to be addressed.

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¹ British Fashion Council, *The Economic Value of Fashion* (2015); British Fashion Council, 'London Fashion Week – Facts and Figures' (13 September 2017) <<http://www.britishfashioncouncil.com/pressreleases/London-Fashion-Week-September-2017-Facts-and-Figures>> accessed 30 March 2018, citing Fashion United, *Statistics Report* (2017).

² British Fashion Council, *Positive Fashion Report* (2014); British Fashion Council, 'Government Relations' (undated) <<http://www.britishfashioncouncil.co.uk/About/Government-Relations>> accessed 29 April 2018.

³ See, Equity and others, LFW Model Program (2010); Equity, 'Ten point Code of Conduct for the Treatment of Models during Photo Shoots in Studios and on Location' (12 November 2012) <<https://www.equity.org.uk/documents/ten-point-code-of-conduct/>> accessed 29 April 2018 ; British Fashion Council, 'Best Practice Guide For Model Agencies' (2017) <

It is commonly held that runway models are poorly paid for their work. In actual fact, little is officially reported on this question, aside from anecdotal comments about supermodels' exceptionally high earnings jarring in comparison to the implied understanding that most runway models are otherwise paid 'in clothes, not cash'.⁴ The organisations who advocate for minimum standards of remuneration themselves do not provide tangible evidence assessing the scope of the issue.⁵ This dearth of publicly available information may indicate how sensitive this topic remains within the sector.

Today, the fate of fair remuneration for models relies on the good will of key industry players,⁶ as current employment regulation does not provide safeguards or encouragement for breakthroughs on this point.⁷ As modelling professionals find no regulatory framework to which anchor their negotiation, their bargaining position continues to be undercut, and so despite the fact that they have recently coalesced within unions.⁸ Accordingly, this article turns to intellectual property law to bridge this gap by envisaging runway models' eligibility to performers' rights found in the 1988 Copyright, Designs and Patents Act (CDPA).⁹

Performers' rights are a relevant avenue to explore for a number of reasons. First, performers' rights provide the means to secure access to a stream of revenues. These intellectual property rights confer the right to control and therefore to monetise the fixation and distribution of one's performance,¹⁰ such as a model's runway walk. They also grant the right to equitable

<http://www.britishfashioncouncil.com/uploads/files/1/Best%20Practice%20Guide%20for%20Model%20Agencies%20.pdf> > accessed 29 April 2018. See also, British Fashion Council, Fashioning a Healthy Future: The Report of the Model Health Inquiry (September 2007) < <http://www.britishfashioncouncil.co.uk/uploads/files/1/The%20Report%20of%20the%20Model%20Health%20Inquiry,%20September%202007.pdf>> accessed 31 July 2018; British Fashion Council, Review of Model Health Inquiry Recommendations and Opportunities (February 2016) < <http://www.britishfashioncouncil.co.uk/uploads/files/1/Model%20Health%20Inquiry%20Review%20Feb%2016.pdf>> accessed 31 July 2018. .

⁴ See Grace Cook, 'Anatomy of a Catwalk Show —And How the Model Industry Works', *The Financial Times* (27 February 2015) < <https://www.ft.com/content/274cff32-be15-11e4-8cf3-00144feab7de>> accessed 31 July 2018 ; Natalie Robehmed, 'Highest-Paid Models 2017: Kendall Jenner Takes Crown From Gisele With \$22M Year', *Forbes* (21 November 2017) <<https://www.forbes.com/sites/natalierobehmed/2017/11/21/highest-paid-models-2017-kendall-jenner-oustsgisele-with-22-million/#78fa5ac92b5c>> accessed 31 July 2018.'

⁵ See for the British Fashion Council, the Model Alliance and Equity for campaigns launched without disclosing evidence or data.

⁶ These include unions, agencies, government bodies, but goodwill is also noted within models' employers (designers, fashion houses and fashion publishers), see Cook (n 4).

⁷ The main piece of legislation relevant to the activity of fashion modelling is the 2003 Employment Agencies Regulations but the Regulations do not deal with questions of minimum standard of remuneration. The Conduct of Employment Agencies and Employment Businesses Regulations 2003, 2003 No. 3319.

⁸ Equity became a union for models in 2007 and developed sector-wide agreement from 2010 (official website: < <https://www.equity.org.uk/models/>>. The international union Model Alliance was formed in 2012 (official website: <<http://modelalliance.org/>> both accessed 29 April 2018.

⁹ 1988 c. 48, as amended, Part II. It is not the purview of this article to give a detailed account of performers' rights, rather their condition of subsistence which will be the focus on this analysis.

¹⁰ CDPA, Section 182-184.

remuneration for the use of such performances.¹¹ Second, performers' rights confer protection in the form of moral rights.¹² This enables performers to protect, with some notable exceptions,¹³ the integrity of their interpretation¹⁴ and to ensure that it is duly credited.¹⁵ The moral dimension of performers' rights would echo protection recently given to models by the 'anti-Photoshop decree' in France which prohibits the photo-shopping of models' images that is detrimental to the profession as well as to the public's perception of health or beauty.¹⁶

Finally, performers' rights would give models' unions unprecedented leverage in negotiations with other industry players in the sector. This is because performers' rights may be enforced collectively through representative organisations, whilst preserving the possibility for individuals to retain control over their rights if desired. Furthermore, models' representatives would gain in lobbying strength by joining forces with other stakeholders in the creative industries also recipients of performers' rights, such as the Musicians' Unions or the Actors' Guild of Great Britain,¹⁷ whilst adding to their collective weight.

In these regards, performers' rights could offer the rudimentary safeguards national policy-makers are looking to establish in the sector in terms of economic security and professional standards. This opportunity for change is all the more relevant given that performers' rights will remain unaffected by the departure of the UK from the European Union (EU). This is because performers' rights are established at national law and international treaties¹⁸ and where incorporated within UK law¹⁹ aside from European regulations.²⁰ As such, the UK will remain bound to its international obligations following Brexit.

¹¹ CDPA, Section 191G. For aspects of the regime undercutting the measure's effectiveness, see Richard Arnold, *Performers' Rights* (3rd, Sweet Maxwell, 2016) 117.

¹² CDPA, Chapter 3.

¹³ CDPA, Sections 205E, 205G and 205J. See also, text to n 93.

