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## EDITORIAL

I am delighted to introduce Volume 27(1) of the *Nottingham Law Journal*, an independent peer-reviewed and indexed academic journal that has published annually for over 40 years, one of the oldest law journals in the United Kingdom. The journal embraces critical legal thinking and underpins Nottingham Law School's proud history of excellence in legal education, scholarship and research.

This edition features a series of thematically linked articles in support of intellectual property law (IP) education and research. The contributions emanate from the 10<sup>th</sup> Anniversary European Intellectual Property Teachers Network (EIPITN) Conference, beautifully hosted by Jr. Dr. Ulrike Wennersten at the vibrant School of Economics, Lund University in Sweden on 29–30 June 2017 which I had the pleasure of co-convening and chairing. We present articles by the joint winners of the Routledge Best Presentation Prize. There is also a very special contribution from world-renowned IP educator Professor Emerita Ruth Soetendorp. Newer to the IP law field is our own PhD candidate Mobeen Shah and her review of Maria Tzanou's monograph, *The Fundamental Right to Data Protection: Normative Value in the Context of Counter-Terrorism Surveillance*. Congratulations to Nottingham Law School LLB student Alexander Lucas, who won the Student Essay Prize on a copyright law topic. The theme of the 2018 World Intellectual Property Day is 'Powering change: Women in innovation and creativity' and I am proud to publish work by so many female authors in this edition.

In addition, this volume features a broader selection of other topical articles, case notes, critical commentary addressing issues of contemporary legal significance and several book reviews. Professor Mark Pawlowski and James Brown focus on tangible property in their piece 'The Termination of Real Property Interests by Frustration under English Law'. Independent researcher Philip Morris considers reforms to constitutional practices and British Crown Dependencies. Gordon Chung demystifies estoppel by negligence, an underdeveloped concept in commercial law. We have a book review of Dr Vasileios Adamidis' research monograph, *Character Evidence in the Courts of Classical Athens* which has been nominated for two prizes, the SLS Peter Birks Prize for Outstanding Legal Scholarship and the International Sociological Association Research Committee on the Sociology of Law (ISA RCSL) Podgórecki Prize.

This year we will also produce volume 27(2) arising from the School's high profile Centre for Legal Education's conferences held in 2015 and 2017. This will comprise a special legal education edition jointly edited by my colleagues Professor Jane Ching and Pamela Henderson.

Finally, since joining the editorial team eight years ago in 2010 as Book Review Editor, this is my last edition as Editor. Dr Helen Hall will take over for the rest of 2018 and beyond. My sincere gratitude to all the contributors, reviewers, subscribers and readers of the *Nottingham Law Journal*. Particular thanks to my small but able team of editors and finally, thanks to our administrative assistant Kerri Gilbert.

DR JANICE DENONCOURT



## ARTICLES

*The address for submission of articles is given at the beginning of this issue.*

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### *10<sup>th</sup> Anniversary European Intellectual Property Teachers Network (EIPTN) Conference 2017*

The EIPTN brings together IP educators in higher education from across Europe to exchange ideas on best practice and innovation supported by our longstanding sponsors, the European Union Intellectual Property Office and the European Patent Office. Over 30 delegates attended from 20 countries to discuss and debate the future of IP law education and the needs of the twenty-first century IP law student. We learned from IP education thought leaders and researchers at the forefront of new approaches to IP education in the EU.

Since the 1980s when I was a student in the first IP law elective at the University of Western Australia, the role of IP rights in driving the global and digital economy has gained momentum. The economic value of IP rights is often underestimated. Beyond giving immeasurable pleasure and enhancing our daily quality of life (e.g. the personal computer, mobile phone, life-saving medicines and Netflix), IP rights protect our innovation and creative industries that create higher quality and better-paid employment for our students, the future generation. The international IP legal framework evolved with the adoption of the Trade-Related Agreement on Aspects of Intellectual Property Rights (TRIPS) in 1995 between all member nations of the World Trade Organization (WTO). However, IP law issues such as the patentability of human genes, business methods and medical methods of treatment, among others, require a deeper understanding. The increasing expansion and scope of IP rights demands more IP educators and researchers to shape the curricula and our understanding of the nature and central role of IP rights in the modern world.

Not only the IP law framework has changed – the UK is the first country in the world to have a Minister of Intellectual Property Law. Sam Gyimah MP, Minister of State for Universities, Science, Research and Innovation, currently has responsibility for IP matters, working within the Department for Education and the Department for Business, Energy and Industrial Strategy. Further, the English legal system is one of the very few countries in the world to have a specialist IP court, the Intellectual Property Enterprise Court (IPEC); previously known as the Patents County Court, located in London. IPEC is an alternative to the High Court involving IP disputes such as patents, trade marks, designs and copyright.

Over the past decade, world class Nottingham Law School has nurtured IP law education excellence through its undergraduate, post-graduate and professional IP programmes and the creation of its IP Law Research Group. Transdisciplinary IP law issues are increasingly relevant to new legal research, scholarship and IP policy. This connotes an educational style of IP law education that crosses many disciplinary boundaries to create a more holistic approach, while inviting critical thinking from a wider variety of

perspectives than ever before. New perspectives include moral and ethical considerations, and how IPRs support sustainability. I am particularly pleased to introduce the special IP law education section of this edition, which features several enlightening contributions. First, Dr Sabine Jacques (*University of East Anglia*) explores the use of gamification in IP law education. Peter van Dongen (Netherlands Patent Office) and Joe Sekhon (*University of Portsmouth*) share their research into current trends in teaching IP law to entrepreneurs in the Netherlands and the UK. Sabine and Joe were co-winners of the EIPTN's inaugural Routledge Taylor-Francis 2017 Best Presentation Prize. Next, inspirational IP law educator and researcher, Professor Emerita Ruth Soetendorp, shares her memoirs of four decades of IP education during its evolution as a law discipline, now a standard elective offered in UK law degrees. Over her academic career, Ruth has contributed to the IP education literature with dozens of articles, reports and chapters. Research-active well into retirement, Ruth has taught thousands of IP students in the UK and abroad. She has also chaired the influential Intellectual Property Awareness Network (IPAN) a non-profit organization "committed to improving awareness and understanding of IP in the UK."

One of the things the EIPTN conference papers 2017 seek to remind us is that IP rights are full property rights (rights *in personam*). They can be dealt with just as any other form of property. This makes IP rights owners very powerful indeed. IP rights education is essential for everyone, not least law students and lawyers.

Dr J Denoncourt



# EXPERIMENTING WITH GAMIFICATION IN LEGAL HIGHER EDUCATION: A THOUSAND INTELLECTUAL PROPERTY RIGHTS

DR SABINE JACQUES\*

## ABSTRACT

Battling against student boredom and disengagement, IP law teachers need to continuously adapt their teaching methods and approaches to meet student expectations. This article argues that the use of gamification in legal higher education constitutes a pedagogical tool to foster student collaboration, motivation, creativity and engagement. It discusses a personal experiment consisting of the design of a tangible board game with a digital app for intellectual property law students.

## INTRODUCTION

In a world where information is endless and students are acquainted with the latest technologies, education continuously needs to reinvent itself to meet students' expectations. Even though today's students might not be tech savvy, there is no denying that teachers currently face the most technologically integrated generation.<sup>1</sup> Unsurprisingly, the Socratic Method<sup>2</sup> sits uneasily with students continuously connected via digital devices (e.g. mobile phones, personal computers or tablets).<sup>3</sup> Today's students are continuously stimulated and are exposed to numerous forms of entertainment. Consequently, they become less patient in their personal lives and they have similar expectations for their education. Against this backdrop, law teachers in general need to overcome new challenges in adapting their teaching approaches to students' needs and preferences to keep them motivated and foster engagement in the learning process.<sup>4</sup> Indeed, particular pedagogical issues in the legal discipline concern the greater number of students, the expansion of the curriculum<sup>5</sup> and teaching methods have diversified over the years. And yet, legal higher education continues to face challenges such as the relevance of the degree to enter the legal profession and how implement research in the curriculum. Whilst many universities abide by the research-led teaching approach, which intends to promote and embed research in the curriculum, difficulties may arise as to how research fits teaching.

This article reflects on a personal experiment to introduce gamification in law schools based on my research with the design of a tangible board game and its app version to foster motivation and engagement in- and outside the classroom. Therefore, while

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<sup>1</sup> Chris Jones & Binhui Shao, *The net generation and digital natives: implication for higher education* (2011) available at [http://oro.open.ac.uk/30014/1/Jones\\_and\\_Shao-Final.pdf](http://oro.open.ac.uk/30014/1/Jones_and_Shao-Final.pdf) (last access date 3/10/2017).

<sup>2</sup> Peter Jarvis, 'The Socratic Method' in P. Jarvis (ed.), *The Theory and Practice of Teaching* (Routledge, 2006), 90.

<sup>3</sup> Heather Garretson, Tonya Krause-Phelan, Jane Siegel and Kara Zech Thelen, 'The value of variety in teaching: a professor's guide' (2014) 64(1) *Journal of Legal Education*, pp. 65–92; Benjamin V. Madison, III, 'The elephant in law school classrooms: overuse of the Socratic method as an obstacle to teaching modern law students' (2008) 85(3) *University of Detroit Mercy Law Review*, p. 293; Thomas Keefe, 'Teaching Taxonomies', (2006) 14 *Perspectives* p. 153, p.156.

<sup>4</sup> D. Donahoe, 'An autobiography of a digital idea: from waging war against laptops to engaging students with laptops' (2010) 59(4) *Journal of Legal Education*, p. 486.

<sup>5</sup> Including its adequateness to prepare students to enter the legal profession (i.e. requirements are provided by the Solicitors Regulation Authority in the UK).

many issues can be mirrored in other legal disciplines, this article focuses exclusively on intellectual property (IP) law. First, why and how gamification represents a viable teaching method is explained by examining the relevance of gamification in legal higher education and devising the profile of current students. Second, we consider the nature and benefits of gamification in IP education. Finally, the results of the gamification in IP education experiment at the University of East Anglia, strengths and weaknesses, are evaluated. The remainder of this article analyses attempts to widen the use of technologies and pedagogies for the future of legal higher education.

## RELEVANCE OF GAMIFICATION FOR LEGAL HIGHER EDUCATION

A recurring problem in legal higher education is the student's decrease in motivation and engagement to participate actively in the learning process.<sup>6</sup> This requires teachers to continuously overhaul teaching methods and find approaches to combat student boredom.<sup>7</sup> Gamification is simply the use of game design and mechanics to enhance non-game contexts, as gamification is thought to increase participation and engagement in learning. Some teachers have introduced features of friendly competition such as leader boards, scores, points, badges, levels etc. which can be integrated into an institution's intranet portal.<sup>8</sup> These types of gamification enable students to compare their performance with that of others in the same class. Whilst such mechanics can contribute to increase attendance and potentially increase the performance of students, this article argues that for gamification to be successful in higher education, there needs to be a better integration of game-like elements in the curriculum. This will require appealing to a particular mindset to foster motivation and focus on the emotional student responses to influence the design of learning activities. The introduction of such features in an educational environment already includes the use of game mechanics to improve the learning process. However, further changes may need to be made to fully appreciate the benefits of gamification and the associated change in student behaviour.

Kapp defines gamification as 'using game-based mechanics, aesthetics and game thinking to engage people, motivate action, promote learning, and solve problems.'<sup>9</sup> Whilst games tend to pursue primarily a goal of entertainment, gamification purports the use of game elements and activities in a serious environment to improve independent learning and therefore, commitment.<sup>10</sup> Yet, games and education are similar as they both aim to achieve a specific goal through overcoming obstacles. These similarities between environments have been identified by the past, as educational games in general are not

<sup>6</sup> This can lead to emotional and psychological distress. Eventually, this psychological distress and isolation may go on to developing depression or other mental health problems during their time either at University or either, in their professional career. Therefore, by tackling isolation, student withdrawal and boredom in the classroom, one could perhaps argue that gamification contributes to battling against mental health disorders in higher education. See N. Kelk, G.M. Luscombe, S. Medlow and I. B. Hickie, 'Courting the Blues: Attitudes Towards Depression in Australian Law Students and Legal Practitioners' (2009) *Brain & Mind Research Institute*, p. 388.

<sup>7</sup> Daniel M. Ferguson, 'The Gamification of Legal Education: Why Games Transcend the Langdellian Model and How They Can Revolutionize Law School' (2016) 19 *Chap. L. Rev.* p. 629, p. 630.

<sup>8</sup> A. Amriani, A. F. Aji, A. Y. Utomo, and K. M. Junus, 'An Empirical Study of Gamification Impact on E-Learning Environment' (2013) In: *Proceedings of 2013 3rd International Conference on Computer Science and Network Technology, IEEE*, October, pp. 265–269.

<sup>9</sup> Karl M. Kapp, *The gamification of learning and instruction* (John Wiley & Sons, 2012), p. 10.

<sup>10</sup> G. Silverman, 'Law Games: The Importance of Virtual Worlds and Serious Video Games for the Future of Legal Education' in E. Rubin (Ed.), *Legal Education in the Digital Age* (Cambridge University Press, 2012), pp. 130–157.

new.<sup>11</sup> However, there is very limited use of games in higher education.<sup>12</sup> Generally, these games are relegated into households and parents wishing to ensure that their children learn important skills whilst having fun and hopefully later, improve their school performance.<sup>13</sup> Student achievement and academic success nevertheless shares resemblance with a player's progress in a game.<sup>14</sup> Indeed, students must achieve various learning objectives and outcomes established in relation to a particular module. Additionally, students' progress is repeatedly monitored – either through active participation in the classroom, through seminars or via assessments. This phase is actually crucial as results and marks determine the future of the student. In this context, educational institutions have already embraced gamified activities and technologies.

Today, universities use online marking and complex statistical methods to analyse the overall learning experience of students.<sup>15</sup> Furthermore, technology is already used to enhance the student experience, for example, the use of PowerPoint. Initially, the reliance of this type of visual aid intended to bring lectures closer to the student's environment. However, today, a PowerPoint presentation cannot compete with other typical sources of information created and executed by professional multimedia companies. Therefore, instead of fostering student engagement, slides led to the opposite effect.<sup>16</sup> Students became even more disengaged, impatient and passive. To mitigate this effect, some teachers use other technologies to increase student participation, for example the use of clickers in the classroom where students anonymously answer multiple choice questions. Whilst this leads to a group discussion, the number of questions asked remains limited and feedback is not immediate.<sup>17</sup>

Gamification aims at increasing the use of game-like elements and technology to track student progress offering new ways of identifying the levels reached by students but also, it offers myriads of ways to incentivise collaboration amongst students instead of competition against one another.<sup>18</sup> Therefore, instead of relying on technological effects to lure students into the learning process, gamification allows to create an environment conducive to interactions and better understanding of information.

Throughout my experience as a teacher, I realised that more and more, students compared their performance with one another and this sometimes leads to feelings of unfairness towards the learning process. Through the transfer of game-like elements to an educational context, this perceived unfairness is mitigated by the focus on collaboration and teamwork towards the same learning goals. Here, students rely less on the teacher for learning to take place. In my experience, this ultimately results in a positive change of student behaviour towards the learning process.

<sup>11</sup> First games constituted simulations of war zone scenarios. J. Coleman, 'Learning through games'. in E. Avedon and B. Sutton-Smith (Eds). *The study of games*. (New York and London. John Wiley, 1971), pp. 322–329.

<sup>12</sup> Though this approach is gaining popularity. Daniel M. Ferguson, 'The Gamification of Legal Education: Why Games Transcend the Langdellian Model and How They Can Revolutionize Law School' (2016) 19 *Chap. L. Rev.* p. 629, p. 633; S. de Freitas, *Learning in immersive worlds: a review of game-based learning* (Bristol: Joint Information Systems Committee, 2006), p.54 available at [http://www.jisc.ac.uk/media/documents/programmes/elearninginnovation/gam-ingr\\_eport\\_v3.pdf](http://www.jisc.ac.uk/media/documents/programmes/elearninginnovation/gam-ingr_eport_v3.pdf)

<sup>13</sup> J. Coleman, 'Learning through games'. in E. Avedon and B. Sutton-Smith (Eds). *The study of games*. (New York and London. John Wiley, 1971), pp. 322–329.

<sup>14</sup> G. Kiryakova, N. Angelova & L. Yordanova, 'Gamification in Education' (2014) available at <http://www.sun.ac.za/english/learning-teaching/ctl/Documents/Gamification%20in%20education.pdf>

<sup>15</sup> See student statistics' pages on various institutions' websites. E.g. UCL's student statistics data providing information on the composition of UCL's student body. <https://www.ucl.ac.uk/srs/statistics>

<sup>16</sup> D. Donahoe, 'An autobiography of a digital idea: from waging war against laptops to engaging students with laptops' (2010) 59(4) *Journal of Legal Education*, p. 488.

<sup>17</sup> Daniel M. Ferguson, 'The Gamification of Legal Education: Why Games Transcend the Langdellian Model and How They Can Revolutionize Law School' (2016) 19(2) *Chapman Law Review*, p. 638.

<sup>18</sup> *Ibid.*, p. 630.

Concentrating on the learning process and the creation of an ‘immersive learning’<sup>19</sup> environment, rather than being primarily associated with knowledge, gamification fosters a change in the students’ behaviour. The inclusion of game characteristics intends to increase the students’ motivation, which in turn, improves the level of knowledge in a particular legal field. By focusing on collaboration and commitment, a new sense of responsibility is developed. In other words, not only does gamification provide a way to render lectures more entertaining, it offers more flexibility for students to reach a higher level of understanding and acquire skills currently disappearing from education.

## THE STUDENT LEARNER PROFILE

There has always been a mismatch between professors and students. This is somewhat generational but it is even truer with current students. The learner’s profile behaves differently than previous generations. For example, yesterday’s learners who went on to become professors may have a linear reasoning whereby concepts are tackled one after another and generally text-based. Today’s learners believe they can multi-task quickly (e.g. having several programmes running simultaneously on their screens during lectures),<sup>20</sup> they thrive in collaborative environments and rely less on teachers for imparting knowledge than any generation before.<sup>21</sup> This does not mean that students do not rely on teachers anymore, rather the role of the teacher is morphing to meet the developing needs of the student profile.<sup>22</sup> In an age where information is endless, the teacher becomes a facilitator,<sup>23</sup> helping students navigate and acquire new knowledge for future purposes.

There is no denying that modern university students have an increased sense of entitlement.<sup>24</sup> Whatever the driver, the ascent of the importance of student satisfaction, high fees paid for education, the competitive nature of the job market or a combination of these, students want to be in control of their learning process. They want to choose their modules and have a strong expectation that teaching methods are aligned to their needs and tastes.

Additionally, as in their private lives, students are used to going from one resource to another within a matter of seconds, they are less patient and call for immediate feedback.<sup>25</sup> Whilst feedback is inherently important for improving the learning experience, there is a discrepancy between the teacher’s and the students’ perspectives as to the type

<sup>19</sup> S. de Freitas, *Learning in immersive worlds: a review of game-based learning* (Bristol: Joint Information Systems Committee, 2006), available at [http://www.jisc.ac.uk/media/documents/programmes/elearninginnovation/gaming\\_report\\_v3.pdf](http://www.jisc.ac.uk/media/documents/programmes/elearninginnovation/gaming_report_v3.pdf).

<sup>20</sup> Hannah Green & Celia Hannon, Young People are spending their time in a space which adults find difficult to supervise or understand (DEMOS, 2015) p. 18–67, available at <http://dera.ioe.ac.uk/23215/1/Their%20space%20-%20web.pdf>

<sup>21</sup> Yet, studies show this is a myth. Y. Ellis, W. Daniels and A. Jauregui, ‘The effect of multitasking on the grade performance of business students’ (2010) 8 *Research in Higher Education Journal*, <http://www.aabri.com/manuscripts/10498.pdf>; L. L. Bowman, L. E. Levine, B. M. Waite and M. Dendron, ‘Can students really multitask? An experimental study of instant messaging while reading’ (2010) 54 *Computers & Education*, pp. 927–931; L. Barak, ‘Multitasking in the university classroom’ (2012) 6(2) *International Journal for the Scholarship of Teaching and Learning*, article 8.

<sup>22</sup> D. Donahoe, ‘An autobiography of a digital idea: from waging war against laptops to engaging students with laptops’ (2010) 59(4) *Journal of Legal Education*, p. 491.

<sup>23</sup> Don Tapscott, Growing up digital: the rise of the Net generation (Meridian, January 1998) available at [https://projects.ncsu.edu/meridian/jan98/feat\\_6/digital.html](https://projects.ncsu.edu/meridian/jan98/feat_6/digital.html)

<sup>24</sup> Already identified in the nineties: Diane Reay, Gill Crozier & John Clayton, ‘Fitting in’ or ‘standing out’: Working-class students in UK higher education (2010) 36(1) *British Educational Research Journal*, pp. 107; Peter Sacks, *Generation X goes to college: an eye opening account of teaching in postmodern America* Chicago (Open Court, 1996).

<sup>25</sup> Evans describes this as the ‘feedback gap’; Carol Evans, ‘Making Sense of Assessment Feedback in Higher Education’ (2013) 83(1) *Review of Educational Research*, pp. 70–120.

of feedback expected. For example, students tend to complain about the way feedback is provided, its content, the timing and the activities allowing feedback opportunities. Meanwhile teachers believe they offer multiple oral and written feedback opportunities in and outside the classroom. However, teachers perceive that their students are unable to identify these opportunities which reduces their ability to reflect and enhance their performance.

As student motivation appears to be in decline, it is important to understand the typical law student profile. Studies show that key factors such as discovery, sense of challenge and feedback can positively impact student motivation and sense of control, focusing less on the cognitive process and related efforts, and more on problem solving, creativity, ability to predict challenges and observations.<sup>26</sup> Given that law students are accustomed to instant high quality multimedia and have very different learning styles, gamification could provide a bespoke, controlled learning experience.

### REVAMPING THE REVISION GAME: A THOUSAND INTELLECTUAL PROPERTY RIGHTS

*A Thousand Intellectual Property Rights* is a dedicated IP law board game. Aimed predominantly at law students, it draws on well-known game rules to raise awareness of the complexities of IP law issues in a lucid manner. Essentially, the premise of the game is that the students role play and upon their arrival in the classroom they impersonate inventors at a science fair.

Sat in teams around a board, each inventor in turn has to answer IP law-related questions in playing cards to progress their pawn on the board. If the student fails to answer the question correctly, a card from the 'chance' pile. Here, the team may discuss and answer the question as a team to earn money for future ventures. Beware industrial espionage! At any point, a player from a competing team can try to block another's progress by posing a threat. The first player to reach the end of the board and the team having earned the most money, wins the game.

To introduce gamification in a module, one needs a game or at least the introduction of game-like elements in the learning process. I explored the possibility of including gamification in higher education by designing my own board game, *A Thousand Intellectual Property Rights* as a revision tool for a masters' level IP module based on my research into gamification as a pedagogical method. From the outset, I knew that I would have to come up with a narrative to immerse the students into the learning process. After all, if I wanted the students to be immersed and engaged, I needed to ensure that they related to the game.<sup>27</sup> Context is therefore important as it impacts on student attention. On arrival in the classroom, students are in an unusual situation: they have to impersonate inventors at a science fair and they do everything possible to ensure their invention is protected by IP laws.

Games can lead to mixed emotions: winners generally experience a feeling of happiness whereas losers tend to feel failure and can quickly disengage with the game. Therefore, it is important for the learning activities to enable repeated attempts, tailored

<sup>26</sup> Contra: Paul A. Kirschner, John Sweller & Richard E. Clark, 'Why minimal guidance during instruction does not work: an analysis of the failure of constructivist, discovery, problem-based, experiential and inquiry-based teaching' (2006) 41(2) *Journal of Educational Psychologist*, pp. 75–86.

<sup>27</sup> On the importance of student connection with information, see Deirdre Wilson and Dan Sperber, 'Relevance Theory' in Horn, L.R. & Ward, G. (eds.) 2004 *The Handbook of Pragmatics* (Oxford: Blackwell, 2004), pp. 607–632; A. B. Frymier & G. M. Schulman, "'What's in it for me?'" Increasing content relevance to enhance students' motivation' (1995) *Communication Education* p. 40, p. 44.

to the students' level of knowledge and allowing multiple paths to achieve the same goals. I therefore added a twist, compared to traditional games, by setting out two goals. As inventors, the students must do everything legally possible to secure the success their invention deserves by winning IP rights (individual goal). Not only do they have to secure the IP rights to protect their invention, they also need to collaborate to gain money to commercialise future innovative ventures (team goal). My aim in setting these two goals was to allow stronger students to thrive, while mitigating the feeling of failure experience by other students. This rests on the idea that peer-based learning fosters collaboration, support in the competition and conceptual knowledge in education.<sup>28</sup>

Inherently, the game requires rules and unsurprisingly, these rules need to work. These rules are crucial to ensure the efficiency of the activity. They need to define what can be achieved to progress and what is not permitted. Additionally, rules should aim to insert fun and foster interactivity. Students must want to engage in the learning activity and to do so, rules need to be clear and coherent. To achieve the two key goals of this game, students are divided into teams. Each team sits around a board, which includes pawns for public display of the players' progress. A trusted inventor will keep a record of the money earned by the team on a piece of paper. This makes progression transparent and tends to incite friendly competition amongst students while the learning takes place. On this board, students find a main deck of cards from which they must draw a card and answer the question in turn. This enables the player to progress on the board. The other deck of cards is the 'chance' pile. To provide multiple paths to meet the game's objectives, students failing to answer the main question may draw a card from the chance pile. Here, students need to collaborate, discuss and agree on an answer for the team to earn money and achieve the team goal. Finally, the game also has 'threat' cards which can be played at any point in the game to block another student's progress (mirroring an industrial espionage scenario). These 'threat' cards inject an element of unpredictability and surprise contributing to making the learning experience more fun. This also allows students to think about strategies to achieve targets and obtain rewards from their progression.

To inject entertainment value, in addition to the 'threat' cards, I designed three further types of cards for the 'chance' pile. These included: (1) a gift card to represent a research grant and therefore additional unexpected money for the team; (2) a card with a spinner authorising the initial unanswered question to be bounced onto another player; and (3) a 'pay your debts' card where the team has to give back money to pay for R&D expenses. While these cards have very little to do with the acquisition of knowledge or the testing of knowledge, they contribute to the narrative, the general theme of being an inventor at a science fair trying to commercialise his or her own IP and to seek collaborations for future ventures. In essence, the additional cards render the game relatable and add credibility in the eyes of the player.

It is essential for the game to include activities enabling students to meet the module's learning outcomes and objectives. Imagination and creativity on behalf of the teacher is essential to introducing game-like elements in legal higher education. In the LLM Globalisation of Intellectual Property Law module, I achieved this by providing a wide range of questions covering all IP law rights and topics (approx. 150 questions). These questions address different skills as the question cards include multiple choice questions, case scenarios, closed questions and open-ended questions. This endeavour

<sup>28</sup> Curtis J. Bonk & Vanessa P. Dennen, 'Massive Multiplayer Online Gaming: A Research Framework for Military Training and Education' (Technical Report 2005-1) p. 29.

provides two types of feedback. First, feedback is provided throughout the duration of the game as answers with a brief explanation are provided on each card. This increases student performance as students are encouraged to learn from their mistakes and adapt to progress. As such, progress is immediately reflected to the student advancing in the game.<sup>29</sup> Second, feedback is provided at the end of the game by designating the individual and team winners.

To consolidate their knowledge during the time building towards the exam, all cards are uploaded on the intranet as flashcards. These cards are downloadable even on portable devices such as smartphones or tablets for students to use at their leisure. Each card includes a QR code<sup>30</sup> and is embedded links redirecting students to resources for further information. These alternative sources have been carefully chosen from a wide range of materials ranging from blog posts, to vlogs and including official reports, videos and podcasts.

### STRENGTHS AND WEAKNESSES OF GAMIFICATION IN IP LAW HIGHER EDUCATION

What was particularly interesting from my perspective as teacher was how each team evolved throughout the game. What surprised me was how students started to *own* the game by adapting it to their needs. Whilst all teams started by simplifying the rules (leaving the ‘threat’ cards out), most of them played with the full set of rules once they were more acquainted with the game. They ensured they read the correct answer aloud to enable others to consolidate their own IP law knowledge. More interestingly, students began to take out their notepads and write down concepts they needed to revise in light of the forthcoming summative assessment.

Furthermore, I very much enjoyed my role as a facilitator. It was easier for me to go through the various teams and identify where clarifications were needed (or what level of knowledge or understanding my students have by this point) rather than if I was facing a group of over 50 students and asking questions sporadically. Here, the ‘chance’ cards functioned particularly well. Allowing the team to answer as a group, these cards resulted in an opportunity for a good discussion amongst the students, which I could witness and contribute to by providing feedback. I quickly realised the benefits in terms of flexibility and opportunities that this unique game created. In this regard, gamification allows students to have a sense of greater control by individually tailoring their learning experience. Further, by relying on interactivity and collaboration the predetermined learning objectives are largely achieved. Equally, the game facilitates feedback as the students then to automatically realise the consequences of their actions as the game progresses.

Whilst I sometimes experienced a decrease in students’ motivation and engagement in a traditional learning environment, gamification allowed me to render the learning experience addictive for my IP law students. This change in behaviour propelled students to be at the centre of their learning process, enabling me, as a teacher, to have a better feel and control over what happened in the classroom.<sup>31</sup>

<sup>29</sup> Referred to as ‘Juicy feedback’ in Daniel M. Ferguson, ‘The Gamification of Legal Education: Why Games Transcend the Langdellian Model and How They Can Revolutionize Law School’ (2016) 19(2) *Chapman Law Review*, p. 636.

<sup>30</sup> Meaning a two-dimensional barcode.

<sup>31</sup> Markus Krause, Marc Mogalle, Henning Pohl & Joseph J. Williams, ‘A playful game changer: fostering student retention in online education with social gamification’ (2015) *Proceedings of the Second ACM Conference on Learning @ Scale*, pp. 95–102.

However, the introduction of gamification more generally in legal higher education is not without inconvenience. The entry costs (e.g. in time) are significant for the teacher as a huge amount of educational development time is required during the preparation phase.<sup>32</sup> The activities need to be meticulously planned and adapted to the students' level for the game to be successful. Further costs are required for the fine-tuning of the game. Gamified learning is complex and will most likely require adjustments to be made in future editions of the game. Due to the nature of legal education, the activities will need to be updated on a regular basis to mirror legal developments. This naturally increases the time, effort and investment in this pedagogical approach. After all, if the design is poor or if the rules do not work, the students will not be motivated or engaged. To the contrary, the change in behaviour may be negative and potentially lead to an increase of confusion and disengagement.

Simply rewarding students might increase their impatience and render them less creative. This is the reason why the overreliance on points, badges<sup>33</sup> or leader boards are possibly inadequate in higher education as not everyone is competitive in nature. These students may actually lose interest and disengage with the learning process. It is therefore essential to use game mechanics to 'support an intrinsically rewarding experience'<sup>34</sup>.

A more embedded approach to gamification in legal higher education might require changes in the design of assessments. Some gamified learning experiences do not match the learning objectives easily.<sup>35</sup> This aspect could nevertheless be moderated by better planning as it is best to align the gamified activities onto the learning objectives set for a particular module from a preparatory perspective.

#### WIDENING THE USE OF TECHNOLOGY AND ALTERNATIVE TEACHING APPROACHES IN THE FUTURE

In an attempt to deter IP infringements, both the EU and the UK wish to educate young people about IP law concepts. Today's youth tend to display attitudes approving counterfeiting and piracy.<sup>36</sup> To instigate a behavioural change and develop a better understanding of IP rights, ideas have emerged to introduce gamified learning activities across the curriculum at an early age. Whilst recognising that such behavioural shift will not be an easy goal to reach, the European Union Intellectual Property Office ('EUIPO', formerly the Office for Harmonization in the Internal Market or 'OHIM') is ready to assist Member States. Relying on education and subject specific experts, the introduction of gamified learning activities is encouraged. New games could be disseminated in educational institutions across the EU to raise awareness of younger generations of IP law issues, important property rights that inherently shape our society and economy.<sup>37</sup>

<sup>32</sup> For more on the 'rollercoaster ride of trial and error'. Clark Aldrich, *Simulations and the future of learning: an innovative (and perhaps revolutionary) approach to e-learning* (Pfeiffer, 2003).

<sup>33</sup> See now the introduction of 'open badges'. Anne Hole, 'Open badges: exploring the potential and practicalities of a new way of recognising skills in higher education' (2014) Special edition on digital technologies in learning development, *Journal of Learning Development in Higher Education*, available at <http://www.aldinhe.ac.uk/ojs/index.php?journal=ildhe&page=article&op=view&path%5B%5D=281>

<sup>34</sup> Iulian Furdu, Cosmin Tomozei & Utku Köse, 'Pros and Cons: Gamification and Gaming in the Classroom' (2017) 8(2) *Brain*, p. 58.

<sup>35</sup> S. de Freitas & T. Neumann, 'The use of 'exploratory learning' for supporting immersive learning in virtual environments' (2009) 52 (2) *Computers and Education*, pp. 343- 352.

<sup>36</sup> OHIM, *Intellectual Property and Education in Europe*, September 2015, available at <https://euipo.europa.eu/ohimportal/documents/11370/80606/IP+and+Education+final+report+September+2015>

<sup>37</sup> Similar considerations are found in the UK, see Ian Hargreaves, 'Digital Opportunity: A Review of Intellectual Property and Growth' (UKIPO, 2011), p. 78 available at [http://orca.cf.ac.uk/30988/1/1\\_Hargreaves\\_Digital%20Opportunity.pdf](http://orca.cf.ac.uk/30988/1/1_Hargreaves_Digital%20Opportunity.pdf).



Despite initiatives such as the UK Intellectual Property Office (UKIPO) Wallace & Grommit,<sup>38</sup> ideas and case studies developed by copyrightuser.org<sup>39</sup> and upcoming Black Swan,<sup>40</sup> gamified learning in the IP law field is still nascent.<sup>41</sup> Recent research posits the gamification market as growing. Market Watch's study forecasts that by 2020, the gamification market would grow from USD 1.65 billion in 2015 to USD 11.10 billion with Asia-Pacific becoming the front runner.<sup>42</sup> This growing trend towards the use of game-like elements in serious contexts is welcomed, but more could be done. For example, the EUIPO's suggestion to bring member states, teachers and stakeholders together and the work of the European IP Teachers' Network (EIPTN) is an important starting point.<sup>43</sup>

However, for gamification to be efficient as well as effective, a blended learning approach is recommended. This would bring together game-like elements tailored to the goal pursued and create social tools to encourage support and student interaction. Here, it is important to focus less on reward, than to provide a learning environment conducive to greater motivation, engagement and interaction. Equally, the development of educational games in higher education should ensure that in addition to acquiring knowledge, such initiatives encompass ways to challenge the existing system. Essentially, this is what the 'chance' cards sought to achieve by providing opportunities for the teams to discuss IP law concepts and challenge the current system to invite legal reforms.

Whilst the experiment reported in this article has focused on IP law in higher education, it is reasonable to consider expanding the reach of this endeavour beyond universities. This is not without hurdles. First, *A Thousand Intellectual Property Rights* would have to be adapted to its new audience by multiplying the questions suited for players without any prior knowledge in IP law and by fine-tuning the alternative resources used referred to in the game. Second, support needs to be offered to teachers and schools as these tend to be non-IP law experts. Finally, teachers would also require greater guidance on the specific assessment methods to verify whether learning outcomes have been met.

As a first attempt to broadening the use of the hard copy board game experimented with by my students, I ventured into developing an app, accessible to all (including the wider public) for download onto mobile devices. Whilst this development project is still underway, the biggest challenge is to reproduce the blended learning approach described earlier in the digital environment. This goes to show that simply because an activity works well in one format that it will automatically be efficient in another. To the contrary, any such attempt requires unique tailoring and careful planning. Therefore, gamification is not a linear process, rather it resembles the back-and-forth movement of a clock's pendulum.

<sup>38</sup> The UK Intellectual Property Office provides a nationwide educational resource called Wallace & Gromit's World of Cracking Ideas, focusing on a wide range of topics from entrepreneurship to intellectual property. The website, featuring characters Wallace & Gromit, was developed in partnership with Aardman Animations and is aimed at children aged 4 to 16. See <http://crackingideas.com/>

<sup>39</sup> 'The Game is On' currently has three episodes. Each short animation is accompanied by case studies covering a broad range of copyright issues. See <http://www.copyrightuser.org/educate/the-game-is-on/>

<sup>40</sup> This is an educational board game created by a team at Lancaster University. For more, see <https://www.lancaster.ac.uk/enterprise/centre/students/ip-game/>

<sup>41</sup> It is also worth mentioning IPSims. This game focuses less on substantial IP concepts but raises awareness as to the different procedural stages of obtaining a patent while thinking about ways to best commercialise an invention. Hence, this endeavour does not aim at educating students to IP concepts.

<sup>42</sup> Market Watch's study: 'Gamification Market by Solution (Consumer driven and Enterprise driven), Applications (Sales and Marketing), Deployment Type (On-Premises and Cloud), User Type (Large Enterprise, SMBs), Industry and Region – Global Forecast to 2020' (February 2016) available at <http://www.reportsnreports.com/reports/479613-gamification-market-by-solution-consumer-driven-and-enterprise-driven-applications-sales-and-marketing-deployment-type-on-premises-and-cloud-user-type-large-enterprise-smb-industry-and-region-global-forecast-to-2020.html>

<sup>43</sup> OHIM, *Intellectual Property and Education in Europe*, September 2015, p. 79 available at <https://euiipo.europa.eu/ohimportal/documents/11370/80606/IP+and+Education+final+report+September+2015>.

## CONCLUDING REMARKS

Educational approaches and practices continue to evolve, always aimed at bringing the learning process closer to the student's environment. Currently, some IP law students display a lack of engagement with their studies, which ultimately hinders the learning process. Gamification represents a viable solution to the problems of minimal perceived feedback and ability to directly relate to the content of specific IP law modules.

As individuals, we are all familiar with game mechanics and we have played games since an early age. There is evidence that games motivate individuals in engaging in particular activities. Games enable players to relate to the learning activity by providing meaning to the experience. Equally, games provide opportunities to practice overcoming challenges. Law schools already integrate game elements into their curriculum (badges, points, leader boards, clickers etc.). Consequently, to some extent legal teachers are already game developers. However, gamification activities need to be carefully developed and fully integrated with more conventional learning processes in the curricula, with the emphasis on support instead of mere reward.<sup>44</sup>

<sup>44</sup> The author is happy to be contacted should any intellectual property teacher be interested in experiencing the IP game with their students. Email: [sabine.jacques@uea.ac.uk](mailto:sabine.jacques@uea.ac.uk) or [sabine.jacques6@gmail.com](mailto:sabine.jacques6@gmail.com)

# EMBEDDING INTELLECTUAL PROPERTY LAW IN DUTCH AND BRITISH UNIVERSITIES: INVENTOR JOHANN LIPPERSHEY AND HIS TELESCOPE

*JOE SEKHON and PETER VAN DONGEN\**

## ABSTRACT

Whilst the Dutch inventor, Johann Lippershey was ultimately not successful in securing a patent for inventing the telescope in 1608, his failure to do so and specifically the reasons for his failure, should act as a cautionary tale as to why Universities in the Netherlands and the UK should provide their respective students with a comprehensive and coherent knowledge of IP so that they have the greatest chance of protecting and exploiting any intellectual property (IP) they do create once graduated. This paper examines what Dutch and British universities are doing to embed IP education in their respective curricula and whether the changing nature of their roles in society has helped or hindered their ability to deliver IP education in the form that their student communities desire.

## INTRODUCTION

For a patent application to be successful a patentee must ensure (amongst other criteria) that he is the first to file an acceptable application.<sup>1</sup> This first to file approach offers a number of benefits including avoiding the sometimes difficult question as to who was the first to invent (which arguably sits more comfortably with the natural rights theory underpinning patent law and many of the other IP rights that are common place today).<sup>2</sup> First to file is also credited with incentivising inventors to disclose their inventions as soon as is practicable because they could well be rewarded with a twenty year monopolistic right over the invention in return for disclosure.<sup>3</sup> In essence, “. . . the first-to-file system . . . delivers rough, but simple justice”<sup>4</sup> in comparison with the evidential and administrative difficulties often associated with the first-to-invent system.

This paper will use the example of the Dutch inventor Johann Lippershey, (who is widely credited with the invention of the telescope but who failed to secure a patent largely as a result of the first to file principle), as a salutary reminder to Dutch and British universities that the teaching of IP should form an integral part of their undergraduate and postgraduate curricula, particularly if they wish their students to be able to commercially benefit from their ingenuity and inventiveness. This paper will also review a selection of the current delivery models employed by both Dutch and British universities to educate their students about intellectual property. Observations, where appropriate, will be made as to whether these methods are still fit for purpose and what

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<sup>1</sup> L Bently and B Sherman *Intellectual Property Law* (2014) Oxford University Press.

<sup>2</sup> A Mossoff ‘Rethinking the development of patents: an intellectual history, 1550–1800’ (2001) 52 *Hastings LJ* 1255, 1259–1276.

<sup>3</sup> Anon, ‘Prior Art in Patent Law’ (1959) 73 *Harv L Rev* 369, 380.

<sup>4</sup> *Supra* N [2].

additional delivery protocols could be deployed by higher education institutions in both countries as means of maximising the beneficial impact of IP curriculum on the student population at large.

#### JOHANN LIPPERSHEY: INVENTOR OF THE TELESCOPE

Widely credited with the invention of the telescope,<sup>5</sup> Johann Lippershey nonetheless failed to secure a patent for his efforts which he filed for in 1608. Of German origin, Lippershey settled in Middleburg, the capital of the province of Zeeland in the Netherlands, in 1594. It is at this stage that his eventual association with the telescope began. By 1608, his work as a spectacle maker and master lens grinder led him to apply to the States General of the Netherlands for a 30 year patent for his telescope which he named ‘kijker’ or ‘looker’.<sup>6</sup> The States General was the national government of the Netherlands at the time.

The following was an entry taken from documents originating from the archives of the States General, dated 2 October 1608.<sup>7</sup>

“On the petition of Hans Lippershey, spectacle-maker, inventor of an instrument for seeing at a distance, as was proved to the States, praying that the said instrument might be kept secret, and that a privilege for thirty years might be granted to him, by which everybody might be prohibited from imitating these instruments, or else grant to him an annual pension, in order to enable him to make these instruments for the utility of this country alone, without selling any to foreign kings and princes.”

Whilst this entry evidences that Lippershey applied for a patent<sup>8</sup> what is not clear however is who or what inspired him to develop the telescope in the first place. Most accounts suggest that Lippershey was inspired by “ . . . two children playing in his shop with some lenses and [they] noticed that, by holding two of them in a certain position, the weather-vane of the nearby church appeared much larger. [At this point] Lippershey . . . tried this out for himself and then improved it by mounting the lenses in a tube.”<sup>9</sup> Other less common accounts suggest that Lippershey’s apprentice held the lenses and not the aforementioned children, whilst alternative explanations imply that Lippershey ironically copied the idea from another optician.<sup>10</sup>

What is clear however was that Lippershey was not granted a patent but instead was issued with an annual pension which he himself had suggested as an alternative to a patent. In return for this pension, Lippershey promised not to sell the invention to foreign kings.<sup>11</sup>

What is particularly interesting for the purposes of this paper were the reasons given by the States General as to why Lippershey could not be granted a patent. The main reasons were that others also claimed ownership over the telescope concept and its development which was already in the public domain in Middleburg, the Netherlands and beyond. Principle amongst those asserting claims in addition to Lippershey were Jacob Metius and Zacharias Jansen. Metius had also sent a petition to the States General in which he asserted that he had developed a telescope of at least equal power

<sup>5</sup> H King, *The History of the Telescope* (2003) Dover Publications, Inc.

<sup>6</sup> R Dunn *The Telescope* (2011) Dover Publications, Inc.

<sup>7</sup> Supra N [6].

<sup>8</sup> Supra N [6].

<sup>9</sup> Supra N [6].

<sup>10</sup> Supra N [7].

<sup>11</sup> Supra N [6].

to Lippershey's but using less expensive materials.<sup>12</sup> Whilst Jansen, specifically his son, Hans, asserted that his father had in fact "invented the telescope in 1590 and used it to look at the moon and stars."<sup>13</sup> Crucially however Hans' sister "gave either 1611 or 1619 as the date of invention" thereby undermining Jansen's credibility in terms of first to invent.<sup>14</sup> It is perhaps easy to understand therefore why the States General did not grant Lippershey a patent; even if Lippershey had successfully defeated the first to invent claims of both Metius and Jansen, he would have found it impossible to counter the argument that in fact his telescope did not satisfy two of the three pillars of what we now term as the classic trinity of both Dutch and UK Patent law;<sup>15</sup> the telescope was neither new or inventive given that there were versions of the telescope widely available not only in the Netherlands, but in France, Germany and Italy.<sup>16</sup>

### RATIONALES FOR TEACHING IP LAW IN UNIVERSITIES

Whilst Lippershey did not go entirely unrewarded for the invention of the telescope in the Netherlands (he was after all granted an annual pension for his efforts); it is worth noting albeit hypothetically, that if Lippershey had received guidance on how patent law and more generally how the IP framework in the Netherlands operated during his era; the outcome of his patent application to the States General could well have been different. Whilst later on in this section, the paper will argue that universities could do more to ensure their students understand the importance of IP education to their future economic prospects, it is worth stating at this point that during Lippershey's era (1570–1619), the two universities in existence in the Netherlands (Leiden and Franeker) did not have at the centre of their mission the employability of their students which Tomlinson has argued is more of a 20th/21st century construct.<sup>17</sup> Instead, these two universities according to Martin<sup>18</sup> (and similar to other mediaeval universities of the period) had as their guiding principles the following two concepts. Teaching (in particular teaching select demographic groups such as priests and lawyers) and scholarship ("the systematic study and critical interpretation of existing knowledge."<sup>19</sup>) It is therefore perhaps unfair to superimpose too literally modern day ideals on mediaeval universities still in their infancy and therefore it should be perhaps considered normal institutional practice for Dutch universities not to have afforded Lippershey with any IP teaching nor any guidance on progressing his telescope patent; he was after all not even a student of either university.

Fast forward to today and the level of ingenuity and inventiveness displayed by Lippershey is arguably more common place amongst students in his jurisdiction, the Netherlands and the UK. Indeed, in 2006, Dutch universities in partnership with private organisations applied for 8,180 patents, whilst in the same year, UK universities applied for 6,656 partnership patents.<sup>20</sup> However there is little in the way of examinable data

<sup>12</sup> Supra N [6].

<sup>13</sup> Supra N [6].

<sup>14</sup> Supra N [6].

<sup>15</sup> Article 2, Chapter 1. General Provisions. Kingdom Act 15 December 1994, containing rules in respect of patent: the Dutch Patents Act; and s.1(1) Patents Act 1977.

<sup>16</sup> Supra N [6].

<sup>17</sup> M Tomlinson 'Graduate Employability: A Review of Conceptual and Empirical Themes' (2012) 25, 4, Higher Education Policy, pp 407–431.

<sup>18</sup> B Martin 'Are universities and university research under threat? Towards an evolutionary model of university speciation' (2012) 36, 3, Cambridge Journal of Economics, pp 543–565.

<sup>19</sup> *Ibid.*

<sup>20</sup> D Butterman and VSNU Bureau, Research Universities in the Netherlands (VSNU, 2007).

regarding the application rates for patents and indeed other registrable IP rights from students in either country. It is therefore perhaps timely at this juncture to consider the rationales as to why all modern era Dutch and UK universities should teach the subject of IP to their respective student communities; particularly given that the option of an annual pension in lieu of a patent (or another IP right) no longer exists for university students except as a historical anomaly.

One of the primary reasons cited as to why universities should deliver IP curriculum to students is because of the beneficial impact intellectual property, or more specifically the protection and exploitation of IP has on the economies of the countries in which the universities are located and are significant stakeholders.<sup>21</sup> As members of the European Union, both the UK and the Netherlands have benefited enormously from this IP ‘premium.’ By way of example, over the period 2011–2013, IPR intensive industries<sup>22</sup> generated 42% of total economic activity (GDP) in the EU, with a monetary value of €5.7 trillion.<sup>23</sup> Similarly in terms of EU trade, both the UK and Netherlands helped to generate a trade surplus of €96.4 billion between 2011–2013.<sup>24</sup> Perhaps most significantly of all, given that one of the central 21st century missions of universities is to ensure their graduates are employable<sup>25</sup> upon completing their studies, IPR intensive industries not only directly generated 28% of all jobs in the EU but also paid significantly higher salaries than other industries, with a salary premium of 46%.<sup>26</sup> It is clear therefore that universities in both the Netherlands and the UK would do well on the basis of this headline economic data alone, to consider the integration of IP centric curriculum into their respective course offerings to prospective and existing students as a means of satisfying their employability and contribution to society agendas.

Another significant rationale that has been deployed to further the cause of IP education in universities has been the utilitarian social contract higher education model.<sup>27</sup> In its essence, this model focuses on universities addressing the industrial and societal needs of the population at large. For instance, utilitarians such as Jeremy Bentham were responsible for establishing University College London in 1826 “ . . . specifically to meet the needs of a modern industrial society that had been ignored by Oxford and Cambridge Universities.”<sup>28</sup> Utilitarianism is also well known to IP academics and practitioners alike; it has been used as a classic justification to further the development specifically of patent law; “ . . . the primary focus of the patent system is on the disclosure of technical information for scientific and industrial reasons . . . ”<sup>29</sup> In the context of Dutch and UK universities fulfilling their vision and mission, utilitarianism it is suggested offers a compelling reason as to why IP education should be at the centre of a university’s value proposition. The study of IP will offer students for example, a ‘quid pro quo’ opportunity to patent their inventions for a twenty year period in return for disclosing their patent applications to the public at large. As a result not only does the student benefit by being granted an IP right by the state; the state also benefits by gaining access on behalf of society to the patented invention.

<sup>21</sup> EPO and EUIPO Intellectual Property Rights Intensive Industries and Economic Performance in the European Union (2016) EPO and EUIPO.

<sup>22</sup> IPR intensive industries are defined as those having an above average use of IPR per employee.

<sup>23</sup> *Ibid.*

<sup>24</sup> *Supra* N [23].

<sup>25</sup> *Supra* N [18].

<sup>26</sup> *Supra* N [23].

<sup>27</sup> *Supra* N [19].

<sup>28</sup> *Ibid.*

<sup>29</sup> *Supra* N [2].

For completeness it is perhaps appropriate to state that other justifications for IP rights (and therefore by extension, justification for such rights to be taught in universities) do exist. In relation to these justifications it is worth referring to Denoncourt's work<sup>30</sup> as these rights are not directly relevant to the narrative of this paper.

## IP EDUCATION IN THE NETHERLANDS

In the Netherlands, approximately 100,000 master students can choose in the region of 800 courses, including 102 courses at nine law schools at general universities in Amsterdam, Groningen, Leiden, Maastricht, Nijmegen, Rotterdam, Tilburg and Utrecht. Formal LLM courses can contain IP rights education to some extent, but most academics teach their students about IP laws and legislation as opposed to IP rights; a subtle but yet important distinction.

The content of the IP rights courses or units focuses largely on copyright, trademark and design law. This enables academics to utilise their experience from working in law firms with these specialisms. It is perhaps worth noting given the focus on Lippershey and his telescope earlier in the paper that only one masters course 'IP Law and Knowledge Management' at Maastricht University includes education on patents. At the other eight universities the teaching staff that deliver material on IP rights on the Commercial Law and Information Law units avoid instruction relating to patents and the legislative framework underpinning them. As such, the overwhelming majority of law schools in the Netherlands are unable to provide suitable in-depth learning opportunities relating to patents; a problematic situation in light of the importance attached to equipping students with employability attributes as part of a university's vision and mission.<sup>31</sup>

Beyond the confines of law faculties in the Netherlands, IP rights education is not an integral part of the curriculum offered by science, engineering, economics, business administration or medicine faculties either. It is submitted that this is another serious omission since students as future inventors, entrepreneurs and managers will not have access to essential IP rights information and might face the risk that they will learn what they need to know the 'hard way' (as Lippershey did) after graduation. Since convention dictates that individual Dutch academics have sole responsibility for the development of curriculum in accordance with the Humboldt social contract model<sup>32</sup> which advocates inter alia, "a high level of autonomy [for] professors",<sup>33</sup> it is impossible for the Dutch Ministry of Education and Science or boards of directors of universities to impose changes to the IP rights education curriculum even if it is (in a utilitarian sense) in the interests of both the students and society at large.<sup>34</sup>

However where Dutch government departments have had some success has been in utilising the Netherlands Patent Office (specifically by the Ministry of Economic Affairs) to provide IP services to Dutch universities since 2004. This has been a specific delivery priority for the Ministry in light of the importance it attaches to ensuring that both science graduates and academics receive integrated IP rights education as a means of ensuring these individuals have the ability to identify, protect and exploit the IP emanating from their project work or research.

<sup>30</sup> J Denoncourt 'The creative identity and intellectual property' (2016) 25, *Nottingham Law Journal*, pp 39–54.

<sup>31</sup> *Supra* N [18].

<sup>32</sup> *Supra* N [19].

<sup>33</sup> *Supra* N [19].

<sup>34</sup> *Supra* N [19].

Since 2004, officials and account managers from the Netherlands Patent Office have coordinated and organised IP-centric lectures and other sessions for students at 40 faculties of engineering, science, economics, business administration and medicine including materials for PhD students at medical centres.<sup>35</sup> These services have varied from guest lectures discussing the Dutch IP rights framework in an introductory sense to more specialist sessions providing important insights into for example, how to use IP databases and related issues such as managing and licensing IP rights once accrued. In all instances, the requests for these sessions emanate from academics from the aforementioned faculties and the IP content of such sessions is always aligned with the overarching themes of the electives or courses in which these sessions will sit; for instance the IP implications of products or services created in the fields of biotechnology, artificial intelligence and virtual reality by way of example. This observation again demonstrates the prevalence of the Humboldt social contract model in Dutch universities; with its emphasis on academic freedom and a significant level of personal autonomy for academics in the learning and teaching space.<sup>36</sup> This 18th century German model focused on the concept of academic freedom for both students and academic staff. Conceptually, it is based on the work of German/Prussian neo-humanists such as Wilhelm von Humboldt, Fichte and Schleiermacher. The notion of academic freedom focused on students learning for the sake of learning ‘*Lehnerfreiheit*’ and professors having the authority to study and teach whatever subjects they wanted; ‘*Lehrerfreiheit*’. Martin cited the following essential elements of this model; “scholarly learning and humanistic education; training the bureaucratic and professional elite; generous funding by the state; the essential unity of teaching and research; and a high level of autonomy with professors and students free to seek truth and knowledge as they understood them.”<sup>37</sup> The number of students attending these IP sessions since 2004 has been approximately 1,500 per academic year.<sup>38</sup> Table 1 opposite sets out the nature and scope of the IP education services delivered by the Netherlands and Benelux Patent Offices.

In addition to offering the learning and teaching modalities above, the Netherlands Patent Office in collaboration with the Patent Academy of the European Patent Office (EPO) developed a product called the IP Roadmap. The overall aim of the Roadmap was to stimulate an awareness of IP amongst researchers as well as embed IP education into the curriculum of students in Dutch universities between 2010–2015. One of the key operational objectives of the Roadmap product was to involve decision makers from government, industry and the university sector and show them the growing importance of IP rights to the needs of students, academics and society in general. It is arguable that the Roadmap is evidence of the Triple Helix model<sup>39</sup> of university education in practice. This model is predicated on the assumption that universities should make a meaningful contribution to their country’s economy; and that the best way to maximise this contribution is to forge “. . . closer links between universities, industry and government.”<sup>40</sup> The Netherlands Patent Office and the EPO also assumed that by involving decision makers from government, industry and the university sector, these decision makers in

<sup>35</sup> M. Thursby, A.W. Fuller and J. Thursby, (2009). An Integrated Approach to Educating Professionals for Careers in Innovation, *Academy of Management Learning & Education*, 8, 389–405.

<sup>36</sup> *Supra* N [19].

<sup>37</sup> *Supra* N [19].

<sup>38</sup> P van Dongen Services offered by the Netherlands Patent Office and the Benelux Intellectual Property Office (2017) . <https://rvo.nl/topics/ip-rights/lectures>.

<sup>39</sup> *Supra* N [19].

<sup>40</sup> *Supra* N [19].



Table 1. Services delivered by the Netherlands Patent Office and the Benelux IP Office

| <b>Name</b>                        | <b>Contents</b>   | <b>Target audience</b>  | <b>Duration (hours)</b> | <b>Scientific disciplines</b>   |
|------------------------------------|---|---|-------------------------|---|
| <b>Lectures</b>                    | IPR laws, procedures and ownership<br>- copyright<br>- patent<br>- trademark<br>Freedom to operate;<br>Infringement;<br>Enforcement of IPR;<br>Costs of IPR; and<br>Management of IPR | Students  | 2–8                     | Science, Technology (artificial intelligence, biotechnology, life sciences), Engineering ICT, Maths<br>Economics, Business Administration |
| <b>Presentations</b>               | Patentability of research results<br>- IP requirements<br>- MTA-<br>- Use of notebooks<br>- Freedom to Operate<br>- Patent attorney<br>- Publish and patent<br>- Inventor vs. owner   | Scientists and PhD students<br>Project managers<br>Deans                      | 1–2                     | Science, Technology Engineering, Maths (STEM)   |
| <b>Presentations</b>               | Reasons to file patents and how to exploit them.<br>Procedures, costs, licenses, sales, etc.  | Scientists and PhD students<br>TTO staff                                      | 1–2                     | Science, Technology Engineering, Maths (STEM)   |
| <b>Invention Disclosures</b>       | Use of IDF by scientists and TTO<br>Patent searches and IPC   | Scientists and PhD students<br>TTO staff                                      | 4–8                     | Science, Technology Engineering, Maths (STEM)   |
| <b>Workshops: Use of Databases</b> | Identification of patents for research proposals / market research<br>- Google Patents<br>- Espacenet<br>- Patentscope<br>- PatStat   | Students, Scientists and PhD students<br>TTOs<br>University Librarians        | 2–4                     | Science, Technology Engineering, Maths (STEM)<br>Economics, Business Administration   |
| <b>Management Games</b>            | Patents for TT at universities<br>Patents in (open or closed) innovation processes with companies   | Students and scientists<br>Students<br>TTOs<br>Research funding organisations | 1–4                     | Science, Engineering, Economics, Business administration  |

turn could convey the importance of having knowledge of IP to academics and other stakeholders from their respective sectors. It was also hoped that the Roadmap would ultimately inspire professors and others with learning and teaching responsibilities, to redesign university course content so as to include IP education as the cornerstone of curriculum at both undergraduate and postgraduate level. However the results of the Roadmap initiative have been mixed. In accordance with the Humboldt social contract model,<sup>41</sup> academics have not been inclined to change their course content on the scale that the Netherlands Patent Office and the EPO had hoped. It would therefore appear that academics at Dutch universities (along with their colleagues in other jurisdictions) are not prepared to relinquish their learning and teaching autonomy even at the behest of university senior management, perhaps reflecting a desire to protect against a perceived attempt to usurp their academic freedom and high level of personal autonomy; both classic characteristics of the Vannevar Bush social contract<sup>42</sup> between universities and the state.

Compared to the aforementioned attempts to embed formal IP education into the Dutch university system by external actors including the Netherlands Patent Office and the EPO, other attempts have perhaps been more successful given that their focus has been on delivering informal IP education; education that does not necessarily result in a credit bearing award. Whilst only speculation at best, it is arguable that this informal approach has worked because it respects the underlying thesis underpinning the Humboldt and Vannevar Bush social contract models<sup>43</sup> so diligently adhered to by Dutch universities; namely informal, non credit bearing curriculum does not interfere with the academic independence and integrity of those working in learning, teaching and research roles.

Some examples of informal IP teaching that have been deployed at Dutch universities include the Turning Technology into Business course at Delft University of Technology; the Science Based Business course at Leiden University and Entrepreneurship in the Life Sciences at Venture Labs at Amsterdam University.<sup>44</sup> The annual attendance rate for these courses amounts to more than 600 masters students. One of the objectives of these courses is that students should be educated in how to transform their science and technology knowledge and expertise into innovations that can solve problems and thereby have a beneficial impact on society in the long term; clearly a knowledge of IP (particularly patents) forms a key part of achieving this objective. During these courses, a basic understanding of IP rights and the use of IP databases is integrated into the development of another course objective; the formulation of a business plan. Another observation to make about these courses is that students can start using academic patents from their respective universities as a means of solving problems facing society other than those for which the patents were originally granted for. At the conclusion of these courses a common assessment is for students to pitch their IP centric business plans to an external expert jury as a means of stress testing and validating the potential and commercial viability of their business propositions. As Tomlinson<sup>45</sup> argued any initiative that supports students managing the transition from higher education to the labour market would be welcomed and would prove popular. It is asserted that the aforementioned courses with their focus on IP in practice do just that.

<sup>41</sup> *Supra* N [19].

<sup>42</sup> *Supra* N [19].

<sup>43</sup> *Supra* N [19].

<sup>44</sup> D. Hartmann (2014). Turning Technology into Business Using University Patents. *Technology Innovation Management Review*, 37–43.

<sup>45</sup> *Supra* N [18].

In addition to the more conventional ‘bricks and mortar’ learning and teaching methodologies discussed above, a number of Dutch universities have also embraced the use of technology as a means of disseminating knowledge about IP to students in the Netherlands. The use of Massive Online Open Courses (MOOC) is an example of one such initiative. In the Netherlands a consortium of four Technical Universities (Delft, Eindhoven, Twente and Wageningen) has developed a new MOOC for a course on ‘Entrepreneurship for Engineers’ together with the Start-Up Delta initiative in Amsterdam. This MOOC delivers learning and teaching content to undergraduate students on various topics (including intellectual property) and the content is typically based upon the case study format; in other words using successful entrepreneurs who previously studied at these universities as the backdrop to understanding the theoretical and practical content embedded in each MOOC. The MOOC at the centre of this discussion ‘Entrepreneurship for Engineers’ covers the following content: (1) What does it take to become a “Technopreneur”? (self assessment); (2) How to identify business opportunities (e.g. applying a problem / solution approach and using Google and EPO patent databases to generate ideas); (3) How to undertake market research for new ideas and innovations (e.g. using International Patent Classification codes in WIPO’s Patentscope) and how to collate evidence for the viability of a business idea; and (4) How to develop the ability to translate a business idea into marketing and financial plans; (i.e. using patents, designs and trademarks as intangible assets for the purposes of such plans).

If participating students successfully pass the examination for this MOOC, they can then submit their application to enrol for the official MSc courses in Technical Entrepreneurship at one of the four universities referenced above. In the spring of 2017 some 20,000 students followed this MOOC and the four universities expect to enrol some five percent of these students on to their MSc courses in academic year 2017/2018.

## INTELLECTUAL PROPERTY EDUCATION IN THE UK

The teaching of IP rights law as a subject in the UK has been part of the higher education curriculum for decades. A significant milestone was the publication of the seminal textbook by Professor William Cornish in 1981 entitled “Patents, Copyrights, Trademarks and Allied Rights.”<sup>46</sup> As Soetendorp<sup>47</sup> stated, the publication of this book plus “. . . the need for IP expertise to resolve computer software based disputes” led to a demand for IP legal education in the early 1980’s. Soetendorp also identified a number of other economic and industrial developments that led to the consolidation of this demand. In her work she noted: (1) that STEM graduates may wish to pursue careers as patent attorneys and patent examiners; (2) the rise in importance of IP or intangible assets on corporate balance sheets; (3) the advent of the Internet which has resulted in an explosion of technology based companies; and (4) the rise of entrepreneurship as a legitimate career destination for university graduates which requires the critical aspects of a business idea to be legally protected in order to ensure the survival of the resulting business beyond the average three year startup life span.<sup>48</sup>

<sup>46</sup> R Soetendorp ‘Developing the curriculum for collaborative intellectual property education’ (2006) Paper delivered at the WIPO International Symposium on Intellectual Property Education & Research, Geneva, June/July 2005; and the WIPO High Level National Seminar on Intellectual Property Education in China, Foshan, November 2005 available at <https://core.ac.uk/download/pdf/125895.pdf>.

<sup>47</sup> *Ibid.*

<sup>48</sup> *Supra* N [47].

Soetendorp's analysis has been endorsed by Gubby.<sup>49</sup> What is most interesting however is how UK universities have responded to this demand for IP education. In general terms, UK universities have adopted a narrow construction of this wide-ranging and multifaceted demand; they have primarily placed IP education in law schools as a means of facilitating the training and development of students wishing to practice as IP lawyers.<sup>50</sup> It is arguable that this approach is not only overly restrictive given that students from other degree disciplines should understand the subject of IP (and not just those wishing to practice as lawyers)<sup>51</sup> but is also very reminiscent of the approach this article first discussed in relation to Lippershey and the mediaeval universities of his era;<sup>52</sup> "[universities are there] . . . to [simply] produce trained professionals equipped with useful knowledge and skills . . ."

At undergraduate level it can be asserted with some confidence that UK universities place a duty on their law schools " . . . to offer an IP law elective as part of the undergraduate law degree. IP law is usually taught in the second or final year as a full credit bearing option module."<sup>53</sup> It is at postgraduate level however where we see this narrow 'Lippershey era' approach to IP education in full prominence. Nineteen of the UK's leading universities offer a combined total of 28 predominantly law masters degrees that offer IP as a substantial part of the course content, as set out in Table 2 opposite.<sup>54</sup>

The limitations of this narrow 'mediaeval social contract'<sup>55</sup> approach to IP education, "the primary task of [which] was to train an elite with the knowledge and skills needed to serve in the . . . legal professions"<sup>56</sup> has been identified by a number of scholars<sup>57</sup> and non governmental organisations.<sup>58</sup> Gubby for instance suggested that "an understanding of IP should not be confined to the graduates of law schools. In an economy increasingly based on intangible assets, it is not only trained lawyers that are required, but also IP trained managers [as they] need to be able to identify IP [as well as have] the competence to assess when and how to protect that IP."<sup>59</sup> In a similar vein, a report produced by the National Union of Students (NUS) in partnership with the UK IP Office (UKIPO) and the Intellectual Property Awareness Network (IPAN)<sup>60</sup> found that UK students in general terms lacked knowledge of intellectual property and its importance to their future careers. In particular this report identified that many students had a poor grasp of key intellectual property rights such as design rights and copyright. The students in this report also expressed concern that the teaching of intellectual property was generally limited and that they would prefer the teaching of this subject to be more closely aligned to their degree disciplines. It is suggested that this last observation is significant, given that it supports the assertion made in this paper that universities by simply focussing the majority of their IP education efforts on law

<sup>49</sup> H Gubby 'Universities need to teach business students about patents; a suggested approach' (2015) 6, 3, *European Journal of Law and Technology*.

<sup>50</sup> *Supra* N [47].

<sup>51</sup> *Supra* N [50].

<sup>52</sup> *Supra* N [19].

<sup>53</sup> *Supra* N [47].

<sup>54</sup> Postgraduate Intellectual Property Courses in the UK <<https://www.postgraduatesearch.com/pgs/search?course=intellectual-property>> accessed 22 January 2018.

<sup>55</sup> *Supra* N [19].

<sup>56</sup> *Supra* N [19].

<sup>57</sup> *Supra* N [50].

<sup>58</sup> Student attitudes toward intellectual property (2015) A Report published jointly by the National Union of Students, the Intellectual Property Awareness Network (IPAN) and the UKIPO.

<sup>59</sup> *Supra* N [50].

<sup>60</sup> *Supra* N [59].

Table 2. Postgraduate Law Degrees offered by UK Universities

| University                      | Postgraduate Degree   |
|---------------------------------|---|
| Aberdeen                        | Intellectual Property Law LLM   |
| Bangor                          | International Intellectual Property Law LLM   |
| Bournemouth                     | 1. Intellectual Property Law LLM<br>2. Intellectual Property PGCert   |
| Brunel                          | 1. Intellectual Property Law PGCert<br>2. International Intellectual Property Law LLM   |
| Cardiff                         | Intellectual Property Law LLM   |
| Derby                           | Intellectual Property and Information Technology Law LLM  |
| East Anglia                     | Information, Technology and Intellectual Property Law LLM   |
| Edinburgh                       | Intellectual Property Law LLM   |
| Glasgow                         | 1. Intellectual Property, Innovation and the Creative Economy MSc<br>2. Intellectual Property and the Digital Economy LLM   |
| Kings College London            | 1. Intellectual Property and Information Law LLM<br>2. Copyright Law (UK, US and EU) PGDip<br>3. Copyright Law (UK, US and EU) MA   |
| Leeds                           | Intellectual Property Law LLM   |
| Oxford                          | Intellectual Property Law and Practice PgDip  |
| Manchester                      | Intellectual Property Law LLM   |
| Nottingham Trent                | 1. Intellectual Property Law LLM<br>2. Trade Mark Practice Professional Certificate   |
| Queen Mary University of London | 1. Intellectual Property (Management of Intellectual Property) MSc<br>2. Intellectual Property Law LLM<br>3. Trade Marks Law and Practice PGCert<br>4. Intellectual Property Law PGCert |
| Reading                         | Intellectual Property Law and Management LLM  |
| University of West London       | International Studies in Intellectual Property Law LLM  |
| Sussex                          | Information Technology and Intellectual Property LLM  |
| Swansea                         | Intellectual Property and Commercial Practice LLM   |

students in law schools are not only perpetuating a narrow ‘mediaeval social contract’<sup>61</sup> view of what IP education should be for but also perhaps ignoring the needs of other student cohorts within the university.

Whilst the prevalent and somewhat problematic delivery model adopted by UK universities is to deliver IP education through the auspices of Law Schools, there are however embryonic signs that universities are recognising the limitations of this approach

<sup>61</sup> Supra N [19].

and are expanding the remit of IP education beyond law schools to other faculties and using innovative delivery models to achieve this. UK universities for instance are using the concept of clinical legal education and pro bono clinics as a means of disseminating IP knowledge from law students and law schools to students needing advice and guidance about their IP rights in a given situation. This model has proved successful where adopted; as it uses experiential learning to convey IP knowledge which would otherwise be communicated in more traditional lecture and seminar modalities.<sup>62</sup> This approach also has other benefits for UK universities. Firstly it supports the concept of graduate employability which Tomlinson views as an integral part of a University's mission.<sup>63</sup> It also enables universities to claim with some confidence that they are addressing the industrial and societal needs of the population at large in a utilitarian social contract sense;<sup>64</sup> as they are developing graduates with a knowledge of IP which Gubby and Soetendorp have both acknowledged as essential to the current and future needs of a society increasingly based on intangible as opposed to tangible assets.

Another feature of IP education in the UK is the active role that the UKIPO plays in disseminating IP knowledge in its own right as well as supporting UK universities, schools and colleges in this regard. The UKIPO has developed a number of IP education initiatives and tools including: IP Tutor and IP Tutor Plus; IP for Research; Lambert Toolkit for Universities; Intellectual Asset Management Guide; Future Innovator's Toolkit; Cracking Ideas; and the Think Kit. Arguably, this co-existence approach with its emphasis on closer links between universities and government agencies enables universities to undertake “. . . a new third mission of contributing to the economy” or as Martin referred to it; the Triple Helix model role for universities. A role in addition to the requirement to teach and undertake research.<sup>65</sup>

#### *Role of University of Portsmouth's Technology Transfer Office (TTO) in IP Education*

The UKIPO is taking steps to execute the IP education objectives as set out in Goal 4 of its 2017–2020 Corporate Plan<sup>66</sup> to help create and deliver a range of IP centric initiatives and resources to assist universities. UK universities are also engaging with the latent demand for IP literacy from their various stakeholders including their student cohorts by offering IP curriculum and a range of support services aimed at specific student groups with specific IP needs (e.g. student entrepreneurs and how to protect their business ideas). The University of Portsmouth, through its TTO is a case in point. It has had some success in recent years in securing funding from the UKIPO. This has included £30,000 to establish an IP Clinic to assist student entrepreneurs with any IP issues resulting from their business ventures; and a further £75,000 in order to create a knowledge exchange campus between itself, Southampton and Bournemouth universities as a means of helping regional SMEs exploit their IP.<sup>67</sup>

However, whilst these initiatives are welcome and demonstrate some synergistic equivalence to programmes delivered in the Netherlands, it is the view of the authors that UK Universities could do more at an individual institutional and 'joined-up' basis to meet the current and anticipated need for IP literate graduates. This is particularly

<sup>62</sup> C Sylvester 'Bridging the Gap? The effect of Pro Bono Initiatives on Clinical Legal Education in the UK (2003) *Journal of Clinical Legal Education*, pp 29–40.

<sup>63</sup> *Supra* N [18].

<sup>64</sup> *Supra* N [18].

<sup>65</sup> *Supra* N [18].

<sup>66</sup> Goal 4 of the UK Intellectual Property Office's Corporate Plan 2017–2020: "We will develop high quality IP based learning resources that support the national curriculum and higher education courses in subject areas identified by teachers.

<sup>67</sup> UK IPO 2012 Fast Forward Competition winning entries [www.ipo.gov.uk/fastforward.htm](http://www.ipo.gov.uk/fastforward.htm).

important if the UK wishes to embrace the economic and social opportunities resulting from the major technological changes facing society including for instance the increasing adoption of artificial intelligence.<sup>68</sup> Universities could for example, consider mandating the delivery of IP curriculum to all undergraduate and postgraduate students at various entry points. Universities could also consider recruiting IP academics with faculty centric specialisms. Similar to entrepreneurs in residence<sup>69</sup>, whereby universities recruit entrepreneurs to provide start-up support and mentoring primarily to their students and graduates; universities could also introduce a similar scheme but for IP academics. For instance an IP academic with an expertise in copyright and design rights could be beneficial ‘in residence’ in a faculty with art, design and media courses; whilst an IP academic with a background in patents could be ‘in residence’ in a faculty with engineering curriculum. This proposal could also address two key issues which are currently limiting the impact of IP education across UK university campuses; universities relying on too few academics to deliver the subject of IP and a lack of IP knowledge in students graduating from faculties delivering primarily STEM, creative as well as business and law centric curriculum.<sup>70</sup>

In relation to ‘joined-up’ institutional thinking one observation that can be made about the university delivery models evaluated by Martin is that they all focus primarily on universities delivering their various educational objectives as standalone organisations, almost in ‘splendid isolation’ of each other.<sup>71</sup> It is perhaps appropriate therefore to consider the development of a new model or at the very least the inclusion of an additional principle in the existing models as a means of better assisting universities meet their obligations under their respective social contracts with the state and society at large. Adopting the ‘Autonomous Interdependence’ (AI) principle could lead to universities collaborating far more with one another (i.e. interdependence) on issues of strategic importance to the state and society at large (i.e. reinforcing the social contract). In addition, assisting one another where there was a fulfilment gap; for instance university X providing university Y with academic resource and/or strategic direction relating to the delivery of IP curriculum and associated initiatives. The benefit of this approach is potentially that a university’s freedom in all matters would not be curtailed; each institution would remain autonomous (thereby respecting the historical narrative of previous university models with their focus on academic freedom). However, AI would place greater emphasis on universities working collaboratively, both strategically and operationally, to achieve desired institutional and societal outcomes. It is arguable that as a conceptual model, AI could potentially assist universities achieve far more in the IP education space than working alone.

### *Broadening participation in IP education via Massive Open Online Courses (MOOCS)*

A relatively recent introduction in the educational arena has been the development of massive open online courses or MOOCS as they are commonly called.<sup>72</sup> Covering a broad

<sup>68</sup> HM Government Industrial Strategy 2017.

<sup>69</sup> W Christina, H Purwoko, A Kusumowidagdo ‘The Role of Entrepreneur in Residence towards the Students’ Entrepreneurial Performance: A Study of Entrepreneurship Learning Process at Ciputra University, Indonesia’ (2015) 211, *Procedia – Social and Behavioral Sciences* (Elsevier), pp 972–976.

<sup>70</sup> *Supra* N [59].

<sup>71</sup> ‘Splendid isolation’ A term originally used to describe British foreign policy during the late 19th century under the Conservative premierships of Benjamin Disraeli and Lord Salisbury. It was a policy focused on avoiding alliances and entanglements. By analogy most universities in relation to their educational mission, work on this basis. Working or partnering with other universities is largely adhoc and on an initiative by initiative basis; the delivery of IP curriculum by universities at present is no different in this regard.

<sup>72</sup> The ‘modern’ MOOC movement can trace its birth back to late 2011 when the first Stanford MOOCS took off. ‘By The Numbers: MOOCS in 2017’ <<https://www.class-central.com/report/mooc-stats-2017/>> accessed 10 February 2018.

Table 3. Selection of MOOC Providers

| <b>UK Universities via Future Learn</b>      | <b>Overseas Universities Via Future Learn</b>   | <b>Commercial / Other Providers (Country of Partner Universities)</b>           |
|--|---|---|
| Aberdeen, Bath, Birmingham,                  | Auckland, Cape Town                             | British Council, British Film Institute, British Library, British Museum        |
| Dundee, East Anglia, Edinburgh               | Fudan, Monash                                   | London School of Hygiene and Tropical Medicine                                  |
| Exeter, Glasgow, Kings College               | Oslo, Shanghai International Studies University | Coursera, Desire2Learn (worldwide),   |
| Lancaster, Leeds, Leicester                  | Shanghai Jiao Tong University                   | Udemy (individual instructors)  |
| London, Liverpool, Loughborough              | Sung Kyun Kwan University                       | Udacity (USA)   |
| Newcastle, Nottingham, Open                  | Tel Aviv, Trinity College Dublin                | EdX (USA, Australia, Netherlands)   |
| Queen's, Reading, Royal Holloway             | Yonsei  | MOOEC (Australia), EduKart (India), ALISON (Ireland), Aprentica (Latin America) |
| Sheffield, Southampton, Strathclyde, Warwick | Groningen                                       | National Film and Television School   |

range of subjects and disciplines, approximately 78 million learners had enrolled for at least one MOOC by the end of 2017.<sup>73</sup> Various factors have contributed to the popularity of MOOCs. They offer students the opportunity to study high quality courses online with prestigious universities without having to pay fees (or limited fees) or meet any formal entry requirements. Further, attendance at university campuses is not necessary as delivery is exclusively online, allowing students to combine these courses with their existing commitments. In terms of UK universities and their footprint in this space, many UK universities deliver MOOCs via 'FutureLearn', a private company owned by The Open University.<sup>74</sup> 'FutureLearn' is also the delivery partner for a number of overseas universities. Table 3 above sets out MOOC providers in the UK.

Whilst the number of MOOC subscribers and MOOC providers is impressive by any metric, the number of MOOCs relating to IP is limited in relative terms. Table 4 opposite sets out IP-specific MOOCs.

It is reasonable to assert that a greater variety of IP centric MOOCs<sup>75</sup> could be deployed as a means of educating a global audience on the importance of IP to their career and business goals. IP MOOCs could also assist subscribers understand the classic quaternary of IP education; how to identify, protect and commercialise (and therefore not infringe) IP by delivery of course content focussing on the numerous IP rights available to creators of IP.

<sup>73</sup> *Ibid.*

<sup>74</sup> MOOC Providers <[https://www.thecompleteuniversityguide.co.uk/distance-learning/moocs-\(massive-open-online-courses\)/](https://www.thecompleteuniversityguide.co.uk/distance-learning/moocs-(massive-open-online-courses)/) accessed 12 February 2018.

<sup>75</sup> Google Search using the terms 'intellectual property moocs' and 'IP moocs' searched 12 February 2018.



Table 4. Intellectual Property MOOCS

| <b>Provider</b> | <b>Course</b>   |
|-----------------|---|
| Udemy           | Intellectual Property Toolkit                                     |
| Udemy           | Must-Know IP Law (Patent, Trademark and Copyright)                |
| Udemy           | Intellectual Property: Inventors, Entrepreneurs, Creators         |
| Coursera        | Patenting in Biotechnology  |
| Coursera        | Protecting Business Innovations via Copyright                     |
| Coursera        | Protecting Business Innovations via Trademark                     |
| edX             | Intellectual Property Rights: A Management Perspective            |
| Desire2Learn    | Foundations of IP Strategy  |
| Udemy           | Intellectual Property Strategy                                    |
| Udemy           | Copyright Basics: How to Protect Your Work from Piracy            |
| edX             | Intellectual Property Law and Policy – Part 1: IP and Patent Laws |

#### CONCLUDING REMARKS

In conclusion, universities in both the Netherlands and the UK could deliver IP curriculum to a more diverse range of students and redirect their fixation with teaching the subject of IP only to undergraduate and postgraduate law students. There is a societal imperative to do this; both the Netherlands and the UK are rapidly moving towards a purely knowledge-based economy where the value of a company's IP or intangible assets is significantly higher than the value of its tangible assets. Without basic IP rights education, university students will be at a distinct disadvantage if they do not understand the nature of IP rights and more importantly, lack the knowledge and skill to identify, protect and commercialise these assets for themselves or for their employers. In mitigation, there exist a number of underlying almost philosophical reasons as to why universities have not embraced the subject of IP more enthusiastically as part of their student curriculum; however it is the opinion of the authors of this paper that unless universities change their mindset towards IP curriculum, other stakeholders in the educational space will emerge to stafisy this ever growing need.

# 30 YEARS OF INTELLECTUAL PROPERTY LAW EDUCATION: A REFLECTION

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## ABSTRACT

This personal reflection traces the growth of intellectual property (IP) education from 1988-2018. During that time IP has progressed from being taught only in law schools to a topic covered from primary to post-doctoral level, irrespective of discipline. Realising the importance of bringing IP law concepts to IP rights creators meant imagining a different approach to IP Education. That is happening, thanks to enlightened colleagues working with enlightened national and international institutions such as the UKIPO and WIPO and a gloriously diverse range of academics and students.

## INTRODUCTION

I am encouraged by a research finding that 85–95% of students think IP will be relevant to their future careers<sup>1</sup>. Throughout the thirty years of my reflection, I highlight the colleagues and partners that have been crucial to my IP education work, whether as a teacher, researcher, resource developer or programme designer. IP education is highly relevant to the work of the international IP institutions: the World Intellectual Property Organization (WIPO), the European Patent Office (EPO) and the Office of Harmonization of the Internal Market / European Intellectual Property Office (OHIM/EUIPO). I have been involved with each institution in their international projects developing IP educational resources, undertaking teaching programmes and conducting research. My commitment to IP education coincided with changes in higher education learning and teaching practice leading to recognition by the Leverhulme Trust and Higher Education Academy. Involvement with the Intellectual Property Awareness Network (IPAN)<sup>2</sup> and European Intellectual Property Teachers Network (EIPTN)<sup>3</sup> have given me a vibrant platform to set out the progress that has been made, and anticipate some of the inevitable developments that IP educators will have to take on board in the next 30 years.

## PROLOGUE

In 2018, I will have been an intellectual property (IP) educator for 30 years – a generation. In that time study of ‘IP’ has developed from being focussed solely on IP law to an area that inspires academic research into the impact of IP in economics, philosophy, history, political science, sociology, gender studies, linguistics, art, anthropology, marketing, psychology.<sup>4</sup> More recently, industrial and commercial aspects of IP, including

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<sup>1</sup> Soetendorp R, Patent Information in the Academic Context, pp 23–26, 1997 Elsevier Science Ltd.

<sup>2</sup> Details: IPAN website [www.ipaware.org](http://www.ipaware.org).

<sup>3</sup> See [www.eiptn.eu](http://www.eiptn.eu).

<sup>4</sup> Estelle Derclaye, ‘Today’s Utopia is Tomorrow’s Reality’ [2017] 48(1) IIC- Int. Rev. Intell. P. <[https://www.researchgate.net/publication/312181658\\_Today%27s\\_Utopia\\_Is\\_Tomorrow%27s\\_Reality](https://www.researchgate.net/publication/312181658_Today%27s_Utopia_Is_Tomorrow%27s_Reality)> accessed 26 April 2018.

enterprise, entrepreneurship, competition, financial valuation, and strategic management mean IP is relevant both in the boardroom and in academe.

In 1981, I graduated from the Dorset Institute.<sup>5</sup> I was also mother of two primary school children and the partner of a very busy congregational minister of religion. With a BSc Hons Law and Politics, I was anxious to find paid employment that would fit the routine of school run and term times (which ruled out taking up the offer of articles from friends who had expected me to train as a solicitor). The Institute canteen manager, who had become a friend over my three years study, mentioned that in the new academic year she would have a vacancy for a canteen assistant. I assessed that as a great opportunity ‘to get my foot in the door of academe’ should the need arise for a part time lecturer. After three weeks as a dinner lady, an established academic suddenly left, and I was invited to take my first class.

I was not completely new to teaching and learning. My first qualification was as a Youth and Community Worker<sup>6</sup> (Westhill College, Selly Oak, Birmingham 1966–1968). Key elements of that programme were informal and social education. From which I had learnt to recognise in others a desire to learn that might be hard to discern in the face of formal expectations.

### BECOMING AN IP LECTURER IN THE 1980s

Why did I choose to specialize in Intellectual Property education? It may be more accurate to say IP chose me. In 1987, I was a part time lecturer at Dorset Institute of Higher Education, which was already offering degrees demanding creativity and innovation. I quickly realised that in all these areas of study, IP could provide a common language making the link between disciplines as diverse as Law, Media, Design, Engineering and Computing. Whatever new ideas, processes, products or services students were creating they would need to be able to protect and exploit them, as well as needing to avoid the mistake of using someone else’s IP without appropriate permission.

*In my initial classroom encounters with product design engineers, I would introduce my topic as “Prophylactic Law” – the subject that will help you avoid making expensive mistakes.*

From working to ensure that Bournemouth’s budding engineers, media mavens, and lawyers could work together to protect and exploit their IP through an introduction to the legal language of ideas, I was inspired to take my own ideas out into the world.

The potential impact of IP law struck me first in 1987 whilst completing an LLM at Southampton University. A poster appeared on the Law faculty noticeboard. If I had had a smartphone, I would have photographed it. It invited applications to study the Intellectual Property Law Diploma at Queen Mary, University of London (QMUL). Bournemouth, like all UK HE institutions was enjoying a period of rapid change. The relevance of IP to students graduating into careers that would demand an awareness of intangibles and their value hit me hard. I thoroughly enjoyed the two years part time study at QMUL, due in no small measure to the calibre and personality of two teachers who have remained lifelong friends: Professor Alison Firth<sup>7</sup> and Professor Jeremy Phillips.<sup>8</sup> The texts we used were Professor Bill Cornish’s ‘Cases and Materials on

<sup>5</sup> The Dorset Institute became Bournemouth Polytechnic in 1990 and Bournemouth University in 1992.

<sup>6</sup> Westhill College, Selly Oak, now part of Birmingham University 1966–1968.

<sup>7</sup> Professor Alison Firth, Newcastle Law School, Newcastle University.

<sup>8</sup> Professor Jeremy Phillips.

Intellectual Property'<sup>9</sup> in the original pastel colour softcover 'samizdat' version. When I looked round the QMUL cohort, comprising about 100 lawyers in various stages of training, a thought, which was to nag at me during that course and beyond, was:

*It is one thing to be training lawyers in IP law. But who is going to give the CREATORS of IP rights the opportunity to learn about the rights they will be creating? Who will teach IP beyond the law school?*

Once I had signed up for the PGDip IP, Bournemouth appointed me to a fulltime lectureship, and paid my QMUL fees. I was itching to get IP law on to the new LLB, and to integrate IP into the new Engineering Product Design BSc and other appropriate programmes.

### EXPANDING IP EDUCATION IN THE 1990s

I knew my IP experience was limited. I sought, and was fortunate to enjoy, three short-term placements in 1992/3 with leading intellectual property solicitors Nabarro Nathansons and Bird & Bird.<sup>10</sup> They gave me an invaluable opportunity to gain an insight into IP law practice, and get to know some of IP's movers and shakers.

The Bournemouth LLB team welcomed the idea of an IP Law module. The module was championed on its progress through the various university quality committees by Paul Turner, a local patent attorney.<sup>11</sup> He was unreservedly enthusiastic that the local university should be offering IP law and encouraged us to forge links with the Patent Office (now the UKIPO). *Ab initio*, Bournemouth's IP students have had a good working relationship with the IP profession, and the support of the IPO. I knew it would take a charm offensive to get IP into the BSc Product Design degrees, and that Paul Turner would be key. Together we captured the hearts and minds of previously unknown colleagues in the Design, Engineering and Computing faculty. Once the DEC colleagues agreed to include IP in a Business Development module, I sensed the potential for 'Intellectual Property Education'. The Product Design students were required to develop an innovative project for their end of year final assessment. The IP module required them to present a 'simplified' patent specification for that innovation. Alongside my lectures and tutorials, Paul Turner saw to it that the young product designers were able to search the Portsmouth Patent library, under the Patent Librarians' guidance. He visited the university to review the students' specifications with them before submission for assessment.

An innovative learning experience was developed at Bournemouth, which continues today, at BU and at Aston. The 'IP adviser/client assignment project'<sup>12</sup> involves LLB IP law students acting as advisers to BSc Product Design student clients. It was met with enthusiasm from both faculties. Law and Design students would develop transferable skills that it is difficult to impart didactically: the lawyers would learn how to convey legal information in a way that clients could appreciate; the designers would learn how to convey what they were designing in a way that the lawyer could appreciate. In year

<sup>9</sup> William Cornish, *Cases and Materials on Intellectual Property* (5th edn, Sweet & Maxwell 2006).

<sup>10</sup> Now: Nabarro LLP and Bird & Bird LLP.

<sup>11</sup> 'Students Showcase Their Creativity at the 2012 Festival of Design and Innovation' (*Bournemouth University*, 5 July 2012) <[http://assets.bournemouth.ac.uk/news-archive/newsandevents/News/2012/july/contentonly\\_1\\_7896\\_7896.html](http://assets.bournemouth.ac.uk/news-archive/newsandevents/News/2012/july/contentonly_1_7896_7896.html)> accessed 25 April 2018.

<sup>12</sup> Humphries-Smith, T. and Adrian, A., 2012. Intellectual Property Education – Thinking outside the Box meets Coloring within the Lines. *International Journal of Learning & Intellectual Capital*, 9 (3), 337–350.

one of the project, the lawyers submitted academic, authoritative essays that would have been impenetrable to a designer. The designers prepared scrappy sheets describing their innovations. The lawyers were told “Presenting advice in that way will lose you clients”. The designers were told “Presenting your innovation in that way will cost you money – every time a lawyer has to ask ‘what did you mean by . . . ?’” In subsequent years, the assessment included a small element of peer assessment. The lawyers submitted engaging, layperson friendly letters supported by legally authoritative supporting appendix. The designers submitted beautifully presented CAD folders explaining their innovations. The advice letter assignment is invariably well received and enjoyed by participating students. But it will only work where there are enthusiastic academics,<sup>13</sup> and supportive course administrators to champion it.

About this time I met Mandy Haberman,<sup>14</sup> inventor of the AnywayUpCup® and campaigner for Intellectual Property education. Mandy’s story made a deep impression on the Bournemouth product designers, and her courageous story continues to impress students today. Bournemouth’s award of an Honorary Doctorate in 2002 gave Mandy the locus to campaign even more energetically for all students to be introduced to IP.

In 1996, the UK Patent Office invited me to share my IP education ideas at the Patent Librarian conference (PatLib) in Aberdeen, Scotland. Immediately after my presentation, the then Patent Office Comptroller, Paul Hartnack, asked to meet me, with words that I have never forgotten:

*These are great ideas. What a pity that there is no IP in an idea. If you protect your ideas, you would become a very rich woman.*

Speaking at the European Patent Office Patinova Conference in 1990, Karl Heinrich Oppenlander, President of the Institute for Economic Research in

Munich, commented, “If a young engineer comes into contact with patent information at a very early stage, during his training if possible, he will use this source of information regularly since he will already be familiar with it.” The Patent Office took a lively interest in the IP education initiatives at Bournemouth. In 1997, they agreed to fund a small project that would enable me to offer one hour of intellectual property ‘introduction’ to all Bournemouth’s degrees. About 30 degree programmes took up the offer. Feedback was positive. Only the BSc Nursing students had begun reluctantly. They expressed irritation at having to ‘waste an hour’ when they could have been learning ‘how to make people better’. By the end of that class, though, half the students had shared an innovation or an improvement that they had introduced on to the ward. They were respectful of the potential for intellectual property to be used e.g. by a pharmaceutical company putting the trade mark symbol ® on a drug distribution chart, that could be distributed more widely to other NHS trusts.

Professor Paul Cole,<sup>15</sup> a patent attorney who went on to play a crucial role in the development of postgraduate IP education at Bournemouth commented in 1999:

*How good it is to meet young inventors who know what they are taking about when they arrange a first meeting with a patent attorney. Especially when they realize that their university experience reduces the time taken for an initial meeting, which makes is cheaper.*

Interest in IP education was beginning to grow. I was invited to present papers to the Association of University Research Industrial Links (AURIL), to the EU’s Patinova

<sup>13</sup> Professors Dinusha Mendis and Tania Humphries at Bournemouth, Claire Howell at Aston.

<sup>14</sup> ‘Mandy Haberman’ <[www.mandyhaberman.com/](http://www.mandyhaberman.com/)> accessed 24 April 2018.

<sup>15</sup> ‘Professor Paul Cole’ (*Chartered Institute of Patent Attorneys*) <<http://www.cipa.org.uk/about-us/people/council-members/paul-cole/>> accessed 25 April 2018.

97, and to L@wnet. The Society of Public Teachers of Law (SPTL) formed its first Education group. I was asked to join the IPAN<sup>16</sup> at the invitation of its founder, patent attorney Dr. John Reid. One of our first tasks together was to visit the UK's Engineering Council to help them formulate their first reference to IP in the UKEC 'SPEC'.<sup>17</sup> The IPAN is a unique, independent network of organisations and individuals committed to improving awareness and understanding of IP in the UK. It was first formed in 1993 on the initiative of Reid, then President of the Chartered Institute of Patent Attorneys. IPAN focuses its activities on the Finance and Economics, Parliamentary and Education sectors (about which more below).

## A CENTURY TURNS – TOWARDS A PROFESSOR OF INTELLECTUAL PROPERTY MANAGEMENT

Having enjoyed the rigorous QMUL introduction to IP law, I was nervous that offering students anything less rigorous would be written off as 'dumbing down'. A chance encounter with Dr Theodore Zeldin's BBC Radio 4 talk based on his book 'Conversations'<sup>18</sup> gave me confidence.

*Zeldin asked an engineer how long it would take to teach him to be an engineer. 'Three months' was the reply. Not to be a real engineer, but to understand an engineer's language and their problems, to learn the essence of the way they think. He suggested that the term 'social exclusion' includes all those whose mind-set is confined to a single profession, and asks 'what new kind of education or training will not just slot students into pigeon hole careers?' Employers want flexible, multi-skilled graduates, open to learning, and equipped to respond to the rapidly changing nature of the workplace. The students don't have a problem with that.*

His ideas on inter-disciplinarity at work helped me to address the concerns expressed by Intellectual Property lawyers that offering any IP Education to non-lawyers was in effect 'dumbing down' and inherently risky. The questions I have asked myself when planning IP education for non-lawyers are as follows:

1. What is the minimum level of IP law needed to take initial steps to protect potential IP (confidentiality)?
2. What is the minimum needed to understand when it is essential to bring in an IP expert (patent or trade mark attorney, IP lawyers)?
3. What should be included to enable student to understand IP law concepts in the context of their own academic discipline?

I could see Zeldin's prescience reflected in the explosion of interest in IP awareness that began around 2000, with the publication of Rembrandts in the Attic.<sup>19</sup> United States business schools were ahead of UK equivalents in bringing IP education in to their post-graduate programmes<sup>20</sup>, but undergraduate IP education internationally continued to be lacking.

The late 90's were exciting times for IP law, with public institutions (NHS, Defence Forces, HE Institutes) being tasked by government to introduce IP policies as an attempt

<sup>16</sup> 'The Intellectual Property Awareness Network' <[www.ipaware.org](http://www.ipaware.org)> accessed 24 April 2018.

<sup>17</sup> 'UK Standard for Professional Engineering Compliance – Third Edition' (*Engineering Council*, January 2014) <<http://www.engc.org.uk/UKSPEC>> accessed 24 April 2018. (hereinafter UK-Spec).

<sup>18</sup> Theodore Zeldin, *Conversations* (Harvill Press, 1988).

<sup>19</sup> Rivette K and Klein D, *Rembrandts in the Attic* (Harvard Press 2000).

<sup>20</sup> See e.g. Hennessey W, Intellectual Property Program of the Franklin Pierce Law Centre: Past Developments, Current Situation, and Future Tasks, with particular emphasis on its education methodology to develop human resources meeting social needs. ICS Seminar, February 2004.

to ensure the maximum benefit from any IP they might generate. For a number of years B.U. course specification documents included my statement: “Bournemouth University undertakes to encourage the recognition, protection and exploitation of intellectual property rights generated by participants in this programme, to the benefit as appropriate of students, staff, industrial/other third parties/partners and the university.” It was exciting, if at times frustrating, for me to be invited by other universities to help them with their IP policy drafting. On one occasion, the British Council invited me to meet a delegation from Russian universities, keen to learn how they too might manage their IP. The biggest frustration when discussing IP policies with universities was the blanket assumption that a ‘one size fits all’ policy would allow all IP rights created by students to be university-owned property. Hopefully, my chapter in the UKIPO’s Intellectual Asset Management tool for universities<sup>21</sup> has helped clarify matters.

Government policy to expand university student numbers by 50%<sup>22</sup> reflected its aims to reach more underprivileged and pioneer innovations in teaching. Public and private sectors were equally aware this would make exceptional demands on academic staff. The challenge of incentivizing academics to radically change their teaching practice needed to be funded. A fruitful relationship with Linda Byles, Bournemouth’s Learning & Teaching expert, opened my eyes to different approaches to facilitate learning. Together we presented and published on interdisciplinary learning.<sup>23</sup>

I successfully applied for two of the schemes introduced to meet those challenges. The resulting funds, from the Leverhulme Trust and the government’s Higher Education National Teaching fellowship scheme proved a turning point for Bournemouth’s IP research and teaching, and my own ambitions to improve IP education for non-lawyers. The Leverhulme Trust<sup>24</sup> introduced an ‘Innovative Teaching award’ alongside its prestigious research awards. Bournemouth applied, and was put on a short list of seven. Then Leverhulme changed its mind, and cancelled the scheme. Extreme disappointment drove me to seek an audience with Bournemouth’s Vice-Chancellor, Professor Gillian Slater. Together we drafted a letter that prompted Leverhulme to rethink, to reinstitute 3 awards and in 1998 to award one to Bournemouth. The award funded 50% of a senior lecturer salary for 5 years, on the understanding that the University would continue the post into the future. It made possible the appointment of Professor Martin Kretschmer.<sup>25</sup> In 2000, Martin and I formed Bournemouth’s Centre for Intellectual Property Policy & Management (CIPPM).