¹⁴ CDPA, Sections 205F-205H.

¹⁵ CDPA, Sections 205C-205E.

¹⁶ Law 2016-41 of 26 January 2016. See, Yann Basir 'To be or not to be ... photoshopped' (2018) 13(3) *JIPLP* 177.

¹⁷ See for example the lobbying in the creative industries led by the Musicians' Union (Musicians' Union, Campaigns < <https://www.musiciansunion.org.uk/Campaign> > accessed 29 April 2018, the 'Fair Internet for Performers' Campaign < <https://www.fair-internet.eu/description/> > accessed 29 April 2018, or Equity, 'Professionally Made, Professionally Paid' < <https://www.equity.org.uk/campaigns/professionally-made-professionally-paid/> > accessed 29 April 2018.

¹⁸ Rome Convention, Article 7; 1996 WIPO Performances and Phonograms Treaty, Chapter II; 2012 Beijing Treaty, Article 3(1); 1994 TRIPs Agreement, Article 14; CDPA, Part II.

¹⁹ Performers' Protection Act 1963, ch 53; The Performances (Moral Rights, etc.) Regulations 2006 No 18.

²⁰ Council Resolution of May 14, 1992 [1992] OJ C138/1EU/EC treaties status; The European Communities (Definition of Treaties) (WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty) Order 2005 No 3431; Agreement on the European Economic Area, 2 May 1992, as adjusted, Protocol 28(1), Article 5(1); Strasbourg Convention of 11 May 1994, Article 5(1). See also text to n 66.

These considerations thus raise a simple yet fundamental question: can performers' rights be extended to models?

Both UK and international intellectual property laws are silent regarding models' work. Indeed, unlike other national legislation,²¹ the CDPA neither expressly includes nor excludes from the scope of intellectual property rights. Accordingly, this omission provides an opportunity to bring models within the scope of performers' rights under UK law, putting forward an interpretation that is favourable to models' interests.

This argument advances that there is enough flexibility within the UK intellectual property framework to recognise runway models as performers, and it encourages UK courts to reach the same conclusion. This interpretation relies on the statutory definitions of protected performances for it is the main condition to secure performers' rights as are no other requirements to satisfy but to fit within the statutory categories of protected performances.²²

This article identifies three legal bases to qualify runway models as protected performers pursuant to the CDPA, the 1961 Rome Convention²³ and the 1996 WIPO Performances and Phonograms Treaty (WPPT).²⁴ The first one, and primary focus of this analysis, assesses the provisions of the CDPA against the minimum standard of protection required by international agreements to demonstrate that extending performers' rights to runway models is, in fact, a matter of compliance with international law. This is because international treaties may be interpreted as binding the UK to extend performer's rights to any performances of a copyright work. This analysis argues that runway models fit this definition since runway shows are recognized copyright works following the *Ashby* decision by the European Court of Human Rights (ECtHR).²⁵ This article thus uses the *Ashby* jurisprudence as starting and turning point of the interpretation of performers' rights and, for this reason, focuses on runway models exclusively.

The other two claims for performers' rights rely on the literal interpretation of Section 180(2) of the CDPA exclusively. These alternative bases have the advantage of being based on statutory provisions holding direct effect in the UK. However, these claims are also entirely

²¹ Like France for instance, see IPC, Article L 212-1; combined with French Employment Law Code, Articles L 7121-2 and L 7123-1.

²² Except for secondary conditions related to the application of UK law. See CDPA, Section 181.

²³ International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention), done at Rome on 26 October 1961, incorporated in the UK in 1963 (n 21).

²⁴ adopted in Geneva on December 20, 1996. The WPPT was incorporated in the UK in 2006 (n 21).

The 2012 Beijing Treaty adopted by the Diplomatic Conference on the Protection of Audiovisual Performances in Beijing on 24 June 2012 is not included in the purview of this article as it has yet to be ratified by and incorporated in the UK. See, Beijing Treaty on Audiovisual Performances, Miscellaneous No 4 (2013) Cm8699.

²⁵ *Ashby Donald and Others v France* [2013] ECHR 28.

dependent on the court's appreciation of the ordinary meaning of a single piece of text, and as such, may be less reliable as a legal basis for protection.

Going further, this article holds that, by virtue of the flexibility currently existing with the law, policy-makers and industry players need not wait for this interpretation to undergo judicial scrutiny to extend such protection to models and set new professional standards. Indeed, fashion industry stakeholders are well-positioned to take positive steps in awarding models the legal status of performers by revising contractual agreements to recognize such rights in present and future transactions regardless of judicial approval.

2. The Ashby decision: a starting and turning point for performers' rights

In *Ashby*, the dispute crystallised on the right for fashion houses, the alleged rights holders to the copyright in fashion shows, to prevent the distribution of unauthorized photographs of their shows. The photographers claimed that such photographs had been taken for the purpose of news reporting, an act permitted by copyright exceptions safeguarding the freedom of expression and right to information.²⁶ Following an application brought by fashion photographers, the ECtHR reviewed the decision handed down in 2008 by the French Supreme Court in this case.²⁷ The ECtHR was not concerned with the subsistence of intellectual property rights in fashion productions. Rather, the decision focused on balancing the rights guaranteed by virtue of copyright and those protected by the freedom of expression under the European Convention of Human Rights.²⁸ Relevant to the issue is the conclusion reached by the Paris Court of Appeal and French Court of Cassation which was left unchallenged by the parties and the European judges: that fashion shows are 'works' in the meaning of French copyright law.

Following *Ashby*, several scholars have argued that UK copyright law could also be interpreted so as to recognize fashion shows as copyright works.²⁹ Indeed, the condition that a creation be original to be protected³⁰ could be met relatively easily by stressing the careful 'skill and labour', or alternatively, the 'author's own intellectual input' invested in the arrangements of the collections, taking into consideration timing, lighting, choreography, and

²⁶ French IPC, Article L 122-9; Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (InfoSoc Directive), OJ L 167, 22.6.2001, Article 5.5.

²⁷ Cass, crim., 5 février 2008, *X c/ Gaulme, Kenzo et Lacroix*, n° 07-81.387: Bull. crim. 2008 N° 28 p. 109.

²⁸ Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, Article 10.