CIPPM<sup>26</sup> is a unique combination of academics, practitioners and industry colleagues. They are committed to an interdisciplinary approach to policy making in respect of the governance and application of intellectual property rights applying to innovation and creativity. The recognition of intellectual property management as an enterprise skill, and regulatory impact analysis are at the heart of the Centre’s mission. From 2000, CIPPM rapidly achieved national and international recognition. Research and consultancy projects were commissioned by the European Commission, UKIPO,

<sup>21</sup> ‘Intellectual Asset Management for Universities’ (Intellectual Property Office, 26 June 2014) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/308072/ipasset-management.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/308072/ipasset-management.pdf)> accessed 22 April 2018.

<sup>22</sup> ‘Blair’s University Targets Spelt Out’ (*BBC News*, 30 January 2002) <<http://news.bbc.co.uk/1/hi/education/1789500.stm>> accessed 24 April 2018. (calling for a target of 50% of all young people to attend university).

<sup>23</sup> R Soetendorp & L Byles, ‘Law for Non-Lawyers: Facilitating Inter-Professional Dialogue’ (2nd HEA Annual Conference on Learning in Law Initiative, Warwick University, January 2000 <<http://www.ukcle.ac.uk/interact/lili/2000/soetendorp.html>> accessed April 5 2008; Improving Student Learning through the Disciplines, York [with Byles L., Sept/ - *Communicating across the Interdisciplinary Divide 1999 (available from the author)*].

<sup>24</sup> Leverhulme Trust Innovative Teaching Post F801 1997–2002.

<sup>25</sup> Professor Martin Kretschmer is currently Professor of Intellectual Property Law and Director of CREAtE Centre (School of Law) at University of Glasgow.

<sup>26</sup> ‘Centre for Intellectual Property Policy & Management’ <[www.cippm.org.uk](http://www.cippm.org.uk)> accessed 26 July 2018.

European Patent Office, Arts Council, Social Science Research Council (New York), World Intellectual Property Organisation (WIPO), the Arts and Humanities Research Council (AHRC) and the Higher Education Academy (HEA). Professor Kretschmer led CIPPM to make great contributions to IP research and policymaking. He moved in 2012 to Glasgow University to lead CREATE,<sup>27</sup> an interdisciplinary research centre funded jointly by AHRC, EPSRC and ESRC. In addition to its other achievements, CREATE has become an inspired contributor to IP Education through the development of Copyrightuser.org<sup>28</sup> and other initiatives. CIPPM was committed to ‘Knowledge Transfer’ at Bournemouth. We were able to generate income through professional IPR management education to government departments, public and commercial institutions. Whenever a consultancy request was received, I would think back to my initial ideas of inter-disciplinarity and what I had learned from Theodore Zeldin. My first commercial consultancy was in 1999 for Gillette UK plc. Their UK Head of Patents wanted a self-managed learning resource that would sit on their intranet, available to all staff, to introduce themselves to basic IP concepts. He stated:

*It is important that our salespeople travelling all over the globe understand the importance of our trade marks, and ensure that those trade marks are not ‘out at risk’ by the way local merchants display our products in their shop windows.*

The ‘Gillette’ software was put to use (with permission) at Bournemouth as an introductory class for LLB IP students, and as a ‘selftest’ for non-law and other IP short course students.

When the context of a client’s business was foreign to me, I would ask a colleague from another faculty for an introductory one-hour one-to-one tutorial. That would enable me to meet the client with enough background against which to set the IP they wanted to understand. It was an enriching time for me, in which I assimilated the very basics of tax, software development, automotive electronics etc. in order to have the appropriate context in which to place IP concepts and practice.

From our early encounters with Paul Turner, the Chartered Institute of Patent Attorneys (CIPA), and the Patent Office, we had built relationships that stood Bournemouth in good stead when we sought accreditation of the LLB IP law module as satisfying most of the foundation requirements for Patent attorney qualifications. Through CIPPM we worked with CIPA, the Chartered Institute of Trade Mark Attorneys (CITMA) and the IP Regulatory Board to accredit the Bournemouth Post Graduate IP qualifications for foundation level units of both Patent and Trade Mark attorney examinations.

#### THE ‘NOUGHTIES’ – HIGHER EDUCATION ACADEMY NATIONAL TEACHING FELLOW

The government’s HEA National Teaching Fellowship scheme<sup>29</sup> began in 2000. In 2001, the second year of the scheme, £50,000 × 20 awards were available to academic teachers who could demonstrate excellent teaching practice and offer a proposal to enhance innovative teaching practice. I was selected for an award. My proposal was that as IP education was growing in importance, so was online delivery of learning and teaching,

<sup>27</sup> ‘CREATE’ <[www.create.ac.uk](http://www.create.ac.uk)> accessed 26 April 2018.

<sup>28</sup> ‘Copyrightuser’ <[www.copyrightuser.org](http://www.copyrightuser.org)> accessed 26 July 2018. (Including contributions of Hayley Boshier, Ronan Deasley, Bartolomeo Meletti, Dinusha Mendis and others).

<sup>29</sup> ‘National Teaching Fellowship’ (Higher Education Authority) <<https://www.heacademy.ac.uk/individuals/national-teaching-fellowship-scheme/NTF>> accessed 26 April 2018. (The HEA introduced the NTF scheme 2000).



and there would be benefit in making IP education available for online delivery. At the time, one of the leading exporters of IP and IP education was Japan, and the leading exponent of online education was Australia. During a three-month secondment to University of Sydney I worked with Bill Childs as ‘online facilitator’ alongside a trade mark attorney, as we developed a trade mark module for the UTS online Patent & Trade Mark attorney postgraduate programme. It was a steep learning curve, working with a cohort of students who had no realistic expectation of ever meeting each other face-to-face. However, I sensed it was working when one student, having submitted his assignment on the student’s online exchange commented: “That was a toughie. Why don’t we all meet up this evening for an e-beer?” Several of his co-students responded “OK”.

The academic visit to Japan offered opportunities to spend time in different HE institutions. At Tokyo Metropolitan University, the young students sat patiently through my lecture. Their professor had warned me that when I had concluded, they would all have a question or a comment for me. One was unforgettable, “Intellectual property is like food for engineers. They should have a little every day.”<sup>30</sup>

The NTF award funds enabled a small group of Bournemouth colleagues to enrol on Professor Gilly Salmon’s ‘Everything in Moderation’ e-learning programme,<sup>31</sup> which prepared us to offer Bournemouth’s postgraduate IP modules as a blend of face-to-face and online learning on PGCert, PGDip and LL.M. In 2001, World Patent Information<sup>32</sup> recognizing that IP education was gaining ground, invited me to review my IP education work to date. Research for the first stage of the work at Bournemouth revealed that 85–95% of students from all disciplines thought intellectual property relevant to their future careers<sup>33</sup> and identified the need for Intellectual Property to be included in a range of courses across the University. The next stage of the work has been the development of a learning and teaching resource with a very specific aim, to enable the teacher who is an expert in their own discipline, but not an IP expert, to respond to the student demand for an introduction to IP. The format was devised in discussion between the author and Linda Byles, Learning Support Tutor at Bournemouth, to ensure it reflected the latest findings in learning and teaching. It highlights the need for all aspects of intellectual property, patents, trademarks, design rights, to be included on courses that traditionally have had no IP input. Significantly, these included a range of non-science based courses.

For example, Retail Management students were helped to see the benefit of protecting their ideas in relation to innovative shelf designs to combat store theft, which had patent potential. Catering students appreciated that their innovative dishes had patent and trade mark potential. Nurses understood that asserting copyright in a drug dispensing chart could generate commercial benefit as well as ensuring wider distribution. Satisfying demand by conventional measures of time and expertise would be prohibitively expensive.

The key objective of the original Patent Office/Bournemouth University contract, in 1996, was to create a resource that could be more flexibly used. From an early stage, the materials were called ‘Micromodules’ as an indication of their ability to be delivered in a short space of time. Further support was given in 1997 by the Leverhulme Trust, when it awarded Bournemouth University one of only three innovative teaching grants for its

<sup>30</sup> Japanese Engineering student, Tokyo Metropolitan University, 2002.

<sup>31</sup> ‘Five Stage Model’ (Gilly Salmon) <<https://www.gillysalmon.com/five-stage-model.html>> accessed 25 April 2018.

<sup>32</sup> Ruth Soetendorp, ‘Innovators and Advisers Preparing for the Dialogue’ (2001) 23(1) World Patent Information, 63–66.

<sup>33</sup> Soetendorp (n11), R Soetendorp & L Byles ‘Report for the Patent Office’ (Unpublished, 1996) R Soetendorp ‘A Powerful Tool in an Innovative University’ (PATLIB Conference, Aberdeen, May 1996).

work in raising IP awareness. Based on the work of Ramsden and Entwistle (1981)<sup>34</sup> and Gow and Kember (1993)<sup>35</sup> the philosophy underpinning the micromodules has been to foster a 'deep', or integrating, approach to learning. Similarly, the work of Gibbs, Habeshaw and Habeshaw (1989)<sup>36</sup> have provided the underpinning rationale for taking a student centred approach to delivery. The importance of relating to the students as adult learners (see Knowles cited in Soetendorp 1999)<sup>37</sup> has also informed the focus of the work. The micromodule materials include notes for facilitators, lesson plans, student activities, handouts and assessments. They are structured to be delivered in a one or two hour slot, and are designed to be used in a range of group learning environments: in a lecture theatre, with a seminar group, or in a workshop forum. The Micromodules take students through a series of activities, which address important IP concepts. An example of an exercise, and how the pages work is given in the accompanying slides. The hard copy and CD-ROM formats give facilitators maximum flexibility to customise the materials.

In Spring 1999, the micromodule materials were presented to the independent European Technology Assessment Network Expert Working Group for the European Commission. It was gratifying to note the micromodule ethos reflected in their published report on the Strategic Dimensions of IP Rights in the context of Science and Technology Policy, ETAN Working Group 1999 which stated:<sup>38</sup>

*The education of scientists, technologists and business managers in most of Europe does not usually include formal exposure to the field of intellectual property. This frequently results in a failure to appreciate the general IP environment . . . and even a failure to carry out research activities in an acceptable manner (e.g. maintaining laboratory notebooks and procedures in a manner acceptable to US courts).' It continued 'Such training need not be a heavy burden. The necessary minimum would only require a few hours of instruction; practical exercises would also be an advantage.*

Working with the Patent Office's Dave Morgan, the micromodule was devised as a multimedia resource for university teachers to introduce IP concepts as a small addition to existing modules. It was greeted warmly by 'IP enthusiasts',<sup>39</sup> including Hungary's Patent office and Russia's Open University and Patent Office. Take up amongst non-law academics was less enthusiastic. Like the AURIL Red Folder of IP advice for universities, the Micromodule resource was circulated to all universities. It was purchased by twenty-one. However, it is likely that those copies went no further than the office of the senior managers to whom they were addressed. Useful, if painful, lessons were learned. As a result, subsequent learning resources have been presented in formats that can be distributed and accessed more widely. The UKIPO's contribution to IP Education is successfully demonstrated by the Cracking Ideas Think Kit,<sup>40</sup> IP Tutor,<sup>41</sup> IP Tutor+

<sup>34</sup> P Ramsden, & Entwistle, 'Effects of Academic Departments on Students' Approaches to Studying, (1981) 51 British Journal of Educational Psychology 368.

<sup>35</sup> L Gow, & D Kember, 'Conceptions of Teaching and Their Relationship to Student Learning' (1993) 63 British Journal of Educational Psychology 20.

<sup>36</sup> G Gibbs, S Habeshaw & T Habeshaw, *53 Interesting Things to do in Your Lectures* (3rd Edition, Technical & Educational Services 1989).

<sup>37</sup> R Soetendorp, *Law for Non-Lawyers*. (1999) Spring Edition, National Council for Legal Education Newsletter, 5.

<sup>38</sup> 'ETAN Working Paper Strategic Dimensions of Intellectual Property Rights in the context of Science and Technology Policy' (European Commission DG XII – Science, Research and Development, Directorate AP – Policy Co-ordination and Strategy, June 1999) 32 <<http://ec.europa.eu/research/era/pdf/ipr-expertgroupreport.pdf>> accessed 26 April 2018.

<sup>39</sup> 'IP enthusiast' – a term coined by Professor Jeremy Phillips to describe those involved with intellectual property practice law, whose passion to promote IP went beyond normal bounds . . .

<sup>40</sup> 'Think Kit' (*Cracking Ideas – Teaching and Learning Resources*) <[http://crackingideas.com/third\\_party/Think+Kit](http://crackingideas.com/third_party/Think+Kit)> accessed 23 April 2018.

<sup>41</sup> 'IP Tutor' (*Intellectual Property Office*) <<http://www.ipo.gov.uk/blogs/iptutor/>> accessed 23 April 2018.

and most recently animated videos for primary level school students.<sup>42</sup> IP Education was now receiving endorsement as a subject that transcends disciplinary boundaries. YoTakagi, WIPO Executive Director, 2004 at Arab Regional conference on the Teaching of IP Dubai<sup>43</sup> stated, “In view of the expanded role of IP in knowledge-based economies and societies, it is increasingly important to teach IP to students who do not have a legal background.” The sentiment is echoed by Professor James Boyle, Eversheds Lecture, Royal Society of Arts, London 2003:

*We need to bring together the programmers and the web publishers, design artists and the film makers and the people who are computer scientists and the entrepreneurs and say ‘[intellectual property] is affecting you and you ought to be thinking about how it’s affecting you’. . . . This is something in which we have to educate people. There’s no single strategy, we should substantially change the way we look at intellectual property.*<sup>44</sup>

Other bodies funding UK IP education at this time, through Bournemouth University, were the HE Academy Engineering & Law subject centres, the EU through its European Framework Programme 5 DIPS and LIIP projects, which included developing resources linking innovation and industrial property that brought e-learning opportunities to enterprises, completed in 2006, and the Patent Office.

Between 1999 and 2002, via the EU PHARE and EPO Regional IP Programme initiatives, the next wave of candidate States for accession to the European Union were offered IP learning programmes. I was delighted to be invited by the EPO’s Nigel Clarke<sup>45</sup> to teach and share IP concepts with members of the judiciary, industrialists, practitioners and academics in Bulgaria, Poland, Hungary, Slovakia, Latvia and Lithuania. It was a learning experience for me to accept, again, the challenge of distilling the great body of IP law to bare essentials. In 2002, the EU combined with the IP office of the Peoples Republic of China (SIPO) to run programmes to prepare for PRC accession to membership of the World Trade Organization. On that first visit to Beijing, I learnt an important lesson – my lecture was being simultaneously translated. My lecture style has always been to invite questions from the audience as I speak. In the first part of the lecture their questions were forthcoming. Then they began to dry up. I felt uneasy and stopped in my delivery. I asked the audience why they were no longer asking questions. “Madame” came the reply from a student “You have not ceased talking long enough for the translators to let us know what you are saying”.

The WIPO was also responding to interest in IP Education, and invited my contributions to colloquia in Vietnam, Bangladesh, Sri Lanka, and China. There were others, including World Bank and Karnataka State Ministry of Education, who through the TEQIP (Technical Education Quality Improvement Programme) facilitated a three day workshop for engineers and lawyers in Bangalore.

In 2003, I received my established chair at Bournemouth. My preferred title would have been Professor of Intellectual Property Education, but the university wanted Professor of Intellectual Property Management. I did not argue.

In May 2004, I was invited to attend the Japanese Institute of Invention and Innovation commemorative and ceremony and international symposium in Tokyo. At the dinner I

<sup>42</sup> ‘Logo Mania (Nancy and the Meerkats: Nancy’s Musical Box)’ (*YouTube*, 16 Jan 2018) <<https://www.youtube.com/watch?v=ttpl2qu5nRc&feature=youtu.be>> accessed 23 April 2018.

<sup>43</sup> Quoted in R Soetendorp, ‘“Food for Engineers” Intellectual Property Education’ (2004) December, *Industry & Higher Education* 363.

<sup>44</sup> *Ibid.*

<sup>45</sup> Dr Nigel Clarke, Manager of Patent Information Promotion and Patent Information Research at the European Patent Office.

had the good fortune to be sat next to Yoshiyuki (Yo) Takagi,<sup>46</sup> then WIPO's Executive Director, Office of Strategic Planning and Policy Development. He had recently spoken at a WIPO Regional Conference in Dubai. We sustained an animated conversation throughout that dinner, based on a shared enthusiasm for intellectual property education. In 2008, WIPO published "Teaching of Intellectual Property: Principles and Methods",<sup>47</sup> edited by Yo Takagi, to which I contributed the chapter 'Teaching Intellectual Property for Non-Lawyers'.

In 2005, I was part of a small WIPO delegation to Foshan, China to see IP education underway to primary school students.<sup>48</sup> I was unaware of anything like it happening in UK. A SIPO<sup>49</sup> official said "China has only 20 years' experience of IPR issues and many Chinese people know little about the situation. Teaching children about IPR is an effective way of spreading knowledge about the issue and preparing the population for developments in the years ahead."<sup>50</sup> Notwithstanding the cultural differences between PRC and UK, that seemed a pedagogic idea to which we might aspire. In the same, year CIPPM received the World Leaders in IP European Award for Best Achievement in IP Education and Training. In 2006, I joined the Epigeum<sup>51</sup> team (an Imperial College, University of London, spin out) to produce the IP module of their interactive learning resource 'In the Research Context' aimed at PhD students. The following is quoted directly from a PhD Student, Anglia Ruskin University the Epigeum website:

*The IP in the Research Context course was really helpful and the structure and content was well put together. I enjoyed it immensely and feel I have gained considerable insight into this complex area.*

Reflecting on the years leading to my retirement, it is encouraging to see the contribution that CIPPM was able to make to income generating knowledge transfer for Bournemouth University. We developed customized short course training for public and private organisations eager to learn about how to cope with the mysteries of IP. CIPPM's USP was that the client would be able to enjoy a training that was focused specifically on their IP needs, and was fully confidential. Confidentiality (together with Trade Secrets) is too often overlooked as a key element to IP education. However short the programme, time should be allocated to alerting students to the risks of ignoring confidentiality. I have often described a warning about confidentiality as the 'cheapest, simplest, most effective IP advice you will get.'

Students have often sought me out to discuss university projects for commercialization, unaware of the damage ignorance of IP has already done, for example:

*A student recently called "Are you the lady who specializes in IP?" "Yes" "Can you give me some advice about patenting the project I'm entering in the university enterprise competition?" "Yes of course. When would you like to meet to tell me about it, in confidence?" "No need. You can read all about it on my website".*

<sup>46</sup> Yo Takagi, WIPO's Assistant Director General Leading the Global Infrastructure Sector <[http://www.wipo.int/about-wipo/en/activities\\_by\\_unit/index.jsp?contact\\_id=9](http://www.wipo.int/about-wipo/en/activities_by_unit/index.jsp?contact_id=9)> accessed 25 April 2018.

<sup>47</sup> Yo Takagi (ed.), *Teaching of Intellectual Property: Principles and Methods* (Cambridge University Press/WIPO 2008).

<sup>48</sup> Ruth Soetendorp & Lingling Wei, 'Intellectual Property Education in China' in J. Reuvid (ed), *Business Insights: China – Managing Risk* (Kogan Page 2011).

<sup>49</sup> The State Intellectual Property Office of the People's Republic of China.

<sup>50</sup> 'Seminar Highlights IPR Education' (*China Through a Lens*, 22 November 2005) <<http://www.china.org.cn/english/2005/Nov/149558.htm>> accessed 20 April 2018.

<sup>51</sup> 'Research Skills Master Programme' (*Epigeum – Oxford University Press*). <<https://www.epigeum.com/courses/research/research-skills-master/courses/>> accessed 20 April 2018.

Following that exchange, I called the tutor responsible for the enterprise competition, and asked whether the participants received any IP education. “Yes, of course” he replied “at the end of the competition process”

When I retired in 2007 from my full time established post at Bournemouth, I made a distinction between ‘having a job’ and ‘work’. On retirement, I no longer want a proper job, but I do want to work. And I am always interested in IP education work.”<sup>52</sup> Having been involved in refiguring the CIPPM Post Graduate IP programme modules offering CIPA and CITMA Attorney foundation qualifications to blended online and face2face learning, it was good to see the cohort grow six-fold, attracting students from all over UK and Europe. I enjoy a continuing contribution to CIPPM and to other IP education work opportunities that have arisen. Retirement made it possible to relocate back to London, though it meant leaving behind many good friends, and the sea.

### PROFESSOR EMERITA – THE LONDON YEARS

I had benefited from work with two engineering academics who were also education and IP enthusiasts, Professor Jim Roach at Bournemouth University and Dr. Rob McLaughlan at University of Technology Sydney. As a result, we were able to undertake interdisciplinary research into IP education for non-lawyers.<sup>53</sup> An early project involved asking academic engineering conference delegates what they felt about IP education. Their overwhelming response used to be replicated whenever non-law academics were asked about IP education,<sup>54</sup> representing a clear barrier to widespread take up of IP education in non-law faculties:

1. No one taught me about IP rights;
2. If we had decent students, we wouldn’t need to teach about IP; and
3. The syllabus is already too crowded. We can’t take time from teaching the course essentials.<sup>55</sup>

IP may be key for engineers (and other non-lawyers), but it will never be core to their discipline. As a result, the challenge of establishing IP as a named module choice in a non-law degree remains a daunting one.<sup>56</sup> Jim Roach and I understood this, and focused on introducing IP education concepts to Enterprise Educators, starting with a paper at the International Entrepreneurship Educators conference in 2007, and most recently at the 2017 Enterprise Education UK conference. It is good to see our ideas of creating opportunities for engineers to learn about IP being picked up, albeit sporadically, around the globe. Recently in Peoples Republic of China researchers, Tsing Hua University in 2016:

<sup>52</sup> Alice O’Donkor, ‘Interview – Ruth Soetendorp, IP Educator and Outgoing Chair of IPAN’ (*Managing Intellectual Property*, 27 July 2016) <<http://www.managingip.com/Article/3573050/Interview-Ruth-Soetendorp-IP-educator-and-outgoing-chair-of-IPAN.html>> accessed 20 April 2018.

<sup>53</sup> R Soetendorp, R McLaughlan, J Roach, WG Childs, ‘Engineering Enterprise through Intellectual Property Education – Pedagogic Approaches’ (2005) 4(2) WSEAS Transactions in Engineering Education 359, <<https://core.ac.uk/download/pdf/76431.pdf>> accessed 21 April 2018.

<sup>54</sup> But see the IPAN/NUS findings, R Soetendorp, M Haberman & S Smith, ‘University IP Policy: Perception and Practice – How Students and Staff Understand Intellectual Property Policy at their HEI (*Intellectual Property Awareness Network*, July 2006) <[http://ipaware.org/wp-content/uploads/2016/10/IPAN\\_NUS\\_University\\_IP\\_Policy\\_16aug16.pdf](http://ipaware.org/wp-content/uploads/2016/10/IPAN_NUS_University_IP_Policy_16aug16.pdf)> accessed 21 April 2018.

<sup>55</sup> J Roach & R Soetendorp, ‘Intellectual Property in the Engineering Syllabus – A Model for Integrating Key but not Core Concepts Across the Disciplines’ (Higher Education Academy Law and Engineering Subject Centres, 2008) <<https://www.heacademy.ac.uk/system/files/intellectual-property.pdf>> accessed 24 April 2018.

<sup>56</sup> See QAA benchmarks and professional business accreditations mentioned below, endnotes n 72, n 73, n 74.

*Surveys and interviews have been conducted to analyse the perception and understanding of IPR in China. Results showed that students recognise the need and importance of IP in engineering and IP lessons will increase the level of this recognition. Students prefer to learn IP by case studies and conference. Therefore, an IP instruction module has been developed in the IE department of Tsinghua University and a second survey has been launched to examine the effects. At last a website has been developed to help IP learning.<sup>57</sup>*

I have enjoyed the benefit of belonging to two organisations that make significant contributions to furthering ‘the campaign’ for IP education in HEIs. The IPAN<sup>58</sup> (formerly Intellectual Property Awareness Group) was founded in 1993. The European Intellectual Property Teachers Network<sup>59</sup> (formerly the Intellectual Property Teachers Network) was established in 2007.

IPAN’s Education Group formed a successful relationship with the National Union of Students (NUS). NUS Services Research Group worked with IPAN to investigate two questions relevant to IP education in UK universities, using the extensive NUS student and staff database. The first survey (also involving UKIPO) examined the attitude of students to IP.<sup>60</sup> Never before, we believe, had students been given the opportunity to share their thoughts on the relevance of IP to their current courses and future careers. Findings were sufficiently positive, in respect of IP education, to influence UKIPO in the design of their current well-received online resource, IP Tutor,<sup>61</sup> aimed at the HEI community. The second investigation sought to understand the current perception and practice of IP Policies<sup>62</sup> in HEIs. Having experienced a general lack of awareness amongst students and staff of IP at several universities, the IPAN Education Group felt this question was long overdue to be asked. Students, and this time academics too, confirmed again their support for IP education on their programmes. At the same time, their ignorance that IP policies were in place at their institution was clear and difficult to ignore.

Over the past decade, the EIPTN has provided an annual opportunity for university teachers to meet and exchange ideas of bringing IP into university learning and teaching. Techniques, technology developments, and approaches are shared with an openness and enthusiasm rarely found at an academic conference. EIPTN’s work is supported by the European Patent Office and European Intellectual Property Organisation (formerly OHIM). However, for academics enthusiastic about IP education, a major disincentive to furthering academic research in the area has been that IP is not core to their discipline (unless they happen to be IP law academics). Research funding for IP education related projects is harder to obtain. IP education publications tend not to contribute to faculty Research Excellence Framework<sup>63</sup> scores. As I write, the government has announced a third funding framework for universities: Knowledge Exchange Framework

<sup>57</sup> V Raes, P Rau, J Xiang & C Cuiling ‘Promoting Intellectual Property Education for Engineers’ (2016) 8(1) International Journal of Technological Learning, Innovation and Development (China).

<sup>58</sup> ‘The Intellectual Property Awareness Network’ (IPAN) <[www.ipaware.org](http://www.ipaware.org)> accessed 23 April 2018.

<sup>59</sup> ‘European Intellectual Property Teachers’ Network’ (EIPTN) <<http://eiptn.astonwordpress.co.uk/>> accessed 20 April 2018.

<sup>60</sup> ‘Student Attitudes Towards Intellectual Property’ (National Union of Students, 2012) <<https://www.nus.org.uk/PageFiles/12238/IP%20report.pdf>> accessed 23 April 2018.

<sup>61</sup> ‘IP Tutor’ (Intellectual Property Office) <<http://www.ipo.gov.uk/blogs/iptutor/>> accessed 23 April 2018.

<sup>62</sup> Soetendorp, Haberman & Smith (n 47).

<sup>63</sup> The guidance on the assessment framework for the last round of REF submissions is available at ‘Assessment Framework and Guidance on Submissions: Updated to Include Addendum Published in January 2012’ (Research Excellence Framework, 2014) <<http://www.ref.ac.uk/2014/media/ref/content/pub/assessmentframeworkandguidanceonsubmissions/GOS%20including%20addendum.pdf>> accessed 20 April 2018. (For example “intellectual property” is mentioned once, while “impact” is mentioned 219 times).

(KEF).<sup>64</sup> Perhaps KEF may provide better opportunities for IP educators to receive financial support and recognition for their initiatives.

The years immediately following my retirement in 2007, left me feeling a little like the “Nanny McPhee of IP”. I answered calls from law schools of Leicester, Reading and Aston Universities to cover short-term gaps in IP law school teaching. They were fascinating times, which gave me enjoyable opportunities to see other university cultures at first hand. There was work to be done, too, with the University of the Arts London, who have recently advertised for their first IP Law lecturer in the London College of Fashion.<sup>65</sup> That is something that would have been unimaginable 30 years ago. The Museum of Brands<sup>66</sup> brought me in to help devise their first visitor learning programme, a subsequent iteration of which was enjoyed in 2014 by 13,534 schoolchildren or students.<sup>67</sup> When City (now University of London) Cass Business School invited me to help out on their undergraduate module Introduction to Business Law for Business School, it was another chance to ‘get my foot in the door’.<sup>68</sup> Within a couple of years, I was invited to submit a proposal for teaching an IP module to business and management undergraduates. Designing that IP Management module challenged me to put into practice my ideas of how IP might be taught as a full module to non-lawyers. It is still astonishing how few UK Business Schools include IP education for either graduate or post graduate students. The City IPM module divides syllabus content 50:50 between IP Law and IP management. The majority of students choosing the module will not have studied any law, so how to present IP law took some thought. Bottom line, whilst the students would not need to know how to *solve* an IP legal problem, they should be able to *identify* IP issues and know when to call in an IP legal expert before an issue became a problem. This would be the same ‘Prophylactic law’ I had had in mind when first teaching engineers. It was important too that students would hear first-hand from IP managers, in conjunction with academic lectures and reading on IP management issues. Finding IP managers willing to contribute to the module has not been a problem. The students have had the benefit of hearing from IP experts in valuation, licensing, and small, large and global IP strategic management.<sup>69</sup> In recent years, student numbers choosing the module mushroomed (City students apparently eschewing traditional financial management choices for a module more in line with nearby Old Street EC’s Silicon Roundabout career opportunities). City allowed me to take on a practitioner as an assistant to help with tutorials and marking. Working with a young IP professional has brought the module ‘street cred’, which is much appreciated by the students. In 2018 I will be bringing these ideas to an IP module on Cass’s Masters in Innovation, Creativity and Leadership.

<sup>64</sup> Jo Johnson, ‘How Universities Can Drive Prosperity Through Deeper Engagement’ (Speech to HEFCE Conference, 12 October 2017) <<https://www.gov.uk/government/speeches/how-universities-can-drive-prosperity-through-deeper-engagement>> accessed 24 April 2018.

<sup>65</sup> See Job Advert: ‘IP Lecturer’ (University of Arts London, 2018) <<https://ual.tal.net/vx/lang-en-GB/mobile-0/appcentre-1/brand-1/xf-3f148d936616/candidate/so/pm/6/pl/1/opp/3784-IP-Lecturer/en-GB>> accessed April 2018, also posted on IPKAT at ‘Sunday Suprises’ (The IPKAT, 10 December 2017) <<http://ipkitten.blogspot.co.uk/2017/12/sunday-surprises.html>> accessed 23 April 2018.

<sup>66</sup> ‘Museum of Brands, Packaging and Advertising’ <<http://museumofbrands.com/>> accessed 21 April 2018.

<sup>67</sup> ‘Annual Report 2014’ (Museum of Brands, Packaging and Advertising, 2014) <[http://www.museumofbrands.com/\\_assets/2014%20Signed%20and%20submitted%20to%20Charities%20commission.pdf](http://www.museumofbrands.com/_assets/2014%20Signed%20and%20submitted%20to%20Charities%20commission.pdf)> accessed 21 April 2018.

<sup>68</sup> My first Bournemouth University job, following graduation, had been as a dinner lady on the basis that if an elusive law teaching job were to become available, I’d be on hand to hear about it and respond swiftly. After 3 weeks, I left the canteen to begin my academic career as a part time, stand-in law and politics lecturer.

<sup>69</sup> Mandy Haberman, Jackie Maguire, Jim Asher, Donal O’Connell, Carol Daniels, Colin Hunsley, Charles Clark have all contributed to the City UoL IP Management Module.

In 2012, I was asked to be the IP education lead on a research project commissioned by OHIM/EUIPO into IP Education<sup>70</sup> in school curricula across the 28 EU member states. It was, for me, the beginning of a new chapter. In 2005, in Foshan, I had seen the advances being made by the Chinese in Primary School IP education, and was aware of having heard of nothing similar in UK. The OHIM/EUIPO research, which was published in 2015, was commissioned because 35%-50%<sup>71</sup> of young Europeans display attitudes that favour counterfeiting or downloading. This was a legitimate basis on which to undertake the research. I considered it ‘negative’ grounds for IP education (i.e. getting young people to ‘stop’ negative behavior). I accepted the research role on the understanding that we also investigate ‘positive’ aspects of IP education (i.e. getting young people to understand how IP is a symbiotic partner of innovation and creativity) and that we define IP education to include Patents, Trade Marks, Design, Copyright and Confidentiality. Plagiarism was also covered.

The research revealed some inspiring collaborations between Governments’ ministries (especially of Education and of Culture) and stakeholders from public and private institutions. IP is not a stand-alone subject, but appears, integrated, in the syllabuses for Arts, STEM, Citizenship, ICT and Entrepreneurship at levels from primary to upper secondary and vocational levels. However, there is no consistency of approach across the member states. The findings from member states were compared with three international states<sup>72</sup> that ranked highest amongst the most innovative nations.<sup>73</sup>

The UKIPO is well regarded for its IP education resource initiatives. But the UK’s Department for Education (for England, Northern Ireland, Scotland and Wales)<sup>74</sup> returned poorer results in the EUIPO research than most other Member States. In the questions asked of Education Ministries, none of the UK’s constituents mentioned any of the IP rights in the curriculum, nor in IP related learning objectives in the curriculum, nor in on going reform or debates. Nor were there any UK good practices of IP education noted, nor of IP education in the initial or in service training of teachers. Contemporaneous with the OHIM/EUIPO research was the UK government publication of *Enterprise for All: The Relevance of Enterprise in Education*.<sup>75</sup> An otherwise encouraging report by Lord Young, it made no mention of the significance of intellectual property in the commercialisation of enterprise.

The IPAN/NUS research had asked HEI students if they had heard of IP before coming to university. Of those that had, the greatest proportion came from non-UK countries.<sup>76</sup> Question 61 asked, “Was IP referred to during your student education?”. Just under one third of all students surveyed claim that someone has referred to IP while

<sup>70</sup> ‘Intellectual Property and Education in Europe: Study on IP Education in School Curricula in the EU Member States with Additional International Comparisons’ (Office for the Harmonization in the Internal Market (Trade Marks and Designs), September 2015). <<https://euiipo.europa.eu/ohimportal/documents/11370/80606/IP+and+Education+final+report+September+2015>> accessed 25 April 2018.

<sup>71</sup> European Citizens and Intellectual Property: Perception, Awareness, and Behaviour – Executive Summary (European Union Intellectual Property Office, 2013) EU ip-perception study conducted in 2013, <[https://euiipo.europa.eu/tunnel-web/secure/webdav/guest/document\\_library/observatory/documents/IPContributionStudy/25-11-2013/european\\_public\\_opinion\\_study\\_web.pdf](https://euiipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/IPContributionStudy/25-11-2013/european_public_opinion_study_web.pdf)> accessed 20 April 2018. (Updated in 2017).

<sup>72</sup> Switzerland (French speaking and German Speaking), Hong Kong, Singapore, United States of America (California, Massachusetts and Washington).

<sup>73</sup> S Dutta, B Lanvin & S Wunch-Vincent (eds.), ‘The Global Innovation Index 2014 – The Human Factor in Innovation’ (WIPO, Cornell University & INSEAD, 2014) <<https://www.globalinnovationindex.org/userfiles/file/reportpdf/GII-2014-v5.pdf>> accessed 26 April 2018.

<sup>74</sup> Intellectual Property and Education in Europe (n63) at 109 for England; 166 for Scotland; 181 for Wales.

<sup>75</sup> Lord Young, ‘Enterprise for All: The Relevance of Enterprise in Education’ (Department for Business, Innovation & Skills, 2014) <<https://www.gov.uk/government/publications/enterprise-for-all-the-relevance-of-enterprise-in-education>> accessed 26 April 2018.

<sup>76</sup> Soetendorp, Haberman & Smith (n 47).



they have been at school, college or university. This is significantly more likely amongst international students (both those from within and outside the EU) than UK students.

Whilst preparing a recent IP Management exam paper for City, I consulted the EPO's Espacenet database to see what patents there were for cyclists' folding helmets. The first 25 hits included 7 from PRC educational institutions, of which 4 were schools.<sup>77</sup> The Chinese focus on IP education in schools is apparently getting results!

At the time of writing, the Government has launched HERA (Higher Education and Research Act 2017). In December 2017 I asked the then Minister for IP, Jo Johnson MP, about IP education "to ensure our students leave university able to compete with other countries' graduates". He agreed on its importance and its relevance to UKRI (United Kingdom Research and Innovation), the new body corporate comprising the research councils.<sup>78</sup> But the phrase 'intellectual property' is not to be found in the words of the HERA text. Hopefully, IP education initiatives will reflect the spirit of HERA. The Minister for IP is based in two departments: BEIS and DfE and is ideally placed to start the bridge-building needed if UK is to begin to match the IP education achievements of our global competitors.

When I became a reviewer for the UK academic Quality Assurance Agency<sup>79</sup> I saw the power that QAA's discipline benchmark statements hold over academic teams devising and delivering higher education programmes. I realized that IP education would have an entrée into higher education programmes if 'intellectual property' could be articulated into QAA discipline benchmarks. IPAN and the UKIPO both took up my suggestion to respond when QAA launched calls for submissions to the rewriting of subject benchmarks. When we responded, we were rewarded with positive results i.e. subject discipline benchmarks that specifically mention intellectual property, as these two extracts illustrate. The first statement is derived from the Landscape Architecture Benchmark Statement:

*Students . . . will now be expected to have "Knowledge and understanding of . . . . . xvi the role and impact of intellectual property (IP)" within creative design environments*

The Agriculture, horticulture, Forestry, Food, Nutrition and Consumer Sciences Benchmark Statement says, "Students . . . will be expected to have abilities and skills that include the ability to understand the importance of IP rights. At the same time, led by Professor Andy Penaluna, QAA has rewritten its guidance for UK HE providers of Enterprise and Entrepreneurship education to include several mentions of IP.<sup>80</sup> The QAA process of updating benchmark statements is slow, and requires vigilance and determination on the part of any one seeking to influence the process. In the same way that QAA benchmarks will influence the design of HE programmes, so do the accreditation requirements of professional bodies. IPAN played its part in UK Engineering Council including four mentions of 'intellectual property' in its SPEC<sup>81</sup> requirements for chartered and incorporated Engineer qualifications. ACCA has recognised the importance of IP education in the accreditation requirements for accountants. As more

<sup>77</sup> Search results for "Folding Helmet," 'Result List' (*EspaceNet Patent Search*) <[https://worldwide.espacenet.com/searchResults?ST=singleline&locale=en\\_EP&submitted=true&DB=&query=%22folding+helmet%22](https://worldwide.espacenet.com/searchResults?ST=singleline&locale=en_EP&submitted=true&DB=&query=%22folding+helmet%22)> accessed 26 April 2018.

<sup>78</sup> Higher Education and Research Act 2017 s 92 & 93 (Outlining the constituents and role of United Kingdom Research and Innovation).

<sup>79</sup> 'Quality Assurance Agency' <<http://www.qaa.ac.uk/en>> accessed 25 April 2018.

<sup>80</sup> 'Enterprise and Entrepreneurship Education: Guidance for UK Higher Education Providers' (Quality Assurances Agency, January 2018) <<http://www.qaa.ac.uk/en/Publications/Documents/Enterprise-and-entrprenership-education-2018.pdf>> accessed 24 April 2018.

<sup>81</sup> UK-Spec (n 14).

professional bodies, and more QAA subject benchmarks, expect ‘intellectual property’ to be included as an accreditation or academic requirement, IP education will receive a welcome boost.

### REFLECTIONS ON THE FUTURE OF IP EDUCATION – LOOKING FORWARD

IP education has progressed hugely in thirty years. Anyone with the curiosity to learn about IP for themselves will find a plethora of well-designed and easily accessible resources, freely available online. Anyone with the enthusiasm to introduce IP to school or HE students will be similarly well-served. This is a great achievement, and one for which all IP education campaigners are to be congratulated.

However, relying on curiosity and enthusiasm will not be enough to ensure that UK’s school and HE students get an IP education experience equal to that which their counterparts in Europe, Asia and the United States are beginning to enjoy. The UKIPO does an amazing job, but someone needs to take responsibility for introducing initiatives that will foster and unite BEIS and DfE efforts in IP education. It is exciting to be part of the WIPO team, led by Altaye Tedla,<sup>82</sup> developing WIPO Academy’s Intellectual Property Impact Certificate course for Teachers.<sup>83</sup> It addresses two future facing aspects of IP education:

- (i) Appreciation that since all Nation States understand the importance for their rising populations to embrace creativity, innovation and enterprise, linking IP education to those areas of the curriculum makes sense; and
- (ii) Understanding that IP educators need to know how to make the business case to governments and policy makers for IP education to be introduced to schools. To develop that understanding, WIPO is introducing a concept new to IP education for schools – TRIZ.<sup>84</sup> It is ‘a problem-solving, analysis and forecasting tool derived from the study of patterns of invention in the global patent literature’. It is being used as a means of supporting innovators to improve patent strategy by linking a design model to TRIZ tools and methods, and patent strategy data. As such, TRIZ has a part to play where young people are learning about innovation, entrepreneurship and the role of intellectual property.

At the same time, gamification of IP education will be a necessary prerequisite to keep IP education delivery styles ahead of the learning and teaching developments that rising generations of ‘digital nomads’ will be demanding. IP Education games already exist,<sup>85</sup> but their use needs to be more widely accepted

It is heartening to see IP Education gaining academic ‘respectability’ through the funding support given by the UKIPO, EPO, EUIPO and WIPO into researching the perception, practice and process of IP Education. During most of ‘my’ 30 years, the accent has been on IP education at University. More recently, the focus has turned to IP education in schools. This is understandable given the ubiquity of online materials in the classroom, and the need to educate young people about the ethics and risks of ignoring copyright. IP education should always emphasise the ‘positive’ i.e. the ways in which IP can be used to create value and esteem, as well as the ‘negative’ i.e. ‘thou

<sup>82</sup> Altaye Tedla, Head. WIPO Academy, Distance Learning Program.

<sup>83</sup> ‘WIPO –KIPO-KIPA IP Impact Certificate Course for Teachers’ workshop, Abu Dhabi, December 2017<[http://www.wipo.int/meetings/en/details.jsp?meeting\\_id=46266](http://www.wipo.int/meetings/en/details.jsp?meeting_id=46266)> accessed 25 April 2018.

<sup>84</sup> ‘Triz’ (*Oxford Creativity*) <[www.triz.co.uk](http://www.triz.co.uk)> accessed 26 April 2018.

<sup>85</sup> ‘Black Swan’ (*Lancaster University Enterprise Centre*) <<https://www.lancaster.ac.uk/enterprisecentre/students/ip-game/>> accessed 26 April 2018.

shalt not . . .’ In the next few years young people commencing university studies should do so with some basic IP knowledge, on which they can build a deeper understanding of the risks and benefits presented by intellectual property rights. I would not presume to predict how IP education resources might develop in the future. The implications of massification in education<sup>86</sup> and the use of social media platforms including Instagram, Twitter<sup>87</sup> in the face-to-face or virtual classroom are trends that the rising generation of IP educators will be unable to ignore.

## CONCLUDING REMARKS

I have enjoyed my 30 years in IP law education. I have had many great teachers, and made many good friends. I’m a true IP enthusiast. The reward for any educator is to see the success of their students, and I’m delighted at the number of my former students who have taken up the baton of IP education beyond the law school. Promoting IP education at a time when the importance of IP was beginning to be appreciated around the globe gave me the opportunity to share IP education concepts internationally. I am proud and delighted to have played a part in growing international awareness of IP education. It has been an enriching experience, from which I continue to learn a lot. My enthusiasm to champion IP education beyond the law school began in QMUL in 1987 when it dawned on me that no-one was teaching creators of rights about IP. It continued when my first research question ‘How relevant do you think IP will be to your future career?’ received ‘relevant or very relevant’ from 85–95% of responses. It has been buoyed up by the support, encouragement and achievements of so many. When UoAL’s College of Fashion appoints its IP Law lecturer, it will signal the relevance of IP education to a sector that is predicted to contribute £32 billion to UK GDP by 2020,<sup>88</sup> and in turn to *every* sector in which a graduate expects to develop their career. I wish the appointee much success in the post.

Nevertheless, IP education successes over the past 30 years remind us that there is still much to do, and much to achieve.<sup>89</sup> Let students have the last word on why, given the chance, they chose IP education: ‘to protect ideas for future business’; ‘I think it will be relevant in the future’; ‘It is knowledge that most people do not have’ and ‘I consider this course as very important and useful in terms of business environment and especially for entrepreneurs’.<sup>90</sup>

<sup>86</sup> Haris Hasic ‘Teaching IP to the Masses’ (Speech to EIPTN Lund, 2017).

<sup>87</sup> Joe Sekhon ‘Use of Facebook, Instagram and Twitter to educate student entrepreneurs about the importance of IP’ (Speech to EIPTN Lund, 2017).

<sup>88</sup> £27billion worth of womenswear (RTW) sales in the UK in 2015. This figure is predicted to grow 23% by 2020 to £32billion (Mintel Reports, 2016).

<sup>89</sup> Post Script June 2018: I participated in a further WIPO International Seminar on IP and Education in Tbilisi. It was encouraging indeed to see the initiatives from IP Offices and universities representing a number of states. Attendance by Georgia’s Deputy Education Minister was a welcome presence. It was good to read the Center for IP Understanding’s report on The State of IP Education Worldwide which finds ‘a link between the availability of IP education and the strength of a nation’s IP system’.

<sup>90</sup> Cass Business School, City University of London, BSc Business and management 2<sup>nd</sup> year students: asked at the beginning of the module why they had chosen the Intellectual Property Management elective – 75% responded in this way.

# THE TERMINATION OF REAL PROPERTY INTERESTS BY FRUSTRATION UNDER ENGLISH LAW

MARK PAWLOWSKI\* and JAMES BROWN\*\*

## ABSTRACT

This article considers the extent to which the common law doctrine of frustration, which is grounded in the law of contract, is currently available as a means of terminating property rights in land which have as their foundation a contractual relationship (whether express or implied) between the parties. The writers' analysis reveals that a number of such rights falling within the *numerus clausus* principle, notably, leases, contracts for the sale of land, options to purchase land, easements, profits a prendre, mortgages and covenants affecting freehold land may, in principle, be discharged by a frustrating event under English law.

## INTRODUCTION

The doctrine of frustration operates as a means by which a contract may be automatically discharged where an event occurs (without default of either party and for which the contract makes no sufficient provision) which either renders performance of contractual obligations impossible, or at least significantly different from what was intended.<sup>1</sup> In its current form, therefore, the doctrine arises primarily in the context of contract law. But to what extent may it operate outside purely contractual relationships so as to terminate property rights in land? Although there is little English authority on this question, and a number of thorny issues remain as to the application of the doctrine in relation to estates and interests in land, it is the thesis of this article that frustration is available, as a matter of law, as a means of terminating certain real property interests within the *numerus clausus* principle<sup>2</sup> where the right in question is supported by an ongoing (or “live”) contractual relationship between the parties.

Before examining each of these property interests in turn, it may be helpful to give a brief overview of the doctrine as it applies to contracts generally.

## BRIEF OVERVIEW OF THE DOCTRINE

### *(a) when does frustration occur?*

Two well-known cases illustrate the circumstances when frustration will occur where the main purpose of the contract becomes impossible of performance by virtue of

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<sup>1</sup> See, generally, *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696, (HL). The parties may, of course, include in their agreement a clause (for example, a force majeure clause) which expressly provides for unforeseen events, in which case the doctrine of frustration will have no application. The contract may also provide (expressly or impliedly) for which party should bear the risk of the events which have happened.

<sup>2</sup> The principle dictates that there is a closed list of accepted property rights in English law. See, S. Gardner, *An Introduction to Land Law*, (2<sup>nd</sup> ed., 2009), Hart Publishing, at pp. 9–13, who lists a number of rights in rem that can exist over land, including leases, estate contracts, options, easements, profits a prendre, mortgages and covenants. Each of these rights is discussed in this article.

supervening events. In *Taylor v Caldwell*,<sup>3</sup> the defendants agreed to allow the claimants the use of a music hall on four specific days for the purpose of giving a series of concerts and fetes at a rate of £100 for each day. Before the concert was to be given, the premises were destroyed by fire without any fault on either party. The contract made no provision for this eventuality. The court held that the contract was subject to an implied condition that the premises were to continue to exist at all material times and that, because the fire destroyed the property, both parties were freed from their obligations under the agreement. Similarly, in *Krell v Henry*,<sup>4</sup> Krell owned a flat which overlooked Pall Mall which was the intended route of the King's Coronation procession. Henry agreed to hire Krell's flat on the days of the procession. The King was taken seriously ill and the procession was cancelled. The Court of Appeal held that the contract had been frustrated and relieved Henry of the obligation to pay the balance of monies owing. The contemplated purpose of hiring the rooms was to view the coronation and that had been rendered impossible by subsequent events.<sup>5</sup>

Another possible cause of frustration is the prohibition of the contract for an indefinite duration or the unavailability of labour or materials necessary for performance of the parties' activities. In *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd*,<sup>6</sup> for example, a contract to sell machinery to buyers in Poland was frustrated when Poland was occupied by Germany in the Second World War (it being illegal to trade with the enemy in times of war). However, whether the outbreak of war or an interference by government legislation discharges a contract will depend on the actual circumstances of each case. The answer often turns upon the probable duration of the interference and whether the interruption will render further performance of the contract radically different from that originally made. In *Tsakiroglou & Co Ltd v Noblee and Thorl GmbH*,<sup>7</sup> for example, the sellers had agreed to sell to the buyers Sudanese groundnuts and to ship them during October/November 1956. In October, they booked space in one of four vessels scheduled to call at Port Sudan in these two months. In November, the Suez Canal was closed to traffic. The House of Lords held that shipment via the Cape of Good Hope would not constitute a fundamental alteration in the contractual obligations of the sellers. The extra expense of shipment did not justify a finding of frustration, nor the fact that the voyage would take four weeks longer than by the Canal. Similarly, in *Davis Contractors v Fareham Urban District Council*,<sup>8</sup> a firm of building contractors submitted a tender to a local council in relation to a proposed building scheme. Attached to the tender was a letter which stated that the tender was subject to adequate supplies of labour being available as and when required. The tender was successful and the firm entered into a contract to build 78 houses within eight months for £94,425. Unfortunately, adequate supplies of labour were not available and the work took 22 months to complete at a cost to the firm of £115,233. The House of Lords held that the building contract had not been frustrated by the delay. The circumstances in which performance was called for would not render it a thing "radically different" from that which was undertaken by the contract.

<sup>3</sup> (1863) 3 B & S 826.

<sup>4</sup> [1903] 2 KB 740, (CA). See also, *Chandler v Webster* [1904] 1 KB 493.

<sup>5</sup> The case may be contrasted with *Herne Bay Steam Boat Company v Hutton* [1903] 2 KB 683, (CA), where the contract involved the hiring of a steam boat to view a Royal Naval review and for one day's cruise around the naval fleet. Due to the King's illness, the naval review was cancelled. The hirer of the steam boat refused to pay the balance of monies owing under the contract, arguing that it had been frustrated. The Court of Appeal held that the contract was not frustrated, as the naval review was not the only purpose of the contract and the day's cruise around the fleet was still possible.

<sup>6</sup> [1943] AC 32, (HL).

<sup>7</sup> [1962] AC 93, (HL).

<sup>8</sup> [1956] AC 696, (HL).

A contract may also become frustrated as a result of a party's incapacity to perform the contract either through death, illness or unavailability.<sup>9</sup> However, this generally occurs only for the performance of personal services and not for generic commercial services such as building work, which can be performed by numerous individuals. Thus, in *Robinson v Davison*,<sup>10</sup> the contract was frustrated where a piano player became ill prior to a concert she was contracted to play in on a particular date. The inability of an employee to perform his contractual duties due to serious illness may also frustrate his contract of employment.<sup>11</sup>

*(b) underlying basis of the doctrine*

There have been a number of justifications put forward for the application of the doctrine including the notion that there is an implied term or condition in the contract that, if the frustrating event occurs, the contract would be at an end.<sup>12</sup> It has also been suggested that, on the occurrence of the frustrating event, there is a failure of consideration<sup>13</sup> or that the doctrine is based on a special exception to the doctrine of absolute contracts as required by considerations of justice.<sup>14</sup> The currently accepted view of frustration, however, is set out by Lord Reid in *Davis Contractors*<sup>15</sup> who stated that frustration depends, in most cases, on the true construction of the terms of the contract read in light of the nature of the contract and the relevant surrounding circumstances when the contract was made. The doctrine, therefore, is essentially a risk allocation procedure<sup>16</sup> in so far as the question is whether it is reasonable to place the risk of non-performance for the events which have happened on one party or the other, or neither. If it is not reasonably possible to place the risk on either party then the contract is frustrated. If, on the other hand, the risk is placed on a particular party (by contract or otherwise), then the doctrine does not apply. This, in turn, has been held<sup>17</sup> to give rise to a "multi-factorial" approach involving an examination of (1) the terms of the contract (2) its matrix or context (3) the parties' knowledge, expectations, assumptions and contemplations, in particular as to risk, as at the time of the contract (4) the nature of the supervening event and (5) the parties' reasonable and objectively ascertainable calculations as to the possibilities of future performance in the new circumstances. The consequences of the decision whether or not to apply the doctrine fall also to be measured against the demands of justice.<sup>18</sup>

## LEASEHOLD ESTATES

There is little doubt that the foundation of the landlord and tenant relationship rests with contract law principles. Unlike simple contracts, however, what complicates the leasehold relationship is the fact that a legal estate is created by the lease, which, in turn, confers on the leaseholder exclusive possession of the demised property. Indeed,

<sup>9</sup> See, *Stubbs v Holywell Railway Co* (1867) LR 2 Ex 311, (death).

<sup>10</sup> (1870–71) LR 6 Ex 269. See also, *Condor v The Baron Knights* [1966] 1 WLR 87.

<sup>11</sup> See, for example, *Noctuit v Universal Equipment Co* [1986] 1 WLR 641, (heart attack).

<sup>12</sup> *Chandler v Webster* [1904] 1 KB 493, (CA).

<sup>13</sup> This explanation is commonly used in the United States. Similarly, it has been opined that a frustrating event removes the foundation of the contract: *FA Tamplin Steamship Co Ltd v Anglo-Mexican Petroleum Products Co Ltd* [1916] 2 AC 397, at 406, (HL) and *WJ Tatem Ltd v Gamboa* [1939] 1 KB 132, 138.

<sup>14</sup> *Hirji Mulji Cheong Yue Steamship Co Ltd* [1926] AC 497, (PC).

<sup>15</sup> [1956] AC 696, at 720–721, (HL).

<sup>16</sup> See, D. Robertson, "Frustration of Leases: Who Bears the Risk?", (1982) *Sydney Law Review* 674, at 685–686.

<sup>17</sup> See, *Edwinton Commercial Corp v Tsaviris Russ (Worldwide Salvage and Towage) Ltd (The Sea Angel)* [2007] EWCA Civ 547, at [110], per Rix LJ. This view has been adopted by the Supreme Court of New Zealand: *Planet Kids Ltd v Auckland Council* [2013] NZSC 147.

<sup>18</sup> [2007] EWCA Civ 547, at [112].

leases have always been viewed as a hybrid, namely a “chattel real”,<sup>19</sup> lying between real and personal property. In recent years, however, there has been a growing tendency to expose the law of landlord and tenant to a much more comprehensive application of ordinary contract principles.<sup>20</sup> As Laskin J observed in the Canadian case of *Highway Properties Ltd v Kelly Douglas & Co Ltd*,<sup>21</sup> it is “no longer sensible to pretend that a commercial lease . . . is simply a conveyance and not also a contract”.

(a) *Fixed term tenancies*

It was in the leading case of *National Carriers Ltd v Panalpina (Northern) Ltd*<sup>22</sup> that the House of Lords was presented with the first real opportunity to consider whether the doctrine of frustration could apply so as to determine a lease. In this case, a warehouse was let to the tenant for a term of 10 years from January 1974. The tenant covenanted, *inter alia*, not to use the property otherwise than for the purpose of a warehouse. The only vehicular access to the property was by a street which the local authority closed in May 1979 because of the dangerous condition of a derelict Victorian warehouse which was situated nearby. The closure lasted for about 20 months, during which time the tenant’s warehouse was rendered useless. In an action by the landlord for recovery of unpaid rent, the tenant claimed that the lease had been frustrated by the closure of the street. The House of Lords held, by a majority, that the doctrine of frustration was, in principle, applicable to leases<sup>23</sup> but, in view of the fact that the lease still had several years to run after the interruption had ceased, the lease was not frustrated. In reality, the tenants had lost less than two years of use of their warehouse and the lease would still have nearly three years left to run after the interruption had ceased. Essentially, the closure of the street was not serious enough as to go to the whole foundation of the lease rendering the leasehold estate worthless or useless. It is likely, therefore, that the outcome would have been different if the interruption of access had been lengthier.

More recently, the application of the doctrine has been considered in the context of a failure to pay rent caused by the tenant’s inability to obtain housing benefit. In *Graves v Graves*,<sup>24</sup> an assured shorthold tenancy was executed in favour of a divorced wife (as tenant) on the basis that she would be entitled to housing benefit from the local housing authority. Unfortunately, she had been given wrong advice and she was not, in fact, entitled to benefit. The landlord (her ex-husband) sought possession and her defence, *inter alia*, was that the tenancy had been frustrated. At first instance, her

<sup>19</sup> See, for example, the remarks of Nicholls VC in *Crago v Julian* [1992] 1 WLR 372, at 377.

<sup>20</sup> See, generally, S. Hicks, “The Contractual Nature of Real Property Leases”, (1972) 24 *Baylor Law Review*, at 443–544; J. Efron, “The Contractualisation of the Law of Leasehold: Pitfalls and Opportunities”, (1988) 14 *Monash Law Review*, 83–113 and M. Pawlowski, “The Application of the Doctrine of Mitigation of Damages to Leases”, [1995] 18 *Liverpool Law Review* 173. In Australia, the ground-breaking High Court of Australia decision in *Progressive Mailing House Property Ltd v Tabali Property Ltd* (1985) 57 ALR 609 applied the contractual doctrine of anticipatory breach in order to permit the landlord to accelerate its right to recover for future rent subject to its duty to mitigate damages. See, by contrast, the English position in *Reichman v Beveridge* [2006] EWCA Civ 1659.

<sup>21</sup> (1971) 17 DLR (3d) 710, 721, (Supreme Court of Canada).

<sup>22</sup> [1981] AC 675 (HL). In the earlier case of *Leighton’s Investment Trust Ltd v Cricklewood Property and Investment Trust Ltd* [1943] KB 493, the Court of Appeal had held in principle that a lease could not be determined by frustration. This was then appealed to the House of Lords (see, [1945] AC 221), but the House was divided with two Law Lords stating that a lease could be frustrated (Viscount Simon LC and Lord Wright), two saying it could not (Lord Russell and Lord Goddard) with the fifth expressing no opinion.

<sup>23</sup> In *National Carriers*, the term of the lease was for a period of 10 years. It may, however, be artificial to regard the tenant’s rights as governed by executory promises in cases where those rights are, as a matter of substance, more properly viewed by reference to their character as an estate in land with a root of title in the executed demise (i.e., a 99-year lease of land on payment of a premium and with no, or only a nominal, rent). Here, the lease takes on the character of a conveyance of land and, hence, purely a vehicle of estate ownership. In this situation, the contract is largely executed with minimal outstanding obligations on either party still to be performed. For this reason, an executed freehold conveyance may be beyond the scope of the doctrine.

<sup>24</sup> [2007] EWCA Civ 660. See further, J. Brown, “A New Way of Terminating Leases?” [2008] *Conv.* 70.

defence succeeded, the district judge applying the test laid down by Lord Radcliffe in *Davis Contractors*, namely, that frustration occurs “when, without fault of either party, a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it radically different from what was undertaken by the contract”. On appeal, however, the Court of Appeal preferred to decide the case in favour of the wife by relying on an implied condition that the contract would end if housing benefit was not available.

An American case, *Albert M. Greenfield & Co v Kolea*,<sup>25</sup> involving two lease agreements of adjoining premises, is also of interest. The first lease, executed in 1971, covered a one-storey garage, which was to be used for the repair and sale of second-hand motor vehicles. The lease was for a term of two years from May 1971. The second lease, also executed in 1971, covered several pieces of adjoining ground to be used by the tenant for the sale and storage of motor cars. This second lease was also for a two-year term commencing in May 1971. Neither lease contained any provision with respect to the tenant’s obligations in the event of the destruction of the premises by fire. After just one year of occupation, a fire completely destroyed the garage covered by the first lease. The day after the fire, barricades were placed around the perimeter of both premises and the tenant refused to pay the rents due under the leases. The court concluded that the underlying purpose of the lease had, clearly, been frustrated. As contemplated by the first lease, the building was to be used by the tenant for the repair and sale of used motor vehicles. Without a building, the tenant could no longer carry on that business and it also became impracticable for the tenant to continue using the adjoining pieces of land when his business office and repair stations were destroyed by the fire. Further, the barricading of the property prevented the tenant from entering onto the land. Significantly, the underlying policy arguments for discharging the parties from the leases were expressed in these terms:<sup>26</sup>

“In this case, if we applied the general rule and ignored the realities of the situation, we would bind the appellant (tenant) to paying rent for barren ground when both parties to the lease contemplated that the building would be used for the commercial enterprise of repair and sale of used motor vehicles . . . The trial court’s decision to bind the lessee to the lease was simply an application of an outdated common law presumption. That presumption developed in a society very different from ours today; one where the land was always more valuable than then buildings erected on it. Buildings are critical to the functioning of modern society. When the parties bargain for the use of a building the soil beneath is generally of little consequence. Our laws should develop to reflect these changes . . .”

It is also worth mentioning that, apart from the United States, the doctrine of frustration has been held to be applicable to leases in Canada,<sup>27</sup> Australia<sup>28</sup> and New Zealand.<sup>29</sup>

<sup>25</sup> 1976, 475 Pa. 351.

<sup>26</sup> 1976, 475 Pa. 351, at 545.

<sup>27</sup> See generally, *Halsbury’s Laws of Canada*, (1<sup>st</sup> ed., 2017 Reissue), Contracts, LexisNexis, at p.413, n3 and cases therein cited.

<sup>28</sup> In Australia, there are conflicting authorities on whether the doctrine of frustration applies to executed leases. In several Australian cases, however, executed leases have been held to be frustrated: see further, *Halsbury’s Laws of Australia*, Vol. 6, Butterworths, at para. 110–9805 and notes thereto, where it is stated that the principle of frustration is capable of being applied to new situations such as leases, but that a lease would, in practice, rarely be frustrated.

<sup>29</sup> Although judicial opinion was previously divided, it is now generally accepted by the New Zealand courts that the doctrine of frustration is capable of applying to leases of land. Here again, it is acknowledged that the actual circumstances in which the doctrine may be successfully invoked to discharge a lease are likely to be very rare. It is well settled, applying the English cases, that a lease is not frustrated merely by the occurrence of an event which temporarily interrupts the tenant’s occupation of the property. See generally, *The Laws of New Zealand*, Vol. 8, Contract, Butterworths, at para. 369. In *Planet Kids Ltd v Auckland Council* [2013] NZSC 147, the Supreme Court of New Zealand adopted a “contextual and flexible” approach to frustration which takes into account a number of factors including the terms of the contract itself, the parties’ expectations and the nature of the supervening event relying on the observations of Rix LJ in *Edwinton Commercial Corp v Tsaviris Russ Worldwide Salvage and Towage Ltd (The Sea Angel)* [2007] EWCA Civ 547.



*(b) What events will frustrate the lease?*

The actual circumstances in which a lease for a fixed term of years will become frustrated are likely to be rare.<sup>30</sup> Only if the event is so serious that it goes to the whole foundation of the lease, rendering the leasehold estate worthless or useless, will it amount to frustration.<sup>31</sup> Generally speaking, therefore, long term leases will be less easily frustrated than short terms. On this reasoning, the doctrine will apply to a short-term lease of a building (or other structure) which is completely destroyed or burnt down.<sup>32</sup> Similarly, frustration is more likely to succeed where the purpose of a short-term letting was to enable the tenant to view some particular event which was subsequently cancelled.<sup>33</sup> Clearly, the proportion of time the lease is affected by the frustrating event will be highly relevant in most cases.

It has been suggested that if “some vast convulsion of nature” swallowed up the demised property altogether (or buried it in the sea), this would give rise to a frustrating event.<sup>34</sup> This was also recognised by Lord Russell (in his dissenting speech in *National Carriers*) where he opined that a physical destruction of a flying leasehold and the total disappearance of the site comprised in the lease into the sea (so that it no longer existed in the form of a piece of land and could not be the subject of forfeiture) could amount to a frustrating event. In this latter circumstance, “the obligation to pay rent, which issues out of the land, could not survive its substitution by the waves of the North Sea.”<sup>35</sup> On this reasoning, where the subject-matter of the lease comprises a structure only without land (for example, a lease of a flat or office in a block) and the structure is destroyed, it is submitted that the lease would be frustrated because the physical subject-matter of it would cease to be capable of definition. Viscount Simon LC in *Cricklewood Property and Investment Trust Ltd v Leighton’s Investment Trust Ltd*<sup>36</sup> also gave the example of a lease expressed to be for the specific purpose of building which is rendered impossible because of government legislation which permanently prohibits private building in the area in question.<sup>37</sup>

It seems also that a lease would become frustrated if it provided for the use by the tenant of the demised premises for a single purpose which subsequently became illegal. However, a temporary restriction on building works merely suspending the tenant’s ability to build in accordance with its obligations under a long lease would not amount to frustration.<sup>38</sup> That said, it has long been established that, although the whole lease may not be frustrated, it may be that a particular covenant in it may be temporarily

<sup>30</sup> This is because the events which are most likely to occur, such as fire, will normally be provided for in the lease and covered by insurance allowing for reinstatement of the premises. Alternatively, the incidence of the risk will normally be assumed by the tenant.

<sup>31</sup> The tenant’s personal incapacity which prevents him from using the premises will not be sufficient: see, *Youngmin v Heath* [1974] 1 WLR 135, (death of tenant did not discharge a weekly tenancy). But the position may be different where the tenancy contains a covenant on the part of the tenant to constantly reside at the premises: *Sunnall v Statt* (1985) 49 P & CR 367.

<sup>32</sup> See, *Taylor v Caldwell* (1963) 3 B & S 826, (involving a licence to use a music hall).

<sup>33</sup> See, *Krell v Henry* [1903] 2 KB 740 and *Chandler v Webster* [1904] 1 KB 493, (coronation procession cancelled).

<sup>34</sup> See, *Cricklewood Property and Investment Trust Ltd v Leighton’s Investment Trust Ltd* [1945] AC 221, at 229, per Viscount Simon LC.

<sup>35</sup> [1981] AC 675, at 709, per Lord Russell.

<sup>36</sup> [1945] AC 221, (HL).

<sup>37</sup> In *Rom Securities Ltd v Rogers (Holdings) Ltd* (1967) 205 EG 427, an agreement for a lease was held to be frustrated by the refusal of planning permission for the proposed development of the property. In the Scottish case of *The Tay Salmon Fisheries Company Ltd v Speedie* [1929] SC 593, (Court of Session), a lease of 19 salmon fishing seasons was held to be abandoned by the tenant as a result of bye-laws which converted the greater part of the fishing area into a danger zone for the purposes of aerial gunnery and bombing practice. The decision, however, is not based on frustration but on the principle that the bye-laws caused a total eviction of the tenant from the fishing areas. Government expropriation has also been held to frustrate a lease: see, *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1983] 2 AC 352, (HL).

<sup>38</sup> See the facts in *Cricklewood Property and Investment Trust Ltd v Leighton’s Investment Trust Ltd* [1945] AC 221, (HL).

suspended until it becomes possible to perform it.<sup>39</sup> But it has been held that a covenantor will not escape liability for damages for breach of covenant merely because the covenant cannot be performed due to an absence of planning permission or building consent.<sup>40</sup>

(c) *Periodic tenancies*

A periodic tenancy, as we know, continues indefinitely until determined by either party by the service of a valid notice to quit. From a retrospective viewpoint, a weekly tenancy is seen as comprising a single unbroken term which, until determined, grows by the regular aggregation of a new period (or unit) of occupation from week to week.<sup>41</sup> On this reasoning, there is only one single tenancy originating from the original grant.<sup>42</sup> The notion that the term of a periodic tenancy simply “rolls over” from period to period has been judicially identified in several cases. In *Hammersmith and Fulham London Borough Council v Monk*,<sup>43</sup> Lord Bridge observed:<sup>44</sup>

“... the substance of the matter was that ... by his omission to give notice of termination ... each party signifies the necessary positive assent to the extension of the term for a further period.”

In the Australian case of *Commonwealth Life (Amalgamated) Assurance Ltd v Anderson*,<sup>45</sup> Jordan CJ said:<sup>46</sup>

“Whether the tenancy be from year to year, quarter to quarter, month to month, or week to week, it is a tenancy for a definite term of a year, a quarter, a month, or a week, as the case may be, with a superadded provision that it is to continue for another definite term of the same period, unless, by proper notice to quit, it is terminated ... “

In *Prudential Assurance Co Ltd v London Residuary Body*,<sup>47</sup> Lord Templeman concluded<sup>48</sup> that a yearly tenancy is saved from uncertainty:

“... because each party has power by notice to determine at the end of any year. The term continues until determined as if both parties made a new agreement at the end of each year for a new term for the ensuing year.”

Looking, therefore, at a weekly tenancy as no more than an amalgam of individual occupational units of time which together comprise the periodic tenancy, it may be argued that such a tenancy is capable of frustration (in the same way as a fixed term) provided the frustrating event is sufficiently serious to render the relevant period of occupation useless or worthless. The only English case directly in point is *Prince v Robinson*,<sup>49</sup> in which a flat (the subject of a weekly tenancy) had been damaged by a serious fire caused by squatters living in the building at the time. Although not reaching any definite conclusion on the frustration point, the Court of Appeal reiterated the view

<sup>39</sup> See, *Cricklewood Property and Investment Trust Ltd v Leighton's Investment Trust Ltd* [1945] AC 221, at 233–234, per Lord Russell; *John Lewis Properties plc v Viscount Chelsea* [1993] 34 EG 116 and *Baily v De Crespigny* (1869) LR 4 QB 180.

<sup>40</sup> See, *Sturcke v SW Edwards* (1971) 23 P & CR 185 and *Eyre v Johnson* [1946] KB 481.

<sup>41</sup> *Hammersmith and Fulham London Borough Council v. Monk* [1992] 1 AC 478, at 490.

<sup>42</sup> *In Re Midland Railway Co.'s Agreement* [1971] Ch 725, at 732.

<sup>43</sup> [1992] 1 AC 478.

<sup>44</sup> [1992] 1 AC 478, at 490–491.

<sup>45</sup> (1946) 46 SR (NSW) 47.

<sup>46</sup> (1946) 46 SR (NSW) 47, at 50.

<sup>47</sup> [1992] 2 AC 386, (HL).

<sup>48</sup> [1992] 2 AC 386, (HL), at 394.

<sup>49</sup> (1999) 31 HLR 89.

held in *National Carriers* that the doctrine would discharge a tenancy only in wholly exceptional circumstances. In particular, it was seriously doubted whether frustration could apply to a weekly (or other periodic) tenancy in circumstances where fire damage could be repaired within a matter of weeks or months. In *Prince* itself, there was little detailed information about the fire damage, but Walker LJ was able to conclude that the flat could have been restored more or less to its original condition fairly quickly.

The point, however, that a periodic tenancy forms a number of individual periods or units of occupation together comprising the leasehold estate, was not addressed by the Court of Appeal in *Prince* leaving open the intriguing question whether a frustrating event can discharge the tenancy by simply rendering *the relevant unit of occupation* (i.e., the week, month, quarter or year, as the case may be) worthless or useless, as opposed to the “open-ended” term (which, as we have seen, may extend indefinitely in the absence of a notice to quit). On this reasoning, despite the view in *Prince*, extensive fire damage to the demised premises could be characterised as sufficiently serious in so far as it prevented the tenant’s occupation of the property during the current (weekly) occupational unit of time under the tenancy. As against this, however, it could be argued, consistently with the authorities referred to above, that a periodic tenancy should not be viewed as giving rise to a termination of one tenancy at the end of each period, followed by the start of a distinctly new letting.<sup>50</sup> In this connection, it is significant that the continuation of a periodic tenancy does not depend on the exercise of some kind of option to renew the letting after each unit of time. Because the tenancy continues as an integral term (until determined by notice to quit), the true analysis may be that a periodic tenancy should not be viewed as a series of distinct units of occupation, but as a single estate comprising just one grant which is continually extended over time. On this basis, fire damage to the demised property may not be treated as sufficiently extensive so as to frustrate the “estate” if the damage can be repaired within a matter of several months.

#### (d) Unresolved issues

Despite judicial recognition that a lease may, in principle, be discharged by a frustrating event, a number of thorny issues yet remain to be resolved by the courts in relation to the applicability of the doctrine to leases. For example, privity of contract only exists as between the original parties to the lease. Is, therefore, frustration limited to the original landlord and tenant? Or does it apply also as between say, original landlord and assignee of the lease? In the absence of any contractual relationship between these latter parties, the answer appears to be negative.<sup>51</sup> This, however, may be too restrictive given that the Landlord and Tenant (Covenants) Act 1995 allows for the running of the benefit and burden of covenants on the assignment of lease or reversion.<sup>52</sup> Where the term (or the reversion) have been transferred, the relationship between the landlord and tenant is undoubtedly based on privity of estate, but the rights and obligations as between the landlord and tenant remain entirely rooted in the terms of the contract agreed between the original lessor and lessee. There is no reason, therefore, why the application of the doctrine of frustration should not similarly be relied on by the parties’ successors in title. In this connection, it is important to emphasise that, when the term and/or reversion are transferred, the contract still survives, although only as between the original lessor

<sup>50</sup> *Jones v Chappell* (1875) LR 20 Eq 539, at 544.

<sup>51</sup> In *Jones v Cleanthi* [2005] EWHC 2646 (QB), at [49], Bell J concluded that assignees of a lease are not protected by the principles of frustration to the same extent as the parties to the original contract. The point was not addressed on appeal: [2007] 1 WLR 1604.

<sup>52</sup> See, *Gumland Property Holdings Ltd Property Ltd v Duffy Bros Fruit Market (CampbellTown) Property Ltd* (2008) 234 CLR 337, (High Court of Australia), where the assignee of a leasehold reversion was held entitled to terminate a lease and recover loss of bargain damages, notwithstanding the absence of privity of contract between the assignee and lessee.

and lessee. The idea, therefore, that the lease can be determined by frustration when the lease and reversion have been transferred, thereby putting an end to the original contract, is entirely consistent with established principles of leasehold law.

Another unresolved difficulty relates to the consequences of frustration.<sup>53</sup> Does the doctrine automatically discharge the lease? The tenor of the judgments in *National Carriers* suggests that frustration operates automatically. If not, what is the interrelation of the doctrine and the provisions for termination of say, a business tenancy under Part 2 of the Landlord and Tenant Act 1954? The problem here is that both commercial and residential tenancies<sup>54</sup> are regulated by statute which may, depending on the wording of the statute, limit or impede the ability of either the landlord or tenant to apply contractual doctrines and remedies. Unfortunately, the decision in *National Carriers* contains no discussion of this interaction. The writers would venture to suggest that frustration automatically terminates the lease, but if that is not correct, it may be possible to reconcile the doctrine with the relevant statutory regime. Take, for example, a business tenancy. A frustrating event, although incapable *per se* of effecting a termination of a business tenancy,<sup>55</sup> would nevertheless have the effect of accelerating the landlord's right to terminate the tenancy in accordance with the 1954 Act.<sup>56</sup> In other words, if the lease is frustrated, this would permit the landlord to serve a statutory (s.25) notice of termination on the tenant anytime thereafter. Given, however, that the tenant may no longer be in occupation of the premises for the purposes of its business (for example, where the premises have burnt down with no possibility of reinstatement during the remainder of the term), the tenancy may simply cease to be one to which Part 2 applies. If this occurs at the expiry of a fixed term, there will be no continuance under s.24(1).<sup>57</sup> If, however, the tenant is forced out after the expiry of a fixed term, the tenancy will not end for that reason alone, but the landlord will be entitled to terminate giving written notice under s.24(3)(a). So far as the tenant is concerned, it may serve notice to quit on the landlord thereby ending the tenancy under s.24(2), which preserves the right of a periodic tenant to give a common law notice to quit in the normal way. If, on the other hand, the tenant holds a fixed term tenancy continuing under Part 2, then presumably it may give written notice to terminate under s.27(2).

## CONTRACTS FOR THE SALE OF LAND

### (a) *The English caselaw*

The effect of a contract for the sale of land, pending completion of the sale, is to pass the equitable interest to the purchaser. The vendor becomes a constructive trustee for

<sup>53</sup> Interestingly, Lord Wilberforce in *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675, at 697, opined that, "if the frustrating event occurs during the currency of a lease, it would be appropriate to consider the Law Reform (Frustrated Contracts) Act 1943." Thus, for example, in the event of a lease being frustrated, the obligation to pay rent ceases with it in so far as rent is said to issue out of and be derived from the land. If the frustrating event occurs during the course of a rental period, some part of the rent already paid may be recoverable by the tenant from the landlord: see, s.1(2) of the 1943 Act. The consequences of frustration, however, for third parties with derivative interests (for example, subtenants and mortgagees) remain to be decided by the courts. It is unlikely that such interests will be preserved by s.139 of the Law of Property Act 1925 as the section refers only to extinguishment by surrender or merger. In any event, it is likely that such interests will be of little value if the lease is frustrated.

<sup>54</sup> So far as residential tenancies are concerned, the decision in *Hussein v Mehman* [1992] 32 EG 59 suggests that frustration would discharge the tenancy automatically without recourse to any statutory provisions affecting security of tenure. In that case, Mr Stephen Sedley QC (sitting as an assistant recorder at the Wood Green Trial Centre) held that a three-year assured shorthold tenancy had been terminated by the tenants' acceptance of their landlord's repudiatory breach involving a serious and continuing failure to repair the premises. See also, *Prince v Robinson* (1999) 31 HLR 89, involving a weekly Rent Act tenancy.

<sup>55</sup> Section 24(2) of the Landlord and Tenant Act 1954, whilst preserving several common law methods of termination of a business tenancy, makes no mention of the discharge of the tenancy by a frustrating event.

<sup>56</sup> See, *Weinbergs Weatherproofs Ltd v Radcliffe Paper Mill Co Ltd* [1958] Ch 437.

<sup>57</sup> See, *Esselte AB v Pearl Assurance plc* [1997] 02 EG 124.

the purchaser so that the contract becomes specifically enforceable by either party. Prior to the decision in *National Carriers*, the primary objection to extending the doctrine of frustration to leases was that a lease created not merely a contract but also an estate in land.<sup>58</sup> The estate fell to be treated as the subject-matter of the contract and survived even though the tenant derived no benefit from it. This objection, which was said to apply to an executed lease under which the legal estate had passed to the tenant before the occurrence of the frustrating event, would presumably have also applied equally to the equitable interest that vests in a tenant under an enforceable contract for the grant of a lease even though no lease had been executed.

Similar reasoning would, no doubt, have applied to a purchaser under a contract for the sale of land pending the transfer of the legal estate. In both instances, equity, applying the maxim that what ought to be done is to be regarded as already done, allows either party to seek specific performance in order to enforce the transfer of the legal estate in accordance with the contract. In both cases, the purchaser (and the tenant) would be treated as being in the same position *as if* the estate (or lease) had been executed in their favour. On this analysis, although both purchaser (and tenant) are entitled to only an equitable interest, neither can rely on the doctrine of frustration. Such, indeed, appears to be the reasoning adopted in *Hillingdon Estates Co v Stonefield Estates Ltd*,<sup>59</sup> where the vendors agreed to sell certain land to the purchasers which was to be used for building development. Ten years later, a compulsory purchase order was made affecting the land. No conveyance of the legal estate had yet been executed. The purchasers brought an action claiming that the foundation of the contract was the development of the land which had been frustrated by the compulsory purchase order and that, therefore, the contract was extinguished. The vendors, on the other hand, sought specific performance of the contract. Vaisey J held that the contract had not been frustrated and should be carried out. In his Lordship's words:<sup>60</sup>

"I cannot see that there is in this case any reason at all for supposing that there is either an implied term of this contract that it should be frustrated in the event which has happened, or that there has been such a destruction of the fundamental and underlying circumstances on which the contract is based as to justify my saying that the contract did not exist, or ceased to exist at the date when the notice to treat was served . . ."

The decision, however, is unsatisfactory for a number of reasons. First, it appears that Vaisey J was influenced heavily by the long delay that had occurred between the contract and the action brought by the purchasers. Secondly, his Lordship's conclusion that the doctrine "does not operate normally in the case of contracts for the sale of land"<sup>61</sup> appears to have been premised largely on the "complete absence of authority" in point. Thirdly, the decision is hard to reconcile with earlier cases<sup>62</sup> where the land was sold but requisitioned before completion. The vendor, in each case, was not permitted to enforce the contract as he could not perform his obligation to give vacant possession. Finally, the decision might well have gone the other way had it involved some catastrophic event which precluded the remedy of specific performance so that the purchasers could not acquire even an equitable interest in the land. The point here is that the remedy of

<sup>58</sup> See, for example, *London and Northern Estates Co. v Schlesinger* [1916] 1 KB 20, (lease of a flat not terminated by the fact that the tenant had become an alien enemy and was, therefore, prohibited from residing on the premises). See also, *Whitehall Court Ltd v Ettlinger* [1920] 1 KB 680, at 686–687; *Redmond v Dainton* [1920] 2 KB 256; *Matthey v Curling* [1922] 2 AC 180, at 237, (HL); *Swift v Macbean* [1942] 1 KB 375, at 381–382 and *Simper v Coombs* [1948] 1 All ER 306.

<sup>59</sup> [1952] Ch 627. See also, *Paine v Meller* (1801) 6 Ves 349.

<sup>60</sup> [1952] Ch 627, at 634.

<sup>61</sup> [1952] Ch 627, at 631.

<sup>62</sup> See, *Cook v Taylor* [1942] Ch 349 and *James Macara Ltd v Barclays Bank* [1945] KB 148.

specific performance, upon which the equitable interest depends, cannot be applied if the land itself does not exist. The remedy, as we know, is discretionary, and it would be absurd to suppose that equity would compel performance of the contract where the subject-matter of the contract has effectively disappeared.

There is also, of course, the broader point that, since *National Carriers*, objections to the application of the doctrine to leases based on the parties' relationship as giving rise to not only a contract but also an estate in land have been rejected in favour of the modern view that the parties' rights under the lease are governed by executory promises with their origins firmly grounded in the law of contract. That being the case, it is, in the writers' view, a small step to concede that the doctrine should apply equally to contracts for the sale of land notwithstanding that the foundation of the agreement is the transfer of an estate in land.<sup>63</sup> Although there is no clear authority in point, several dicta in the English case law support the notion that frustration applies to sales of land. In *Amalgamated Investment & Property Co Ltd v John Walker & Sons Ltd*,<sup>64</sup> where a listing of property as of architectural or historical interest precluded the purchaser's planned development, Buckley LJ stated:<sup>65</sup>

"I am prepared to assume for the purposes of this judgment that the law relating to frustration of contracts is capable of being applied in the case of a contract for sale of land, though that is one of the matters which has been debated before us. But, making that assumption, I have reached the conclusion that there are not here the necessary factual bases for holding that this contract has been frustrated."

In this case, the purchasers had entered into the contract without any stipulation that it was subject to their obtaining planning permission for redevelopment. That being so, they had accepted the risk that the property could be listed as of architectural or historical interest and the loss fell on them. The same reasoning was applied in *E. Johnson & Co (Barbados) Ltd v NSR Ltd*,<sup>66</sup> where a notice of intended compulsory purchase was issued by the Crown in respect of the land being sold. The Privy Council, on appeal from the Court of Appeal of Barbados, held that this did not frustrate the contract since it was to be presumed, in the absence of contrary provision, that the purchaser had agreed to accept the normal risks incidental to land ownership arising after the date of the contract, including the risk of interference with land rights by the Crown. Significantly, however, in *Universal Corporation v Five Ways Properties Ltd*,<sup>67</sup> concerning a change in the Nigerian exchange control regulations which left the purchaser without funds, Walton J observed:<sup>68</sup>

"Whether or not the doctrine of frustration can ever apply to a contract for the sale of land in circumstances, at any rate, where the land is still there may well be open to doubt, but I do not pause to enquire; I assume for present purposes that it is. But quite emphatically

<sup>63</sup> It should be noted, however, that contracts for the sale of land invariably fix on one party (usually the purchaser) the risk of the property being destroyed by fire. Purchasers, therefore, normally insure on this basis.

<sup>64</sup> [1977] 1 WLR 164. If the vendor has insured, the purchaser, as a person interested, can require the insurance company to lay out the insurance money towards rebuilding or reinstating the building if it has been destroyed or damaged by fire: see, s.83 of the Fires Prevention (Metropolis) Act 1774. Alternatively, he may recover from the vendor any money coming to him under an insurance policy in respect of any damage to or destruction of the property: see, s.47(1) of the Law of Property Act 1925.

<sup>65</sup> *Ibid*, at 173. See also, at 176–177, per Sir John Pennycuik.

<sup>66</sup> [1997] AC 400, (HL).

<sup>67</sup> [1978] 3 All ER 1131.

<sup>68</sup> [1978] 3 All ER 1131, at 1135. The statement was referred to with approval on appeal: see, [1979] 1 All ER 552, at 554, where Buckley LJ stated: Certainly the purchasers were unable, by reason of matters beyond their control, to complete the contract when they should have done so, but this is something quite different from the contract having become incapable of performance; nor, in my view, can it be suggested that anything had happened to make the performance of the contract, in the circumstances existing at the date for completion, significantly different from what was contracted for . . ."

the doctrine of frustration cannot be brought into play merely because the purchaser finds, for whatever reason, he has not got the money to complete the contract.”

Again, in *Hasham v Zenab*,<sup>69</sup> the Privy Council expressly envisaged an event frustrating an order for specific performance before the completion date. Lord Tucker stated:<sup>70</sup>

“The court will not, of course, compel a party to perform his contract before the contract date arrives, and would give relief from any order [of specific performance] in the event of an intervening circumstance frustrating the contract.”

In summary, it can be said that the English courts are prepared to admit the doctrine of frustration as applying to contracts for the sale of land, but the actual circumstances in which the doctrine will be held to frustrate the contract will be rare<sup>71</sup> amounting, in line with the analysis in *Davis Contractors*, to some catastrophic event which renders performance of the contract either impossible or radically different from that envisaged under the contract.

#### *A Commonwealth perspective*

The Canadian caselaw recognises that the court’s dispensing power under the doctrine of frustration may be necessary where the sales contract does not expressly allocate the risk arising from the change of circumstances in the contract and there is no implied allocation of risk in the background or context of the contract that governs the situation. In *Capital Quality Homes Ltd v Colwyn Construction Ltd*,<sup>72</sup> for example, a purchaser agreed to buy a specified number of building lots, but the imposition of planning controls made it impossible to subdivide the land into the required number of lots before completion of the sale. The Ontario Court of Appeal concluded that the contract had been frustrated. Evans JA, after accepting that frustration applies to leases, stated:<sup>73</sup>

“I am unable to distinguish any difference between leases of land and agreements for the sale of land, so far as, the application of the doctrine is concerned. Each is more than a simple contract. In the former, an estate in land is created while in the latter an equitable interest arises. There does not appear to be any logical reason or binding legal authority which would prohibit the extension of the doctrine to contracts involving land.”

Similarly, in *KBK No 138 Ventures Ltd v Canada Safeway Ltd*,<sup>74</sup> a sale contract for the development of land was held to be frustrated because the zoning for the land was changed and the permitted density drastically reduced which significantly altered the costs of the venture and made the purchaser’s intended development uneconomic. The British Columbia Court of Appeal concluded that there was nothing in the contract that allocated the risk to the purchaser and the change in circumstances had transformed the contract into something radically different from what the parties had intended. By contrast, in *Dinicola v Huang & Danczkay Propertie*,<sup>75</sup> a proposed condominium development could not proceed because of the refusal of the city council to grant site plan approval and the eventual downsizing of the property. The Ontario Court of Appeal held that, since the contract dealt with this risk, it was not frustrated.

<sup>69</sup> [1960] AC 316, (HL). See also, *Rom Securities Ltd v Rogers (Holdings)* (1967) 205 EG 427, (planning permission refused).

<sup>70</sup> [1960] AC 316, (HL), at 330.

<sup>71</sup> As the cases indicate, the risk that the premises may be destroyed or damaged, for example, by fire, will normally be borne by the purchaser and in respect of which it is usual to insure.

<sup>72</sup> (1976) 61 DLR (3d) 385.

<sup>73</sup> (1976) 61 DLR (3d) 385, at 397.

<sup>74</sup> (2000) 185 DLR (4<sup>th</sup>), 650.

<sup>75</sup> (1998) 163 DLR (4<sup>th</sup>) 286. See also, *Victoria Wood Development Corporation Inc v Ondrey* (1978) 22 OR (2d) 1, (Ontario Court of Appeal), (no frustration where land purchased for building to knowledge of vendor and, after conveyance, legislation prohibited such development).

In Australia too, despite the obvious distinction between property and contract, the doctrine of frustration has been extended to contracts involving land, although here again, the outcome of the cases is largely dependent on the incidence of risk between the parties.<sup>76</sup> For this reason, the application of the doctrine has only rarely resulted in the frustration of the contract.<sup>77</sup> That said, it is recognised that frustration applies to an executory contract for the sale of land (and an agreement for a lease)<sup>78</sup> notwithstanding that the contract confers an equitable interest on the purchaser.<sup>79</sup>

In New Zealand, the courts have followed the English caselaw and held that contracts for the sale of land are capable in law of being frustrated. Here again, however, in practice, the application of the doctrine will be rare given that such contracts normally provide for either vendor or purchaser to bear the risk of the events which have happened.<sup>80</sup> In *Steele v Serepiso*,<sup>81</sup> however, the measures which the vendors of property needed to take in order to deposit a plan to achieve subdivision of the land proved (due to an inability to obtain an easement of drainage) to be of a substantially different character from what had been contemplated by the parties. The Supreme Court of New Zealand held that the vendors had taken all reasonable steps to try and complete the subdivision and, therefore, they were not in breach of contract. Moreover, although the doctrine of frustration was not invoked *per se*, the vendors were entitled to treat the contract as at an end (without the need for a prior warning notice served on the purchaser) because they could not fulfil the necessary drainage requirements as envisaged by the parties.

## OPTIONS TO PURCHASE LAND

An option to purchase is a contractual agreement relating to a piece of land that allows the purchaser the exclusive right to purchase the land by the exercise of the option. The option usually contains an agreed purchase price and is expressed to be valid for a specified period. The purchaser does not have to buy the property, but the vendor is obligated to sell to the purchaser at the purchaser's election within the terms of the option agreement. Such an option (sometimes referred to as a "call" option) is an estate contract and creates an equitable interest in the land.<sup>82</sup>

There is English authority for the application of the doctrine to options to purchase land. In *Denny, Mott and Dickson Ltd v James B Fraser & Co Ltd*,<sup>83</sup> an agreement entered into between saw millers and timber importers stated that the former should

<sup>76</sup> In most cases, in the absence of specific provision, the purchaser is taken to have assumed the risk of not being able to use or develop the land in a particular way: see, for example, *British Traders' Insurance Co Ltd v Monson* (1964) 111 CLR 86, (ris22 OR (2d) 1, (risk of destruction by fire assumed by purchaser) and *Meriton Apartments Property Ltd v McLaurin & Tait (Development) Property Ltd* (1976) 133 CLR 671, (event preventing development of land in the way anticipated not frustration).

<sup>77</sup> See, for example, *Fletcher v Manton* (1940) 64 CLR 37, (demolition pursuant to government order did not frustrate contract) and *Scanlan's New Neon Ltd v Tooheys Ltd* (1943) 67 CLR 169, at 229, (no frustration where land requisitioned prior to completion).

<sup>78</sup> See, *Re Dennis Commercial Properties Ltd v Westmount Life Insurance Co* [1969] 2 OR 850; *affmd.* without reasons, [1970] 1 OR 698n, (Ontario Court of Appeal). See also, *Lobb v Vasey Housing Auxiliary (War Widows Guild)* [1963] VR 239, (agreement for a lease or licence frustrated) and *Scanlan's New Neon Ltd v Tooheys Ltd* (1943) 67 CLR 169, at 228, (frustration of agreement only excluded by the tenant taking possession).

<sup>79</sup> See, for example, *Wong Lai Ying v Chinachem Investment Co Ltd* [1980] HKLR 1, (PC), (landslip prevented completion within time stipulated in building permit). See also, *Silva v Tarval Property Ltd* (1986) 4 BPR 9101 and *Austin v Sheldon* [1974] 2 NSWLR 661.

<sup>80</sup> See, for example, *Carly v Farrelly* [1975] NZLR 356, (destruction of house by fire did not, in the absence of any express provision in the contract, discharge the purchaser). Where, however, the vendor is insured, the position of the purchaser is ameliorated by statute: see, s.13 of the Insurance Law Reform Act 1985.

<sup>81</sup> [2007] 1 NZLR 1, (Supreme Court of New Zealand).

<sup>82</sup> See, *London & South Western Railway v Gomm* (1882) 20 Ch D 562.

<sup>83</sup> [1944] AC 265, (HL).



purchase all their supplies of certain wood from the latter and should let them a certain timber yard with an option to purchase it (or take it on a long lease) on certain terms. As a result of war time regulations, further transactions between the parties became illegal for an indefinite period. The Privy Council, on appeal from the Scottish Court of Session, held that the regulations operated to frustrate the whole agreement<sup>84</sup> and that, therefore, the option to purchase lapsed since it only arose in the event of the agreement being terminated by a notice in accordance with the terms agreed between the parties. To this extent, the option to purchase was held to be entirely dependent on the main part of the agreement relating to the trade in timber. In the words of Lord Macmillan:<sup>85</sup>

“It cannot be suggested with any reason in the present case that the respondents would have conferred on the appellants an option to purchase . . . independently of the trading arrangements into which they had agreed to enter. The consideration for the option was the fulfilment of those arrangements and there was no severable consideration.”

There is no reason to suppose that the doctrine would not also apply to a so-called “put” option, where the agreement between the parties gives the vendor the right, but not the obligation, to sell the land at an agreed price within a specified time to the purchaser. Unlike the call option, until the put option is exercised, the potential purchaser has no right over or interest in the land. It is not uncommon to find an option and put option (i.e., a “put and call” option)<sup>86</sup> in one agreement. Under such an agreement, if the purchaser does not exercise the option to purchase, the vendor can compel the purchaser to proceed under the put option. In such a situation, applying *Denny*, a frustrating event would (presumably) discharge both options in so far as they formed part of one composite agreement.

## EASEMENTS

An easement, as we know, is a right which attaches to a piece of land. It is not possible, therefore, to be the owner of an easement without being the owner of an estate in land to which the easement is attached. Does this, therefore, necessarily preclude an easement from being discharged as a result of a frustrating event? It is certainly possible for an easement to be impliedly released if it can be shown to be permanently unexercisable, or to have been abandoned by the dominant owner.<sup>87</sup> It is also apparent that an easement which has become impossible to use will be treated as impliedly extinguished. However, if there is any likelihood that it might again become useable, extinguishment will not be presumed.

In *Jones v Cleanthi*,<sup>88</sup> a tenant of a flat was granted an easement to use communal refuse bins in an area at the rear of the building. The landlord was required to carry out certain works to the building in order to comply with a fire safety notice under the Housing Act 1985. These works involved, *inter alia*, the building of a wall on the ground floor blocking off the hallway which gave access to the bin area. The Court of Appeal

<sup>84</sup> Interestingly, part of the contract was an agreement for a lease, but no argument was raised on the application of the doctrine to agreements for leases.

<sup>85</sup> [1944] AC 265, (HL), at 273.

<sup>86</sup> In such an agreement, the option holder’s notice of exercise operates as a mechanism to trigger the obligation to sell or buy the land. Whilst there is no obligation on the option holder to exercise his right, if he does so then the other party is bound to perform his part of the bargain.

<sup>87</sup> See, for example, *Benn v Hardinge* (1993) 66 P & CR 246, where, on the facts, a right of way was held not to have been abandoned despite it not being used for 175 years. See also, *Williams v Sandy Lane (Chester) Ltd* [2006] EWCA Civ 1738, where fencing and earthworks that rendered a right of way less easy to use were held not enough to show abandonment.

<sup>88</sup> [2007] 1 WLR 1604.

held that the statutory obligation relieved the landlord from any liability in respect of rendering the easement unexercisable (and the tenant was not entitled to any damages), but the easement itself had not been extinguished and was only suspended. The Court concluded that it was possible that, at some future time, fire safety regulations (or the use of the property) might change so that the easement could be used again.

Despite the ruling in favour of the landlord, the case is significant in so far as it recognises the possibility of an easement being extinguished by a frustrating event. Indeed, the argument presented on behalf of the tenant is characterised by references to the likely discharge of a lessor's contractual obligations to his lessee "in circumstances where the statute frustrates the performance of the obligation".<sup>89</sup> Moreover, the tenant placed much reliance on the earlier case of *Yarmouth Corporation v Simmons*,<sup>90</sup> where the relevant statute had authorised the erection of a substantial structure which was intended to be permanent and the existence of which was physically inconsistent with a public right of way in that it prevented access onto a beach. Fry J held, not surprisingly, that by necessary implication, the existence of the statutory power extinguished the public right of way. In his Lordship's words, "there was a physical impossibility in the persons who had exercised the alleged right continuing to exercise it in the manner in which they had previously done."<sup>91</sup> By contrast, in *Jones*, the lease had another 72 years to run which, in the Court of Appeal's view, gave ample time for the circumstances to change so far as the requirements for fire safety were concerned.

Reference may also be made to *Huckvale v Aegean Hotels Ltd*,<sup>92</sup> where the Court of Appeal considered whether an easement could be extinguished by its ceasing to accommodate the dominant tenement. The claimants owned premises where they carried on a bakery business. They sold a plot of land (the red land) at the rear of the bakery to the predecessors in title of the defendants for use as a car park for their adjacent hotel. The conveyance contained a reservation of two rights of way over the red land to enable the claimants to gain access to the rear of their property. The contract of sale also provided for the grant of two complimentary rights of way over the adjacent hotel land, the effect of which would have been to give the claimants access through to the main street running in front of the hotel. These complimentary rights of way, however, were void as against the defendants for non-registration of the agreement under the Land Charges Act 1972. The defendants proposed to erect new buildings on the red land which would prevent the claimants from enjoying their rights of way over that land. The defendants argued that those rights had become extinguished as they no longer accommodated the dominant tenement in view of the unenforceability of the complimentary rights of way. In the course of his judgment, Slade LJ stated:

"... in the absence of evidence of proof of abandonment, the court should be slow to hold that an easement has been extinguished by frustration, unless the evidence shows clearly that because of a change of circumstances since the date of the original grant there is no practical possibility of its ever again benefitting the dominant tenement in the manner contemplated by the grant."

The Court of Appeal concluded that there was a triable issue as to whether, on the true construction of the reservation contained in the conveyance, the conditions necessary to establish frustration were satisfied.