²⁹ Estelle Derclaye, 'French Supreme Court Rules Fashion Shows Protected by Copyright – What about the UK?' (2008) 3 JIPL 286; Paul Torremans, 'Ashby Donald and Others v France, Application 36769/08, ECtHR, 5th Section Judgment of 10 January 2013' (2014) 4 QMJIP 95; Teodore Chirvase, 'Copyright and the Right to Freedom of Expression in the Knowledge Society' (2013) 10 J Intell Prop L 324, 335.

³⁰ CDPA, Section 1(1)(a).

the visual coherence of the show together with the models' performances.³¹ The shows' fixation is also needed for copyright protection to follow,³² which can be achieved through audio-video recording or photographs. The only source of uncertainty lies in the requirement that fashion shows fit within the categories of protectable works set by the CDPA, a requirement which is absent under French law.

However, it is generally agreed that the provisions of the CDPA offer national courts significant leeway to admit fashion works as valid copyright works.³³ Indeed, the taxonomy of works prescribed by Section 3(1) of the CDPA is deemed broad enough for fashion shows to fall within a number of 'works', such as 'dramatic works' or 'choreographic works'.³⁴ Regarding dramatic works, it can be argued that the very essence of fashion shows is to be performed by models walking down the runway, and that together they hold sufficient dramatic unity, thereby satisfying the relatively modest definition held under current UK precedent.³⁵ An alternative interpretation might frame the clothing, directing and staging of models as a form of choreography.³⁶

Within this debate, the implications of the *Ashby* decision on models remains undiscussed. Yet this decision plays a pivotal role in the protection of runway models by intellectual property rights as current statutory provisions can be interpreted as granting performers' rights to *any* performances of a recognized copyright work. Following *Ashby*, this would include the performance of a fashion show by runway models. It is therefore essential to turn to the definitions of the subject matter covered by performers' rights to understand the stakes at play for models in post-*Ashby* jurisprudence.

3. The statutory definitions of protected performances

The definition of the types of performances covered by performers' rights has received little legislative or judicial guidance since their introduction at the international level with the

³¹ *Ladbroke v William Hill* [1964] 1 All ER 465, 469, per Lord Reid; Case C-5/08, *Infopaq Int. v Danske Dagblades Forening* [2009] ECR I-6569 (ECJ, Fourth Chamber); Case C-406/10, *SAS Institute Inc v. World Programming Ltd* [2012] 3 CMLR (4) 55, [66]-[67].

³² CDPA, Section 3(2).

³³ *Derclaye* (n 40) 287.

³⁴ *ibid.*

³⁵ *Norwzian v Arks Ltd* (No 2) [2000] EMLR 67; *The Ukulele Orchestra of Great Britain v Erwin Clausen and another (t/a the United Kingdom Ukulele Orchestra)* [2015] EWHC 1772 (IPEC); *Banner Universal Motion Pictures Ltd v Endemol Shine Group Ltd* [2017] EWHC 2600 (Ch); *Green v Broadcasting Corp. of New Zealand* [1989] RPC 469, applied in *Robin George Le Strange Meakin v British Broadcasting Corporation and others* [2010] EWHC 2065 (Ch) para 29-31, per Arnold J.;

³⁶ *Derclaye* (n 40) 287.

Rome Convention, and in the UK with the CPDA.³⁷ This is in contrast to the well-documented reluctance of national legislature and courts to see the category of protected performers defined too broadly.³⁸

Under Article 3(a), the Rome Convention defines the application of performers' rights with reference to the performer. The provision reads: "‘performers’ means actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic works'. The WPPT reiterates verbatim the definition of protected performers under Article 2(a) adding 'or expressions of folklore' so that clause concludes with 'or otherwise perform literary or artistic works or expressions of folklore'. As the two international agreements are almost identical and that the modification introduced by the WPPT did not trigger a change in UK law, deemed already compliant on this point, subsequent developments will only reference the Rome Convention for clarity and convenience of writing. Moreover, the protection by performers' rights of 'expressions of folklore' does not affect runway models' position.

In comparison, the CDPA 1988 defines the scope of performers' rights with reference to the 'performance' meaning '(a) a dramatic performance (which includes dance and mime), (b) a musical performance, (c) a reading or recitation of a literary work, or (d) a performance of a variety act or any similar presentation, which is, or so far as it is, a live performance given by one or more individuals', as per Section 180(2).

The requirement of 'live performance' closing Section 180(2) of the CDPA is not defined by the statute, and could be interpreted as excluding pre-recorded performances and/or requiring that an audience be present – although this second meaning has been vigorously challenged for being too restrictive.³⁹ Either way, this additional qualification introduced by the CDPA will not be a hindrance to runway models whose performance takes place 'live' in both respects.

This article thus focuses on the categories of protected performers and performances listed under Article 3(a) of the Rome Convention and Section 180(2) of the CDPA. More specifically, the analysis tests the statutory interpretation of these provisions against a claim for protection by runway models. National and international laws answer to similar yet distinct interpretative methods. The interpretation of treaties such as the Rome Convention

³⁷ Contrast this lack of precision with the more detailed provisions on performers' rights under French and Australian laws: Australia, 1968 Copyright Act (Australia), s. 22(7), see also s. 248(2); France, IPC, Article L 212-1, Employment Law Code, Article L Article L7121-2.

³⁸ 'Documents de La Conférence de Bruxelles 5-26 Juin 1948' (Brussels Conference Documents) (1951) 310; MP Graham Page in HC Deb., 5th Series, Vol 679 (1963) col. 896, 897; MP Leslie Hale in in HC Deb., 5th Series, Vol 679 (1963) col. 896, 898 ; LJ Mancroft in HL Deb 05 February 1963 vol 246 cc 512, 515; *Musical Performers' Protection Association Ltd v British International Pictures Ltd* (1930) 46 TLR 485,488.

³⁹ Arnold (n 11) 71-2.

must comply with Articles 31 to 33 of the Vienna Convention on the Law of Treaties,⁴⁰ and be performed ‘in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’.⁴¹ National courts may include in their analysis information contained in texts annexed to the agreement that have been accepted as related to the treaty,⁴² amongst other supplementary information.⁴³ In cases where the meaning of the text is either incongruous or obscure, preparatory work may also be admitted to clarify the content of the agreement.⁴⁴

Similarly, the traditional method of literal interpretation in the UK aims to ascertain the ordinary meaning of the words contained in national statutory provisions.⁴⁵ Records of parliamentary debates may also be used in this process, since *Pepper v Hart*⁴⁶ repealed the ‘exclusionary rule’ which previously excluded such documents. Whilst the interpretation of national and international texts is based on different legal grounds, they both seek to assess the objective meaning of the text, by performing a literal analysis of its words as per their ordinary sense.