<sup>89</sup> [2007] 1 WLR 1604, at 1620.

<sup>90</sup> (1878) 10 Ch D 518.

<sup>91</sup> (1878) 10 Ch D 518, at 526.

<sup>92</sup> (1989) 58 P & CR 163. See, G. Kodilinye, "Easements Ceasing to Accommodate the Dominant Tenement", [1990] Conv. 292.

Although *Jones* and *Huckvale* concerned the express grant and reservation, respectively, of an easement, there is no reason, in principle, why the doctrine should not apply to the implied grant of easements (through necessity, common intention or by virtue of s.62 of the Law of Property Act 1925) and easements arising by prescription.<sup>93</sup> Indeed, the same analysis may be said to apply to profits a prendre which, like easements, are grounded in contract in so far as they may be granted expressly (either by statute or deed) or they may be implied under s.62 of the Law of Property Act 1925. They may also be acquired by prescription under the common law, lost modern grant or under the Prescription Act 1832. Take, for example, a profit a prendre granted to X by deed for a period of 20 years to pick apples from an orchard on Y's land. After two years, the whole orchard becomes the subject of a compulsory purchase order to make way for a new motorway across the land. In these circumstances, the profit would, it is submitted, be automatically extinguished or discharged as a result of frustration. Moreover, it should make no difference if the right to pick the apples had arisen impliedly or by prescription.

## MORTGAGES

Mortgages may be created in two different ways: (1) by a grant by demise (i.e., a term of years absolute) and (2) by legal charge (i.e., a charge made by deed under s.85(1) of the Law of Property Act 1925). The former, being founded on a landlord and tenant relationship, is presumably capable of frustration like any other lease made between the parties. Because the mortgage creates a demise, both the lender and the borrower have a legal estate in the land but, applying *National Carriers*, this should not preclude the doctrine from discharging the mortgage in appropriate circumstances.

With registered land, it is no longer possible to create a mortgage by granting a lease. Instead, s.23(1) of the Land Registration Act 2002 provides that a legal mortgage of registered land can only be created by means of a legal charge which grants the borrower a legal interest in the lender's land until the mortgage is repaid. This charge, although not conferring on the lender any legal term or estate in the land,<sup>94</sup> is statutorily deemed to invest the lender with the same protection, powers and remedies (including the right to take proceedings to obtain possession) *as if* a leasehold term had been created in his favour.<sup>95</sup> Significantly also, as mentioned earlier, the legal charge has to be made by deed.<sup>96</sup> In essence, therefore, the legal charge is founded in contract because there are contractual obligations imposed on both the lender and the borrower in relation to the mortgaged property. In particular, the borrower covenants to repay the borrowed money (together with any interest) and, if the borrower defaults, the lender has an action on the borrower's personal covenant to repay the mortgage. Given, therefore, the "live" contractual basis of the mortgage, it is submitted that the doctrine of frustration should, in principle, also apply to this form of mortgage transaction.

The consequences, however, of a frustrating event may be somewhat limited from the borrower's perspective in that he will still be obliged to repay the loan under his

<sup>93</sup> This would include the implied grant of an easement under the rule in *Wheeldon v Burrows* (1879) 12 Ch D 31. The acquisition of an easement by prescription (or long use) is also, it is submitted, founded on implied contract in so far as it is presumed that the servient owner must have granted (thereby implying a deed) the easement at some point in the past. The presumption of grant is based upon the acquiescence of the servient owner (i.e., his failure to object to the actions of the dominant owner). This applies to all forms of prescription, namely, common law, lost modern grant and under the Prescription Act 1832.

<sup>94</sup> See, *Weg Motors Ltd v Hales* [1962] Ch 49, at 74 and 77, per Lord Evershed MR.

<sup>95</sup> See, s.87(1) of the Law of Property Act 1925. In other words, the lender under a legal charge has the statutory equivalent of a term of years absolute: see, *Four Maids v Dudley Marshall Properties Ltd* [1957] Ch 317, at 320, per Harman J.

<sup>96</sup> See, s.85 of the Law of Property Act 1925. The requirements for a deed are stated in s.1(2) of the Law of Property (Miscellaneous Provisions) Act 1989.

personal covenant in the mortgage. The lender, on the other hand, would presumably lose his right to repossess (and sell) the mortgaged property in the event of the land being destroyed as a result of the frustrating event. His right of foreclosure would also be lost given that he is no longer able to step into the shoes of the borrower and become registered as proprietor of the land. In any event, there would be little point in seeking a foreclosure order assuming the land is now worthless; a foreclosure order would also extinguish the personal covenant of the borrower leaving the lender effectively without any remedy to pursue his debt.

In essence, therefore, the effect of frustration would be to destroy the lender's security and discharge all remedies associated with his right to the land, but still leave him with the ability to bring a personal (contractual) action on the borrower's personal covenant and obtain a money judgment for the amount of the loan outstanding prior to the frustrating event.

### COVENANTS AFFECTING FREEHOLD LAND

Here again, the covenant made by one landowner to another regarding the use of land is grounded in contract. As between the original covenantor and covenantee, enforceability of such covenants is governed by the parties' contractual relationship. Beyond the original parties, there are rules which govern the passing of the benefit and burden of covenants at common law and in equity. As with leases, the rights and obligations as between successors in title are entirely rooted in the terms of the contract agreed between the original covenantor and covenantee. Effectively, those rights and obligations created by the original parties pass to their respective successors in title.

Although there is statutory provision, under s.84 of the Law of Property Act 1925 (as amended), for the modification or discharge of obsolete covenants or covenants which impede the reasonable user of the land, it is submitted that the doctrine of frustration may operate independently of s.84 so as to discharge a covenant where some supervening event renders performance of (or compliance with) the covenant impossible to perform. Again by analogy with leases, a particular covenant (positive or restrictive) in the deed may be temporarily suspended until it becomes possible to perform it.<sup>97</sup>

### CONCLUSION

As we have seen, the doctrine of frustration has already been held to apply to the landlord and tenant relationship despite leases having key features which render them a unique form of contract and which anchor them squarely in the law of real property. The notion of the estate, which prior to *National Carriers*, provided an obstacle to the extension of the doctrine to leases, is no longer viewed as the foundation of that relationship but merely one of its incidents.<sup>98</sup> Indeed, the judicial trend is towards a general assimilation of leases with other contractual transactions.<sup>99</sup>

<sup>97</sup> See, in relation to particular covenants in leases, *Cricklewood Property and Investment Trust Ltd v Leighton's Investment Trust Ltd* [1945] AC 221, at 233–234, per Lord Russell; *John Lewis Properties plc v Viscount Chelsea* [1993] 34 EG 116 and *Baily v De Crespigny* (1869) LR 4 QB 180.

<sup>98</sup> See, *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904., (HL).

<sup>99</sup> It is interesting, for example, to observe that the doctrine of disclaimer of a landlord's title has been held to be analogous to the doctrine of repudiation of contract: *WG Clark (Properties Ltd v Dupre Properties Ltd* [1991] 3 WLR 579. See also, *Hussein v Mehman* [1992] 32 EG 59, where a tenancy was held to come to an end by the tenants' acceptance of their landlord's repudiatory breach.

Beyond that, it is possible to conclude that the doctrine applies to other real property interests including contracts for the sale of land, options to purchase land, easements, profits a prendre, mortgages and covenants affecting freehold land. Here, as with leases, the right in question is grounded in an on-going or “live” contractual relationship notwithstanding its inherent proprietary characteristic.<sup>100</sup> As we have seen, there are several English cases which have assumed the existence of the doctrine in relation to sales of land despite the possible objection that the purchaser acquires an equitable interest in the land upon exchange of contracts. The actual circumstances, however, in which the doctrine will be held to frustrate the contract will be rare amounting to some catastrophic event which renders performance of the contract either impossible or radically different from that envisaged under the contract. Moreover, the doctrine operates as a form of risk analysis in so far as the question is whether it is reasonable to place the risk of non-performance for the events which have happened on one party or the other, or neither. If it is not reasonably possible to place the risk on either party then the contract is frustrated. If, on the other hand, the risk is placed on a particular party (by contract or otherwise), the doctrine does not apply. There is also English authority for the application of the doctrine to options to purchase land. The *Denny* case shows that, if the option is dependent on the performance of wider agreement, a frustrating event may discharge the option on the basis that it forms part of a composite contract which can no longer be performed due to illegality or some other supervening cause.

So far as easements are concerned, the decisions in *Jones* and *Huckvale* recognise the possibility of such rights being extinguished by a frustrating event. Although the language of the caselaw is couched in terms of extinguishment (as opposed to the contractual doctrine of frustration), it is apparent that an easement (including, it is submitted, a profit a prendre) which has become impossible to use will be treated as discharged. As we have seen, mortgages by demise, being essentially leases, are founded on a landlord and tenant relationship. Because the mortgage creates a demise, both the lender and the borrower have a legal estate in the land but, applying *National Carriers*, this should not preclude the doctrine from discharging the mortgage in appropriate circumstances. The legal charge, on the other hand, is a creature of statute, but because of the requirement of a deed, it too has the hallmarks of a contractual relationship albeit one between borrower and lender. Similarly, covenants affecting freehold land, in so far as they are also grounded in contract, should be capable of discharge (or suspension) where some supervening event renders performance of (or compliance with) the covenant impossible to perform.

The overall conclusion, therefore, in the writers’ view, is that a real property interest which has as its foundation a contractual relationship (whether express or implied) is capable, in principle, of falling within the doctrine of frustration.<sup>101</sup>

<sup>100</sup> Indeed, the decisive argument in *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675 was “the essential unity of the law of contract and the belief that no type of contract should as a *matter of law* be excluded from the doctrine”: Cheshire, Fifoot & Furmston, *Law of Contract*, (15<sup>th</sup> ed., 2007), OUP, at p.737. Given that the real property interest is grounded in contract, this should also permit the application of the Law Reform (Frustrated Contracts) Act 1943 so as to allow for the allocation of losses and benefits between the parties.

<sup>101</sup> The actual consequences of frustration will, of course, vary with the circumstances of each case and the nature of the real property interest which has been terminated.

# CONSTITUTIONAL PRACTICES AND BRITISH CROWN DEPENDENCIES REVISTED: A CASE-STUDY IN IMPLEMENTING REFORM BY ADMINISTRATIVE GUIDANCE

PHILIP MORRIS\*

## ABSTRACT

Constitutional practices are typically, even at the routine operational level, re-shaped in most developed jurisdictions by a process of extensive democratic debate, political publicly recorded dialogue amongst elite political and bureaucratic actors and normally culminate in some form of legislation or concordats which are themselves subject to subsequent review and revision in the light of operational experiences. This article is a case-study of both the process and apparently final stage of a protracted exercise in re-engineering a series of constitutional practices in the United Kingdom Government/Crown Dependencies interface in the four key areas of processing insular legislation and extension of treaties to those jurisdictions, consultation between them and Whitehall, independent or joint representation in negotiations conducted in international fora and clarification of the historic but often blurred overarching constitutional position. It concludes by offering a new approach reflecting more appropriate values of transparency, democratic accountability and public law certainty.

## INTRODUCTION

The British Crown Dependencies of Jersey, Guernsey and the Isle of Man have, by any standard, over the last twenty years or so, found themselves embroiled in a whirlwind of political and constitutional changes, ranging from, amongst other things, imposed compliance with contentious EU tax measures<sup>1</sup> to agreed development of separate international identities<sup>2</sup> to participation in an amazingly extensive and interventionist Global Forum on Tax Transparency and Information Exchange<sup>3</sup> to painstakingly developed Executive forms of internal government<sup>4</sup> and, more recently, nascent lines of

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<sup>1</sup> See further on these : European Council, *Conclusions of the ECOFIN Council Meeting on December 1 1997 concerning taxation policy*[1998] OJ C2/1, Appendix A; Directive 2003/48 on taxation of savings income in the form of interest payments [2003] OJ L157/38 operative as from 1 July 2005. The adoption of these measures, ostensibly on a voluntary basis but in reality under duress from the UK Government, itself under pressure on this in ECOFIN, caused consternation in the Islands given the absence of proper consultation, arguable breach of the spirit of Protocol No 3 to the UK Act of Accession ([1972] OJ Spec Ed L73) and the acceptance of external scrutiny of their fiscal structures.

<sup>2</sup> Secretary of State for Constitutional Affairs/States of Jersey, *Framework for Developing the International Identity of Jersey* (1 May 2007); Secretary of State for Constitutional Affairs/States of Guernsey, *Framework for Developing the International Identity of Guernsey* (1 May 2007); and Secretary of State for Constitutional Affairs/ Isle of Man Government, *Framework for Developing the International Identity of the Isle of Man* (1 May 2007).

<sup>3</sup> For full details see its comprehensive web-site at: [www.oecd.org/tax/transparency/](http://www.oecd.org/tax/transparency/) (last accessed 18 October 2017).

<sup>4</sup> Full discussion can be found in: P Morris, *Modernizing Government in the Channel Islands: New Political Executives in British Crown Dependencies* (2008) 37 CLWR 63; and PE Morris, *New Systems of Government in the Channel Islands* [2008] PL 430. As from 1 May 2016 the States of Guernsey following a protracted exercise in research and debate has reverted back from its semi-executive structure to a committee based system encompassing six principal committees and a single Policy & Resources Committee entrusted with a co-ordination role, see: [www.gov.gg](http://www.gov.gg) (last accessed 8 February 2018).

inter-jurisdictional co-operation in selected policy areas,<sup>5</sup> a development that has itself fuelled interest in possible moves towards a radical Channel Islands Confederation in the future.<sup>6</sup>

All the Crown Dependencies enjoy sweeping powers of self-government<sup>7</sup> buttressed by a strong and universally observed constitutional convention that Westminster may only legislate for them after consulting with and obtaining the prior consent of the insular authorities<sup>8</sup>. This domestic autonomy is not however unfettered given that Privy Council assent is required for insular primary legislation and the bureaucratic reality that Whitehall does de facto interfere with legislative and policy interests that appear to be contrary to UK policies, interests or its international obligations.<sup>9</sup> Since the late 1980s Jersey, Guernsey and the Isle of Man have made full use of these powers of self government to fashion offshore dominated economies, each of which has distinctive features, and to embark on domestic modernisation projects increasingly centred on social policies, employment protection and human rights provisions broadly mirroring UK standards and approaches. The necessary tools to drive these developments have been furnished by new systems of executive oriented government frequently deploying evidence-based policy-making.

So in historical terms how did the Crown Dependencies arrive at this virtually unique and highly favourable position? A detailed exegesis is beyond the scope of this article (a lucid survey in relation to the Channel Islands can be found in the Supreme Court ruling in *Barclay*<sup>10</sup>) but, very briefly,<sup>11</sup> the Channel Islands were separated from Normandy in 1204 and subsequently a series of Royal Charters granted them numerous constitutional privileges including rights of self-government, fiscal autonomy and freedom to subsequently develop separate assemblies and legal systems. During this long historical time frame the decision was taken, during the reign of King John, to block their incorporation into England. Although often loosely regarded by external observers as an undifferentiated geographical bloc, they are rigidly separate jurisdictions with a strong sense of separate identities and possess domestic systems of common law and customary law which, although having a shared historical root, are in fact characterised by significant and at times fundamental differences.

The Isle of Man story is very different. The Island appears to have been to all intents and purposes a quasi-colony throughout most of its history, certainly from

<sup>5</sup> The three recently established areas of cross-jurisdictional collaboration are: The Channel Islands Joint Brussels Office ([www.channelislands.eu](http://www.channelislands.eu), last accessed 25 May 2017); the Joint Channel Islands Financial Ombudsman Scheme (see the governing insular primary legislation: Financial Services Ombudsman (Jersey) Law 2014 (States of Jersey, L14/2014); and the Financial Services Ombudsman (Bailiwick of Guernsey) Law, 2014 (Projet de Loi, States of Guernsey); and the Joint Channel Islands Competition and Regulatory Authorities ([www.clcra.gg/index.aspx](http://www.clcra.gg/index.aspx), last accessed 26 July 2017). One could also add for the purposes of completeness the British-Irish Council (an umbrella body at Ministerial level encompassing Scotland, Northern Ireland, Wales, Eire, the Crown Dependencies and the UK) that actively pursues joint work streams on matters of common interest to the jurisdictions represented, see its web-site at: [www.britishtishcouncil.org/](http://www.britishtishcouncil.org/) (last accessed 2 September 2017).

<sup>6</sup> See generally on this: P Bailhache (Ed), *Confederation of the Channel Islands: Next Steps?* (Jersey and Guernsey Law Review Ltd, 2014).

<sup>7</sup> The following three paragraphs are intended to set the scene. Specific points arising and source references are provided in the four substantive areas discussed in the text below.

<sup>8</sup> For a perceptive critique of this, in the context of Jersey, and possible limitations on it in the modern era see further: J Jowell, The UK Power over Jersey's Domestic Affairs, in P Bailhache (Ed), *A Celebration of Autonomy: 1204: 2004, 800 Years of Channel Islands' Law* (Jersey Law Review Ltd, 2005), pp 249–269.

<sup>9</sup> See further on this: P Morris, Constitutional Practices and British Crown Dependencies: The Gap Between Theory and Practice (2012) 41 CLWR 1.

<sup>10</sup> *R (Barclay) v Secretary of State for Justice (No 2)* [2014] UKSC 54; [2015] AC 278 [6]-[10] (Lady Hale). See generally: P Johnson, Sark, The Supreme Court and the Status of the Channel Islands: Or *Barclay* Bites Back (2016) 20 (2) *Jersey and Guernsey Law Review* 126.

<sup>11</sup> The following points are largely derived from P Bailhache, Introduction, in P Bailhache (Ed), n8 supra.

the Revestment in 1765, only securing substantial devolution in 1958<sup>12</sup> and gradually developing it over a thirty year subsequent time frame. This does not though appear to have impeded its evolution of legislative, judicial and executive functions. Tynwald is one of the oldest continuously in existence legislatures in the world, a separate system of courts administer a distinctive Manx common and customary law as well as insular legislation and 1986–1990 was notable for the phased in centralised Ministerial system of government designed to catalyse and improve the quality of insular law/policy-making. It is probably fair to say that assertion of the Manx national identity and demands for unfettered self-government have, since the mid 1980s, been a recurring theme whereas in Jersey and Guernsey such demands have been largely muted apart from debate regarding independence or a radical shift towards a Channel Islands Confederation over the last ten years or so.

This extensive, historically founded, autonomy combined with their separate court systems, legal professions and insular legislatures pursuing distinctive policy-making and law reform agendas has generated the potential for, and actuality of, Whitehall/insular conflict, in particular in spheres where the UK has a clear position or is required to comply with international obligations. The intersection between insular legislative autonomy and the UK Government's position creates fertile ground for conflict – that is in a real sense *the* key issue that implicitly underpins the search for balanced solutions in the four substantive areas discussed in this article.

Managing these conflicting pressures is a tricky task on both sides, and requires a middle path to be taken that both preserves traditional insular autonomy while maintaining the principle of UK supervision. A good illustration is the recent *Barclay* case in the UK Supreme Court confirming the well established right of Westminster to legislate for the Islands, if need be overriding the normal requirement for prior consultation and their agreement (the paramount power) and similarly a right to exercise executive powers to ensure that insular legislation is consistent with the UK's international obligations.<sup>13</sup> This is though counterbalanced by the assertion of a right to review Orders in Council applicable to the Channel Islands based on the advice of the UK Government acting wholly or partly in pursuit of UK interests.<sup>14</sup> It is exactly this type of delicate balancing exercise that pervades the Whitehall/Crown Dependencies interface in the four substantive areas discussed below.

It is not your present author's intention to add, certainly not in a systematic way, to the burgeoning literature and policy statements on developments just outlined in the first two paragraphs of this article, although recent and projected development of the Crown Dependencies representation in international fora will be discussed in the appropriate later section. This article is neither the time nor place for that. Rather the themes to be pursued are developments post 2010 in four key spheres<sup>15</sup> are: (i) a modern re-statement of the general constitutional position; (ii) processing of draft insular legislation and the extension of treaties to the Islands; (iii) possible moves towards enhanced international representation; and (iv) improvements in the apparently mundane but practically important topic of consultation between the MoJ and insular governments.

<sup>12</sup> See generally DG Kermodé, *Offshore Island Politics: The Constitutional and Political Development of the of the Isle of Man in the Twentieth Century* (Liverpool University Press, 2001) Chap 6. See also: Isle of Man Act 1958, repealed and replaced by the Isle of Man Act 1979.

<sup>13</sup> *Barclay* fn10 supra[36] and [48](Lady Hale).

<sup>14</sup> *Supra* [58] (Lady Hale).

<sup>15</sup> See generally on these explicitly identified as a reform agenda in: Ministry of Justice, *Government Response to the Justice Select Committee Report "Crown Dependencies": developments since 2010* (March 2014; Cm 8837).



At appropriate points insular perspectives will be incorporated into the discussion although it needs to be constantly borne in mind that finalised changes in constitutional practices are expected to be achieved by 2020 at the latest, and this appears to be, at the current juncture at least, a matter for negotiation between the MoJ and the insular administrations.<sup>16</sup> These now appear to be infused by a new spirit of cooperation and goodwill on both sides. As any well informed observer of these Islands knows, greatly improved constitutional and policy interactions with successive Conservative majority/Coalition Administrations represents a clean break with the tensions, conflict and flawed decision-making that defaced the New Labour 1997–2010 years.<sup>17</sup>

We thus appear at the time of writing to be in the midst of a re-engineering of the operational and some policy aspects of the UK/Crown Dependencies constitutional relationships, and this is soon to be delivered in a matrix characterised by strictly limited democratic debate, both in the insular Assemblies and at Westminster, and no legislation whatsoever. The decision to proceed by administrative edict<sup>18</sup> rather than legislation or a formal set of concordats is admittedly reflective of the historic preference, in both the insular Administrations and Whitehall, for an uncodified, flexible constitutional relationship,<sup>19</sup> but it does generate serious questions in terms of transparency, public law certainty and democratic accountability.

The traditional reliance on behind closed doors negotiations, deals, administrative guidance and bi-lateral trust and confidence between Whitehall and the insular administrations, has tended, historically, to serve both sides well and generally functioned satisfactorily. But problems have clearly emerged, visibly, since at least 1997 and earlier, less visibly. Much of this appears to be caused by a combination of external pressures in terms of scrutiny of fiscal structures, the quality of financial regulation, compliance with European/UK human rights norms, the need belatedly to guarantee basic employment/social rights and internal political unrest revolving around the imperative for modernised, democratic and transparent systems of government. It is, given this context, no longer tenable for either Whitehall or insular governments to simply articulate the trite position that the Crown Dependencies are not represented at Westminster, that these are purely insular matters and hence reform is not necessary. Unless there is in the near future a serious re-think about the entire constitutional structure and operational practices involving preferably a stronger emphasis on legislation, transparency and formal structures, there remains a very real risk of fresh political conflict. This could fatally fracture the entire UK/Crown Dependencies constitutional interface and in turn trigger a search for radical and possibly unwelcome constitutional alternatives.

Finally, on an entirely different note, it needs to be borne in mind that UK withdrawal from the EU, currently projected to materialise in 2019, itself throws into sharp focus issues in terms of international representation and proper consultation during the whole negotiation process. In particular the vexed question as to what if anything will replace Protocol No 3 to the UK Act of Accession, the Crown Dependencies vital umbilical cord

<sup>16</sup> At least judging from the Guernsey perspective and given the commonality in broad policy issues it is likely that the Isle of Man and Jersey will be proceeding according to a similar time frame for implementation. On the Guernsey position see: States of Guernsey, Constitutional Investigation Committee, *Proposals to Achieve Autonomy in the Legislative Process and International Affairs for Guernsey* (4 November 2015) para 1.4.

<sup>17</sup> These are vividly recounted by a former Bailiff of Jersey and Minister for External Relations in: P Bailhache, *One or Two Steps from Sovereignty* (2009) 13(3) *Jersey and Guernsey Law Review* 252.

<sup>18</sup> See Annexes A, B, C fn 15 *supra*.

<sup>19</sup> See generally on this: L Le Rendu, *Jersey: Independent Dependency? : The Survival Strategies of a Microstate?* ( Ex Libris Press, 2004) (on Jersey but much of the key perspectives equally relevant to Guernsey and the Isle of Man).

with the EU single market.<sup>20</sup> The acute urgency of effectively addressing the Islands' concerns during this time frame scarcely needs stressing, and precisely how this plays out will be an important early "acid test" of any new agreed operational practices as well as shedding valuable light on the experiences to be absorbed for the future in these two particular spheres.

## THE FOUR SUBSTANTIVE REFORM AREAS

In this main substantive section of this article discussion will focus on four key areas of concern that emerged in the time frame 1997–2010 and which have formed a focal point for MoJ, the lead UK Government department with primary responsibility for the Crown Dependencies,<sup>21</sup> during the two separate inquiries conducted in 2010–2014.<sup>22</sup> Although these are for the purposes of convenience treated separately, the constitutional, political and administrative reality is that they frequently overlap, in particular the modern re-statement of the general constitutional relationship needs to be understood in conjunction with the entire issue of enhanced international representation for the Crown Dependencies.

### (i) *The Overarching Constitutional Position.*

This is neither the time nor the place to articulate in detail the UK/Crown Dependencies constitutional relationship, suffice to say that the Islands enjoy virtually complete domestic legislative and policy-making autonomy subject only to the Crown's good government power of intervention (requiring essentially a clear breakdown in the administration of justice or a serious threat to the rule of law) and a paramount power to legislate directly for the Islands if need be in breach of a deeply entrenched constitutional convention requiring the assent of the insular governments before any legislation can be imposed.<sup>23</sup> The latter unilateral power is apparently qualified in both Jersey (by mandating the consent of the States Assembly in relation to directly applicable UK legislation and Orders in Council prior to their effective registration in the Royal Court of Jersey<sup>24</sup>) and the Isle of Man (via distinctive Manx constitutional law doctrine whereby Tynwald enjoys co-ordinate authority with Westminster<sup>25</sup>) although it remains improbable that UK courts would ever endorse these incursions into traditional UK parliamentary sovereignty.

These and other key constitutional precepts are discussed in the concluding section and a new constitutional settlement suggested that would probably require a Crown Dependencies-specific Kilbrandon Mark II constitutional inquiry. Kilbrandon itself was from, an insular perspective, something of a non-event given that relationships

<sup>20</sup> For full discussion of Protocol No 3 see generally: A Sutton, *Jersey's Changing Constitutional Relationship with Europe*, in P Bailhache (Ed) fn8 supra pp 153–247.

<sup>21</sup> Although modern practice in relation to substantive policy issues is for the relevant UK policy department to liaise directly with insular administrations in the Crown Dependencies.

<sup>22</sup> Ministry of Justice, *Government Response to the Justice Select Committee's Report: Crown Dependencies* (November 2010; Cm 7965); and Ministry of Justice fn15 supra.

<sup>23</sup> See generally on this the account in: The Royal Commission on the Constitution 1973-Vol-I Cmnd 5460 (The Kilbrandon Report) paras 1347–63, 1472–3 that is now somewhat dated but the key principles essentially remain correct.

<sup>24</sup> States of Jersey Law 2005, Article 31 (Revised Edition, 16.800, States Greffe, Jersey).

<sup>25</sup> *In the Matter of Re CB Radio Distributors* (1981–1983) Manx LR 381, 396–7 (Staff of Government Division of the High Court); and *In Re Tucker* (1988) Manx Law Bulletin 33 (Staff of Government Division of the High Court). See further on this: PW Edge, *Manx Public Law* (Isle of Man Law Society, Douglas, the Isle of Man, 1997) pp 47–57; and a more broad ranging discussion in: PW Edge, David, Goliath and Supremacy: The Isle of Man and Sovereignty of the United Kingdom Parliament (1995) 24 Anglo-American LR 1.

between the Islands and the UK Government only formed a relatively small part of it (its principal purpose being UK constitutional reform) with evidence mainly submitted by insular administrations, the Home Office and no real substantive reform outcomes.

In an attempt to mitigate future constitutional and political conflict as well as furnish an accessible guide for the operational functioning of the constitutional relationship, the MoJ has articulated a modern re-statement of it, set out as a concise statement, in the Government's response to the 2010 Justice Select Committee inquiry.<sup>26</sup> The re-statement appears to have a senior ministerial imprimatur<sup>27</sup> and is essentially a codification rather than a reform statement albeit one updated to reflect modern issues. It needs to be read in conjunction with the traditional Kilbrandon Report statement in order to furnish an accurate, official modern account of the constitutional relationship. It will not be reproduced in full here but the following salient points worth noting are essentially as follows.

First, and acknowledging this is at the behest of the Justice Select Committee, the constitutional relationship should operate to meet current needs while recognising the critical importance of the Islands being able to represent themselves both in the UK and internationally although this should not challenge or change the existing constitutional relationship.<sup>28</sup> Secondly, that relationships with the Islands are the responsibility of the UK Government as a whole, so that *all* Whitehall policy departments interact directly with insular governments where appropriate to their policy responsibilities including specific jurisdictional policy issues.<sup>29</sup> Thirdly, while the UK Government has a responsibility to ensure that the Islands have sufficient advice and assistance to function effectively as separate jurisdictions with distinctive social and economic profiles, equally it expects the Crown Dependencies to embrace the "good neighbour principle" and "ensure that its own policies do not have a significant adverse impact on the UK's interests".<sup>30</sup> Fourthly, that the UK Government retains ultimate responsibility for the international relations and good government of the Crown Dependencies, and that carries with it the commensurate power to ensure these obligations are met including actively seeking to ensure that, while the Islands' policies do not need to closely mirror those of the UK, any policies or practice fundamentally contrary to UK principles or interests will be actively resolved.<sup>31</sup> Finally, the UK Government formally recognises that the Crown Dependencies enjoy an international identity separate from that of the UK: this requires consultation with them on international instruments that may extend to them and, where practicable, consultation with them on development of the UK position on specific international issues.<sup>32</sup> It may, moreover, justify and the UK Government fully supports the use of Entrustment (essentially a UK Government grant of specific permission to enter into international negotiations on an independent basis) as a vehicle for self-representation in the international arena.<sup>33</sup> These key issues in the modern re-statement serve as a working guide for officials in insular administrations,

<sup>26</sup> See fn15 supra.

<sup>27</sup> fn 15 supra (Ministerial Foreword).

<sup>28</sup> Supra, para 1.

<sup>29</sup> Supra, para 3.

<sup>30</sup> Supra para 4. These strictures are clearly directed at the Islands' rapid development as offshore finance centres since the late 1980s and the strains this has placed on UK/Crown Dependencies relations in specific policy spheres, the best known being arguably finance-magnet fiscal structures and the development of specialised business sectors. For an exemplary illustration of the issues involved see the Channel Islands fulfilment industries case at fn 39 infra.

<sup>31</sup> Supra para 5.

<sup>32</sup> Supra para 6.

<sup>33</sup> Supra.

Whitehall and other stakeholder groups and are commented on in more detail below in sections (ii)–(iii).

The fundamental point for present purposes is not the substantive content of the constitutional relationship : the modern re-statement by the MoJ appears to represent essentially a distillation and readable version of existing (and recommended) generally accepted practices, but with an acceptance of the Islands’ development of their own separate international identities, including formal endorsement of the Letter of Entrustment technique, and a series of practically important “how to” notes(essentially working protocols for the detailed operational working of Whitehall/insular administrations interactions) on the extension of UK parliamentary legislation to them, extension of international instruments to them and procedures for dealing with requests from the Crown Dependencies for the extension of the UK’s ratification of international instruments to them. The themes pervading these guidance notes<sup>34</sup> are the need to engage in and for timely consultation, efficiency in administrative and law officer decision-making, clarity in the entire process and implicitly the need to “get it right first time” and thus avoid the conflicts, tensions and at times maladministration which regularly surfaced during the New Labour epoch.

These are laudable objectives and once implanted into Whitehall/insular interface ought to make a significant contribution to improvements in the proper functioning, at the operational level, of the UK/Crown Dependencies constitutional relationship, and thus build on the marked improvements that have already been reported by both the MoJ<sup>35</sup> and Justice Select Committee<sup>36</sup> inquiries post 2010. On the other hand, they signally fail to address key substantive and process issues. For instance there is no elaboration of the earlier weighty “good neighbour” and “constitutional propriety” indicia<sup>37</sup> as devices for guiding, shaping and determining law and policy-making both in the Islands and Whitehall. The “good neighbour” emerging constitutional precept is admittedly endorsed again but implicitly as a device for restraining perceived abuse of offshore facilities.<sup>38</sup> A classic recent example being, arguably when conceptualised in broad, subjective terms, the big downsizing of fulfilment industries in the Channel Islands, triggered by a negative UK Administrative Court ruling, constructed almost entirely on UK and EU VAT low value consignment relief (LVCR) platforms.<sup>39</sup>

To simply implant the “good neighbour” principle into the constitutional interface without any corresponding recognition of “constitutional propriety”, itself implicitly endorsed and reported as implemented in the Justice Select Committee Report,<sup>40</sup> as a countervailing mechanism is arguably an unbalanced approach. Equally so is the

<sup>34</sup> See fn15 supra. In specific terms : Annex A, “How to Note”, *Extension of UK Primary Legislation to the Crown Dependencies*; Annex B, “How to Note” on the *Extension of International Instruments to the Crown Dependencies*; Annex C, “How to Note”, on *Dealing with Requests From the Crown Dependencies to Extend The UK’s Ratification of International Instruments*.

<sup>35</sup> fn15 supra para 6.

<sup>36</sup> House of Commons Justice Committee, *Crown Dependencies: developments since 2010*: Tenth Report of Session 2013–14(HC 726; 16 January 2014).

<sup>37</sup> See generally on these: Ministry of Justice, *Government Response to the Justice Select Committee Report: Crown Dependencies* fn 22 supra. For fuller discussion see: Morris fn9 supra, pp 22–24.

<sup>38</sup> fn 15 supra.

<sup>39</sup> See: *R (On the Application of the Minister for Economic Development of the States of Jersey) v The Commissioners for Her Majesty’s Revenue and Customs* [2012] EWHC (Admin) 718(Mitting J) for a highly technical analysis of relevant EU and UK VAT measures in LVCR commercial trading albeit, he concluded, not inherently abusive ([62]) and displaying little judicial sympathy for the severe job losses in Jersey and Guernsey anticipated to be triggered by the ruling. For discussion of the substantive issues see: V Bell and C McDonnell, *Low Value Consignment Relief: The Judgment and its Implications* (2012)16 (2) *Jersey and Guernsey Law Review* 119.

<sup>40</sup> House of Commons Justice Committee, *Crown Dependencies*, Eighth Report of the Session 2009–2010 (30 March, HC 56-1) p 3. .

failure to elaborate in detail the relative weights which ought to be assigned to these constitutional precepts in particular policy areas. Another equally valid failure is the glaring omission to properly flesh out in the general modern re-statement the “good government” power: essentially an amorphous unilateral power vested in the Crown to intervene directly in the affairs of the Crown Dependencies, if need be without their consent. No one seems to know its precise content (other than it requires extreme scenarios such as a breakdown in public order or endemic corruption insular governments, legislatures or judiciaries or a serious threat to the rule of law<sup>41</sup>) and there is no substantive, authoritative governmental or judicial definition. Again an agreed articulation of its substantive content and illustrative examples of in what circumstances and how it might be invoked would have added real substance and clarity to the modern restatement.

Although these “good neighbour” and “constitutional propriety” precepts appear to pull in opposite directions and may on occasions, particularly in business development of their offshore finance centres, be frankly irreconcilable, they serve as valuable reference points in the entire Whitehall/Crown Dependencies interface and could and should have been built upon in order to furnish a robust, balanced and transparent framework for its policy and operational functioning. The fulfilment industries case in the Channel Islands exemplifies the point in the sense that the “good neighbour” precept as an interpretive background principle suggests that business-magnet fiscal incentives<sup>42</sup> causing UK revenue losses and under-pricing UK based suppliers, purely on the basis of offshore transactional comparative advantages, are obviously hard to square in broad, subjective terms with being a “good neighbour”; but on the other hand to unilaterally lay to waste these commercially vibrant, high-employment industries, via the Finance Act 2012,<sup>43</sup> comes close to a breach of “constitutional propriety” given clear evidence of insular governments’ objections and the economic dis-location it has inflicted in the Channel Islands.<sup>44</sup> The case shows the major problems in a broad policy and operational sense of striking the right balance between the two precepts, and the need for them to be fleshed out in a Memorandum of Understanding so that they are invested with sufficient precision and clarity to serve as meaningful guide in policy-making and Ministerial decision-making.

Perhaps more fundamentally the modern restatement continues to evade the pressing need for a 21<sup>st</sup> century version of Kilbrandon involving the full range of consultation with a wide range of stakeholder interests, commissioned research findings and ideally a set of binding political concordats at the minimum and preferably a new constitutional statute for the conduct of the relationship. There really is a strong case for a Kilbrandon Mark II, not simply because of recurring political tensions, but also given the radical transformation in the Islands since the late 1980s, in particular their rapid growth as international offshore finance centres, the development of executive systems of government enhanced by new external relations functions and the overriding imperative to observe international policy prescriptions in relation to taxation and financial regulation. These factors are sources of serious strains in the constitutional relationship, fault lines are appearing in it and it is arguably no longer “fit for purpose” in the 21<sup>st</sup> century.

<sup>41</sup> Supra, paras 37 and 41.

<sup>42</sup> These incentives are delivered by UK/EU VAT measures and not insular legislation so it is arguable that the “good neighbour” precept ought to carry reduced weight in any UK Ministerial or judicial balancing exercise.

<sup>43</sup> S199. This appears to be at first glance a breach of the core constitutional convention requiring insular assent to such matters but it may well be that, in point of fact, that the reference to court and acceptance of the ruling is in essence a “behind closed doors” agreement to resolve the dispute on essentially an arbitral-type basis.

<sup>44</sup> See for example: EU to close LVCR loophole, *Jersey Evening Post*, June 29 2015, reporting the heavy impact of the withdrawal of LVCR on Jersey’s fulfilment sector with the predicted loss of in excess of 600 jobs.

In terms of insular reactions to the modern re-statement, insular reactions are, at this juncture at least, equally disappointing. Guernsey sees no necessity to alter the status quo ante or to search for a more durable, transparent basis on which to conduct it.<sup>45</sup> The Isle of Man Government<sup>46</sup> for its part saw no necessity for any action post the 2010 MoJ inquiry, seemingly content to record its satisfaction at the “improved lines of communication with the UK” that has resulted in “greater recognition of the Island as a mature and responsible democracy, along with increasing opportunities to represent ourselves on the international stage.”<sup>47</sup> Jersey seems content to simply note the 2012 Report but has on an apparently unilateral basis been energetically developing its External Relations function, principally via the creation of a dedicated Ministerial portfolio and the development of an agreed foreign policy at Council of Ministers level.<sup>48</sup> Obviously there is scant chance of a Kilbrandon Mark II exercise or modernization of specific facets of it or a set of concordats unless the political will exists in Whitehall and the Islands, and this seems conspicuous by its absence. This broad issue will be analysed in detail later in the concluding section, and an alternative prospectus offered up.

(ii) *International Representation.*

In this section the discussion will focus on post 2010 evolution in the vexed issue of the Crown Dependencies international representation in negotiations affecting their distinctive political and economic interests. This is obviously a topic of great importance given the commencement of UK Brexit negotiations and the tricky issue of how the Islands unique relationship with the EU, via Protocol No 3, is to be re-modelled (or simply jettisoned) and the nature of insular political leaders’ roles, if any, during these negotiations.

To briefly re-iterate the long established constitutional position: the UK Government remains responsible for the Islands’ international relations and consistently maintains this includes, in terms of external political sovereignty, the capacity to take binding decisions on their behalf and if necessary at odds with their expressed positions if overriding UK policies or interests warrants it.<sup>49</sup>

The rapid expansion of the Islands as international offshore finance centres since the late 1980s and the application of UK and international norms which transcend their shores, especially in the spheres of fiscal structures and European human rights standards, has thrown into sharp focus the delicate question as to precisely how their distinctive political and economic interests are to be properly represented and by what methods. This was a particularly acute problem during the Icelandic banking crisis and has led to two specific reforms intended to bolster the Crown Dependencies’ international identities and furnish a method for their self-representation in the international arena.

<sup>45</sup> States of Guernsey, Constitutional Investigation Committee, fn16 supra paras5.9 and generally paras 5.7–5.10. That said there are a series of key suggested reforms in the broad areas of processing insular legislation and international representation. These key proposals have now been endorsed by the States of Deliberation (the Bailiwick’s legislature) and seem likely to form the basis for future discussion with the MoJ, see : Official Report of the States of Deliberation of the Island of Guernsey, Vol 5, No 2, Wednesday 27 January 2016 – *Billet d’ Etat* I.

<sup>46</sup> Della Fletcher, Executive Director of the Isle of Man Government, Letter to the Author, 2 February 2015.

<sup>47</sup> House of Keys, *Official Report*, 28 January 2014 (Chief Minister Bell).

<sup>48</sup> For full details see its dedicated web-site at: [www.gov.je/Government/Jersey World/International Affairs/Pages/index.aspx](http://www.gov.je/Government/Jersey%20World/International%20Affairs/Pages/index.aspx). (last accessed 15 September 2017). See also: States of Jersey, *External Relations: Common Policy* (Presented to the States on 23 November 2013 by the Council of Ministers; States Greffe R140/2012).

<sup>49</sup> See for example fn 15 supra where the MoJ cautions that notwithstanding the Framework Documents, in particular that the UK has pledged not to act internationally for the Islands without prior consultation, that this explicit commitment “should not be mistaken for guarantees that the UK will always be in a position to represent the Islands’ views internationally when those views diverge from the UK’s own interests” (p11).

The first is that in 2007 the UK Government negotiated separate Framework Agreements with the insular governments whereby their interests are properly recognised by the UK Government during international negotiations. The Framework Agreements are essentially a positive response by the UK Government to the insular governments' demands for greater international personality including the freedom to enter into international negotiations on an independent basis. They are a species on UK/Crown Dependencies' soft law" that clearly re-iterates their distinctive interests and the evolution of separate international identities. Their subject-matter is not formally de-limited, and they are in essence bi-lateral agreements designed to risk-manage Whitehall/insular conflict. The second is formal recognition and rapid expansion of Entrustment as a means of facilitating their self-representation in international fora. Entrustment is, as noted earlier, in essence UK Government grant of specific permission for insular governments to enter into international negotiations on an independent basis in relation to specific policy issues. It is subject to the need, at least in regard to the spectacular expansion of tax information exchange agreements on a global basis, for subsequent UK ratification and the necessity for the assent of insular legislatures prior to their transposition into secondary regulations.

The current position of the UK Government is to respect and support the natural desire of the Islands to further develop their international identities and achieve international engagement but that this must be done within the parameters of the existing constitutional relationship.<sup>50</sup> Given this seemingly fixed position coupled with routine use of Entrustment both the Framework Agreements and Letters of Entrustment, although initially simply a matrix of insular/UK external relations "soft law", have arguably crystallised into political usages and potentially could, over a much longer time frame, morph into new constitutional conventions. Although the process of new constitutional conventions emerging is typically a decade after decade time frame it may well be that the Framework Agreements and Entrustment techniques could, given the fact they are underpinned by solid constitutional and political muscle and regularly used, more rapidly crystallise into generally binding conventions.

In the meantime the UK Government endorses the continued use of Entrustment and its expansion into policy areas other than tax information exchange but cautions that this is not in the gift of the MoJ alone and requires full consultation with and the consent of other Whitehall policy departments in relation to specific Entrustments.<sup>51</sup> Likewise the UK Government, in apparent reversal, or significant modification, of its earlier position that it would be "unrealistic" to include Crown Dependencies Ministers and officials in UK negotiating teams, on the ground that UK officials could not reasonably be expected to prioritise the Crown Dependencies' interests over those of the UK Government in the event of conflict,<sup>52</sup> now appears in principle to countenance their inclusion on a case by case basis. The overarching position that the UK Government retains ultimate responsibility for their international relations remains however intact and the Framework Agreements were negotiated and signed by the UK Government on that basis.<sup>53</sup> In a similar vein the Framework Agreements should not be misread as mandating international representation of the Islands if these diverge from those of the UK, that the policy positions of other sovereign states may de-limit the UK's own bargaining position and there are international negotiations' scenarios where the

<sup>50</sup> See further on this: fn 15 supra p 4.

<sup>51</sup> fn 15 supra p 11.

<sup>52</sup> fn 22 supra p 13.

<sup>53</sup> fn 15 supra p 11.

international institution in question simply debars the participation of non-sovereign jurisdictions.<sup>54</sup>

So we have now reached the position whereby in principle the Crown Dependencies cannot only act internationally pursuant to specific Entrustment, but also may be granted representation in UK Government teams during international negotiations.<sup>55</sup> This very issue has now come quickly into play in UK Brexit negotiations: both the Houses of Commons<sup>56</sup> and Lords<sup>57</sup> in their separate inquiries urge full consultation with, and involvement of, the Crown Dependencies but fall short of suggesting insular governments' inclusion in UK negotiating teams. This is so even though both Reports<sup>58</sup> envisage possible conflicts in UK and Crown Dependencies' interests during the negotiating process and that there is always the potential for adversarial positions to be adopted.<sup>59</sup> The House of Lords European Union Committee confines itself to urging Crown Dependencies representation in UK free trade negotiations with countries beyond the EU, and to support Jersey and Guernsey's efforts to ensure that UK membership of the WTO extends to them as it currently does to the Isle of Man.<sup>60</sup> The current position seems to be one of the UK Government accepting in principle the possibility of Crown Dependencies participation in UK negotiating teams, but that actual instances of this facility being granted are likely to be rare.

Precisely how the Crown Dependencies representation in UK negotiating teams would play out in international negotiations has thus far not been elaborated on, but the tone and content of UK Government statements post 2010 strongly suggest this would be a secondary role, articulating and modifying the Islands' positions if need be, but that the UK negotiators retain the prerogative, using that term in a loose sense, to assert UK interests and to secure an agreement even if this is inconsistent with the interests of the Crown Dependencies. Given that the current UK position and practice on representation in UK negotiating teams seems somewhat niggardly (the author is unaware of a single instance of this ever having been granted thus far) it may well be that use of Entrustment on a collective basis may be a more effective and realistic way forward in negotiating scenarios where all the Crown Dependencies have a shared interest and position. Moreover, use of General Entrustment in selected policy areas where UK prior consent is adjudged excessively intrusive may be a similarly optimal solution. This seems particularly apposite not simply for third country free trade negotiations, but also with the EU itself given the Islands' distinctive economic profiles with their heavy reliance on offshore finance centres, tourism and agriculture. It may in fact be that this is the optimal method for securing a robust, transparent and "fitness for purpose" replacement for their crucial Protocol No 3 link with the EU.

As we progress well into the 21<sup>st</sup> century and international representation issues become ever more acute across an expanding range of policy issues, there is here potentially an unfolding scenario that could easily trigger a re-run of the conflicts and tensions which regularly surfaced between successive New Labour Administrations and insular governments in the 1997–2010 era. It is this. Despite its acceptance in principle

<sup>54</sup> fn 15 supra p 11.

<sup>55</sup> fn 15 supra p 10.

<sup>56</sup> House of Commons Justice Committee, *The Implications of Brexit for the Crown Dependencies* (Tenth Report of the Session 2016–2017) (HC 752).

<sup>57</sup> House of Lords, European Union Committee: *Brexit: The Crown Dependencies*, 19<sup>th</sup> Report of the Session 2016–2017 (23 March 2017 HC Paper 136).

<sup>58</sup> House of Lords, European Union Committee, fn 57 supra, Summary para 1; and House of Commons Justice Committee, fn 56 supra Summary para 3.

<sup>59</sup> House of Lords European Union Committee, fn 57 supra, Summary para 4.

<sup>60</sup> House of Lords European Union Committee, fn 57 supra, Summary, para 6.



of inclusion of Crown Dependencies politicians/officials in international negotiating teams, this remains rather grudging (if Brexit negotiations do not necessitate such inclusion, it is difficult to envisage what other policy issue would) and yet Jersey, Guernsey and the Isle of Man have all, admittedly with varying degrees of commitment, pressed ahead with the development of separate External Relations functions squarely located in insular governments policy-making apparatuses.

The Isle of Man has created a clearly defined and apparently well resourced External Relations Division based in the heart of the Manx Government with a remit to maintain operational relations with the UK Government, scrutiny of developments within the EU and provision of timely information to Manx Government Departments and ensuring that proper consideration is given to whether the Isle of Man should be included in international treaties and conventions.<sup>61</sup> This developing function is, moreover, reflective of the Isle of Man Government's commitment to address global issues, find its place in the global arena and actively develop economic growth in the international financial services sector.<sup>62</sup> Greater progress has been made in Jersey with the creation of a separate portfolio of Minister for External Relations, although the Minister does not, as yet, have a separate Department, and an agreed External Relations Common Policy that focuses on promotion of Jersey's economic interests, compliance with international standards on labour and human rights, environmental protection and engagement with key international partners.<sup>63</sup> In contrast Guernsey has made more modest progress, simply creating an informal External Relations Group in insular government whose activities are marked by an absence of transparency and an apparent dis-inclination to creatively develop an independent external relations policy.<sup>64</sup> The States of Guernsey Policy Council<sup>65</sup> has however supported use of general Entrustment subject to specified exclusions and the ad hoc participation of Guernsey representatives in UK negotiating teams interacting with the EU, OECD, UN and the Commonwealth.

None of the above jurisdictional developments have properly addressed the vexed issue of insular representation in UK teams engaged in international negotiations. This is, moreover, an issue that is unlikely to go away given Brexit negotiations and the entire array of international policies and practices on taxation, financial crime and financial institutions supervision that permeates their international-facing offshore finance dominated economies. Given this policy context and the resources that Jersey and the Isle of Man in particular are investing in External Relations, this is an issue that simply has to be clearly and decisively resolved. If the UK Government continue to persist with its narrow line that the overarching constitutional position militates against an expansive

<sup>61</sup> See generally its informative web-site at: [www.gov.im/about-the-government/affairs/international-affairs/external-relations/](http://www.gov.im/about-the-government/affairs/international-affairs/external-relations/) (last accessed 25 May 2016). A structured framework for the continuing activities of the External Relations Division is articulated in: Isle of Man Government, *International Relations Framework Document* (Cabinet Office, the Isle of Man, May, 2015).

<sup>62</sup> Isle of Man Government, *supra* pp 4–7.

<sup>63</sup> See generally on this development, the informative Department web-site at: [www.gov.je/Government/Jersey-World-International-Affairs/Pages/index.aspx](http://www.gov.je/Government/Jersey-World-International-Affairs/Pages/index.aspx) (last accessed 10 September 2017); and States of Jersey, *External Relations: Common Policy* (Presented to the States on 23 November 2013 by the Council of Ministers; States Greffe R140/2012).

<sup>64</sup> States of Guernsey Policy Council, *Greater Autonomy in the Legislative Process and International Affairs, Billet d'Etat*, Wednesday 25<sup>th</sup> September, 2013, XV III 20B, p 1398.

<sup>65</sup> See further States of Guernsey Constitutional Investigation Committee, fn16 *supra*, para7.7, approved by the States of Deliberation fn 45 *supra*. The Policy Council was not a Cabinet in a substantive sense but rather a co ordinating committee constrained by absence of authority over Departmental Boards in insular government and lack of accountability for its decisions given that these remained vested in Departmental Boards. On 1 May 2016 the Policy Council was replaced by the Policy & Resources Committee with its President constituted as the Bailiwick's senior political leader and invested with responsibility for external relations and constitutional affairs: States Review Committee, *The Organisation of States Affairs – Guide to the Proposals of the States Review Committee* (June 2014), pp 7–8 and 10–11. See also for the new insular government structure as a whole including the role of scrutiny: [www.gov.gg](http://www.gov.gg) (last accessed 25 June 2017).

approach (the States of Guernsey Policy Council has adopted a similar position<sup>66</sup>) there is a very real risk of a repetition of the conflict and tensions witnessed during the New Labour years as Jersey and the Isle of Man become increasingly assertive and self-confident in prosecuting their External Relations functions. In doing so they will doubtless find this runs into the resistance of a UK Government keen to limit this under the rubric of its established constitutional responsibility for their international relations. Although that is undoubtedly a UK Government prerogative,<sup>67</sup> it is increasingly difficult to square with the Crown Dependencies international policy concerns across an ever expanding range of subjects. At some point this needs to be decisively resolved, preferably by permitting insular representation in UK negotiating teams, but clearly articulating when this is and is not permitted and ensuring full transparency in the relevant criteria.

*(iii) Consultation with UK Government Departments.*

The broad issue of timely, effective and responsive consultation is one that, in some ways, goes to the heart of the UK/Crown Dependencies constitutional nexus: it is not merely a key component of the core constitutional convention, it is in a practical, continuing sense the key factor that lubricates the proper functioning of government machinery in Whitehall, St Helier (Jersey), St Peter Port (Guernsey) and Douglas (the Isle of Man).

When consultation is late, ineffective, one-sided or perfunctory we find that serious political conflict and tensions are generated, and these can, and unquestionably have had, an enervating effect on the future smooth functioning of Whitehall/insular dialogue and decision-making. A whole series of incidents post 1997 and over a twenty years time frame could be re-counted here but here just two of them will be briefly averted to for the purposes of illustration. The first was the decision in 1998 announced by the Home Office (at that time the lead Whitehall policy department with responsibility for the Crown Dependencies) unilaterally and evidently in the absence of any prior consultation with the insular administrations, to initiate the Edwards inquiry into the Islands' systems of financial regulation. At the time of its publication the Edwards Report<sup>68</sup> was lambasted in some quarters for its relatively restrained proposals and for the covert dilution of its original blueprint,<sup>69</sup> but be that as it may the Islands have generally reacted positively to its recommendations across the entire range of investor protection and financial sector supervision.

Despite the overall solution eventually delivered, the fact remains that deeply flawed, in fact non-existent, consultation clearly, from an insular perspective, damaged its perceived legitimacy as a regulatory reform charter, resulting in, initially at least, selective implementation over an unnecessarily long time frame. The proposed Joint Channel Islands Financial Ombudsman Scheme has, for example, taken sixteen years to bring to completion although that virtually unique reform has admittedly required the resolution of complex policy and technical inter-jurisdictional issues. A second illustration of the vital importance of full and timely consultation is provided by the effective imposition of the EU Code of Conduct on Business Taxation and Taxation on Savings Directive on the Islands, marked by inadequate consultation, even though this a prima facie a breach of the clear spirit of the Protocol No 3 guarantee and exposes the Islands' fiscal

<sup>66</sup> States of Guernsey Policy Council fn 64 supra para 42.

<sup>67</sup> Using that term here in its popular, linguistic sense rather than its technical constitutional law meaning.

<sup>68</sup> Home Office, *Review of Financial Regulation in the Crown Dependencies – A Report*, Part I, Cm 4109-I (Edwards Report).

<sup>69</sup> See for example the trenchant critique in : A Mitchell, P Sikka, J Christensen, P Morris and S Filling, *No Accounting for Tax Havens* (Association for Accountancy and Business Affairs, 2002), Chap 4.

structures and banking practices to, in insular terms, unwelcome external scrutiny and accountability.<sup>70</sup>

Despite its immense practical importance and obvious policy formation relevance, the UK Government position on this is limited. Its starting point is that, apart from the compulsory granting of the Royal Assent to insular legislation and extension of international instruments to the Islands, the UK Government notes that it is in broad terms “best practice for the UK Government and the Crown Dependencies to engage with each other on a broader range of matters”.<sup>71</sup> Given that inadequate or non-existent consultation has fuelled Whitehall/insular conflict, a simple exhortation for proper consultation is hardly conducive to smoother functioning of the relationship. It would not be unduly problematic to formulate an additional “how to” note fleshing out the basic requirements of full, timely and responsive consultation and preferably setting a date, say ten years in advance, conferring on the note the status of a political cum administrative usage or even its inclusion in a new constitutional relations statute as suggested in the conclusions. What is suggested here, in more specific terms, is a “general how to” note on consultation core principles with the specific “how to” notes read in the light of and influenced by the requirements of the “general how to” note.

Instead of a sorely needed general statement of good consultative practice, the UK Government simply re-iterates the critical importance, across the entire Whitehall policy departmental spectrum, of prompt, efficient and effective consultation that is both mandatory and respects the Crown Dependencies distinctive policy concerns, in the spheres of international agreements relevant to them and provisions of UK Bills impacting on insular interests.<sup>72</sup> Specific “how to” notes are reproduced on these two broad issues with room for a tailored solution in specific instances.<sup>73</sup> There is no doubt that this detailed elaboration of mandatory consultation procedures will hopefully bolster the quality of Whitehall/insular interactions and lead to greater efficiency and sensitivity in the application of UK legislation and international instruments to the Islands.

*(iv) Extension of International Instruments and UK Legislation to the Islands.*

The discussion in this section needs to be read in conjunction with consultation issues raised in (iii) above in order to gain a full picture of precisely how the constitutional relationship functions at the operational level. These two sections (iii) and (iv) are closely connected in the sense that timely and effective consultation with the insular administrations is a strong theme pervading “how to notes” issued by the MoJ, publicly accessible and delineating mandatory procedures characterised by transparency, due process, tight time limits, respect for insular autonomy and full consultation. These are intended to serve as working guides for those officials and political representatives entrusted with management of the relationship. Provided they are properly adhered to and, any deficiencies in them resolved, they ought to significantly bolster the quality of the decision-making in both Whitehall and insular administrations.

The “how to notes” encompass three distinct areas of Whitehall/insular relationships: extension of UK primary legislation to the Crown Dependencies; extension of international instruments to them; and procedures for dealing with requests from

<sup>70</sup> For full discussion of this episode by a senior Jersey Law Officer, see: W Bailhache, *Jersey’s Changing Constitutional Relationship with the United Kingdom*, in P Bailhache (Ed) fn 8 supra pp 271–284, 276–280.

<sup>71</sup> Ministry of Justice, fn15 supra, p 8.

<sup>72</sup> fn15 supra, pp 8–9.

<sup>73</sup> See generally Annexes A and B, fn15 supra.

them for the extension of the UK's ratification of international instruments?<sup>74</sup> Provided these are observed and “fine tuned” in the light of operational experience they could, over a lengthy time frame, be regarded as political usages and possibly constitutional conventions in their own right. They will doubtless, moreover, serve to reduce corrosive political conflict in this nexus while at the same time preserving the traditional flexibility in its administration that has and generally does meet the legitimate expectations of Whitehall and insular governments.

Apart from these detailed working guides, the MoJ makes some general observations on the working of the constitutional relationship in these areas, and these comments are suggestive of both improvements post 2010 and a genuine commitment in the MoJ to deliver further improvements in the future.<sup>75</sup> The first is that the endemic problem of delays in grant of the Royal Assent now seems to have been solved: the process has been successfully streamlined so that the time lag from the MoJ receiving the draft insular law to the date when it submitted to the Privy Council is now twenty working days at the most.<sup>76</sup> Likewise in regard to the vexed issue of the extension of Treaty obligations at their request to the Islands, the MoJ reports the introduction of a draft model compliance matrix designed to speed the process up and enable Whitehall policy departments to take a proportionate risk based approach in evaluating the request and avoid duplication of work already carried out by the insular Law Officers.<sup>77</sup> Turning to future international obligations, the MoJ operates a “forward look” system whereby the Crown Dependencies are encouraged to “scan the horizons and provide advance notice of specific international instruments which they wish to have extended to them”.<sup>78</sup> This will speed up the process of extension and the FCO has committed to assist this by providing advance notice of forthcoming international instruments accompanied by relevant policy guidance.<sup>79</sup>

These are all valuable developments but one missed opportunity concerns the Manx system for grant of the Royal Assent to insular primary legislation: this is delegated to the Lieutenant-Governor as the official representative of the Crown in the Isle of Man, removing the need for Privy Council approval, apart from specified situations, and thereby effectively accelerating the entire process.<sup>80</sup> Whether this practice ought to be replicated in Jersey and Guernsey is, according to the House of Commons Justice Committee (the MoJ seems strangely silent on this possible reform), a matter for them.<sup>81</sup> This seems rather anodyne: a positive recommendation on this from the House of Commons Justice Committee and preferably the MoJ itself would obviously considerably increase the prospects of its introduction in Jersey and Guernsey. Such a reform would effectively address the problems of delay, although this may be overstated and it may well be the real issue is that of further boosting jurisdictional autonomy.

<sup>74</sup> Annexes A, B and C, fn15 supra.

<sup>75</sup> fn15 supra para 6.

<sup>76</sup> fn15 supra para 6. For fuller discussion from the Jersey perspective see: R Whitehead and S Meiklejohn, *Coming up to Speed with Royal Assent* (2013) 17 (3) *Jersey and Guernsey Law Review* 363.

<sup>77</sup> fn15 supra, para 6.

<sup>78</sup> fn15 supra para 7.

<sup>79</sup> Supra.

<sup>80</sup> This reform was first introduced in 1981 and the statutory basis for it can be found in the following Order in Council : Royal Assent to Legislation ( Isle of Man ) Order 1981 (Privy Council Office, 23 September 1981), reproduced as Appendix 1-Processing Legislation for the Isle of Man, in States of Guernsey Constitutional Investigation Committee, fn 16 supra. Specified exceptions where Privy Council assent to insular primary legislation is still required include defence, international relations, nationality, citizenship, the constitutional relationship between the UK and the Isle of Man and exercise of the Royal Prerogative: Art 3.

<sup>81</sup> House of Commons Justice Committee fn 36 supra para 30.

Further research in both jurisdictions would be required to assess whether it would be appropriate, and it may be that the traditionally more limited functions vested in the Lieutenant-Governors in Jersey and Guernsey would militate against adoption of the Manx system. Moreover, such a reform initiative cannot and should not be considered in isolation: there needs to be detailed analysis of whether and precisely how this would impact on interactions with the States Assemblies, insular administrations, the MoJ, the court systems and legal professions etc. Well informed observers of interlocking practices in small jurisdictions of this nature will readily testify that polycentric effects are a real issue, and typically magnified when, as is so often the case in the Crown Dependencies, small clusters of individuals straddle legal systems, insular Assemblies and insular governments. This in turn can, and frequently does, generate conflicts of interests, not least when these individuals have personal and business interests in off-shore finance centres<sup>82</sup> serviced by a regular flow of insular primary legislation currently requiring final approval via the conventional “arms length” Privy Council route.

Guernsey has led the way in terms of insular responses with a series of reforms designed to speed up the Royal Assent and a positive case for adoption of the Manx system not so much on grounds of speed in securing the Royal Assent (this seem marginal in practice compared with the traditional Privy Council route<sup>83</sup>), but in more general constitutional terms of bringing the law-making power closer to Guernsey, that the Lieutenant-Governor is well placed to perform the function and it would better reflect Guernsey’s maturity as a jurisdiction with responsibility for its own affairs.<sup>84</sup> In contrast Jersey and the Isle of Man have yet to formulate detailed responses, seemingly content to negotiate behind closed doors with the MoJ and then presumably to implement any agreed reforms by administrative guidance. The Isle of Man has, of course, already implemented this reform in 1981 so that it may well be that, from a Manx perspective, any further agreed reforms would simply be in the form of administratively streamlining the entire process. This is a stark contrast with the Guernsey perspective of a formal inquiry and a series of well reasoned proposals for reform.<sup>85</sup> The problems encountered in these areas are essentially common to the Crown Dependencies: it would be distinctly beneficial for Jersey and the Isle of Man to initiate similar inquiries, if only as an aid to the promotion of transparency and adoption of common positions in future dialogue and negotiations with the MoJ.

## CONCLUSIONS

We have now reached the position, or at least ought to comprehensively by 2020, if Whitehall/insular discussions proceed satisfactorily, whereby operational practices in the four key areas identified above have been modernised, streamlined and a sorely needed measure of transparency implanted into them. Despite this the re-engineering project post 2010 falls clearly short of the standards of transparency, democratic accountability and public law certainty one would expect in 21<sup>st</sup> century liberal democracies. The working practices covered in the “how to” guidance notes are not mere routine

<sup>82</sup> For discussion of the problems these conflicts of interest can generate, including contested insular primary legislation requiring Privy Council approval see further: MP Hampton and JE Christensen, *Treasure Island Revisited. Jersey’s Offshore Finance Centre Crisis: Implications for Other Small Island Economies* (1999) 31(9) *Environment and Planning A* 1619; and J Christensen and MP Hampton, *A Legislature for Hire: The Capture of the State in Jersey’s Offshore Finance Centre*, in MP Hampton and JP Abbott (Eds), *Offshore Finance Centres and Tax Havens: The Rise of Global Capital* (Palgrave, 1999), Chap 7.

<sup>83</sup> States of Guernsey Constitutional Investigation Committee, fn 16 supra, paras 5.4 and 4.3.

<sup>84</sup> States of Guernsey, Constitutional Investigation Committee, fn 16 supra, para 5.4.

<sup>85</sup> See generally the entire raft of proposals in States of Guernsey Constitutional Investigation Committee, fn 16 supra.

details : they flesh out in important ways the practical functioning of the constitutional relationship and deliver the vital objective of respecting Whitehall and insular legitimate expectations in both an operational and policy sense. Likewise the modern re-statement of the overarching constitutional relationship is an accessible, accurate and up to date version of its key features that may assist in avoiding misunderstandings, not least outside the British Isles. On the other hand it signally fails to expand on the amorphous “good government” power and the legal instruments which may be utilised when it is exercised.

The metamorphosis of the Crown Dependencies over the past thirty years, into leading international offshore financial centres, controversial business fiscal structures and closely linked special purpose vehicles exposed to external scrutiny in the EU and OECD, high profile bank collapses revealing deficiencies in banking supervision, new forms of Executive Government resulting in identifiable political leaders, the development of distinct External Relations functions armed with the imminent expansion of Entrustment in international fora, all point to the need for a Kilbrandon Mark II constitutional inquiry examining in detail all aspects of the Islands’ constitutional and administrative relationships with the UK, EU, Commonwealth and supranational bodies. The inquiry should cover the entire range of subject-matter, ruling nothing out and nothing in, including the possibility of outright independence, transition to some form of new Channel Islands Confederation on a selective or fully fledged basis (there are already instances of innovative inter-jurisdictional collaboration in financial services complaints handling, competition law and policy and relations with the EU<sup>86</sup>) and exploration of the possibilities of a re-modelled link with the EU post Brexit, itself essential to preserve their offshore status and single market access. This all assumes, of course, that the political will both in the UK Government and insular governments exists and that it would be resourced at a level that delivers a good quality process and set of substantive outcomes.

Continuing to persist with incremental, bureaucratically driven reform on key operational practices and policy issues simply fails to measure up the fundamental values of transparency, democratic accountability and public law certainty which are routinely expected in these forms of relationships in the 21<sup>st</sup> century. Accordingly the outcome of a Kilbrandon Mark II ought ideally, in the present author’s view, be encapsulated in a Crown Dependencies Constitutional Relations Act enacted at Westminster following full debate and extended to these jurisdictions by Order in Council provided Tynwald (the Isle of Man), the States Assembly (Jersey) and the States of Deliberation (Guernsey), have granted their approval following debate and majority vote. In the longer term a fundamental shift in this direction may well be the only viable reform path in terms of effectively addressing corrosive political conflict and the fundamental imperative for transparency in the conduct of the constitutional relationship.

The Crown Dependencies Constitutional Relations Act should, it is suggested, contain the following key substantive features:

- A modern statement of the general constitutional relationship including an accepted definition of the good government power and that the UK international relations responsibility must be read subject to the Act.
- A group of provisions detailing use of Entrustment and the policy areas in which it is permitted and policy areas where general Entrustment is authorised.

<sup>86</sup> See the materials cited at fn5 supra.

- Replication of the Manx practice of devolving grant of the Royal Assent, subject specified exceptions, to insular primary legislation to Lieutenant-Governors in Jersey and Guernsey.
- Placing the “how to notes” on a statutory footing and expansion of the technique into other areas where appropriate, including a general, definitive statement of the requirements of proper consultation.
- Formal recognition of the “good neighbour” and “constitutional propriety” precepts as valid constitutional principles.
- Elaboration of the status of the paramount power including formal recognition of the extent to which it has been qualified by constitutional principles in Jersey and the Isle of Man.
- Creation of a formal standing committee, including external members, for the conduct of Crown Dependencies/UK continuing policy and operational interactions including the publication of its minutes.

The above key points are not intended to be exhaustive: other statements or practices could be added, or existing provisions fleshed out, in the light of operational experience or new developments, by legislative amendment, Orders in Council or agreed Codes of Practice. The shift to a more formal legal framework would obviously lead to a loss of flexibility and generate risks of court challenges in terms of judicial review and breaches of statutory duty. This could though be addressed when optimal by use of Codes of Practice issued under statutory powers and use of a mandatory independent complaints mechanism to resolve disputes.

Some would doubtless argue that a radical shift in this direction is wholly inconsistent with deeply entrenched constitutional traditions in this nexus, with its strong preference for informality and flexibility,<sup>87</sup> and that a focus on structures simply misses the key points: that it is policy differences and absence of mutual respect which are the underlying causes of recent mis-functionings in the constitutional relationship. That is correct up to a point but structures do matter in constitutional, political and administrative interactions: a more robust, transparent framework furnishes an environment for a new start and imposes fundamental reference points, in particular the “good neighbour” and “constitutional propriety” precepts, more conducive to balanced decision-making and conflict avoidance. More fundamentally perhaps this suggested new start delivers contemporary constitutional values of transparency, democratic accountability and public law certainty which would strengthen the functioning of an increasingly re-configured relationship as the 21<sup>st</sup> century progresses.

One can only hope that the reform prospectus outlined above delivers these objectives. Because if it fails to do so we then may start to move into radically different constitutional terrain involving a fundamental break with Crown Dependency status that could involve outright independence,<sup>88</sup> a Channel Islands Confederation or complete domestic self-government and with it the removal of UK Government oversight. None of these developments would necessarily be welcomed either in Whitehall or the populations of Jersey, Guernsey and the Isle of Man. But this could realistically be the final destination on the constitutional reform journey unless some form of modern constitutional settlement along the lines suggested above is introduced and proven

<sup>87</sup> See generally on this *Le Rendu*, fn 19 *supra*, the leading study on Jersey but much of the analysis equally applicable to Guernsey and the Isle of Man.

<sup>88</sup> Independence as an option has been actively discussed in all three Crown Dependency jurisdictions, see for example the varied perspectives in: P Bailhache (Ed), *Dependency or Sovereignty: Time to Take Stock* ( Jersey and Guernsey Law Review, Ltd, 2012); and Isle of Man Government, *Second Interim Report on Future Constitutional Objectives: A Report by the Council of Ministers* (1993).

to be effective. The new constitutional relations statute suggested by the author is no “sticking plaster” solution: it is an indispensable instrument for both preserving their Crown Dependency status and enhancing its balanced, transparent and accountable operational functioning.

The suggested new constitutional structure is clearly of itself no panacea for the problem of striking the right balance between upholding traditional insular autonomy on the one hand and on the other ensuring compliance with UK political and economic interests including its international obligations. This will only be achieved, irrespective of whatever new structures or revamped operational practices are in the fullness of time implemented, if key political and bureaucratic actors approach the interactions embedded in the relationship with the requisite goodwill, co-operative ethos and preparedness to recognise the multi-dimensional legitimate interests at stake.



# ESTOPPEL BY NEGLIGENCE: DEMYSTIFICATION OF AN UNSETTLED AND UNDERDEVELOPED CONCEPT IN COMMERCIAL LAW

GORDON CHUNG\*

## ABSTRACT

In common law jurisdictions, the *nemo dat quod non habet* rule is regarded as a *prima facie* rule and the title of the innocent purchaser only prevails in very limited circumstances. While the countervailing estoppel exception has developed to afford better protection to the purchaser, the court invariably adopted a pro-owners interpretation of this exception at the expense of the rights of the buyer. For many years, there has been a lack of scholarship on estoppel by negligence, which in the author's view has become an underdeveloped doctrine devoid of practical value. Worse still, the judicial attempts to incorporate the principles of tort of negligence into the law of estoppel have generated further confusion over its true interpretation. Ultimately, this situation has led to diverse understandings of the nature and scope of a duty of care required in the estoppel context. Therefore, a re-examination of the concept of estoppel by negligence is warranted in order to give it a clearer and more modern meaning.

## INTRODUCTION

The *nemo dat quod non habet* (“*nemo dat*”) rule,<sup>1</sup> originated from the Roman law, embodies the general principle that a transferee cannot get a better title to goods than that of his transferor, whose underlying rationale is to preserve the sanctity of private ownership.<sup>2</sup> The protection accorded to the original owner is presumably justifiable, especially in the circumstance where the transfer of possession is completely involuntary and thus not made by choice of the owner.<sup>3</sup> While the *nemo dat* rule has already been given statutory effect in both England<sup>4</sup> and Hong Kong<sup>5</sup>, this inherently pro-owners rule has excited severe criticisms and is seen as “commercially inconvenient” because it fails to protect the *bona fide* purchaser.<sup>6</sup> Indeed, a stark contrast can be drawn from the civil law systems in Germany and France, where protection of innocent purchasers is considered as the *prima facie* rule and the legal title of the true owner only prevails in exceptional circumstances.<sup>7</sup> This competing approach, unlike the *nemo dat* rule, aims at protecting the “reliance of commerce in the flawless execution of contract”, albeit at the expense of the rights of the owner.<sup>8</sup> As explained by Professor Ewan McKendrick, *bona fide* purchasers are equally worthy of protection due to the necessity of “encourag[ing]

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<sup>1</sup> Translated as “no one gives who possess not”.

<sup>2</sup> See, for example, Ji-Lian Yap, “Appraising the Market Overt Exception” (2008) 3(4) JICLT 254, 255.

<sup>3</sup> Ingeborg Schwenzer, Pascal Hachem and Christopher Kee, *Global Sales and Contract Law* (Oxford University Press, 2012), p. 529 at [40.78].

<sup>4</sup> Sale of Goods Act 1979 (“SGA”), s. 21(1).

<sup>5</sup> Sale of Goods Ordinance (“SOGO”), s. 23(1).

<sup>6</sup> See, for example, Ewan McKendrick, “Sale of Goods” in Andrew Burrows (ed.), *English Private Law*, 3rd edn (Oxford University Press 2013), p. 676 at [10.24].

<sup>7</sup> Wenwen Liang, *Title and Title Conflicts in Respect of Intermediated Securities Under English Law* (Cambridge Scholars Publishing, 2013), p. 55 (citing the observation of Ewan McKendrick).

<sup>8</sup> See Schwenzer, Hachem and Kee (n 3), p. 528 at [40.69].

the free-flow of commerce”, which can only be done by creating an environment in which buyers can purchase with confidence.<sup>9</sup> Therefore, for a market to function desirably,<sup>10</sup> it is necessary to read down the scope of the *nemo dat* rule so as to accommodate a competing but equally important principle<sup>11</sup> – the security of commercial transaction.<sup>12</sup>

In view of the commercial reality, several exceptions have emerged to afford better protection to innocent purchasers, including sale by seller or buyer in possession,<sup>13</sup> sale by mercantile agent,<sup>14</sup> sale under a voidable title,<sup>15</sup> market overt<sup>16</sup> and the doctrine of estoppel.<sup>17</sup> Yet, the unpalatable truth is that both the *nemo dat* rule and its exceptions essentially operate in an all-or-nothing fashion. Although Devlin LJ in *Ingram v Little* had suggested that a preferable solution is to divide the loss between the innocent persons “in such proportion as is just in all circumstances”,<sup>18</sup> the Law Revision Committee forthrightly rejected such approach in fear that it would create “uncertainty” arising from the grant of a “wide and virtually unrestrained judicial discretion”.<sup>19</sup> Consequently, judges still confront an inherent dilemma when asked to decide which of two innocent parties is to suffer by the fraud of a third.<sup>20</sup> The task is further complicated by the fact that existing statutory provisions are highly complex to apply in practice.<sup>21</sup> The deep-rooted problem is that, on many occasions, the contemporary court gave supremacy to private ownership by interpreting, especially, the estoppel exception at the blatant expense of the security of commercial transaction.<sup>22</sup> Specifically, estoppel by negligence has remained an underdeveloped concept of uncertain ambit, operating in greater favour of the original owner. To resolve this long-existing doubt, this article will begin with a close examination of estoppel by negligence with reference to the case of *Moorgate Mercantile Co. Ltd. v Twitchings*, which has generated considerable confusion in this area of law, and then propose a “categorical approach” in order to clarify its ambit.

## THE ESTOPPEL BY NEGLIGENCE EXCEPTION – A THEORETICAL SHIELD TO *BONA FIDE* PURCHASER

An early attempt to lessen the *nemo dat* rule was made by Ashhurst J in the case of *Lickbarrow v Mason*, where he propounded that “[w]henver one of two innocent persons must suffer by the acts of a third, *he who has enabled such a third person to occasion*

<sup>9</sup> See Schwenzer, Hachem and Kee (n 3), p. 528 at [40.69].

<sup>10</sup> See Schwenzer, Hachem and Kee (n 3), p. 528 at [40.73].

<sup>11</sup> *Bishopsgate Motor Finance Corp. Ltd v Transport Brakes Ltd* [1949] 1 KB 322, 336–337 (per Lord Denning).

<sup>12</sup> Ken Kanjian, “The Nemo Dat Rule and Estoppel by Representation and Estoppel by Negligence – *Moorgate Mercantile Co. Ltd. v Twitchings*” (1979) 8 Sydney L. Rev. 698, 698.

<sup>13</sup> SGA, ss. 25(1) and 25(2); SOGO, ss. 27(1) and 27(2).

<sup>14</sup> SGA, s. 24. See Factors Ordinance, s. 2; SOGO, s. 23(2).

<sup>15</sup> SGA, s. 23; SOGO, s. 25.

<sup>16</sup> SGA, s. 22 (although the market overt exception was already abolished in the England); SOGO, s. 24.

<sup>17</sup> SGA, s. 21(1); SOGO, s. 23(1).

<sup>18</sup> [1961] 1 QB 31 at 73 (“... If it be pure misfortune, the loss should be borne equally; if the fault or imprudence of either party has caused or contributed to the loss, it should be borne by that party in the whole or in the greater part”). See also Eric Baskind, Greg Osborne and Lee Roach, *Commercial Law*, 2nd edn (Oxford University Press, 2016), p. 267.

<sup>19</sup> Aubrey L. Diamond, “Law Reform Committee, Twelfth Report on the Transfer of Title to Chattels” (1966) 29 Mod. L. Rev. 413, 414.

<sup>20</sup> *Shaw v Commissioner of Metropolitan Police* [1987] 1 WLR 1332 (per Lord Justice Lloyd).

<sup>21</sup> Patrick S. Atiyah et al., *Atiyah’s Sale of Goods*, 12th edn (Harlow: Pearson, 2010), p. 401. See also Cliona Kelly, “Losing Nemo? Reform of the Nemo Dat Rule in Ireland” in Eoin O’Dell and Geoffrey Shannon (eds.), *Law and Practice: Essays on Reform* (Dublin: Clarus Press, 2008); McKendrick (n 6), p. 678 at [10.25].

<sup>22</sup> J.K. Macleod, *Consumer Sales Law: The Law Relating to Consumer Sales and Financing of Goods*, 2nd edn (Routledge-Cavendish, 2007), p. 709 at [21.07].

the loss must sustain it”.<sup>23</sup> Ashhurst J’s dictum, known as the “facilitation theory”, has excited severe criticisms for being too wide because it operates harshly against the careless and imprudent owner of goods.<sup>24</sup> Although Ashhurst J’s overly broad formulation has not been well endorsed,<sup>25</sup> the essential ideas articulated by him forms the basis for the estoppel exception in commercial law.<sup>26</sup>

Today, Ashhurst J’s “facilitation theory” is reformulated in section 21(1) of the SGA, which states that “[t]he buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller’s authority to sell”.<sup>27</sup> This provision – dubbed “title-estoppel” – serves to deprive the original owner of his title and, by operation of law, vest it in the *bona fide* purchaser.<sup>28</sup> Yet, despite this judicial recognition of the estoppel exception, a close reading of English case law reveals that this exception has been interpreted in an invariably narrow manner.<sup>29</sup> Worse still, the radically different judicial interpretations of “negligence” in the estoppel context have put this area of law into a state of uncertainty. Consequently, estoppel by negligence is still an underdeveloped legal concept in modern commercial law. Without the court’s attempts to clarify the ambit and applicability of this concept, it merely acts as a theoretical shield to *bona fide* purchasers devoid of any practical value.

#### THE DICHOTOMY BETWEEN “REPRESENTATION” APPROACH AND “TORT-BASED” APPROACH IN ESTOPPEL CASES

The starting point of the discussion must be the nature of estoppel by negligence. Most fundamentally, the word “estoppel” derives from the French *estoupail* or a *variation*, which refers to placing a halt on the imbalance of the situation.<sup>30</sup> In common law jurisdictions, estoppel is a legal doctrine recognised both at law and in equity in various forms. It is a “principle of justice and of equity”<sup>31</sup> aimed at protecting a party who suffers detriment as a result of the other party’s act that is capable of inducing an expectation.<sup>32</sup> The recognised proposition of an estoppel by representation was well articulated by Brett J in the case of *Carr v. London & North Western Ry. Co.*,

“[i]f a man, whatever his real meaning may be, *so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts*, and that it was a true representation, and that the latter was intended to act upon it in a particular way, and he

<sup>23</sup> (1787) 2 Term Rep 63 at 70. See also a statement to the similar effect in the often-cited U.S. case of *Root v. French* (N.Y.), 13 Wend. 570 at 572 (*per* Savage C.J.): “[h]e shall suffer who by his indiscretion has enabled such third person to commit the fraud”.

<sup>24</sup> P. Feltham, D. Hochberg and T. Leech, *Spencer Bower the Law Relating to Estoppel by Representation*, 4th edn (London: LexisNexis, 2004), p. 59 at [III. 5.1].

<sup>25</sup> See, for example, *Mercantile Bank of India Ltd. v Central Bank of India Ltd.* [1938] AC 287 at 298; *Sheik Ali Ahmend Al-Thani v Bradshaw & Webb (Sales) Ltd* (Unreported, Queens Bench Division, 30 March 1988).

<sup>26</sup> Dilan Thampapillai, “Transfer of Property” in Dilan Thampapillai et al. (eds.), *Australian Commercial Law* (Cambridge University Press, 2015), p. 79.

<sup>27</sup> SGA, s. 21(1) (emphasis added). For Hong Kong, see SOGO, s. 23(1).

<sup>28</sup> David Crystal-Kirk, “Innocent Purchaser Protection” (1980) 14 Law Tchr. 104, 106.

<sup>29</sup> Sales Law Review Group, “Report on the Legislation governing the Sale of Goods and Supply of Services” (2011) The Stationery Office, Dublin, 245; Louise Gullifer, “Title Conflicts: Nemo Dat and its Exceptions” in Michael Bridge et al., *The Law of Personal Property* (London: Sweet and Maxwell, 2013), at [13–040]; Angela Foster, “Sale by a Non-Owner: Striking a Fair Balance between the Rights of the True Owner and a Buyer in Good Faith” (2004) 9(2) Cov LJ 1, 4.

<sup>30</sup> Lai Oshitokunbo Oshisanya, *An Almanac of Contemporary Judicial Restatements: with Commentaries* (Spectrum, 2008), p. 199.

<sup>31</sup> *Industrial & Commercial Realty Co. Ltd v Merchant Credit Pte Ltd* [1980] 1 MLJ 208 (Justice Choor Singh quoted Lord Denning, *The Discipline of the Law* (London: Butterworth, 1979), p. 271).

<sup>32</sup> Oshisanya (n 30), p. 199.

with such belief does act in that way to his damage, the first is estopped from denying that the facts were as represented”.<sup>33</sup>

It is apparent that Brett J’s dictum, in virtue of the generality of its formulation, applies with equal force to both positive and negative conduct. In other words, an estoppel may arise out of words or conduct, intentional or negligent.<sup>34</sup> Therefore, following Brett J’s dictum, an estoppel by negligence may arise if the true owner of goods by conduct of “culpable negligence”<sup>35</sup> has led the purchaser into the belief that the seller is entitled to pass title.<sup>36</sup> In such cases, estoppel by negligence is often regarded as a subdivision of estoppel by representation, based essentially on passive conduct<sup>37</sup> or a failure to act.<sup>38</sup> Although several commentators took the view that there should be no such nuance in terminology,<sup>39</sup> there appears to be consensus that omission or silence *per se* may in some circumstances have the same consequences as an expressed representation.<sup>40</sup> The traditional approach as to what amounts to “negligence” in the estoppel context was laid down in *Bell v Marsh*, where it was stated that a true owner may be estopped from asserting his title if he has acted carelessly on the basis that “[a] man may act so negligently that he must be deemed to have made a representation, which in fact he did not make . . .”.<sup>41</sup> A close reading of this statement indicates that “negligence” in the estoppel context is primarily characterised as a “species of representation”.<sup>42</sup> It follows that an estoppel claim will have a real prospect of success if the negligent conduct in question amounts to a representation that the seller has authority to sell.<sup>43</sup> Unfortunately, this, as I put it, “representation” approach to establishing an estoppel by negligence has found limited application in modern commercial cases.<sup>44</sup>

To make matters worse, the contemporary courts’ tendency to incorporate elements of the tort of negligence into the law of estoppel has added much more confusions to this already troubled context.<sup>45</sup> Particularly, a divergent view of the meaning of “negligence” was expressed by Lord Wright in the case of *Mercantile Bank of India Ltd v Central Bank of India Ltd*,<sup>46</sup> where he identified three prerequisites for establishing an estoppel by negligence:

<sup>33</sup> (1875) L.R. 10 C.P. 307 at 317 (emphasis added). See also *W. Malcolm McKay Co. v British American Co* (1923) SCR 335 (per Justice Idington).

<sup>34</sup> J. Walter Jones, *The Position And Rights Of A Bona Fide Purchaser For Value Of Goods Improperly Obtained* (Cambridge: Cambridge University Press, 1921), p. 54.

<sup>35</sup> Jones (n 34).

<sup>36</sup> Judith Sihombing, *Goods: Sales and Securities*, 3rd edn (Hong Kong University Press, 1997), p. 67 at [3.8.2].

<sup>37</sup> Sean Wilken, *The Law of Waiver, Variation and Estoppel*, 2nd edn (Oxford University Press, 2002), p. 216 at [9.149].

<sup>38</sup> Barry C. Crown, “Case of the Twice Sold Caterpillar” (1991) *Sing. J. Legal Stud.* 197, 200.

<sup>39</sup> Ewan McKendrick (ed.), *Goode on Commercial Law*, 4th edn (London: Penguin, 2010), p. 452 (suggested that the mere fact that a man might by suitable means have prevented the other from disposing of the good, but remained silent, is insufficient to invoke the doctrine of estoppel).

<sup>40</sup> E. Peel (ed.), *Treitel’s Law of Contract*, 12th edn (London: Sweet and Maxwell, 2007), pp. 427–429. See also *Matthews v Doctrieve Corporation Pty Ltd* (2003) 59 IPR 155; *Thompson v Palmer* (1938) 49 CLR 507 at 547 (per Dixon J); *With v O’Flanagan* [1936] Ch 575.

<sup>41</sup> [1903] 1 Ch. 528, 541 (per Collins MR).

<sup>42</sup> Kanjian (n 12) 701.

<sup>43</sup> Kanjian (n 12) 701.

<sup>44</sup> *Central Newbury Car Auctions Ltd. v Unity Finance Ltd.* [1957] 1 Q.B. 371 at 389–390, 396 (both Hodson LJ and Morris LJ, while relying on a “representation” type of analysis, ruled that merely permitting the rogue to take possession of a car falls short of a representation that he had authority to sell).

<sup>45</sup> Wilken (n 37), p 217 at [9.151]; B. Geva, “Reflections on the Need to Revise the Bills of Exchange Act” (1982) 6 *Can Bus LJ* 269, 319; Barry C. Crown, “Estoppel by Negligence” (1987) 29 *Malaya L. Rev.* 299, 304; Crown (n 38) 200. See, for example, *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd and Others* [1986] 1 AC 80 at 111; *Canadian Pacific Hotels Ltd v Bank of Montreal et al* (1987) 40 DLR (4th) 385 at 421.

<sup>46</sup> *Mercantile Bank of India Ltd.* (n 25) at 299 (cited with approval a passage from *Swan v North British Australasian Co. Ltd* (1863) 2 H. & C. 175 at 182).

- (1) a duty must be owed to the person being misled either as an individual or a member of the general public;
- (2) there must be a breach of that duty; and
- (3) the breach must be the proximate or real cause of leading the person into that mistake.

Notably, on many occasions, the necessity of these three elements has been simply assumed by the court without debate.<sup>47</sup> In fact, Lord Wright's, as I put it, "tort-based" approach owed its origin to the classic statement articulated more than 100 years ago by Blackburn J, who similarly stressed the requirement of "[t]he neglect of some duty that is owed to the person led into the belief, or . . . to the general public of whom that person is one, and not merely neglect of what would be prudent in respect of the party himself".<sup>48</sup> Following this approach, the silence of a person who is under a duty to speak constitutes a breach of that duty and thus estops him from denying the "truth of assumption which by his silence he has allowed to make".<sup>49</sup> While the "tort-based" approach has gained widespread support, contemporary English courts have demonstrated a persistent reluctance to impose a burdensome obligation upon original owners to take care of their own property or to safeguard others against loss.<sup>50</sup> Unlike the Irish courts that are more amenable to recognising duty of care to avoid economic loss,<sup>51</sup> recourse to a "tort-based" analysis will invariably generate pro-owners outcomes under English law.

*The Twitchings case: inherent confusions arising from the "tort-based" approach*

The landmark case of *Moorgate Mercantile Co. Ltd. v Twitchings* ("Twitchings") has significantly influenced the development of estoppel by negligence<sup>52</sup> and clearly demonstrates that the "tort-based" approach operates within narrow confines. In the *Twitchings* case, the issue involves whether the finance company ("plaintiff"), a member of the Hire Purchase Information Ltd. ("HPI"),<sup>53</sup> has lost its title to the motor vehicle, after it failed to register its interest and the fraudulent hirer offered the vehicle for sale to the car dealer ("defendant") who was also a member of HPI. In this case, the plaintiff let a vehicle on hire purchase to the hirer and, by mistake, failed to notify the HPI of the transaction. The defendant later bought the car from the hirer after being informed by the HPI that the vehicle was not registered. But in fact, the hirer had not paid the full instalment and thus had no right to sell the vehicle. As a result, the plaintiff asserted a claim against the defendant for conversion. While the *Twitchings* case mainly concerns the law of estoppel, the most problematic aspect of the case is that the term

<sup>47</sup> See, for example, *Mercantile Bank of India Ltd.* (n 25); *Moorgate Mercantile Co. Ltd. v Twitchings* [1977] A.C. 890. See also the Singapore cases of *Industrial Resources Bhd. v United National Finance Ltd.* [1987] 1 M.L.J. 513 and *E.G. Tan & Co. (Pte) v Lim & Tan (Pte)* [1987] 2 M.L.J. 149.

<sup>48</sup> *Swan v North British Australasian Co. Ltd* (1863) 2 H. & C. 175 at 182.

<sup>49</sup> George Spencer Bower and Sir Alexander Kingcome Turner, *Estoppel by Representation*, 2nd edn (London: Butterworth, 1966), p. 69 (emphasis added).

<sup>50</sup> Atiyah (n 21), p. 372; Bonnie M. Holligan, "Protection of Ownership and Transfer of Moveables by a Non-owner in Scots Law" (2015) University of Edinburgh, 147; See Schwenzer, Hachem and Kee (n 3), p. 527 at [40.67]; John Goldring, "The Negligence of the Plaintiff in Conversion" (1977) 11 MULR 91, 111; *Twitchings* (n 47) at 925 ("[s]uch an approach illustrates the risk of creating legal duties where none were ever contemplated . . . [e]ven extreme carelessness with his own property will not preclude him from recovering it . . ."). See also *Central Newbury Car Auctions Ltd.* (n 44) at 394 (per Morris LJ) ("[I]t cannot be that ownership is lost on the basis of enduring punishment for carelessness").

<sup>51</sup> Wolfgang Faber and Brigitta Lurger (eds.), *National Reports on the Transfer of Movables in Europe: Volume 2: England and Wales, Ireland, Scotland, Cyprus* (Sellier European Law Publisher, 2008), p. 241. See also Fidelma White, *Commercial Law* (Dublin: Thomson Round Hall, 2002), Ch. 19; Bryan M.E. McMahon and William Binchy, *Law of Torts*, 3rd edn (Bloomsbury Professional, 2000), Ch. 10.

<sup>52</sup> See, for example, *Johnson Matthey v Dascorp* [2003] VSC 291; *Republic of India v India Steamship Co* [1998] AC 878; *Tradax Export S.A. v Dorada Compania Naviera S.A.* [1982] 2 Lloyd's Rep. 140.

<sup>53</sup> The HPI is an organisation established by the leading finance companies to prevent fraud in connection with hire purchase agreements.

“negligence” has been taken as a reference to the tort of negligence and the resulting complexity leads to the judges’ divergent understanding of under what circumstances a duty of care should be imposed on the original owner.<sup>54</sup>

*The Pro-Owners Interpretation of “Duty of Care”*

In the *Twitchings* case, the majority of the House of Lords (“HL”) rejected the application of estoppel by negligence on the basis that the plaintiff owed no duty of care to other dealers to register its transaction. Specific emphasis was placed on the fact that the HPI was a *voluntary* rather than *mandatory* scheme.<sup>55</sup> Simply put, the legal reasoning given by the majority was essentially “based on the elements of the tort of negligence”.<sup>56</sup> Lord Edmund-Davies, viewing it inappropriate to create “legal duties where none were ever contemplated” and to “elevate all carelessness into a tort”, held that a “legal duty not to be careless” should not be imposed on the plaintiff.<sup>57</sup> Notably, Lord Edmund-Davies not only engaged in a duty-based analysis but even established a high threshold for triggering the duty of care in the estoppel context. Likewise, Lord Russell voiced his support and further argued that a finding of duty in negligence cases would be an “unwarrantable extension of principles of estoppel or of the tort of negligence”.<sup>58</sup> A similar opinion was expressed by Lord Fraser who took an extreme view that “[a]n owner of property is entitled to be careless with it if he likes, and *even extreme carelessness with his own property will not preclude him from recovering it* from [an innocent purchaser]”,<sup>59</sup> implying that negligence or omission *per se* never deprives the true owner of proprietary protection.<sup>60</sup>

More notably, the majority’s harsh stance is primarily driven by an overriding policy consideration that the imposition of a duty of care would incentivise existing members of the HPI to resign from membership.<sup>61</sup> Particularly, the adverse, disincentive effect of ruling in favour of the *bona fide* purchaser in negligence cases is envisaged by Lord Edmund-Davies, who commented on the oddity that “a finance company which, without obligation, takes the precaution of joining H.P.I. Ltd. [should] thereby [be] placed under a higher duty than those companies who refrain from joining”.<sup>62</sup> Such invocation of public policy consideration, in fact, mirrors Geoffrey Lane LJ’s proposition raised earlier in the Court of Appeal (“CA”) that a member of the HPI is not expected to bear greater responsibilities than other non-members.<sup>63</sup> Yet, given that the *Twitchings* case purely concerns a dispute between two members of HPI, it is inappropriate to base the reasoning on the comparative responsibilities of non-members *vis-à-vis* members of HPI and this tends to confuse the real issue.<sup>64</sup> More ironically, due to the outcome of the *Twitchings* case, the rules of HPI have actually been modified to impose a contractual and/or tortious duty on members to each other.<sup>65</sup> In any event, the majority’s restrictive

<sup>54</sup> See, for example, *Crown* (n 38) 200.

<sup>55</sup> *Twitchings* (n 47) at 904.

<sup>56</sup> Judith Nicholson, “Owning and Owing in What Circumstances Will the Responsibilities of Ownership Preclude or Postpone the Assertion of the Rights of an Owner” (1988) 16 *Melb. U. L. Rev.* 784, 794.

<sup>57</sup> *Twitchings* (n 47) at 919.

<sup>58</sup> *Twitchings* (n 47) at 930.

<sup>59</sup> *Twitchings* (n 47) at 925 (emphasis added).

<sup>60</sup> Craig Rotherham, “Property and Justice” in M.H. Kramer (ed.), *Rights, Wrongs and Responsibilities* (New York: Palgrave, 2001), p. 151.

<sup>61</sup> See Kanjian (n 12) 704; Ian Fagelson, “Wrongful Sale of Hire Purchase Cars” (1977) 40 *MLR* 64, 66.

<sup>62</sup> *Twitchings* (n 47) at 919.

<sup>63</sup> *Moorgate Mercantile Co. Ltd. v Twitchings* [1976] Q.B. 225 at 252–254. See also A. V. Gill, “Title by Estoppel and H.P. Car Transactions” (1974) 9 *Irish Jurist N.S.* 223, 230.

<sup>64</sup> Gill (n 63) 230.

<sup>65</sup> See *Crystal-Kirk* (n 28) 105.

approach and undue insistence on policy considerations fails to give effect to the reasonable business expectations of *bona fide* purchasers.<sup>66</sup>

### *The Pro-Purchasers Interpretation of “Duty of Care”*

By contrast, the minority of the HL expressed a high degree of “judicial unease” at having to safeguard the careless owner against the *bona fide* purchaser.<sup>67</sup> In the *Twitchings* case, Lord Salmon took a bold step to recognise that,<sup>68</sup> despite the fact that the dispute is purely related to “economic loss”, the requisite duty of care still falls within the principle set out in the landmark case of *Donoghue v Stevenson*,<sup>69</sup> as enlarged by *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*<sup>70</sup>

“[A]ll the members of HPI are in such close business propinquity with each other that they are . . . clearly ‘neighbours’ within the meaning of that word as used by Lord Atkin”.<sup>71</sup>

Indeed, this relaxed approach to establishing a duty of care was more compatible with the majority views of Browne L.J. and Lord Denning in the CA. While Browne L.J. stated that the plaintiff presumably owed a duty to all other members of the HPI,<sup>72</sup> Lord Denning went even further to suggest that such duty extended to any person whom the plaintiff could reasonably foresee would check the documents of the HPI before entering into a transaction.<sup>73</sup> Having said that, these formulations seem to go too far and impose too onerous a burden on the original owner of goods. Moreover, their strong emphasis on the ambit of duty likely obscures the essential criteria of an estoppel such as the element of reliance.<sup>74</sup>

In particular, Lord Salmon apparently blurred the distinction between the law of estoppel and the tort of negligence, by saying that from a practical point of view it does not matter whether a third party is treated as being entitled to damages for negligence or estoppel by negligence.<sup>75</sup> Yet, this conclusion is potentially flawed and warrants careful examination. Assuming that, after the transaction that allegedly results in the estoppel operating in favour of the third party (the purchaser), the original owner sells his goods to a fourth party, the dividing line between the two concepts becomes highly relevant and two different outcomes may arise. Succeeding in estoppel transfers the owner’s title to the third party and thus the former will have no title to pass it to the fourth party. An action in tort, however, will not deprive the owner of his title so that he still retains the right to pass it to the fourth party. As we can see, Lord Salmon simply transplanted the tort of negligence to establish an estoppel by negligence without caution. Notably, even Lord Wilberforce, another dissident of the case, had serious reservations about recourse to an exclusive application of the “neighbour” principle in the context of estoppel.<sup>76</sup> In his view, the unintended consequence of Lord Salmon’s overly pro-purchasers

<sup>66</sup> Nigel P. Gravells, “‘Duty Situations’ and Policy Considerations – The Need for Business Sense” (1976) 35(2) Cambridge Law Journal 225, 225.