Applying such method, this article outlines three possible legal bases to support the award of performers’ rights to runway models, as mentioned in introductory comments. The first explores the definition of protected performers under the Rome Convention to demonstrate that UK is bound by virtue of international obligations to extend protection to all interpretations of underlying ‘works’ in the meaning of copyright. Combined with the *Ashby* jurisprudence, this interpretation supports the inclusion of runway models within the scope of protected performers under UK law. The second and third legal bases for protection are based exclusively on CDPA. They examine the possibility to frame runway modelling as a form or ‘dramatic performance’ or ‘presentation’ as per Section 180(2)(a) and Section 180(2)(d) of the Act. Each claim will be considered in turn, focusing more extensively on the first.

4. A claim to performers’ rights based on the underlying copyright ‘work’

⁴⁰ Vienna Convention on the Law of Treaties, entered into force 27 January 1980, Treaties Series No 58 (1980). The United Kingdom instrument of ratification was deposited on 25 June 1971 and the Convention entered into force on 27 January 1980.

⁴¹ Vienna Convention, Article 31(1).

⁴² Vienna Convention, Article 31(2).

⁴³ Vienna Convention, Article 31(3).

⁴⁴ Vienna Convention, Article 32(a)-(b).

⁴⁵ Holger Fleischer, ‘Comparative Approaches to the Use of Legislative History in Statutory Interpretation’ (2012) 60(2) *The American Journal of Comparative Law* 401.

⁴⁶ [1993] AC 593 (HL). See comments by Lord Denning in *Davis v Johnson* [1979] AC 264, 276-77, *Hadmore Production v Hamilton* [1983] 1 AC 191, 201. For cases excluding parliamentary debates: *Millar v Taylor* (1769) 4 Burr 2303, 2332 (Willes J) (KB).

Both the national and international definition of protected performances feature the notion, or concept, of a ‘work’, the short-hand term used to refer to the subject matter receiving copyright protection under Part I of the CDPA and under the Berne Convention.

The wording of Article 3(a) of the Rome Convention associates the definition of protected performers with those artists who perform ‘artistic and literary works’, mirroring the classification of protected subject matter covered by the Berne Convention. This suggests that the phrase ‘artistic and literary works’ is to be understood as a short-hand for the subject matter protected by the Berne Convention,⁴⁷ *i.e.* referring to the entire class of protected works.⁴⁸ This interpretation is also supported by the World Intellectual Property Office in their Guide to the Rome Convention,⁴⁹ although it should be acknowledged that the Guide itself does not carry any normative weight.⁵⁰

A similar association between the subject matter of copyright and performers’ rights cannot be as readily inferred in Section 180(2) of the CDPA. Indeed, the wording of the parallel clauses forming Section 180(2)⁵¹ lacks symmetry. On the one hand, the first two clauses list ‘(a) a dramatic performance’ and ‘(b) a musical performance’ without reference to an underlying ‘work’ in the meaning of copyright or otherwise. On the other hand, the following two clauses include ‘(c) a reading or recitation of a literary work’ and ‘(d) a performance of a variety act or any other similar presentation’ – with clear references to ‘works’ or types of underlying works.

The asymmetry of the wording of Section 180(2) could be read as a compromise between creating consistency in the writing style of the CDPA between copyright and performers’ rights,⁵² and the wish to extend performers’ rights protection to other types of performances.⁵³

The wording of Section 180(2) supplanted the definition of protected performers under the 1958 Performers’ Protection 1958 which referred to the ‘the performance of any dramatic or musical work’.⁵⁴ In 1963, the statute incorporating the Rome Convention under UK law specified that the phrases ‘performance of a dramatic work’ and ‘performance of a musical

⁴⁷ Berne Convention for the Protection of Literary and Artistic Works. of September 9, 1886, completed at Paris, on May 4, 1896, last amended on September 28, 1979, Article 2(1).

⁴⁸ *Id est* as referring to the entire class of protected works not just not defined to be ‘artistic’ or ‘literary’ in the meaning of sections 3 and 4 of the CDPA.

⁴⁹ WIPO, *Guide to the Rome Convention and to the Phonograms Convention* (WIPO Guide) (Geneva, Publication No 617 (E) 1981) 21, para 3.1.

⁵⁰ *ibid*, 4.

⁵¹ CDPA, Section 180(2)(a)-(d).

⁵² Compare Section 3(1) and Section 180(1) of the CDPA.

⁵³ As permitted by Article 3(a) and Article 9 of the Rome Convention.

⁵⁴ 1958, Section 1 and Section 8(1). See also, 1925 Act, Section 1 combined with Section 4.

work’ were substitutes for the definition of performers contained in the Rome Convention, and should be construed as such.⁵⁵ No such interpretative note was repeated in the CDPA.

In the absence of clarification in the texts and their supporting documents, the insertion of the word ‘work’ in the definition of the subject matter covered by performers’ rights brings into question the extent to which the award of intellectual property rights is conditioned by the subsistence of a copyright ‘work’ underlying the interpretation. Must a performance be an interpretation of a copyright ‘work’ to open the door for performers’ rights? What meaning and how much weight should be given to the insertion of the word ‘work’ in the definitions of protected performances or performers under UK and international law? Finally, should a different interpretation apply to the various clauses of Section 180(2) of the CDPA?

These questions are central to establishing the validity of runway models’ claims to performers’ rights based on the *Ashby* jurisprudence insofar as the decision recognized fashion shows as full-fledged copyright works.

Neither international preparatory work nor national parliamentary debates offer any guidance on the meaning or function that national courts should give to the notion of ‘works’ in the definition of performers’ rights.⁵⁶ Consequently, this analysis applies a literal technique of interpretation to the relevant texts from which it deduces four possible outcomes, each identified as a ‘level’ of interpretation.

Level 1: no correlation or connection

The first level of interpretation infers nothing from the insertion of the word ‘work’ in either statutory definition. This interpretation reduces the use of the word ‘work’ as a mere convenience of language, and rejects any correlation with the provisions pertinent to copyright law.⁵⁷ As a result, the subsistence of a copyright work underlying the performance would not be a pre-condition for the subsistence of performers’ rights.