<sup>67</sup> *Crystal-Kirk* (n 28) 106.

<sup>68</sup> *Twitchings* (n 47) at 908.

<sup>69</sup> [1932] A.C. 562 at 580–581 (“[Y]ou must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question”).

<sup>70</sup> [1964] A.C. 465 at 524.

<sup>71</sup> *Twitchings* (n 47) at 908 (emphasis added). See further Lord Atkin in *Donoghue* (n 69) at 580–581.

<sup>72</sup> *Twitchings* (n 63) at 248.

<sup>73</sup> *Twitchings* (n 63) at 244.

<sup>74</sup> *Crown* (n 38) 202. See also *Abigail v Lapin* [1934] AC 481 PC (NSW) 504.

<sup>75</sup> *Twitchings* (n 47) at 911–912.

<sup>76</sup> *Twitchings* (n 47) at 903–904.

interpretation would be to unnecessarily widen the ambit of duty,<sup>77</sup> thereby imposing a “*universal duty* on the part of property owners to safeguard others against loss”.<sup>78</sup>

*The “middle-of-the-road” approach – a “general duty to speak” test*

Resorting to a separate line of reasoning, Lord Wilberforce made clear that ‘inaction or silence’ can give rise to an estoppel,<sup>79</sup> if there is a ‘duty to speak or act in a particular way’.<sup>80</sup> For the purpose of establishing a duty, he expounded the so-called ‘general duty to speak’ test framed in the following terms:

“[T]he test of duty is . . . whether, having regard to the situation in which the relevant transaction occurred, as known to both parties, a reasonable man, in the position of the [purchaser] of the property, would expect the ‘owner’ acting honestly and responsibly, if he claimed any title in the property, to take steps to make that claim known to, and discoverable by the [purchaser] and whether, in the fact of an omission to do so, the [purchaser] could reasonably assume that no such title was claimed”.<sup>81</sup>

Simply put, according to Lord Wilberforce’s formulation, the courts should consider whether a reasonable person would construe the original owner’s silence as a representation that he does not claim any title in the property. Two salient features of this test are worth noting:<sup>82</sup> first, it is unnecessary to establish any pre-existing legal duty to speak; and second, it must be shown that the owner knew or, at the very least, suspected that the purchaser’s belief was mistaken.<sup>83</sup>

In the *Twitchings* case itself, considering that “very great reliance to the knowledge of finance companies is placed by dealers on the operation of this system”, Lord Wilberforce found that a duty to speak exists.<sup>84</sup> His dictum reflects, as I put it, a “middle-of-the-road” solution emphasising on the presence of reliance. Accordingly, Lord Wilberforce’s approach, while framed in terms of a duty, expresses a higher esteem to the fundamental requirements of an estoppel. More importantly, this so-called “duty to speak” is generally deemed as a “lesser duty” and arises more readily.<sup>85</sup> But at the end of the day, the existence of such duty depends largely on a sufficient degree of reliance and foreseeability.<sup>86</sup> Therefore, the test, as applied by Lord Wilberforce, is an amalgam of two approaches: the “representation” approach and the “tort-based” approach.

Unfortunately, this apparently balanced approach does not sit well with the general principle of tort law laid down by Lord Diplock in the case of *Home Office v Dorset Yacht (“Dorset Yacht”)*:

“[O]missions . . . give rise to no legal liability in the . . . ommitter for loss or damage sustained by others . . . however reasonably or probably that loss or damage might have been anticipated . . . you need not warn him of a risk of physical danger to which he is about to expose himself . . .”.<sup>87</sup>

<sup>77</sup> *Twitchings* (n 47) at 903–904.

<sup>78</sup> *Twitchings* (n 47) at 904.

<sup>79</sup> *Twitchings* (n 47) at 902.

<sup>80</sup> *Twitchings* (n 47) at 903.

<sup>81</sup> *Twitchings* (n 47) at 903. This test was subsequently reformulated by Webster J in *Pacol Ltd & Ors v Trade Lines Ltd and R/I SijfIV (“The Henrik Sif”)* [1982] 1 Lloyd’s Rep 456, but has been subject to criticisms.

<sup>82</sup> Wilken (n 37), p. 173 at [9.52].

<sup>83</sup> See further *The Stolt Loyalty* [1993] 2 Lloyd’s Rep 281; *contra Spiro v Lintern* [1973] 1 WLR 1002 (CA) 1011.

<sup>84</sup> *Twitchings* (n 47) at 904.

<sup>85</sup> Sandra Annette Booyens, “The Standard Terms Governing Current Accounts in Singapore: The Customer’s Duty of Care, The Unauthorised Debit and the Allocation of Risk” (2009) National University Of Singapore 1, 103.

<sup>86</sup> Nicholson (n 56) 796.

<sup>87</sup> [1970] A.C. 1004 at 1060.



One possible criticism is that Lord Wilberforce's formula might create anomaly as it seemingly imposes liability for a mere failure to act in the circumstance where, for example, a reasonable pedestrian would anticipate a man standing nearby, who was acting honestly and responsibly, to warn him of the peril.<sup>88</sup> Apart from its apparent theoretical contradiction, Johnson J in *Leonard v Ielasi* further criticised that the test laid down by Lord Wilberforce is too narrow because it would prevent a duty from arising in cases where there are special facts known to the original owner that relate to the fraudulent seller but are outside the knowledge of the purchaser.<sup>89</sup> But other than that, Lord Wilberforce's "middle-of-the-road" approach appears to be more desirable, when compared with the approaches of other Law Lords.

### PROPOSED SOLUTION: A "CATEGORICAL" APPROACH TO ESTOPPEL BY NEGLIGENCE CASES

The foregoing discussion of the *Twitchings* case demonstrates the inherent difficulty in identifying the precise circumstances from which a duty may arise in the estoppel by negligence context<sup>90</sup> and the potential drawbacks of incorporating an analysis based on tort of negligence into the law of estoppel.<sup>91</sup> As observed by commentator Michael Bridge, the reported cases provide "no reliable affirmative guidance" on when a duty of care should be imposed.<sup>92</sup> More specifically, three criticisms can be made of adopting a "tort-based" approach in estoppel cases. First and foremost, the imposition of a duty of care runs counter to the true, ordinary meaning of section 21(1) of the SGA. Particularly, in the case of *Thomas Australia Wholesale Vehicle Trading CO Pty Ltd v Marac Finance Australia Ltd* ("*Thomas Australia*"), Kirby P delivered a strong and "persuasive"<sup>93</sup> dissenting judgment, expressing the undesirability of equating "negligence" in the estoppel context with tort of negligence:

"[i]n an area of the law where it has long been recognised that inconsistent decisions have complicated and obscured the operation of the statute . . . and where, beyond duty relationships, practices and commercial realities are changing and developing all the time, it is illegitimate . . . to bridle the statutory language by imposing the requirement of a precondition of a duty relationship which is not to be found in that language, is not necessary for its operation . . . and which frustrates the purpose of the statute and its beneficial operation in the just resolution of the claims of innocent purchasers who will otherwise suffer by virtue of careless conduct on the part of the owner".<sup>94</sup>

Simply put, Kirby P forthrightly pointed out that there is nothing contained within the statute that demands the requirement of a duty of care in estoppel cases.<sup>95</sup> Accordingly, imposing a duty of care amounts to an unwarranted diminution in the

<sup>88</sup> Jason W. Neyers, "A Coherent Law of Estoppel?" (2003) 2 J. Obligations & Remedies 25, 37.

<sup>89</sup> (1988) 46 SASR 495 at 515.

<sup>90</sup> Notably, judges who declined to impose a duty include Geoffrey Lane LJ (CA), Lord Edmund-Davies (HL), Lord Fraser (HL) and Lord Russell (HL), whereas judges who found an existence of duty of care include Lord Denning (CA), Browne L.J. (CA), Lord Salmon (HL) and Lord Wilberforce (HL). See also Nicholson (n 56) 796.

<sup>91</sup> Crown (n 38) 200–203.

<sup>92</sup> Michael Bridge (ed.), *Benjamin's Sale of Goods*, 8th ed. (London: Sweet & Maxwell, 2010) at [7–016]. cf *Central Newbury Car Auctions Ltd.* (n 44) at 385 (Lord Denning broadly interpreted the duty as being owed to the whole world).

<sup>93</sup> *Leonard* (n 89) at 507 (Millhouse J viewed Kirby P's judgment as persuasive and considered that the court should follow his approach if necessary).

<sup>94</sup> (1985) 3 NSWLR 452 at 459 (emphasis added). See also D.W. Greig, Neil Gunningham and Gordon J. Borrie, *Commercial Law* (Sydney: Butterworths, 1988), p. 151 at [2.076].

<sup>95</sup> *Thomas Australia* (n 94).

beneficial protection offered by the statutory provision.<sup>96</sup> It tends to encrust section 21(1) of the SGA with meanings which are “unnatural, artificial or exceptional”.<sup>97</sup> Indeed, one should bear in mind that estoppel by negligence is not a separate legal concept but merely a variety of estoppel by representation.<sup>98</sup> In any event, the rights of the negligent owner must be balanced against the considerations of “conduct” specified in section 21(1) of the SGA.<sup>99</sup> Second, if elements of tort of negligence are relevant, the contemporary courts’ reluctance to extend the instances where a duty of care arises in tort cases may further extend to estoppel by negligence cases.<sup>100</sup> In fact, based on the majority’s judgment in the *Twitchings* case, the establishment of a duty of care has already been made “somewhat more onerous” in comparison with Lord Atkin’s “neighbour” principle.<sup>101</sup> Although the true owner of goods is not expected to be an insurer of the purchaser, he is not entitled to be “as careless with the goods” as he wishes and still retains title.<sup>102</sup> It follows that a duty of care, if required, must not be rendered too onerous. Unfortunately, the stringency of the majority’s approach has placed *bona fide* purchasers in an extremely disadvantaged position.<sup>103</sup> Last but not least, the “tort-based” approach tends to obscure the essential notion of “inducement” and “reliance”, which is the triggering condition of the doctrine of estoppel.<sup>104</sup> Recourse to the tort of negligence will only create further confusion in the law of estoppel.

Due to the difficulties and dangers in using a tort-based analysis<sup>105</sup> to formulate an all-encompassing test,<sup>106</sup> the court should instead introduce, at least, two groups of owner whose negligence or failure to act is capable of triggering the operative effect of estoppel by negligence:

- (i) owner who was in a pre-existing relationship with the *bona fide* purchaser;
- (ii) owner who failed to exercise such reasonable care that, in the light of the surrounding circumstances, has enabled the *bona fide* purchaser to reasonably infer a representation.

Support for this, as I put it, “categorical approach” can be gleaned from Sir Rupert Cross’s apparent unease with resting an estoppel claim on a tort-based analysis:

“It is possible that when the cases and underlying principles come to be authoritatively reviewed it will be found that *the requirements of duty of care and proof of carelessness can be dispensed with*. All that is necessary . . . is *proof of intentional words, acts or conduct, which can reasonably be construed as a representation by the representor to the representee who need not be in direct relationship*”.<sup>107</sup>

<sup>96</sup> *Thomas Australia* (n 94).

<sup>97</sup> See *Gamer’s Motor Centre (Newcastle) Pty Ltd v Natwest Wholesale Australia Pty Ltd* [1985] 3 N.S. W.L.R. 475 at 479 (per Kirby P).

<sup>98</sup> See Kenneth Coleridge Turvey Sutton, *Sales and Consumer Law*, 4th edn (Australia: Thomson Reuters, 1995).

<sup>99</sup> See Sutton (n 98).

<sup>100</sup> Crown (n 38) 201.

<sup>101</sup> Kanjian (n 12) 705. The reasoning in *Twitchings* was followed and further expanded upon in the subsequent case of *Cadogan Finance Ltd v. Keith Lavery and Peter Murray Fox* [1982] Com LR 248 (QB). See also Baskind, Osborne and Roach (n 18), p. 275.

<sup>102</sup> See Sutton (n 98).

<sup>103</sup> Craig Rotherham, *Proprietary Remedies in Context: A Study in the Judicial Redistribution of Property Rights* (Oxford: Hart Publishing, 2002), p. 73.

<sup>104</sup> Crown (n 38) 202.

<sup>105</sup> Crown (n 45) 304.

<sup>106</sup> Neyers (n 88) 38.

<sup>107</sup> Sir Rupert Cross and Colin Tapper (eds.), *Cross on Evidence*, 6th edn (London: Butterworth, 1985), p. 94 (emphasis added). See also Crown (n 38) 200.

Cross's proposition is further reconcilable with Kirby P's view that estoppel by negligence "can be [more simply and better] explained by reference to pre-existing law [of estoppel]".<sup>108</sup> In a similar fashion, Professor Neyers also suggested unpacking those "silent defendant[s]" into different categories,<sup>109</sup> in order to avoid interpretative confusions arising from the diverse understandings of how a duty of care can be established. While category (i) primarily covers the situation where there was, for instance, an established relationship of "contract or agency",<sup>110</sup> category (ii) is directly relevant to the *Twitchings* case and thus merits special attention. Under the latter category, the scope of estoppel by negligence is broadened to cover cases where the original owner "failed to exercise reasonable care" in respect of his goods and such negligence, omission or silence has misled an innocent purchaser, who has exercised reasonable care in buying the goods and has acted in good faith.<sup>111</sup> Yet, despite this apparently pro-purchaser formulation, the onus should be on the purchaser to show his reasonable care, good faith and the owner's negligence.<sup>112</sup> Based on category (ii), it is therefore possible to rationalise the minority's decision in the *Twitchings* case without referring to the concept of duty of care.<sup>113</sup> While, arguably, in some estoppel by negligence cases the true owner did not know that the purchaser would act upon its negligence, category (ii) bypasses this difficulty by appealing to a predominantly objective test.<sup>114</sup> The test is, in essence, how a reasonable person in the buyer's position would interpret the original owner's omission or silence<sup>115</sup> and whether the owner should have known of the buyer's assumption.<sup>116</sup> The degree of reliance placed by the purchaser thus becomes highly critical to this evaluative exercise. In application, the defendant in the *Twitchings* case drew a false but reasonable inference from, coupled with the plaintiff's failure to register its interest in the motor vehicle, the information supplied by the HPI.<sup>117</sup> The reasonableness of the defendant's inference is particularly evident from the fact that almost 98 percent of the English finance companies already registered their interests in vehicles at the time.<sup>118</sup> Therefore, the plaintiff's silence in the *Twitchings* case is considered "more eloquent than words" because the surrounding circumstances give silence its meaning.<sup>119</sup> Apparently, the plaintiff has so conducted itself that a reasonable man would believe that the plaintiff intended its own negligence (and thus its representation that the car was not subject to any hire purchase agreement) to be acted upon.

To reinforce the above reasoning, a similar analysis can also be applied to explain the ruling in *Syarikat Batu Sinar Sdn Bhd. & Ors v. UMBC Finance Bhd & Ors* ("Syarikat") – a Malaysian case sharing very similar facts with the *Moorgate* case – where the High Court ruled that the failure (or negligence) on part of the UMBC staff to register its ownership claim on the tractor *created the legitimate expectation operating in the mind of a reasonable buyer or constituted the necessary representation to a subsequent unknowing*

<sup>108</sup> *Thomas Australia* (n 94).

<sup>109</sup> Neyers (n 88) 38–39.

<sup>110</sup> See *Mercantile Bank of India Ltd.* (n 25) at 299 (per Lord Wright).

<sup>111</sup> Similar support can be found in J. Farrar and M. O'Regan, "Reform of Personal Property Security Law" (Wellington, Law Commission, 1988), p. 21; Ontario Law Reform Commission, "Report on Sale of Goods" (Vol. II 1979), p. 311.

<sup>112</sup> Ontario Law Reform Commission (n 111), p. 311.

<sup>113</sup> See Duncan Sheehan, *The Principles of Personal Property Law* (Hart Publishing, 2011).

<sup>114</sup> Wilken (n 37), p. 217 at [9.151], cf *Twitchings* (n 47) 903, where Lord Wilberforce preferred a predominantly objective test, albeit framed in terms of "duty".

<sup>115</sup> Crown (n 38) 200.

<sup>116</sup> See *Lorimer v State Bank of New South Wales* (1991) (unreported) 53 at 69.

<sup>117</sup> Wilken (n 37), p. 217 at [9.151].

<sup>118</sup> [1975] 3 All E.R. 314 at 318, 329 (per Lord Denning and Geoffrey Lane L.J.); Goldring (n 50) 111.

<sup>119</sup> See *Orion Finance Ltd. v D. Williams & Company Ltd* [1997] EWCA Civ 1 at 79 (per Evans J).

buyer regarding the status of the vehicle at the time of the purchase.<sup>120</sup> In the *Syarikat* case itself, the adverse consequence towards the *bona fide* purchaser was found to be reasonably foreseeable, particularly in light of the fact that all buyers of secondhand cars in West Malaysia have heavily depended on the absence of any registered endorsement of ownership claim in the registration card as a “green light” to deal with sellers who are the sole registered owner.<sup>121</sup> Hence, Peh Swee Chin J held that the UMBC was precluded from denying the dealer’s authority to sell, on the basis of estoppel by negligence.<sup>122</sup> Based on the above analysis, the *Syarikat* case clearly falls within category (ii) and thus serves to exemplify its applicability in negligence cases.

In any event, one should bear in mind that the doctrine of estoppel is a “flexible principle” by which justice is done according to the circumstances of each individual case.<sup>123</sup> In other words, the circumstances in which an estoppel by negligence may operate are not strictly limited to categories (i) and (ii). But on balance, the proposed “categorical approach” would provide clearer guidance to judges and likely afford better protection to *bona fide* purchasers, thereby striking a fairer balance between the sanctity of private ownership and the protection of commercial transactions.

## CONCLUSION

In English law, the *nemo dat* rule is an inherently pro-owner rule, whose applicability must be confined to appropriate circumstances in order to better balance the interests between the original owner and the *bona fide* purchaser. While the countervailing estoppel exception was invented to mitigate the harshness of the *nemo dat* rule, the courts have continuously displayed a judicial reluctance to deviate from the rule, except in the most extreme circumstances. More problematically, the principles of tort of negligence have been consistently borrowed by the courts in deciding most, if not all, negligence cases, resulting in the diverse interpretations of the extent and nature of a duty of care in the estoppel context.

Notably, all the eight judges in the *Twitchings* case expressed conflicting understandings of the requirement of a duty of care. Geoffrey Lane LJ, Lords Edmund-Davies, Fraser and Russell preferred a higher threshold to trigger the duty of care in favour of the property owner, whereas Browne L.J., Lords Denning and Salmon, expressing deep unease at having to over protect the negligent owner, adopted a relatively pro-purchasers interpretation. Furthermore, Lord Wilberforce added to this confusion by formulating a “middle-of-the-road” solution, which has been criticised as narrow and seemingly contradicts the general tort law principle enshrined in the *Dorset Yacht* case. At the end of the day, the incorporation of tort of negligence into estoppel cases seemingly frustrates the true meaning of section 21(1) of the SGA. It will only create an additional barrier to *bona fide* purchasers and potentially undermine the essential elements of “reliance” and “inducement” in the law of estoppel. Estoppel by negligence, due to its theoretical uncertainty and narrow operative scope, has already become a forgotten concept in commercial litigations and its existence should be justified on a more solid legal basis.

<sup>120</sup> (1990) 3 MLJ 468 (emphasis added).

<sup>121</sup> *Syarikat* (n 120).

<sup>122</sup> Although the High Court’s pro-purchaser interpretation partially grew out of the need to develop Malaysian common law in a way that is compatible with “local circumstances” or “local inhabitants”, *Syarikat* (n 120) at 474. See also Elham Balavar, “The Doctrine of Nemo Dat Quod Non Habet and Its Exceptions” (2014) 4(5) J. Appl. Environ. Biol. Sci. 7, 9.

<sup>123</sup> See *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331; *Teh Poh Wah v Sereban Securities Sdn Bhd* [1996] 1 MLJ 701.

In view of the obvious difficulties in formulating an all-encompassing test framed in terms of a duty of care, the proposed “categorical approach” is a preferable solution as it can better avoid such interpretative confusions and thereby generate more balanced outcomes in estoppel by negligence cases. While category (i) encompasses cases where there was an established relationship between the true owner and the *bona fide* purchaser, category (ii) extends to cover cases where the owner failed to exercise reasonable care regarding his goods and his failure to act has misled the purchaser to reasonably infer a representation regarding the status of the goods in question. The latter category, by appealing to the use of a predominantly objective test and emphasising the notion of reliance, can better rationalise the minority’s judgment in the *Twitchings* case. In short, the proposed “categorical approach” will likely give clearer guidelines to judges and avoid over-protecting those negligent owners in future estoppel cases.



## CASE NOTES

*The address for submission of case notes is given at the beginning of this issue*

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### THE PRESUMPTION THAT AN ACT OF PARLIAMENT DOES NOT BIND THE CROWN

*R (on the application of Black) v. Secretary of State for Justice* [2017] UKSC 81  
(Lady Hale, Lord Mance, Lord Kerr, Lord Hughes, Lord Lloyd-Jones)

#### INTRODUCTION

In the recent Supreme Court case *R (on the application of Black) v Secretary of State for Justice*<sup>1</sup>, the Court had the opportunity to re-consider the presumption that an Act of Parliament does not bind the Crown (“the Presumption” hereafter). After reviewing the arguments for and against changing the Presumption, the Court unanimously ruled that the Presumption remained unchanged and applicable. Nevertheless, the Court also unanimously agreed that there was a need for the Parliament to consider whether the Presumption should be abolished or reversed.

This article argues that the Presumption is already very certain and clear. Lady Hale’s judicial reasoning has added more certainty to the Presumption. Also, it will be argued that there is no need to reform the Presumption. It will be suggested that perceiving the Presumption as a “presumption” is rather conceptually misleading. It would have been conceptually clearer to understand it as simply a well-known “rule of drafting” acknowledged by the Courts and the Legislature, of which the Courts will construe statutes accordingly.

#### FACTS

In *Black*, the Claimant was a prisoner who wanted to report smoking inside the prison. He sought to rely on the Health Act 2006 (“the Act”) which prohibits smoking in public premises. The Secretary of State replied to the Claimant that the Health Act 2006 did not bind the Crown at all.<sup>2</sup> Hence, the Crown had no duty to ensure that there was no smoking in the prison. Even if the Crown had previously ensured its premises were smoke-free, it was done voluntarily, rather than as a result of being bound by the Act.<sup>3</sup>

The Supreme Court unanimously agreed that the Crown was not bound. The Court reiterated the long-standing rule of statutory construction that there is a presumption that Acts of Parliament only bind the Crown by express words or necessary implication.

<sup>1</sup> [2017] UKSC 81, [2017] All ER (D) 104.

<sup>2</sup> *Ibid* [4].

<sup>3</sup> *Ibid* [40], [49].

### *What is the “Presumption”?*

Whenever an Act of Parliament imposes an obligation<sup>4</sup>, the Presumption will be triggered so that the Crown is not bound by that obligation, unless there has been (1) express wording that the Crown is bound or (2) by necessary implication.<sup>5</sup> The Presumption has nothing to do with Crown immunity, but is simply “a rule of statutory interpretation”.<sup>6</sup>

Lady Hale described this Presumption as a “classic and conventional statement of principle”<sup>7</sup>, which is “so well established in modern time that many, many statutes will have been drafted and passed on the basis that the Crown is not bound except by express words or necessary implication”<sup>8</sup>. The Courts have long recognised this Presumption, as can be seen in a Privy Council case in 1947 and a House of Lords case in 1990.<sup>9</sup> Hence, this rule is not novel and is well-established. In particular, in order for a statute to bind the Crown, the Court would expect to see an express provision “dealing expressly with exactly how and to what extent the Act is to apply to the Crown”, such as the following:<sup>10</sup>

#### 48. Application to Crown

(1) Subject to the provisions of this section, the provisions of this Part, except sections 21 to 25 and 33 to 42, and of regulations made under this Part shall bind the Crown.

(The remaining of the section is omitted.)<sup>11</sup>

In relation to “necessary implication”, the Court will only consider the Crown to be bound, in the absence of express wording, if “one very important purpose of the Act would have been frustrated”.<sup>12</sup> For example, the Court has to interpret the Act to be compatible with the obligations under the European Convention on Human Rights.<sup>13</sup> The Court expressly stresses that “it is not enough that it is intended for the public good or that it would be even more beneficial for the public if the Crown were bound”.<sup>14</sup>

### *Arguments in favour the Claimant*

The Claimant has argued that the Presumption should be changed or reversed, because the Presumption has long subject to academic criticisms.<sup>15</sup> A reversal would mean that “the Crown is bound unless expressly excluded from some or all of the Act’s provisions”.<sup>16</sup> In arguing in favour of having a reversal, it has been suggested that such Presumption offends the rule of law, and it has also generated uncertainty.<sup>17</sup>

The Claimant further argues that the wording of the Health Act does suggest that the Crown was bound in ensuring prisons as smoke-free. In particular, section 3(2) of the Health Act expressly makes reference to prisons and hence it can be argued that “the ban is intended to apply to government premises”.<sup>18</sup>

<sup>4</sup> Office of the Parliamentary Counsel, *Crown application: Guidance for members of the Office of the Parliamentary Counsel (OPC) on Crown application* (January 2016) <<https://www.gov.uk/government/publications/crown-application--2>>.

<sup>5</sup> *Black* (n 1) [50].

<sup>6</sup> *Ibid* [36(2)].

<sup>7</sup> *Ibid* [22].

<sup>8</sup> *Ibid* [35].

<sup>9</sup> *Ibid* [22], [23], [25].

<sup>10</sup> *Ibid* [44].

<sup>11</sup> Health and Safety at Work etc. Act 1974.

<sup>12</sup> *Black* (n 1) [36(6)].

<sup>13</sup> *Ibid*.

<sup>14</sup> *Ibid* [36(5)].

<sup>15</sup> *Ibid* [33].

<sup>16</sup> *Ibid* [34].

<sup>17</sup> *Ibid* [33], [34].

<sup>18</sup> *Ibid* [42].



In terms of policy and considering the purpose of the Act, “prisoners in public prisons are in just as much need of protection from second-hand smoke”.<sup>19</sup> Even Her Majesty’s Prison Service has once misbelieved that the ban was legally binding to them.<sup>20</sup>

Despite all these arguments, the Court unanimously held that the Presumption applies. Hence, the Crown is not bound.

## COMMENTARY

This commentary section will be divided into two parts. The first part will highlight that Lady Hale’s judicial reasoning has made the concept of “necessary implication” more certain. The second part will respond to Lady Hale’s urge for reform.<sup>21</sup>

### *Lady Hale’s judicial reasoning fosters better understanding of the Presumption and the concept of “necessary implication”*

It is suggested that Lady Hale’s judicial reasoning fosters proper understanding of the doctrine and has increased the certainty of what the concept of “necessary implication” entails. It has been previously criticized that the concept of “necessary implication” is “not self-explanatory”<sup>22</sup> and “the scope of the necessary implication test is not wholly certain”<sup>23</sup>.

Firstly, Lady Hale clearly places paramount consideration on whether there has been express wording of “the Crown is bound”. In particular, it is noteworthy that Lady Hale explains in considerable length that other Acts contain express wording of “the Crown is bound”.<sup>24</sup> Most importantly, Lady Hale emphasizes that Acts of Parliament have been drafted and passed based on the Presumption. Hence, it is submitted that for future cases, unless there are such express wording, it is already certain the Crown is not bound. The “necessary implication” ground is therefore mostly irrelevant.

Secondly, there will only be “necessary implication” if a very important purpose will be frustrated by not binding the Crown.<sup>25</sup> Lady Hale’s reasoning means that the threshold is so high that the Act has to be rendered unworkable in order to trigger this ground.<sup>26</sup> Alternatively, such ground can only be triggered if there are issues on compatibility with the ECHR.<sup>27</sup>

Lady Hale’s reasoning adds certainty to the concept of “necessary implication”, because she has considered “whether, in the light of the words used, their context and the purpose of the legislation, Parliament must have meant the Crown to be bound”.<sup>28</sup> Despite Lady Hale has acknowledged that the wording of Health Act does seem to indicate the Crown is bound, she still concludes that the Crown is not bound. This enhances certainty, because this reasoning means that the “wording, context, and the purpose” themselves alone will not trigger any “necessary implication”. This reinforces that there must be something express to the effect of “the Crown is bound”. Hence, for

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid* [3].

<sup>21</sup> *Ibid* [35].

<sup>22</sup> *Crown Application* (n 4) at 1.17.

<sup>23</sup> *Ibid* at 1.22.

<sup>24</sup> *Black* (n 1) [43]-[48].

<sup>25</sup> *Ibid* [36(6)].

<sup>26</sup> *Ibid* [49].

<sup>27</sup> *Ibid* [36(6)].

<sup>28</sup> *Ibid* [37].

future cases, it is suggested that there will be no room for argument on the “wording, context and purpose” so long as there is no such express wording to the effect “the Crown is bound”.

To sum up, as said, the legal question is rendered much clearer by Lady Hale’s approach. The first question is whether there has been any express wording. The second question is whether the Act would be rendered unworkable if the Crown is not bound, or there are human rights compatibility issues. The answers to both questions should be a quick one, because the first question is a simple question of fact of yes-or-no, and the second question has a very high threshold.

*Is there a need to reform the Presumption?*

It has been argued that the Presumption is already very certain and clear. Hence, any proposal of reform is not worthwhile, and will be argued against below. In particular, Lady Hale has discussed two reform proposals.<sup>29</sup>

*Against the first reform proposal*

One proposal is to reverse the Presumption, so that unless an Act of Parliament expressly excludes the Crown, the Crown will be presumed to be bound.<sup>30</sup> The two advantages of this proposal are that (1) “this would have the merit of clarity and certainty” and (2) “it would force the Crown to think carefully about whether and to what extent it should be bound and to justify any exemption”.<sup>31</sup>

It is argued that this proposal is not worthwhile. In relation to the first advantage, it has been argued above that the current Presumption itself is clear enough. The paramount consideration is whether there has been express wording to the effect of “the Crown is bound”. Lady Hale’s reasoning and explanations have also contributed to the certainty of “necessary implication”. Moreover, had there been a reversed Presumption, there will mostly likely still be a corresponding reversed “necessary implication” ground in making the Crown not bound, if doing so would make the statute unworkable.

The only apparent advantage of the reversed Presumption is that such would provide certainty to those who is not aware of the long-established Presumption. This would not justify a reversal, because it is unknown how many people do not know the existence of the rule. Hence, there is no empirical justification. Furthermore, given the Supreme Court stresses the long standing-ness of this Presumption<sup>32</sup>, together with Government’s effort on the *Guidance for members of the Office of the Parliamentary Counsel (OPC) on Crown application*<sup>33</sup>, it can be argued that this Presumption has enough publicity.

Furthermore, a reversal would mean that all the statutes, which have been drafted and passed based on the Presumption, will have to be amended accordingly. Alternatively, even if the adoption of a reversed Presumption carries with it only a prospective effect applicable only to future statutes, it is still undesirable. This is because not only will it make the situation more confusing by having two regimes, the long-standing-ness of the Presumption means that there is already sufficient clarity for the Crown itself and the public to know whether the Crown is bound.

In relation to the second advantage of having a reversed Presumption, such is untenable. There is no evidence that the current Presumption fails to force the Legislature to think whether the Crown should be bound. It can be equally argued that the current

<sup>29</sup> *Ibid* [34].

<sup>30</sup> *Ibid*.

<sup>31</sup> *Ibid*.

<sup>32</sup> *Ibid* [22].

<sup>33</sup> *Crown Application* (n 4).

Presumption, in only binding the Crown by express wording, has already forced the Legislature in doing so. To support this, it is noteworthy that a lot of everyday-relevant Acts of Parliament contain the express provision “Application to Crown”, such as the Consumer Protection Act 1987 and the Occupier’s Liability Act 1957.<sup>34</sup> For the Health Act 2006 in question, another Part of it (in relation to supervision of management and use of controlled drugs) does contain such express wording<sup>35</sup>, but by striking contrast the smoking-free Part does not. These indicate the Legislature has sufficient awareness on whether the Crown should be bound.

#### *Against the second reform proposal*

Another reform proposal is to have “a single test: what did Parliament intend? In other words, there would be no presumption either way and no requirement that any implication be ‘necessary’”.<sup>36</sup>

This proposal is unsatisfactory, because it misunderstands the logic of the Presumption. By calling it a “presumption”, it is somewhat misleading. One may easily misunderstand that it means the Legislature has not thought about this, and due to royal immunity, the Crown is presumed not to be bound.

This is not what the “presumption” is about. Instead, the Presumption is built on factual and long-established common understanding that the Legislature has borne in mind whether the Crown should be included. It is rather a “rule of drafting”<sup>37</sup> that if the Crown is not expressly included, it is excluded. This “rule of drafting” has been acknowledged by both the Legislature and the Judiciary. Hence, the Parliamentary intention already is very clear. To require the Court to draw any “proper inference” would mean the Parliament’s clear intention is not followed. It should be noted that there is no room for mistake or accidental left out of a provision “Crown is bound”.

Had one misunderstood the Presumption as meaning simply presuming the Crown is not bound irrespective of whether the Legislature has thought about this, it would have led to further erroneous conclusion that the Presumption is against the rule of law. This is because one may have wrongly thought the Presumption would mean laws are not equally applicable to the public and the Crown (e.g. due to some royal prerogatives, or Crown immunity). This is clearly wrong, because the Presumption does not exist out of some royal prerogative<sup>38</sup> or Crown immunity<sup>39</sup>. Rather, it is a reasoned decision by the legislature that the Crown is not included.

## CONCLUSION

The case of *Black* vitally reinforces the continued applicability of the Presumption. In particular, it is noteworthy that Lady Hale’s reasoning has added certainty to the functioning of the Presumption. Whilst Lady Hale has urged a consideration on whether there should be any reform on the Presumption, this article argues that the Presumption

<sup>34</sup> See s.9 of Consumer Protection Act 1987; s.6 of Occupier’s Liability Act; s.12 of Animals Act 1971; s.16 of Safety of Sports Grounds Act 1975; s.48 of Health and Safety at Work etc. Act 1974; s.44 of Building Act 1984; s.205 of Equality Act 2010; s.5 of Defective Premises Act 1972; s.183 Road Traffic Act 1988; s.54 of Food Safety Act 1990. All of these are examples which expressly provide that certain provisions of the Acts are applicable to the Crown. Another observation is that the Guard Dogs Act 1975 does not provide for applicability to Crown.

<sup>35</sup> s.23 of Health Act 2006.

<sup>36</sup> *Black* (n 1) [34].

<sup>37</sup> This understanding as a “rule of drafting” can be supported by *Black* (n 1) at [35], and the usage of *Crown Application* (n 4).

<sup>38</sup> *Black* (n 1) [28].

<sup>39</sup> *Crown Application* (n 4) at 1.2–1.4.

is already very certain and clear, which is devoid of any need of reform. This article has also rebutted some common criticisms of the Presumption, of which results from a misunderstanding of the Presumption.

This article has suggested that the Presumption is conceptually not really a “presumption”, but simply a well-known “rule of drafting” which has been acknowledged by the Courts and the Legislature. Both the Legislature and the Courts are perfectly aware that if the Crown is not expressly bound in an Act, the Crown is not bound. Having such a “rule of drafting” in mind, the Courts construe an Acts of Parliament accordingly. Hence, there will be no uncertainty as to the scope of an Act.

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# TV REALITY SHOWS AND THE BALANCE BETWEEN PRIVACY AND PUBLIC INTEREST BROADCASTING

*Ali v. Channel 5 Broadcast Ltd*  
[2018] EWHC 298 (Ch)  
High Court, Chancery Division  
Arnold J

## INTRODUCTION

Reality TV is hugely popular in the UK and globally and private individuals sell their privacy, often for large sums of money, in return for public fame. Such individuals run the risk of acquiring some form of public status and thus expose themselves to greater intrusions into their private life in the future; at least until their fame dies down. Other individuals however are not willing participants and may be the subjects of reality TV for reasons other than pure entertainment. Programmes exposing certain individuals for their criminal or anti-social behaviour are now watched by millions of viewers, justified by the argument that it is in the public interest to expose such individuals.

The following questions need to be asked: “Should such programmes be broadcast irrespective of the harm or embarrassment caused to that individual?”; and “Do the individuals concerned have recourse to redress if they are caught on camera and discussed on national or international television?” If the programme in question damages their reputation, they may have a case to sue in defamation. However, in many cases it is unlikely that such individuals will have much of a reputation to defend.<sup>1</sup> In addition, a television company may face contempt of court proceedings if the programme were to seriously prejudice a forthcoming criminal trial.<sup>2</sup> Alternatively or in addition, individuals may also seek to bring claims based on breach of privacy,<sup>3</sup> complaining that the broadcast is a misuse of their private information as well as a violation of their right to private life under Article 8 of the European Convention on Human Rights 1950.<sup>4</sup>

A recent decision of the High Court,<sup>5</sup> has reminded us that such actions are possible and that broadcasting companies need to be careful to balance individual privacy with their desire to inform the public on matters of public interest, however loosely defined in certain cases. This commentary reviews the potential implications of the decision on future programmes and legal actions. It will also re-examine *Peck v United Kingdom*,<sup>6</sup> a case which had rather different facts, but which nevertheless reminded broadcasting and public authorities that they owe duties under the European Convention.<sup>7</sup>

## THE FACTS AND DECISION

In this case, the claimants brought an action for damages against the defendant television production company for misuse of their private information. As a result of rent

<sup>1</sup> A claimant must prove that their reputation has been lowered in the eyes of right-thinking members of society: *Sim v Stretch* [1936] All ER 1237 HL, (1936) 52 TLR 669.

<sup>2</sup> Contempt of Court Act 1981, s2.

<sup>3</sup> *Campbell v MGN Ltd* [2004] 2 AC 457. This case established the action of misuse of private information, developed from the common law action in confidentiality.

<sup>4</sup> As given effect to by the Human Rights Act (UK) 1998.

<sup>5</sup> *Ali v Channel 5 Broadcast Ltd* [2018] EWHC 298 (Ch).

<sup>6</sup> *Peck UK* (Application No..44647/98). Decision of the ECHR, 28 January 2002.

<sup>7</sup> Implemented under the Human Rights Act 1998. Only the state can be liable for a breach of the Convention brought before the European Court of Human rights; although the state will be liable for the actions of both public and private bodies by not safeguarding Convention rights. Under the 1998 Act, only public authorities can be directly liable, although the courts must ensure that private bodies and individuals do not violate Convention rights.

arrears, the claimants' landlord had obtained a possession order for the property they occupied and the local housing authority advised them to wait until eviction before they could be rehoused. The landlord obtained a High Court writ of possession and when enforcement officers attended the property to evict the claimants they were accompanied by the defendant's film crew; the landlord's father also attended. The first claimant, who was the voluntary media secretary of a Muslim political party, was awoken as they entered the property and was given an hour to vacate. The second claimant returned after taking her children to school. Various exchanges took place during the hour, but shortly before they vacated the first claimant agreed to be interviewed. Subsequently, the landlord's father posted on social media two videos he had recorded of the eviction. The defendant then broadcast edited footage as part of a series of programmes called "Can't Pay? We'll Take It Away". The programme containing the claimants was seen by 9.65 million viewers and the claimants' daughter suffered bullying at school, as a consequence. The claimants accepted that the writ was a public court order and that the defendant was entitled to broadcast the fact that they had been evicted, but contended that the programme included filming of them in their home, in distress and being taunted by the landlord's father, and was thus in breach of their right to respect for private and family life under Article 8 of the Convention. In defence of that claim, the defendant argued that the programme addressed matters of real public concern, namely the public reporting of increased levels of debt, dependence on housing benefit and the effect of enforcement of writs of possession by High Court enforcement officers.

In the High Court, judgment was given in favour of the claimants. The Court first considered whether the claimants had a reasonable expectation of privacy. In the court's view, the claimants did indeed have a reasonable expectation of privacy in respect of the information in question and thus their Article 8 rights were engaged. The property had remained their home until the writ was executed, which was at the expiry of the hour allowed for them to vacate. In the court's view, the principle of open justice did not justify the broadcasting of information beyond the bare fact of the eviction; what happened when the warrant was executed was not part of the court proceedings and thus could not be regarded as a public process or event. Nor, in the court's view, could the impact on the claimants' children be justified by reference to open justice. The broadcasting of the information was not a foreseeable consequence of the claimants' failure to comply with the possession order.

The court also found that the first claimant's rights were not significantly weakened by his political activity; he had no official position and his political activities were not mentioned in the programme. Although the claimants and their children had already suffered damage to their privacy as a result of the social media postings, that did not mean that broadcasting the programme either could not, or did not, inflict further damage given the substantial scale and duration of the broadcasting. Further, they did not cease to have a reasonable expectation of privacy in respect of the small part filmed on the street; as that was a single sequence of events.<sup>8</sup>

The court then considered the question of whether the claimants had consented to the filming and thus the intrusion into their private life. On this issue the Court found that at no stage during the eviction had anyone informed the claimants that the film crew was filming a programme for the defendant television company. The first claimant having been woken up was clearly drowsy and confused and had not been in a fit state to give informed consent. Although he was in a fit state to do so by the time he agreed to be interviewed, he could not be taken retrospectively to have given his consent to

<sup>8</sup> *Ali v Channel 5 Broadcast Ltd* [2018] EWHC 298 (Ch), [145], [158], [162–163], [169].

the broadcasting of material filmed when he was not in a position to consent. The first claimant had agreed to be interviewed only after twice objecting to filming without avail and this did not amount to true consent; in effect it was an agreement to participate under protest. In any event, he made it clear in a later telephone call to the defendant that he objected to being on television. To the limited extent that he had given consent, he had unequivocally withdrawn it prior to first broadcast of the programme.<sup>9</sup>

The Court then proceeded to balance the claimant's Article 8 rights with the defendant's rights under Article 10 to freedom of expression. On this issue, although the court accepted that the programme contributed to a debate of general interest, it found that the inclusion of the claimant's private information went beyond what was justified for that purpose. In the court's view, the programme's focus was not on the matters of public interest, but on the drama of the conflict between the claimants and the landlord's father. Moreover, that conflict had been encouraged by one of the enforcement officers to "make good television." The claimants had not established that the programme was unfair or inaccurate and the defendant had editorial discretion as to the way in which it told the story, but that discretion did not extend to its decision to include the private information of which the claimants complained unless it was justified as contributing to a debate of general interest. On the facts the balance came down in favour of protecting the claimants' Article 8 rights and the defendant had failed to convince the court that this intrusion was justified and proportionate.<sup>10</sup>

Having upheld the claimant's case, the court then considered the appropriate level of damages, and applying the standards that had been laid down in the case of *Gulati v MGN Ltd*,<sup>11</sup> awarded each claimant £10,000. This was to compensate the claimants for the distress caused by the broadcasting of the eviction; the court accepting that the programme involved the disclosure of the claimant's private information to 9.65 million viewers and that while the information in question was not of the highest degree of sensitivity, it was fairly sensitive and the Programme had a voyeuristic quality. The court also stressed that a higher figure would have been awarded if it had not been for the social media posting by the landlords.<sup>12</sup>

## BALANCING PRIVACY AND THE RIGHT TO KNOW: THE DECISION IN PECK

The balance between the right to privacy and the right and duty to report on and broadcast matters of public interest was considered in the landmark decision of the European Court of Human Rights in *Peck v United Kingdom*,<sup>13</sup> a decision concerned with CCTV footage taken by and then distributed by a local authority. Although the circumstances of this case and *Ali* are different, an examination of the earlier case may be useful in estimating the impact of the recent decision.

The applicant, Geoffrey Peck, was suffering from depression. In August 1995, he was walking down Brentwood High Street with a kitchen knife in his hand and attempted to commit suicide by slitting his wrists. Unbeknown to the applicant, he was being

<sup>9</sup> *Ali v Channel 5 Broadcast Ltd* [2018] EWHC 298 (Ch), [172–173], [175], [177–178]. The court also found that the second claimant had independently objected to being filmed at the time.

<sup>10</sup> *Ali v Channel 5 Broadcast Ltd* [2018] EWHC 298 (Ch), at paragraphs 195, 203–206, 210).

<sup>11</sup> [2015] EWHC 1482 (Ch).

<sup>12</sup> *Ali v Channel 5 Broadcast Ltd* [2018] EWHC 298 (Ch), [220]. This was because the court accepted that a great deal of distress had been caused by this posting, which was not of course, the fault of the defendants.

<sup>13</sup> *Supra* [n 9].

filmed by closed-circuit television, although the footage did not show him cutting his wrists. Police and medics were called to the scene and the applicant was later detained for a short period under the Mental Health Act 1983, but released and taken home. In October 1995, the Council issued a press feature in their CCTV News, containing two photographs from the footage along with an account of the incident. The applicant's face was not specifically masked and the article explained that the applicant had been spotted with a knife in his hand and that he was clearly unhappy but not looking for trouble. Three days later the local newspaper – the *Brentwood Weekly News* – used a photograph of the incident on a front page article about the closed circuit television system and again the applicant's face was not specifically masked. The next day an article entitled 'Gotcha' appeared in another local newspaper – the *Yellow Advertiser* with a circulation of approximately 24,000 – containing a photograph from the footage and describing how the police had defused a potentially dangerous affair. A follow-up article was published three days later, using the same photograph and there was evidence to suggest that a number of people recognised the applicant.

One day after the publication of the last article, Anglia Television broadcast a programme to approximately 350,000 people containing extracts of the footage, although the applicant's face had been masked at the Council's request. The applicant became aware of these articles and programmes in late October but chose not to take any legal action because of his depression. The footage was then supplied to the producers of the BBC programme 'Crime Beat', which had on average 9 million viewers. The Council imposed a number of conditions relating to its showing, including that no one should be identifiable and that all faces should be masked. However, in trailers for the programme the applicant's face was not masked and although the producers assured the Council that his face was masked in the main programme, several of his friends and family recognised him from the programme.

The applicant then made a number of television appearances to complain about the situation and also complained to the Broadcasting Standards Commission regarding the programme on the BBC, alleging an unwarranted infringement of his privacy and the Commission upheld his complaints. The applicant also complained to the Independent Television Commission concerning the Anglia television programme and the Commission found that there had been a breach of the Commission's Code as his face had not been properly obscured. As a result of the finding, an apology was given by Anglia TV. The applicant's complaint to the Press Complaints Commission regarding the article in the "Yellow Advertiser" was dismissed, on the basis that the incidents had taken place in a public place and no criminal stigma had been attached to the applicant. An application for judicial review of the Council's decision to release the footage was also unsuccessful.<sup>14</sup> The High Court found that the Council had an implied legal power to release such information to other bodies when that was necessary to fulfil its statutory power to operate the scheme, and that the Council had not acted irrationally in conveying this particular information to the relevant bodies in the manner that it did.

The applicant applied under the European Convention, invoking Article 8 before European Court of Human Rights, and claiming that the use of the footage was an unjustified interference with his right to private life. With regard to the claim under article 8, the Court observed that the disclosure of the footage had resulted in the applicant's actions being observed to an extent far exceeding any exposure to a passer-by or to security observation and to an extent surpassing that which the applicant could have foreseen. Accordingly, the disclosure by the Council of that footage had resulted

<sup>14</sup> *R v Brentwood Council, ex parte Peck* [1998] CMLR 697.



in a serious interference with the applicant's right to respect for private life. Having satisfied itself that the interference was prescribed by law and had a legitimate aim,<sup>15</sup> the Court then held that the reasons for the interference with the applicants' rights were neither relevant nor sufficient so as to be considered as necessary in a democratic society.

The Court stressed that the disclosure of private intimate information could only be justified by an overriding requirement in the public interest and that the disclosure of such information without the consent of the individual called for the most careful scrutiny by the European Court.<sup>16</sup> In the Court's view, the aims of the coverage and its release could not justify the direct disclosure by the Council to the public of stills of the applicant in "CCTV News" without it obtaining the applicant's consent or masking his identity. Neither could it justify its disclosure to the media without it taking steps to ensure so far as possible that his identity would be masked. Particular scrutiny and care was needed given the crime prevention objective and the context of the disclosures. The disclosure of the material in CCTV News and to the Yellow Advertiser, Anglia Television and the BBC were not accompanied by sufficient safeguards. This constituted a disproportionate and unjustified interference with the applicant's private life under Article 8. In arriving at that conclusion, the Court held that the applicant's voluntary media appearances after the initial coverage did not diminish the serious nature of the interference, neither did they reduce the need for care concerning disclosures. The applicant had been the victim of a serious interference with his right to privacy. Further, it could not be held against him that he had later tried to expose and complain about that wrongdoing through the media.<sup>17</sup>

#### THE EFFECT OF *ALI* ON BROADCASTING AND PRIVACY

The decision in *Peck* provides useful guidance on how broadcasting authorities, and the media and public authorities generally, need to accommodate the right of individual privacy when carrying out their broadcasting and other duties. The key, of course, is proportionality, and a careful balancing of conflicting interests, to show that any interference is necessary in a democratic society, as required by the qualifying provision in Article 8(2).