Such an interpretation precludes any meaningful bond between the subject matter eligible to performers’ rights and to copyright. The notion of ‘work’ would only attach to Part I of the CDPA dedicated to copyright subject matter,⁵⁸ and be decoupled from any references present in subsequent parts of the Act.

⁵⁵ Performers’ Protection Act 1963, Section 1(1).

⁵⁶ To the exception of ‘literary work’ which is defined as holding the same meaning under Part I and II as per Section 211 of the CDPA.

⁵⁷ Under the Berne Convention or Part I of the CDPA.

⁵⁸ CDPA, Sections 1(2) and (3).

This is the interpretation put forward by Justice Richard Arnold, the leading performers' rights scholar in the UK, writing extra-judicially.⁵⁹ Indeed, Arnold considers that 'dramatic performances' need not be of 'dramatic works' within the statute's meaning given in Part I.⁶⁰ In his view, 'dramatic performance' enjoys its own independent meaning, broader in scope. This would be consistent with Section 211(1) of the same act which does not list 'dramatic work' within the expressions having the same meaning as in copyright provisions. Oddly, this interpretation would not apply to performances of 'literary works' as Section 211(1) of the CDPA specifies that the phrase carries the same meaning in the context of performers' rights as it does for copyright.

Level 2: a contributing element of definition

The next level of interpretation continues to reject the insertion of the word 'work' in national and international statutory definitions as formally conditioning the subsistence of performers' rights on the presence of an underlying copyright work. However, it does not rule out the identification of a copyright work as an entirely irrelevant factor. Courts may find in the existence of an underlying copyright work an element in favor of extending performers' rights to performances falling near the margins of intellectual property law, like runway modelling.

This level of interpretation mitigates the risks of any subjective shepherding as to what falls within the ordinary meaning of protected 'performances' under the CDPA and protected 'performers' under the Rome Convention. Furthermore, this interpretation introduces some coherence between copyright and performers' rights without forging too tight a bond or interdependence between the subject matter protected by copyright and performers' rights.

Under the first or second levels of interpretation, the *Ashby* jurisprudence would bear no, or little, weight in the assessment of runway models' eligibility to performers' rights. At most (as per the second level), the subsistence of copyright in the fashion shows underlying models' activity could be perceived as a contributing but not a deciding element of their eligibility. Runway models would have to resort to the alternative claims outlined in Section 'Alternative claims to performers' rights for runway models' of this article.

Level 3: A reference point for a de minimis standard of protection

The third, and preferred, level of interpretation suggests that use of the word 'work' is not fortuitous but implies that protected performances would be, at a minimum, those that are interpretations of protected or protectable 'works' in the meaning of copyright law.⁶¹

⁵⁹ Arnold (n 11) 62-70.

⁶⁰ Arnold (n 11) 62-64.

⁶¹ CDPA, Section 3.

As with the second level of interpretation, the third interpretation is supported by Article 9 of the Rome Convention which specifies that ‘[a]ny Contracting State may, by its domestic laws and regulations, extend the protection provided for in this Convention to artists *who do not perform literary or artistic works*’.⁶² This article implies that the presence of a copyright work underlying the performance is central to the definition of protected performers under Article 3(a).

Leaving considerations vis-à-vis the Rome Convention to one side, the case for this third level of interpretation for the CDPA’s definition of eligible performances is less straightforward. As previously mentioned, the association between the subject matter eligible to performers’ rights and copyright works in Part I of the CDPA is not as discernible under Section 180(2). This is, again, in part due to the asymmetry in the construction of the provisions’ clauses between Section 180(2)(a)-(b) and Section 180(2)(c)-(d).⁶³

Level 4: A requirement for the subsistence for performer’s rights

The fourth level of interpretation of the word ‘work’ featuring in the definition of protectable performers or performances implies a stronger – or perhaps the strongest – link between the subject matter eligible to copyright protection and that covered by performers’ rights. This level proposes that performances *must* be interpretations of protected/able work under copyright law to be covered by performers’ rights themselves. This interpretation moves away from the notion of ‘work’ as merely setting a *de minimis* standard of protection for performers to it being a statutory requirement for protection. Again, this interpretation can be supported by a subsequent provision of the Rome Convention (Article 9) which allows, but does not bind, signatory states to extend protection to performances lacking an underlying copyright work.

Reservations about the relevance of this level of interpretation in relation to the national text must be repeated here. As mentioned in the third level of interpretation, the connection inferred between the subject matter covered by copyright and that eligible to performers’ rights may not be as convincing if Section 180(2) of the CDPA is studied in isolation of other international texts.

In effect, the third and fourth levels of interpretation would lead to the same result: any interpretations of a copyright work, whatever the genre, will automatically trigger the application of performers’ rights. This is the direct consequence of attributing to the underlying copyright ‘work’ the function of acting as requirement for protection, *de minimis* or else. However, the fourth level of interpretation will also act as bar to protection by

⁶² Emphasis added. Article 9 in the text of the treaty published by WIPO bears the heading of ‘Variety and Circus Artists’. This indication is an editorial modification and bears no normative weight. See, WIPO Guide (n 59). *Nota bene* Article 9 finds no equivalent provisions under the WPPT.

⁶³ text to n 51.

blocking any claims to performers' rights which does not concern the interpretation of a copyright work.

Level 3 and 4 offer the advantage of drawing clearer boundaries around the subject matter protected by performers' rights. The enforcement of performers' rights would increase in reliability as their scope of application would then be informed by copyright caselaw. The fourth level would be the most effective at mitigating against the risk of enabling all-encompassing performers' rights but bears the shortcoming of exerting the highest degree of inter-dependence between copyright and performer's rights, giving judges little flexibility over the application of performers' rights going forward. For this reason, the third level of interpretation is put forward as most suitable one as it offers an appropriate compromise between introducing consistency in the enforcement of copyright and performers' rights respectively, without inferring too strong a link between the two intellectual property rights.

A number of question arises if the court were to attribute different levels of interpretation to the Rome Convention and the CDPA, as it may be the case with the third and fourth level of interpretation. The text of the Rome Convention is clear: signatory states may grant more protection to more performers, but it cannot fall below what is guaranteed by the international agreement. The CDPA may only depart from the Rome Convention to the extent that it grants a more generous standard of protection than the one prescribed under the international agreement.⁶⁴ If the Rome Convention is interpreted as intending to include within the scope of performers' rights any interpretations of content covered by copyright – regardless of their categorization or genre – the CPDA must be interpreted in such a way that is consistent with this standard of protection or be reformed accordingly.⁶⁵ The wording of the CDPA holds enough flexibility for UK courts to admit such an interpretation, and in turn, confer performers' rights to runway models without need for a statutory reform to this end.⁶⁶ Indeed, the categories of 'dramatic performance' or 'any other presentation' under Sections 180(2)(a) and Section 180(2)(d) may be used to have the CDPA comply with the Rome Convention. This point is further discussed in subsequent developments.

Failing to do so, the UK would be in breach of the Rome Convention and the WPPT. Unlike most international treaties, these conventions are accompanied by unusual enforcement methods as their implementation falls under the scrutiny of the World Trade Organization (WTO) and the European Union. This is the result of the Rome Convention and the WPPT

⁶⁴ Rome Convention, Article 7, Article 14, Article 21, Article 22.

⁶⁵ See cases outlining the duty to interpret national law in light of EU standards or international obligations: Case C-106/89 *Marleasing SA v La Comercial Internation de Alimentacion SA* [1990] EU:C:1990:395, 8 (in light of EU legislation); C-53/96 *Hermes International v FHT Marketing choice BV* [1998] EU:C:1998:292, at 28 (in light of TRIPs); *Vodafone 2 v Revenue and Customers Commissioners (No 2)* [2009] EWCA Civ 446, para 37-38 per Sir Andrew Morritt C. Interpretation will be performed within the limits of not introducing a direct effect of international text, C-135/10 *Societa Consortile Fonografici (SCF) v Del Corso* [EU:C:2012:140], 46.

⁶⁶ Should *Ashby* be followed by UK courts, as expected, see text to n 29.

being annexed to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS),⁶⁷ itself annexed to the WTO Agreement.⁶⁸ In turn, the WPPT Agreement, WTO Agreement, and *de facto* the TRIPS agreement, were made designated European Treaties.⁶⁹

5. Alternative claims to performers' rights for runway models

In the event that the Rome Convention is interpreted as per the first or second level, runway models may still rely upon the provisions of the CDPA to claim protection under performers' rights. Two distinct claims may be formulated around the category of either 'dramatic performance (Section 180(2)(a)) or 'performance of a variety act or *any similar presentation*'⁷⁰ (Section 180(2)(d)). In such hypotheses, UK courts must assess the act of walking in a fashion show against the ordinary meaning given to the legal concepts of 'dramatic performance' or 'any similar presentation'. It is submitted that the notion of 'dramatic performance' would be broad enough, and more suitable, for a claim under performers' rights, but the meaning given to the phrase 'any similar presentation' could also be tested.

A claim based on 'a dramatic performance'

Might runway modelling be likened to a dramatic performance in the ordinary sense of the phrase? Section 180(2) specifies that 'dramatic performance' includes a work of dance or mime, but no further guidance is given by the CDPA. Neither concept of dance or mime readily suits the activity of runway modelling under their ordinary meanings. Rather, runway modelling puts the legal definition UK legislators and case law have given to the adjective 'dramatic' to the test. As there is no judicial authority available in relation to performers' rights,⁷¹ commentators have turned to copyright case law on this question.⁷² Analogies

⁶⁷ TRIPS, Article 14.

⁶⁸ WTO Agreement, Annex 1C.

⁶⁹ European Communities Act 1972, Section 1(2) and 1(3); European Communities (Definitions of Treaties) (The Agreement Establishing the World Trade Organization) Order 1995 No 265; European Communities (Definition of Treaties) (WIPO Copyright treaty and WIPO Performances and Phonograms Treaty) Order 2005 No 3431.

⁷⁰ Emphasis added.

⁷¹ At the time of writing, April 2018.

⁷² Arnold (n 11) 62-63, para 2.05-2.06. It should be noted that turning to such case law have the courts indirectly binding with one another the subject matter protected by copyright and protected by performers' rights as we accept to give the adjective 'dramatic' the same meaning in the context of an interpretation level which rejected this proposition.

between performers' rights and author's rights have been accepted by the courts in other aspects of their regimes.⁷³

Even in the context of copyright claims, judicial decisions considering the definition of 'dramatic work' are sparse. In *Norowzian (No 2)*,⁷⁴ the Court of Appeal defined a 'dramatic work' as a 'work of action, with or without words or music, which is capable of being performed before an audience'. If dramatic character resides in the presence of movement ('work of action') and the capacity of performance ('capable of being performed') live ('before of an audience'), it appears that runway modelling could reasonably be accepted as a form of 'dramatic performance' in the meaning of Section 180(2).

There is clear tautologism in defining dramatic performance with reference to a 'dramatic work', which is itself defined by its ability to be performed. Should this logic apply, a protected performance by law would a performance capable of performance. 'Dramatic works' and 'performances' in law would form a definitional loop.

More recent jurisprudence proves useful in avoiding this circularity, as the definition of dramatic works was further tested in the High Court in *Ukulele Orchestra*⁷⁵ and *Banner*.⁷⁶ Both decisions confirm the relevance of the characteristics outlined in *Norowzian (No 2)* and emphasize the essence of a dramatic work also lies in 'coherent framework', which can be repeated.⁷⁷ The notion of 'dramatic work' would be inconsistent with un-dramatized or un-staged expressions or expressions lacking dramatic unity.⁷⁸ It is clear from the *Banner* judgment that Snowden J refrained from limiting or constraining the definition of 'dramatic work' any further; other jurisdictions have required that elements such as characters, the progression of a plot or a storyline be present in the work for it to be considered 'dramatic'.⁷⁹

A claim based on 'or any other presentation'

Whilst 'dramatic performances' offer a suitable route for the qualification of runway modelling as a form of performative expression eligible to performers' rights, the category

⁷³ *Henderson v All Around the World Recordings Ltd & Anor* [2013] EWPC 7, para 48 per Birss J. See also, Arnold (n 11) 63, para 2.05-2.06.

⁷⁴ *Norowzian v Arks Ltd (No 2)* [2000] EMLR 67.

⁷⁵ *The Ukulele Orchestra of Great Britain v Erwin Clausen and another (t/a the United Kingdom Ukulele Orchestra)* [2015] EWHC 1772 (IPEC).

⁷⁶ *Banner Universal Motion Pictures Ltd v Endemol Shine Group Ltd* [2017] EWHC 2600 (Ch).

⁷⁷ *ibid*, para 43-45 per Snowden J ; *The Ukulele Orchestra of Great Britain v Erwin Clausen and another (t/a the United Kingdom Ukulele Orchestra)* [2015] EWHC 1772 (IPEC) para 104-105, Hacon J.

⁷⁸ *Banner Universal Motion Pictures Ltd v Endemol Shine Group Ltd* [2017] EWHC 2600 (Ch) para 44.

⁷⁹ See in Australia, *Aristocrat Leisure Industries Pty Ltd v Pacific Gaming Pty Ltd* [2000] FCA 1273, para 61-62 per Tamberlin J. See also in the United States, *Universal Pictures Co v Harold Lloyd Corporation*, 162 F 2d 354 - Circuit Court of Appeals, 9th Circuit 1947, 365, citing *Seltzer v Sunbrock*, 22 F Supp 621 - Dist Court, SD California 1938, 69.

of ‘any other presentation’ listed in Section 180(2)(d) of the CDPA should also be explored as an alternative.⁸⁰ This option would be particularly relevant should catwalking be dismissed for falling outside the ordinary meaning of ‘performance’ by the courts but within the more basic notion of ‘presentation’.

It is possible that ‘any other presentation’ is to be interpreted *ejusdem generis* together with the genre of variety acts,⁸¹ which precedes it under Section 180(2)(d), although the concept of variety act is not entirely clear itself.⁸² The meaning of the phrase could be broadened so as to include runway modelling as also envisaged by Arnold.⁸³

6. Intellectual property policy considerations

The policy rationales in favour of extending performers’ rights to runway models were outlined in introductory comments.⁸⁴ This analysis now turns to the policy considerations which may hinder runway models’ claim for performers’ rights, focusing specifically on rationale arising from within intellectual property law. This is because such considerations have been repeatedly raised each time the legal protection of performers was subject to reform by policy-makers or reviewed in court.⁸⁵ As such, they inevitably inform the judicial scrutiny paid by the courts to the Rome Convention or the CDPA, and need to be addressed. In reviewing each of the main policy considerations, this argument concludes that they do not hold a theoretical or empirical basis sound enough to block runway models’ claim to performers’ rights.

The application of performers’ rights to new forms of performance is often met by the concern of seeing the most mundane of human activity trigger infringement proceedings.⁸⁶ In the context of catwalking, some may worry that ‘walking’ or ways of walking may be restricted by conferring intellectual property rights to runway models. This risk will never materialise for the simple reason that performers’ rights that it is legally inaccurate. Unlike copyright, do not grant any right, proprietary or other, over the substance of the performance. Performers’ rights only guarantee the right to authorize the record the performance and to

⁸⁰ Arnold’s preferred interpretation it seems. See, Arnold (n 14) 68, para 2.17.

⁸¹ Arnold (n 11) 68, para 2.17.

⁸² Arnold (n 11) 67, para 2.15-2.16.

⁸³ Arnold (n 11) 68, para 2.17.

⁸⁴ text to n 9.

⁸⁵ Arnold (n 11) 4-37.

⁸⁶ See comments made by MP Graham Page in HC Deb., 5th Series, Vol 679 (1963) col 896, 897.

distribute such records subsequently. There is to date, no intellectual property protection conferred over the style of a performance, or manner in which it is rendered.⁸⁷

In contrast to the arguments made earlier, it could be argued that regarding runway models as performers would be detrimental to the overarching integrity of the subject matter protected by performers' rights. It is the highly commercial nature of runway shows that is put forward as unsuited for its protection under performers' rights, implying a lack of aesthetic value. This ground was notably written into the intellectual property law of other countries, like France, to exclude models from performers' rights.⁸⁸ However, no such exclusion has been written into international or UK law. There is no condition of quality, aesthetic content or originality for performances to secure protection under performers' rights. Neither could it be inferred from the ordinary meaning of the text or its interpretation in good faith. This absence of condition conforms to a well-accepted principle according to which neither copyright nor performers' rights should be concerned with aesthetic merits. Therefore, the perceived lack of artistic value of models' performance is not sufficient to exclude their work from performers' rights.

The introduction of performers' rights, and subsequent extension, have been met by the fear that courts would be flooded with groundless claims for protection by individuals far removed from the original definition of 'performances'.⁸⁹ A claim to performers' rights by runway models could face such criticism. A counterpoint to this argument notes that the floodgates are already open. They were open when performers' rights were introduced in national and international level with little guidance as to which performances should qualify. If anything, the interpretation of the law proposed here (as per Level 3 or Level 4) is one which provides the opportunity to fence out parasitic claims from performers' rights by limiting their application to interpretations of copyright works. To date, it is the only method capable of rationalizing the class of protected performers which has been formulated that does not solely rely on judges' appreciation of the ordinary meaning of 'performance', with the subjectivity that such an approach inevitably entails.

The practical feasibility of rights management is another recurrent concern when new types of protected performers are considered, notably those involving group performances. Often one will read that casts of thousands, or 50-piece ensembles, would make the management of performers' rights impossible in practice, *i.e.* not effective commercially due to transaction

⁸⁷ Unless they amount to contributions in the nature of authorship. See, Mathilde Pavis, 'Is There Any-Body on Stage? a Legal (Mis)understanding of Performances' (2016) 19 (3-4) JWIP 99.

⁸⁸ n 21.

⁸⁹ Arnold (n 11) 11, see also text to n 38.

costs in the event that each individual participant should receive equal intellectual property rights.⁹⁰

A related concern is the fear that introducing new claimants eligible to performers' rights would be detrimental to the interests of copyright holders who sit atop the hierarchy of interests to which intellectual property law caters. This concern is based on the view that copyright holders' interests would be prejudiced economically by having to share the revenues generated by protected content with more stakeholders. Similarly, it has been argued that copyright would be emptied of its substance if their holders were to be obliged to seek the consent of other stakeholders, such as runway models, in the processes of creation, production and distribution of protected content.⁹¹

First of all, it must be stressed that it is precisely for its capacity to disrupt the current *statu quo* that protection under performers' rights for runway models is sought. Only then, will models 'representatives be in the position to renegotiate existing business practices. As far as economic rights are concerned, concerns can be easily mitigated by the fact that such rights may be assigned by contract or managed through collective licensing⁹² to ease both the risk of disputes and the management of group performances. As long as such agreements are recorded in writing, there is no reason to believe that the management of performers' rights should be any more onerous than the dispense of other legal obligations such as those related to publicity or employment rights.⁹³

For those rights that cannot be assigned, such as moral rights, a number of caveats have been introduced under international and national level to prevent protected performers from blocking or slowing down normal production or communication processes. The CDPA stresses the right to be identified as the performer 'does not apply where it is not reasonably practicable'⁹⁴ to do so and lists a number of specific hypotheses when this would be the case, such as in the context of news reporting, advertising, education or incidental inclusion of the performance in a recording.⁹⁵

The practical significance of this exception for performances used in the advertisement of goods and services found under Section 205E(4) of the CDPA will have to be defined to assess whether fashion shows, although recognized copyright works, are to be regarded as a mere exercise of goods advertising from the perspective of intellectual property law. If so, this may deprive runway models from the right to be identified as performers. This leaves

⁹⁰ Arnold (n 11) 11.

⁹¹ See for example US circuit judge McKeown discussing this issue in *Garcia v Google Inc*, 786 F 3d 733 (9th Cir 2015) 742-3.

⁹² CDPA, Schedule 2A.

⁹³ *Henderson v All Around the World Recordings Ltd & Anor* [2013] EWPC 7, para 48 per Birss J.

⁹⁴ CDPA, Section 205E(2).

⁹⁵ CDPA, Section 205(3)-205E(5)(e).

the relevance of seeking performers' rights protection unchallenged as it is other aspects of their regime, i.e. the economic rights and the moral right of integrity, that would prove most valuable to runway models continue to apply regardless of this limitation.

Similar exceptions also apply to the moral right of integrity which runway models could use to prevent the inappropriate use or editing of their recorded performances. Here, the CDPA excludes from the scope of this prerogative 'modifications made to a performance which are consistent with normal editorial or production practice'.⁹⁶ Whilst there is no statutory definition of 'normal editorial or production practice', it is understood that this exception takes into consideration industry-specific customary practices as they evolve over time, weighting those against the legitimate interests of the performer.⁹⁷ It should also be noted that moral rights may be waived in cases for those runway models which may consent to modifications going beyond the normal editing process.⁹⁸ All of these limitations were introduced precisely to balance performers' protected interest with the practical needs of production and distribution.

Concerning the question of revenue distribution, there are no empirical studies available, to date, confirming that the market would not adapt to a new revenue split.⁹⁹ Further, redistributing revenues fairly between the stakeholders involved in its production and distribution has been the aim of the most recent intellectual property law policies introduced at the European level. In 2016, the European Parliament introduced a proposal directive to implement mechanisms of shared remuneration between creators, producers and other intermediaries, which included performers in its scope.¹⁰⁰ Therefore, far from being an unwanted side-effect, rebalancing revenues in favour of performers is an outcome desired by the most recent governmental proposals for reform in the field.

Finally, from a practical perspective, the short commercial life span of fashion shows could be perceived as undermining the relevance of extending performers' rights to runway models, since long-term large-scale licensing agreements are unlikely to be made. Indeed, without clear distribution channels for the photographs and recordings of fashion shows equitable remuneration rights would be worthless. However, as explained in introductory comments,¹⁰¹ remuneration rights are only one of the three sets of rights granted by performers' rights. The economic rights to consent to the first fixation of the performance and to the subsequent uses

⁹⁶ CDPA, Section 205G(3). See also for other exceptions to this right, Section 205G(4)-205G(6)(b).

⁹⁷ Arnold (n 11) 273.

⁹⁸ CDPA Section, 205J.

⁹⁹ This argument was dismissed in the Gregory Report, see Henri Gregory, 'Report of the Copyright Committee' (1952) 61, para 172; Arnold (n 11) 4.

¹⁰⁰ See, Proposal for a directive of the European Parliament and of the Council on Copyright in the Digital Single Market. Brussels, 14.9.2016 COM (2016) 593 final 2016/0280 (COD), p 3, 5 and Article 15. For the inclusion of performers in its scope see, Recital 3, 40-43 and Chapter 3 of the Proposal.

¹⁰¹ text to n 10.

of the record as well as the moral rights of attribution and integrity provided by the CDPA remain a valuable and relevant form of protection of runway models' work that is not affected by short-term commercial value of fashion shows. In fact, it may be even more critical to have access to regulatory tools to control the first fixation and integrity of runway performances that the window of their commercial viability is so short. Furthermore, runway modelling can now be found within other forms of productions with clear distribution lines and extended commercial longevity, such as Reality TV franchises.¹⁰²

7. Conclusion

This article demonstrates that the vagueness with which performers' rights are defined under national and international law could allow runway models' to put forward a successful claim for protection under performers' rights. The analysis explored three legal bases for such a claim. The first one combines a literal analysis of the Rome Convention with the outcome of the *Ashby* jurisprudence to demonstrate that the UK is bound by international law to extend performers' rights to any interpretations of a copyright work. This conclusion relies on three of the four possible literal interpretations of the statutory definitions of which 'performers' are eligible to performers' rights under Article 3(a) of the Convention. Each interpretation explored a different relation of interdependence between the subject matter covered by copyright and the type of interpretations eligible to performers' rights. As an alternative, the other two legal bases consider including runway modelling within the 'ordinary meaning' of existing categories of protected performers under Section 180(2) of the CDPA: 'dramatic performance' and 'any other presentation'. Considering the current demands of intellectual property policy-makers and the stakeholders in the fashion industry as to the need for the better remuneration of creative professionals, an interpretation of intellectual property law that would frame runway models as performers would not only be consistent with the law, but it would also be, more importantly, *à la mode*.

¹⁰² See for example, 'Project Runway' (2004-present), 'RuPaul's Drag Race' (2009-present), 'The Face' (2012-present) and 'Make Me a Supermodel' (2005-2006) have produced shows for mass-distribution based on fashion designing and runway modelling performances.