Apart from these general considerations, a key factor in determining whether the interference is proportionate and necessary on the facts (assuming that the claimant can satisfy the court that they had a reasonable expectation of privacy) is the extent to which the broadcast or other public dissemination serves the public interest. In this sense, the court's finding in *Ali* that the programme, albeit made for public interest purposes (an investigation into debt), was not focussed on those matters of public interest, but rather on the drama of the conflict between the claimants and the landlord's father, is interesting; and of great concern to broadcasters. In the present case the court accepted

<sup>15</sup> The Court was satisfied that this interference was prescribed by law in that s.163 of the Criminal Justice and Public Order Act 1984, which enabled local authorities to operate such schemes, together with s111 of the Local Government Act 1972, which allows local authorities to do anything to facilitate the discharge of their functions, was sufficiently clear and certain to be acceptable within the terms of article 8(2). The Court also considered that the powers bestowed on the Council under that provision served a legitimate aim in that such powers were necessary for the detection and deterrence of criminal activities and that the publication of such footage served the legitimate aims of public safety, the prevention of disorder and crime and the protection of the rights of others.

<sup>16</sup> *Z v Finland* (1997) 25 EHRR 371.

<sup>17</sup> The Court also noted that at the relevant time the applicant did not have an actionable remedy in breach of confidence, the information in question not having the necessary quality of confidentiality required by the law at that time, and re-publication of confidential information would have been classed as information in the public domain. Accordingly, the applicant had been left with no effective remedy for breach of his Convention right of private life and there had been a violation of Article 13 ECHR – the right to an effective remedy.

that the conflict between the tenants and the landlord had been encouraged by one of the enforcement officers to “make good television” – thus reducing the genuine public interest in making and broadcasting the programme.

This distinction, it is submitted, will be very difficult to maintain in practice, as many public interest stories are presented with mixed motives – to inform the public and to score political or personal points – and provided the media or other publisher has not lost sight of their duty to inform the public the law will offer a defence. In the context of television programmes such as the one in this case, it is inevitable that the programme is being made for both informative and entertainment purposes, and for the courts to try and ascertain which of those purposes dominated in a particular case will be both difficult and potentially unfair.

The *Ali* decision does attempt to impose standards of responsible broadcasting on programme makers and that in itself is unobjectionable. Such standards are imposed by broadcasting authorities; and by the courts in areas such as defamation, contempt of court and indeed in privacy actions generally.<sup>18</sup> The decision in the present case merely takes into account that the purpose of the programme is to entertain. In reducing the public interest nature of the broadcast, and provided programmes made by certain companies (and broadcast on certain channels) are not assumed to have been made for purely financial or prurient reasons, then the courts should be able to avoid making decisions that are unfair or unprincipled. Of course, there will always be an argument about the distinction between what is in the public interest and what the public are interested in, but free speech jurisprudence firmly accommodates that distinction in any case.<sup>19</sup> Such a distinction is necessary to safeguard against unconscionable interferences with privacy, as well as the protection of true and worthy democratic speech. Nevertheless, the decision in *Ali* will likely be met with great concern by programme makers who seek to combine public education and entertainment.

## THE ASSESSMENT OF DAMAGES

In the present case, in awarding damages of £10,000 to each claimant the Court took into account the principles established in the case of *Gulati and others v MGN Ltd*.<sup>20</sup> In that case the claimants, all persons in the public eye, such as actors and sportsmen or people associated with them, sued the defendant newspapers who then conceded liability for infringements of privacy rights and misuse of private information by obtaining confidential or private information from phone hacking and private investigators. The claimants gave evidence as to their horror, distaste and distress at discovering that the defendant’s journalists had been frequently listening to aspects of their personal, medical and professional lives by hacking into their voicemails, describing the effect on their lives caused by the distrust that the defendant’s newspapers’ activities had engendered in them and those around them. The High Court was then required to assess the damages payable to claimants for infringements of privacy rights arising primarily from the phone hacking by the defendant newspaper proprietor, and to give guidance on damages payable in other cases. The court began by stating that a regime in which damages were confined to damages for distress would, to a degree, render privacy rights illusory and fail to provide an effective remedy for breach of Article 8. Further, to award damages to reflect infringements of privacy rights in themselves would not amount to the wrongful reintroduction of

<sup>18</sup> *Campbell v MGN Ltd* (N 3).

<sup>19</sup> See *Von Hannover v Germany* (2005) 40 EHRR 1.

<sup>20</sup> [2015] EWHC 1482 (Ch).

vindictory damages; such damages would be truly compensatory. Thus, compensation could be given in these cases not only for distress and injury to feelings, but also for infringements of privacy rights in themselves, so far as the defendant's acts had impacted on the values protected by the rights contained in Article 8. The Court then gave some guidance on how damages in these cases should be assessed, stating that damages in privacy cases should compensate not merely for distress but also, if appropriate, for the loss of privacy or autonomy. That might, in the Court's view, include a sum to compensate for meaningful damage to dignity or standing, so far as that was not already within the distress element.<sup>21</sup> The Court proceeded to lay down the following principles:

- (1) the disclosure of certain types of private information was more significant than others;
- (2) information about mental and physical health and significant private financial matters attracted a *higher* degree of privacy, and therefore compensation;
- (3) information about social meetings attracted a *lower* degree of privacy and compensation;
- (4) information about matters internal to a relationship would be treated as private, and disclosures which disrupted a relationship or were likely to adversely affect a couple's attempts to repair it were likely to be treated as a *serious infringement* deserving *substantial* compensation;
- (5) the appropriate compensation would depend on the nature of the information, its significance as private information, and the effect on the victim of its disclosure; the effect of repeated intrusions by publication could be cumulative;
- (6) in relation to distress, the "egg-shell skull" principle applied, so that a thinner-skinned individual might be caused more upset, and therefore receive more compensation, than a thicker-skinned individual who was the subject of the same intrusion.

The damages awarded in *Gulati* were particularly high – ranging from £75–150,000 – due to the serious and prolonged nature of the hacking offences committed against high profile individuals. The sums awarded in *Ali* are obviously more modest, and had been reduced as the claimants had already suffered the inevitable stress of their plight being publicised on social media. Nevertheless, they are high enough to send a warning to programme makers who might in future fall foul of privacy laws when making programmes for public education and entertainment.<sup>22</sup>

## CONCLUSION

The decision in *Ali* is a reminder to broadcasters, and the media generally, that they must carry out their duties in a responsible manner and mindful of an individual's privacy and Convention rights. This is spelt out in various broadcasting codes and is part of their ethical training; although legal actions and awards of damages tend to concentrate the mind more than such codes and general principles.

It is suggested that this was, as in *Peck*, one of those cases where it was appropriate to interfere with the editorial judgment of the media and thus protect individuals from

<sup>21</sup> [2015] EWHC 1482, at paragraph 45.

<sup>22</sup> In contrast to previous cases, in *Campbell v MGN Ltd.*, Naomi Campbell received £2,500 plus £1,000 aggravated damages for the publication of details of her drug therapy sessions and photographs of her leaving such sessions; and in *Weller v Associated Newspapers* [2014] EWHC 1163, £5,000 was awarded to a 16 year old girl for publication of unauthorised photographs, with £2,500 being awarded to younger siblings.

an unreasonable and unnecessary intrusion into their private lives. Provided these cases are rare, which they will be if the media practice responsible reporting, then actions such as the one in *Ali* should not intrude too greatly on broadcasting freedom and the public right to know.

DR STEVE FOSTER\*

## BOOK REVIEWS

*Book reviews and books for reviewing should be sent to the address given at the beginning of this issue*

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### INTRODUCING LOGIC TO LAW STUDENTS

*Legal Problem Solving and Syllogistic Analysis: A Guide for Foundation Law Students*  
by KENNETH YIN and ANIBETH DESIERTO  
LexisNexis Butterworths, Australia, 2016  
1<sup>st</sup> edition, 167 pages, Paperback, AUD 52.50, ISBN 9780409343229

#### INTRODUCTION

This highly readable and practical book is aimed primarily at undergraduate law students, providing a guide to developing their problem-solving skills. Although it is a slim volume, it is carefully written and thoughtfully tailored to a student readership. That said, while the target market is clearly students, lecturers will also find it to be an engaging and valuable read. While primarily intended to be a practical guide, the authors clearly identify throughout the established theories and pedagogical research that underpin their approach.

The book is divided in to six chapters:

- Introduction
- IRAC, Legal Deductive Logic, and the Syllogism
- Common Syllogistic Fallacies
- Identifying the Major Premise
- The Extraction of the Minor Premise
- Organising the Answer

It opens with a persuasive argument of the importance of problem solving skills for law students and highlights the link between the concept of a syllogism (a statement of logical relationship) and the IRAC (Issue, Rule, Application, Conclusion) approach often adopted by law schools. Indeed, syllogistic analysis is the focus of the book and it is this which sets it apart from other texts that seek to support students in studying law. There are no obvious competitors that have syllogism as their central theme, at least not in terms of the student market.

Subsequent chapters unpack the core elements of a syllogism as manifested in legal problem-solving, focusing upon inductive and deductive logic. The authors explain how inductive logic (creating and evolving rules) forms the basis of the major premise of the syllogism, while deductive logic (applying those rules) forms the basis of the minor premise. They illustrate how this works in action by using simple examples that will be readily understood even by first year law students, despite the authors' Australian

context manifesting itself in the major premises: 'It is always unpleasantly hot in February' and, just as startling, 'It is hot every day in January'. English law tutors may find it more of a struggle than their Australian colleagues to defend the purported truth of these premises!

As the book progresses, the examples become more complex and nuanced in character, culminating in sophisticated legal scenarios. Indeed, a clear strength of the book is its recognition of the criticality of problem solving in the context of undergraduate law. For example, the authors acknowledge that a typical law student is most likely to formulate an argument within the narrow context of a specific case study. Consequently, the chapter on syllogistic fallacies focuses upon the importance of logical connections between major premise, minor premise and conclusion in the context of legal problem-solving, rather than the philosophical debates around open-ended syllogistic analysis. Using a series of case studies based around the foundation law subjects such as contract, tort and crime, the authors walk students through the most common pitfalls that result in flawed syllogism. For example, students are asked to consider the potential liability of the owner of a rampant lawnmower that turns itself on, tears down the neighbour's fence and destroys a flowerbed. The case studies have been carefully scaffolded so that students can tackle early, simple examples with confidence, but then clearly measure their own progress as the level of complexity gradually increases. This may involve responding to a variation on the facts of an earlier example, or tailor their answer to focus upon the strongest argument for their client. In the case of the lawnmower, they are asked to adjust their major premise to set out the strongest argument that the owner of the lawnmower can advance in his defence. The accompanying narratives emphasise the importance of identifying the legal issue accurately and avoiding circular reasoning or hasty, unsubstantiated conclusions. Students are encouraged to recognise the details and subtleties in the case studies and why it is important to consider all of them. There can be little doubt that the authors have encountered every pitfall and point of confusion experienced by law students, probably many times over.

### CONCLUDING REMARKS

The level of detail throughout is admirable and should enable the reader to replicate the authors' own reasoning processes, as these are painstakingly first deconstructed, then reconstructed. That is not to say, however, that a student should be able to read this book from cover to cover and find their own problem-solving skills miraculously transformed. They will need to practice, reflect and repeat the process in order to gain mastery of it, but that is as it should be; the book functions as a diagnostic tool for current progress as well as a guide for future improvement.

If a fault can be found with this book, ironically it lies in its dedication to helping students to solve the problem. The case studies, by and large, present problems that are capable of a definite solution. While this is, of course, the principal purpose of the syllogistic analysis approach promoted by the authors, in reality not every legal problem is so clear and unambiguous. Students must grapple with scenarios that raise ethical and moral dilemmas, or illuminate a lack of certainty in the law. A student who follows the syllogistic approach too slavishly may produce an answer that is technically correct and demonstrates a logical line of reasoning, but which may not engage fully with alternative interpretations or demonstrate an ethical approach to practice. While it is clearly beyond the intended scope of this particular book to address those issues directly, the authors could perhaps have included more explicit acknowledgement of them.

The practical focus of the book, well-scaffolded case studies and clear explanations make this a valuable and strongly recommended resource for students from the outset of their undergraduate studies.

PAMELA HENDERSON\*

# LESSONS FROM THE ANCIENT GREEK APPROACH TO CHARACTER

*Character Evidence in the Courts of Classical Athens:  
Rhetoric, Relevance and the Rule of Law*

by VASILEIOS ADAMIDIS

Routledge 2017, 1<sup>st</sup> Edition, 244pp, ISBN 978-1-472-48369-0

Late classical Athens has left us a treasury of speeches drafted for use in the Athenian Courts, most famously the speeches of Demosthenes, and it is these texts that form the central source of information for this book. Around 100 speeches survive dating between c. 420–322, and including speeches for both public (*graphai* or *graphe*) and private (*dikai* or *dike*) actions. The Athenian courts relied upon the citizen judge (*dicast*) who collectively heard arguments, and deliberated, and decided upon guilt or innocence, and punishment. Panels of judges ranged in size from 201 (*dikai*) to 501 (*graphai*) and upwards to a theoretical 6,000 citizens.<sup>1</sup> Most notoriously it was such a court that found Socrates guilty and condemned him to death, as recounted in the *Apology* by Plato.

Every Athenian citizen judge took an oath to decide in accordance with the laws and decrees of Athens, to vote on the charges made against the defendant, to hear each litigant equally, and to vote or judge with his most fair judgment.<sup>2</sup> Clearly the speeches were intended for a forensic setting, these popular courts were law courts, and were distinct from the institutions of popular government. However, the speeches indulge in self-aggrandising accounts of the public services performed by the speaker, and attacks upon the record and motivations of the opponent. It is these aspects of the speeches that the book focuses upon, they present evidence of character.

Athenian courts were institutions of direct democracy, and therefore non-representational fora. Prosecution was private, nobody represented the citizens, they acted as prosecutors and judges.<sup>3</sup> Although the citizen judges were experienced, and received remuneration for their service in the courts, they were not legal professionals. There were no presiding judges to oversee the proceedings. Litigants were expected to represent themselves.<sup>4</sup>

From our twenty-first century perspective the speeches written for delivery before the Athenian courts seem to resort to *ad hominem* arguments and neglect the factual issues raised by the charges. There was a recognised need for speeches to be relevant to the charges.<sup>5</sup> However, given the absence of a presiding official the citizen judges (or even the non-judicial audience) enforced the rule by shouting down irrelevant or improper argument (*thorubos*).<sup>6</sup> The obvious risk was that a prejudicial and emotionally effective speech of a prosecutor might displace the effects of the judicial oath in the minds of the collectively aroused judges.<sup>7</sup>

Collective control of both procedure and decision by ordinary citizens, and prominence of what seems to be a focus on the character rather than on evidence of what actually happened has led some scholars to conclude that the Athenian trial was not

<sup>1</sup> Vasileios Adamidis, *Character Evidence in the Courts of Classical Athens* (Routledge 2017), 55.

<sup>2</sup> Edward M Harris, 'The Rule of Law in Athenian Democracy: Reflections on the Judicial Oath' (2006) 9 *Dike* 157, 159–160.

<sup>3</sup> Public actions could be brought by any citizen (*ho boulomenos*), Adamidis (n 1) 69.

<sup>4</sup> Some professional support did exist, and speech writers were of some importance in practice Adamidis (n 1) 62–63.

<sup>5</sup> Aristotle, *Rhetoric*, 1345a 22–3; Adamidis (n 1), 82–88; the judicial oath (n 2); Peter J Rhodes, 'Keeping to the Point' in Edward M Harris and Lene Rubinstein (eds) *The Law and the Courts in Ancient Greece* (Duckworth 2004) 137–158.

<sup>6</sup> Adamidis (n 1), 58–59.

<sup>7</sup> There is some evidence in the speeches the risk was realised on occasion, Adamidis (n 1), 58–59.



primarily an investigation of the facts and enforcement of the law. Thus, the arguments that Athenian courts were political rather than legal institutions,<sup>8</sup> or that the courts enforced informal norms rather than the laws that informed the charges ostensibly deliberated upon.<sup>9</sup> It is against such conclusions that this book is directed. It argues, along with other scholars,<sup>10</sup> that the textual evidence supports a recognisably legal concern with the proving of legally relevant facts through the speeches.

This argument entails presenting an account of character evidence that views it as probative of the facts in dispute. The common-law has always been wary of the prejudicial potential of character evidence. It has not denied its potential probative value, but feared that it would be drowned out by its greater prejudicial effects. This exclusionary stance has been informed by the role of the lay jury as the finder of fact. Exceptions existed, such as the similar fact exception, and the exception when good character of the defendant had been asserted, or where the bad character of a prosecution witness had been alleged.<sup>11</sup> The modern common-law perspective thus views the Athenian practice as unduly inclusionary, and thereby prone to facilitating prejudicial evidence and argument.

Adamidis argues that this modern perception fails to understand correctly how the character evidence was being deployed in Athenian courts. He argues that the Greek understanding of character made a far wider range of character evidence probative, and made all character evidence more probative than modern understanding of character would support. This did not mean that any character evidence whatsoever was relevant in Athenian courts. The risk of prejudicial use of such evidence was recognised.<sup>12</sup> However, it did mean that modern scholars, and by modern he means post-Descartes, often judged relevance anachronistically.

Adamidis traces back the use of character evidence for its probative value in Greek sources back to Homer, and argues for a continuous, although developing over time, understanding of character. He shows that the question was one of considerable philosophical concern, bringing the account up to the time and writings of Aristotle. Up to this point in his work it would be fair to say the book is primarily concerned with the sources, methods, and themes of classical history, informed by an awareness of contemporary legal scholarship. However, he goes beyond these disciplinary limits, in order to explicate the classical Greek ideas of character and personality. The key analytical frame being derived from the work of Christopher Gill.<sup>13</sup>

Gill used the inspiration of such thinkers as Alasdair MacIntyre, who rejected Kantian universalism in ethics, to better understand classical Greek thought.<sup>14</sup> MacIntyre was a major influence in the development of communitarian thought, as represented by such thinkers as Michael Sandel, and Amitai Etzioni, and Charles Taylor, as well as upon such ethical theorists and philosophers as Bernard Williams and Martha Nussbaum.

<sup>8</sup> Josiah Ober, *Mass and Elite in Democratic Athens* (Princeton University Press 1989); SC Todd, *The Shape of Athenian Law* (Oxford University Press 1991), 29; David Cohen, *Law, Violence, and Community in Classical Athens* (Cambridge University Press 1995).

<sup>9</sup> Adriaan Lanni, 'Social Norms in the Courts of Ancient Athens' (2009) 9 *Journal of Legal Studies* 691.

<sup>10</sup> Most notably Edward M Harris, see (n 2) and (n 4).

<sup>11</sup> R v Z [2000] 2 AC 483, 508, per Lord Hobhouse: "Similar facts are admissible because they are relevant to the proof of the defendant's guilt . . . This is the simple truth upon which similar fact evidence is admitted: it has probative value and is not merely prejudicial." For the current statutory law see: Sections 98 to 113 Criminal Justice Act 2003.

<sup>12</sup> Adamidis (n 1), 82–88.

<sup>13</sup> Christopher Gill: 'The Ethos/Pathos Distinction in Rhetorical and Literary Criticism' (1984) 34 *Classical Quarterly* 149; *Greek Thought* (Oxford University Press 1995); *Personality in Greek Epic, Tragedy, and Philosophy: The self in dialogue* (Oxford University Press 1996).

<sup>14</sup> Alasdair MacIntyre, *After Virtue* (University of Notre Dame Press 1981) and Bernard Williams, *Shame and Necessity* (University of California Press).

The focus of the critiques of these thinkers could be said to be upon the approach to the self as epitomised by the work of John Rawls.<sup>15</sup> The undetermined or characterless self that constantly defines itself through the exercise of its free-will.<sup>16</sup> Sometimes the difference is expressed as the difference between a thin (Kantian) self and a thick (Aristotelian) self. Adamidis argues that the Greek conception of the self was thick, and one consequence of this was the greater faith placed in the power of character to explain actions, and therefore its greater probative force.<sup>17</sup>

This reconceptualising of the self is the key to Adamidis's re-analysis of the speeches. I found the interpretation persuasive, and of real benefit in trying to understand how the Greek orators understood their role and practice. Incidentally the work adds to our understanding of Aristotle, whose *Rhetoric* was informed by Athenian oratory in court and in political fora. As such the book is a fascinating exploration of Athenian legal culture.

However, Adamidis aims to do more than illuminate classical Athenian culture. He argues the modern world can learn from the Greek approach to character. His voice is another one calling for a more human and more realistic understanding of the self in modern culture, and he introduces novel ways to understand what this might mean.

One issue the book does not engage with is how solid the Greek reliance upon character was in terms of discerning the truth of disputed facts. Whilst rejecting the unencumbered self of Kant and Rawls, or the *homo economicus* of classical economics, we might resist throwing out the insight gained by identification of the so-called fundamental attribution error by social psychology. It is in a serious concern for the interplay of situational factors and character or dispositional influences that better understanding of human action will lie. Understandably, Adamidis limits his inquiry to the descriptive one of trying to explain and interpret his Athenian sources. However, if we take his case as substantially proved, then it raises the possibility of reflecting upon the consequences of the Greek understanding and use of character in trials for justice. If the disparate works of classical Greek scholarship Adamidis engages with are to be synthesised this must surely be the route.

Regardless of where Adamidis goes next in his research, this book opens up a fascinating new way to understand and appreciate the Greek texts and legal process. It also gives a very useful example of what a Greek concept of the self and character might mean substantially. This is a valuable exercise, as it can be difficult to apprehend the idea of a non-modern approach to the self without some appropriate subject matter to illustrate and develop the idea. Finally, it offers contemporary legal and political thought the possibility of learning from an earlier, and in some ways superior, understanding of the self. In this, it provides one more argument in favour of rejecting the thin modern concept of self and trying to understand humanity as socially and culturally situated human beings rather than decision machines.

To *feel* the truth, as expressed by Isaiah Berlin, that "Forms of life differ" is very difficult to do.<sup>18</sup> One can grasp the idea intellectually, but doing so leaves one like the fish, unaware of the water that one lives within. Adamidis in his engagement with the speeches brings his readers closer to a felt understanding of the ancient Greek world.

<sup>15</sup> Michael Sandel, *Liberalism and the Limits of Justice* (Cambridge University Press 1982); 'The Procedural Republic and the Unencumbered Self' (1984) 12 *Political Theory* 81.

<sup>16</sup> Nicola Lacey, 'Responsibility and Modernity in Criminal Law' (2001) *The Journal of Political Philosophy* 249.

<sup>17</sup> Adamidis (n 1) chapters 3 and 5.

<sup>18</sup> Isaiah Berlin, 'The Pursuit of the Ideal' in Henry Hardy and Roger Hausheer (eds), *The Proper Study of Mankind* (Pimlico 1998).

Overcoming anachronism is to come closer to an alien form of life, and an inherently valuable experience for any dweller in our diverse modern world.

GRAHAM FERRIS\*

# RECOGNISING THE DIFFERENCE BETWEEN DATA PROTECTION AND PRIVACY RIGHTS

*The Fundamental Right to Data Protection: Normative Value in the  
Context of Counter-Terrorism Surveillance*

by MARIA TZANOU

North America (US and Canada), Bloomsbury Publishing Plc, 2017  
290 pages, Hardback, £70.00, ISBN 9781509901678

## INTRODUCTION

Data protection and privacy laws are not only applicable to organisations that have access to vast stores of data, they provide important legal protection for data subjects who visit online websites and submit their personal information digitally in return for the website's respective services. This book by legal scholar Maria Tzanou explores why, to date, the data protection legal framework may not have achieved optimum results in protecting users when online. In particular, she analyses the courts' inclination to decide cases on the basis of the right to privacy rather than data protection principles. She fears that the courts' reluctance to treat data protection separately to the right to privacy may impede its development and limit its ability to respond to emerging technology and new privacy implications.

Thomas M. Cooley has defined privacy 'as the right to be left alone.'<sup>1</sup> There is wide ranging public opinion on the broad nature of the concept of privacy,<sup>2</sup> which has been tied with multifarious ideas such as protection from sexual advances, concealment, intimacy, safeguarding respect and reputation.<sup>3</sup> Right to privacy has been recognised as a fundamental human right in many legislative instruments such as the United Nations Declaration of Human Rights 1948,<sup>4</sup> International Covenant on Civil and Political Rights 1966<sup>5</sup> and the European Convention on Human Rights 1950.<sup>6</sup>

Data protection evolved as a necessity when automatic data processing allowed digital personal data to be collected and stored in vast databases. The data could be accessed and even transferred to other countries for further processing. To prevent the unlawful storage and abuse or unauthorised disclosure of personal data, members of The Organisation for Economic Co-operation and Development ('OECD') drafted the OECD Guidelines in 1980.<sup>7</sup> It established eight data protection principles which have been incorporated into national legislation.<sup>8</sup> The 'collection limitation' principle requires that data should be obtained by lawful means and with consent of data subject; the data quality principle requires that personal data should be relevant to the purpose(s), kept accurate and up-to-date; the purpose specification principle requires that the purposes should be specified before collection of data and subsequent use of the data should be limited to those purposes. The use limitation principle prevents personal data being disclosed unless with the data subject's consent and by authority of law. The

<sup>1</sup> Colin J. Bennett, *Regulating privacy* (Cornell University Press 1992).

<sup>2</sup> Daniel J. Solove, *Understanding Privacy* (Harvard University Press 2008).

<sup>3</sup> Anita A. Allen, 'Uneasy access: privacy for women in a free society' [1992] *The Philosophical Review* 101(3) <<http://doi.org/10.2307/2186088>> accessed 8 July 2018.

<sup>4</sup> United Nations Declaration of Human Rights 1948, Article 12.

<sup>5</sup> International Covenant on Civil and Political Rights 1966, Article 17.

<sup>6</sup> European Convention on Human Rights 1950, Article 8.

<sup>7</sup> OECD, 2013 OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data [online] OECD.org available at: <http://www.oecd.org/sti/ieconomy/oecdguidelinesonthe protectionofprivacyandtransborderflowsofpersonaldata.htm>. Accessed 7 April 2016.

<sup>8</sup> Data Protection Act 1998.

security safeguards principle obliges website operators to protect personal data from loss, destruction, unauthorised access; openness principle requires a general policy of openness about developments, practices and policies with respect to personal data. The individual participation principle allows data subjects to obtain from data controller within a reasonable time and in an intelligible form, and also requires website operators to rectify or erase data kept about them. Finally, the accountability principle requires a data controller to be accountable for complying with measures that give effect to the principles stated above.

In elucidating the application of the data protection principles, Dr. Tzanou examines the normative value of the right to data protection in the context of four case studies relating to counter-terrorism surveillance that give rise to significant data-driven gathering. These four case studies relate to communications metadata; travel data; financial data and Internet data. Examining the case law, the author considers whether the court's judgment is based on the application of data protection and/or privacy law, either separately or together. She critically analyses what, if any, issues she believes should have been taken into consideration during the legal analysis.

## STRUCTURE

The book is divided into two parts. Part I analyses the extent to which data protection is treated as a fully-fledged fundamental right. Part I is further divided into two chapters. Chapter 1 evaluates the theory of data protection and privacy and considers the differences between the two fields of law. Chapter 2 investigates the jurisprudence of the courts on the right to data protection. Part II contains the four counter-terrorism surveillance case studies and is divided into 5 chapters. Chapter 3 examines the communications metadata surveillance in respect of the Digital Rights Ireland case,<sup>9</sup> and its implications for the EU Data Retention Directive that imposes an obligation on electronic communications service providers to retain data for fighting terrorism. Chapter 4 considers travel data surveillance in the Passenger Name Record (PNR) case<sup>10</sup> that allows authorities to screen passenger's information to identify terrorists. Chapter 5 studies financial data surveillance and the Terrorist Finance Tracking Programme (TFTP) that tracks the flow of money to fund potential terrorist based activities. Chapter 6 scrutinises the Internet data surveillance operated by U.S. intelligence authorities, as revealed by Edward Snowden.<sup>11</sup> Chapter 7 concludes by bringing together the arguments in previous chapters, addressing the question of how to strengthen the right to data protection as a standalone fundamental normative right.

## CONTENT

In the modern digital economy, individuals adopt a digital personification of themselves. Information submitted by website users is recorded, collected and processed

<sup>9</sup> Joined Cases C-293/12 and 594/12 Digital Rights Ireland Ltd and Seitlinger and others.

<sup>10</sup> House of Lords European Union Committee, 'The EU/US Passenger Name Record (PNR) Agreement', 21<sup>st</sup> Report of Session 2006–07 (House of Lords 5 June 2007) <<http://www.statewatch.org/news/2007/jun/eu-pnr-hol-report.pdf>> accessed 8 July 2018.

<sup>11</sup> Edward Snowden, a former contractor for the CIA, leaked to the media, details of extensive internet and phone surveillance by American intelligence. Mr. Snowden has been granted temporary asylum in Russia and faces espionage charges over his actions. 'Edward Snowden: Leaks that exposed US spy programme' (BBC News 17 January 2014) <<http://www.bbc.co.uk/news/world-us-canada-23123964>> accessed 14/11/2017.

by intelligent data mining techniques<sup>12</sup> that highlight interesting patterns.<sup>13</sup> This has led to concerns amongst data subjects regarding the privacy of their personal data and the safety mechanisms provided by organisations that can conveniently access their data.

Although Dr Tzanou recognises that personal data is more often and commonly collected for commercial purposes, in this monograph she narrows her focus to data mining for counter-terrorism surveillance purposes. Since the September 11, 2001 attacks,<sup>14</sup> authorities are using technology to develop more discreet ways to gather data. The author puts forward a compelling argument about the need to recognise the difference between the fundamental rights of data protection on the one hand and right to personal privacy on the other.

Tzanou explores threat to individual's privacy through terrorism related cyber surveillance in chapters 3 – 6. Threats to data privacy from surveillance technologies were also examined by authors Akrivopoulou and Psygkas in their book, *Personal Data Privacy and Protection in a Surveillance Era: Technologies and Practices*.<sup>15</sup> Akrivopoulou and Psygkas consider the implications of profiling technologies and make a similar argument to Dr. Tzanou that a clear articulation of the two concepts of data protection and privacy will benefit online users by allowing them greater autonomy and self-determination. Tzanou expresses the need for courts to treat data protection and the right to privacy as separate rights for the benefit of the data subject and further development of the right to data protection.

The need for data protection and privacy law to be treated as two separate rights has also been previously propagated by authors as Maja Brkan and Evangelia Psychogiopoulou<sup>16</sup> when examining the *Promusicae* case.<sup>17</sup> Several authors recognise the interdependency of these rights. According to Olga Mironenko Enerstvedt,<sup>18</sup> data protection is the informational dimension of privacy and even today both data protection and privacy overlap.<sup>19</sup> For example, violating data protection principles will necessarily lead to a violation of the right to privacy (at least information privacy), but a violation of the right to privacy will not necessarily lead to a violation of the right to data protection.<sup>20</sup> In chapter 1, Tzanou explains that both data protection and privacy are separate rights where the former ensures safe transfer of data between mediums and transcends above and beyond the multiple facets of the right to privacy.<sup>21</sup> The

<sup>12</sup> Data mining techniques refer to those methods that are used in the processing of gathered data or information, which will be used in various applications such as to understand interesting patterns in online consumer behaviour for targeted advertisement purposes. Jiawei Han, Jian Pei, Micheline Kamber, *Data Mining: Concepts and Techniques* (Elsevier 2011).

<sup>13</sup> Sonia Livingstone, Leslie Haddon, 'Introduction-Kids online: opportunities and risks for children' (The Policy Press 2009) < [http://eprints.lse.ac.uk/30130/1/Kids\\_online\\_introduction\\_\(LSERO\).pdf](http://eprints.lse.ac.uk/30130/1/Kids_online_introduction_(LSERO).pdf) > accessed 8 July 2018.

<sup>14</sup> At the World Trade Center (WTC) site in Lower Manhattan, 2,753 people were killed when hijacked American Airlines Flight 11 and United Airlines Flight 175 were intentionally crashed into the north and south towers. September 11<sup>th</sup> terror attacks fast facts (CNN 27 August 2017) < <http://edition.cnn.com/2013/07/27/us/september-11-anniversary-fast-facts/index.html> > accessed 8 July 2018

<sup>15</sup> Christina Akrivopoulou and Athanasios-Efstratios Psygkas, *Personal data Privacy and Protection in a Surveillance Era: Technologies and Practices* (Information Science Reference 2011).

<sup>16</sup> Maja Brkan, Evangelia Psychogiopoulou, Courts, Privacy and Data Protection in the Digital Environment.

<sup>17</sup> Case C-275/06 *Promusicae* [2008] ECLI:EU:C:2008:54.

<sup>18</sup> Olga Mironenko Enerstvedt is a PhD Research Fellow at the Norwegian Research Center for Computers and Law, University of Oslo, writing a PhD thesis on Data Protection and Security in Civil Aviation. The principal objective of the project is to examine the impact of the aviation security measures on passenger rights to privacy and data protection. Universtet i Oslo (SMART) < [http://smartsurveillance.eu/?option=com\\_content&view=article&id=89](http://smartsurveillance.eu/?option=com_content&view=article&id=89) > accessed 14/11/2017

<sup>19</sup> Olga Mironenko Enerstvedt, 'Aviation security, privacy, data protection and other human rights: technologies and legal principles' (Springer International Publishing 2017).

<sup>20</sup> *Ibid.*

<sup>21</sup> Maria Tzanou, *The Fundamental Right to Data Protection* (Hart Publishing 2017).

right to privacy protects the data from unnecessarily extensive intrusions. The rights have a tendency to overlap and Dr. Tzanou identifies Germany and France as European member states that do not link data protection with privacy, rather the legal framework is based on national constitutional values notably, 'liberty' in France and 'dignity' and 'personality' in Germany.

The jurisprudence of the European Court of Justice is analysed in chapter 2 to show that although courts are aware of the existence of data protection; their decisions reveal a reluctance to recognise data protection separately from the right to privacy. Instead, data protection is regarded as an aspect of the right to privacy and family life under Article 8 of the European Union Charter of Fundamental Rights.<sup>22</sup>

The following paragraph summarises the case studies carried out by Dr. Tzanou and the ensuing discussion evaluates the various data-driven gathering approaches and the argument given by authorities that such surveillance is needed for reasons of national security.

### *Case study 1 – Communications metadata surveillance*

This case study explores the challenges faced by European member states in applying the Data Retention Directive,<sup>23</sup> which permits retention of data for purposes of investigation, detection and prosecution of serious crime. Here the law protects the content of communication,<sup>24</sup> and prevents it being disclosed. Dr. Tzanou explains that there were fundamental flaws in the Directive such as the lack of definition for 'serious crime' which meant that data could be gathered for any crime that was deemed 'serious'.<sup>25</sup> Member states also faced difficulty in transposing the Directive into local laws, leading to inconsistent application.<sup>26</sup> These challenges led to the Directive being declared invalid in the Digital Rights case.<sup>27</sup> In this case, a request made by the High Court, Ireland (Case C-293/12) concerned proceedings between (i) Digital Rights Ireland Ltd and (ii) the Minister for Communications, Marine and Natural Resources, the Minister for Justice, Equality and Law Reform, the Commissioner of the Garda Síochána, Ireland and the Attorney General, regarding the legality of national legislative and administrative measures concerning the retention of data relating to electronic communications. The Court found that the Data Retention Directive does not ensure the irreversible destruction of the data at the end of the data retention period. Furthermore, the Directive did not require the data in question to be retained within the European Union, with the result that compliance with the requirements of protection and security were not fully ensured under Article 8(3) of the Charter of Fundamental Rights of the European Union. As the issue of retention has not been resolved yet, member states have adopted their own interpretation of data retention laws. The Romanian Constitutional Court immediately adopted a new law on data retention in 2012, in fear of sanctions from the European Commission for failure of implementation, which attracted criticism for being similar

<sup>22</sup> Article 8 of the European Union Charter of Fundamental Rights provides that everyone has the right to the protection of personal data and that such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.

<sup>23</sup> Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC.

<sup>24</sup> Directive 2006/24/EC Articles 1(2) and 5(2).

<sup>25</sup> House of Lords European Union Committee, 'After Madrid: The EU's response to terrorism', 5<sup>th</sup> Report of Session 2004–05-18.

<sup>26</sup> Decision No 1258 of Romanian Constitutional Court.

<sup>27</sup> Joined Cases C-293/12 and 594/12 Digital Rights Ireland Ltd and Seitlinger and others.

to the old Data Retention Directive.<sup>28</sup> In 2014, the Constitutional Court gave a second decision, again striking down the national law.<sup>29</sup> The author signals that if member states are passing their own laws, there will be different levels of protection offered by individual states leading to confusion amongst data subjects about their data protection rights. It is important that the law is designed to promote certainty and clarity in metadata retention.

The second case study focuses on data collected in the international air travel sector in an EU law context.

### *Case study 2 – Travel data surveillance*

Dr. Tzanou investigates the EU-US Passenger Name Record (PNR) narrative whereby PNR information will be used to screen airline travellers (travelling to the US) so as to identify terrorists.<sup>30</sup> PNR data can contain as many as 60 sets of data fields including sensitive data such as religious affiliations, which can be revealed through airplane meal choices, or third party contact details in case of emergency.<sup>31</sup> The author references the Opinion of the Advocate General in *European Parliament v Council and Commission (PNR) case*<sup>32</sup> who questioned how contact details and baggage information can interfere with a person's right to private life as this type of factual information does not, at first glance, seem to be confidential in nature. According to Dr. Tzanou, if sensitive data like religious and dietary requirements are left out, then PNR data does not really interfere with an individual's right to privacy. Dr. Tzanou explains that PNR data is identifiable data whether or not it relates to the private sphere of an individual. The issues relating to the privacy assessment in the AG's discussion will not exist with the data protection analysis. When it comes to data protection, there will be interference if actions are contrary to the purpose limitation principle, retention periods and consent of data subject. Accordingly, Dr. Tzanou concludes that the PNR case was decided on the basis of the right to privacy. She argues that the data protection principles should have been applied to establish the nature and scope of violation. This argument was supported by Serge Gutwirth *et al.*<sup>33</sup> who states that the European Court of Justice disregarded the purpose of processing, use and storage of data which will challenge the purpose limitation principle.<sup>34</sup>

I agree with Dr. Tzanou's view that data protection and privacy are separate rights. Nevertheless, it can be argued that the wide ambit of the concept of privacy means that cases of this nature will in practice frequently bring both rights into close proximity. Rather than expecting the courts to choose to rely on one right over another, it would be more beneficial if there was equal recognition of both fields of law. This would be a positive step as it would guarantee additional rights and protections for the user.

<sup>28</sup> European Digital Rights, 'Romanian Parliament Adopts the Data Retention Law. Again' (23 May 2012) <<http://edri.org/edriogramnumber10-10romanian-parliament-adopts-data-retention-law-again/>> accessed 14/11/2017.

<sup>29</sup> Romanian constitutional court holds data retention unconstitutional (Digital Rights Ireland 9 July 2014) <<https://www.digitalrights.ie/romanian-constitutional-court-holds-data-retention-unconstitutional/>> accessed 14/11/2017.

<sup>30</sup> US Department of Homeland Security, Privacy Office, 'A Report concerning Passenger Name Record Information derived from flights between the US and the European Union' (PNR 18 December 2008) [www.dhs.gov/xlibrary/assets/privacy/privacy\\_pnr\\_report\\_20081218.pdf](http://www.dhs.gov/xlibrary/assets/privacy/privacy_pnr_report_20081218.pdf).

<sup>31</sup> Article 29 WP, Opinion 6/2002 on Transmission of Passenger Manifest Information and other data from airlines to the United States.

<sup>32</sup> Joined Cases C-317/04 and C-318/04.

<sup>33</sup> Serge Gutwirth, Yves Pouillet, Paul De Hert and Ronald Leenes, 'Computers, privacy and data protection: an element of choice' (Springer 2011).

<sup>34</sup> *Ibid.*



There is much that can be learned about people from their personal financial information, which will be discussed in case study 3. It looks at the massive surveillance by U.S. authorities of individual's financial transaction information to combat terrorism.

#### *Case study 3 – Financial data surveillance*

Following the September 11, 2001 attacks, the U.S. Treasury Department initiated the United States Terrorist Finance Tracking Programme (TFTP). It helps track terrorists and their networks by analysing financial transaction information provided by the Society for Worldwide Interbank Financial Telecommunication (SWIFT), a Belgium-based cooperative, under compulsion of administrative subpoenas.<sup>35 36</sup> Arguably, the TFTP interferes with both fundamental rights to data protection and privacy. For example, account holder names, account details, payee account number are all personal data identifiable to a person (human or legal). Dr. Tzanou argues that transfer of financial data between SWIFT and TFTP, and searches conducted will constitute processing of data. Such processing can interfere with the purpose limitation principle because the data collected is used for a completely unrelated objective i.e. to combat terrorism. The massive surveillance of data defeats the data minimisation principle. Individuals are not allowed the choice to access, correct or delete their information which abrogates additional data protection principles.<sup>37</sup> It also violates the right to privacy because information obtained is confidential in nature.

This would not amount to a breach of privacy in the U.S. because in *United States v Miller*<sup>38</sup> it was held that since customers had voluntarily revealed their personal information to a third party (i.e. bank), they could not therefore be entitled to the Fourth Amendment as they lacked any reasonable expectation of privacy.<sup>39</sup> Dr. Tzanou argues that if the U.S. courts had decided the case of *United States v Miller* on the basis of the right to data protection and not privacy, data subjects would have been entitled to the protection of their data.

Finally, case study 4 considers the vast volume of digital data that can be used to acquire personal information. It evaluates the Edward Snowden findings of indiscriminate surveillance and the Safe Harbour, which was a privacy framework that justified the transfer of data across the Atlantic.

#### *Case study 4 – Internet data surveillance*

Whistleblower Edward Snowden, former technician for the Central Intelligence Agency (CIA)<sup>40</sup> revealed that the U.S. was engaged in massive electronic surveillance accessing online data belonging to users and held by companies such as Facebook, YouTube and etc.<sup>41</sup> These revelations enhanced our understanding of political activism and provided

<sup>35</sup> US Department of the Treasury, 'Terrorist Financing Tracking Program: Fact Sheet' available at [www.treasury.gov/press-center/press-releases/Pages/js4340.aspx](http://www.treasury.gov/press-center/press-releases/Pages/js4340.aspx) accessed 8 July 2018.

<sup>36</sup> Notice: Publication of U.S./EU exchange of letters and terrorist finance tracking program representations of the United States Department of the Treasury (Federal Register 23/10/2003) < <https://www.federalregister.gov/documents/2007/10/23/07-5212/notice-publication-of-useu-exchange-of-letters-and-terrorist-finance-tracking-program> > accessed 14/11/2017.

<sup>37</sup> OECD, 2013 OECD Guidelines on the Protection of Privacy and Trans-border Flows of Personal Data [online] OECD.org available at: <http://www.oecd.org/sti/ieconomy/oecdguidelinesontheProtectionofPrivacyandTransborderFlowofPersonalData.htm>. Accessed 7 April 2016.

<sup>38</sup> *United States v Miller* 425 US 435,437 (1976).

<sup>39</sup> *Ibid.*

<sup>40</sup> G Greenwald, E McAskill and L Poitras, 'Edward Snowden: the whistleblower behind the NSA surveillance revelations', *The Guardian*, 9 June 2013, [www.theguardian.com/world/2013/jun/09/edward-snowden-nsa-whistleblower-surveillance](http://www.theguardian.com/world/2013/jun/09/edward-snowden-nsa-whistleblower-surveillance).

<sup>41</sup> G Greenwald and E MacAskill, 'NSA Prism program taps in to user data of Apple, Google and others', *The Guardian*, 7 June 2013, [www.theguardian.com/world/2013/jun/06/us-tech-giants-nsa-data](http://www.theguardian.com/world/2013/jun/06/us-tech-giants-nsa-data).

insight into the large-scale indiscriminate nature of state-corporate surveillance in Western democracies.<sup>42 43</sup>

The EU and U.S. had signed up to the Safe Harbour scheme that established a framework for the safe transfer of data from the EU to the US.<sup>44</sup> The Safe Harbour had become a conduit for massive transfer of data across the Atlantic,<sup>45 46</sup> justifying it on grounds of national security.<sup>47</sup> The author rightly questions how this will be ‘necessary and proportionate to meet the interests of national security.’ The author identifies the *Schrems* case<sup>48</sup> where U.S. intelligence agencies had massive and indiscriminate access to personal data initially processed in the EU. This was found to be contrary to the principles of proportionality and right to privacy.<sup>49</sup> The author confirms that, surprisingly, the right to data protection was mentioned only three times in the court’s analysis and the judgment relied on the application of privacy laws instead. The author accepted that the massive data surveillance did interfere with the right to privacy, but was disappointed the court did not analyse the data protection issues and violations. This is a valid argument on the basis that the extensive surveillance abrogates the purpose limitation principle,<sup>50 51</sup> namely that the data collected by American surveillance companies was initially held by Facebook for commercial purposes. Tzanou argues that if judicial decisions continue to be based on the right to privacy alone, this will hamper further development and understanding of the right to data protection and the interpretation and development of data protection principles. Legislation may fail to modernise in response to new technology, inhibiting data protection from operating as a normative right. Accordingly, over time it will be subsumed into the law of privacy. Akrivopoulou and Psygkas expressed similar concerns, namely, that the courts have overlooked the distinction between the concepts of privacy and identity that will lead to negative consequences in the age of ubiquitous computing.<sup>52</sup>

### *Limitations impeding the right to data protection*

In this research monograph, the author uses a multiple case study methodology to examine the normative value of the right to data protection. This approach increases validity by the collection of multiple sources of evidence, constructing explanations and comparing instances.<sup>53</sup> Here, Dr. Tzanou has collected and compared the evidence from four cases to evaluate the court’s inclination to arrive at its decision on the basis of right to privacy, rather than data protection. Further, she examines four categories of data,

<sup>42</sup> Lina Dencik, Arne Hintz and Jonathan Cable, ‘Towards data justice? The ambiguity of anti-surveillance resistance in political activism (Big Data & Society 2016) <<http://www.statewatch.org/news/2017/may/Ambiguity-of-anti-surveillance-resistance.pdf>> accessed 12/10/2017.

<sup>43</sup> *Ibid.*

<sup>44</sup> 2000/520/EC: Commission Decision of 26 July 2000 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the US Department of Commerce (notified under document number C(2000) 2441).

<sup>45</sup> Communication from the Commission to the European Parliament and the Council on the Functioning of the Safe Harbour from the Perspective of EU Citizens and Companies Established in the EU, Brussels, 27.11.2013, COM(2013) 847 final, 6.

<sup>46</sup> Commission Decision 2002/520/EC of 26 July 2000 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the US Department of Commerce (notified under document number C(2000) 2441).

<sup>47</sup> *Ibid.*

<sup>48</sup> Case-362/13 Maximilian Schrems v. Data Protection Commissioner, 6 October 2015.

<sup>49</sup> *Ibid.*

<sup>50</sup> Data Protection Directive Article 6(1)(b).

<sup>51</sup> *Ibid.*

<sup>52</sup> Christina Akrivopoulou and Athanasios-Efstratios Psygkas, ‘Personal data privacy and protection in a surveillance era: technologies and practices’ (Information Science Reference 2011).

<sup>53</sup> Robert K. Yin, *Case Study Research Design and Methods* (2nd ed, SAGE Publications 1984).

subjected to massive counterterrorism-related surveillance. She analyses data-veillance undertaken by U.S. authorities and considers the jurisprudence of European courts in determining whether data protection is treated as an autonomous right. Dr. Tzanou could perhaps have broadened her sample to include the category of interceptions and sharing of communications by U.S. and the UK. The case of *Liberty and Others v. The United Kingdom*<sup>54</sup> considered the massive telephone and electronic communications intercepted by the U.S. National Security Agency and United Kingdom's Governments Communications Headquarters and whether the 'extensive degree of sharing' between the agencies violated data subject's privacy under Article 8 of the European Convention on Human Rights. Indeed, the Court found a violation of the individual's right to privacy. This case supports Dr. Tzanou's argument that courts readily interpret data privacy breaches with respect to violation of right to privacy, rather than on the basis of data protection law.

Dr. Tzanou suggests there are three elements that limit the right to data protection from operating as a fully autonomous and normative right. First, data protection is closely tied with the right to privacy through frequently associated legislative instruments such as Article 1(1) of the Data Protection Directive. Article 1(1) DPD provides that member states should protect fundamental rights of individuals including their right to privacy. Second, data protection law has its origins in various secondary EU law sources before it was enshrined as a fundamental right in Article 8 of the European Union Charter of Fundamental Rights (EUCFR). Third, Tzanou suggests the substance of the right of data protection lacks certainty. She questions whether the right is confined to paragraph 1 of Article 8 of the EUCFR as creating an entitlement to the protection of personal data or as set out in Article 8 (2) and (3) which establishes the principles of purpose specification, fair processing and right to access? Protecting personal data creates an obligation to protect an individual's right to privacy under Article 8(1) Principles contained in Article 8(2) and (3) relate to the right to data protection specifically. Accordingly, Article 8 of the EUCFR deals both with the right to privacy and data protection. Tzanou suggests that data protection law should have 'autonomous content' and be treated independent of any secondary legislation. Further, she believes that the right to data protection should be balanced against opposing rights and legitimate interests such as the right of data subject to be forgotten prevails over the legitimate interests of search engine service providers and freedom of information.<sup>55</sup> Dr. Tzanou argues that a data protection case should be decided on the basis of data protection principles without any recourse to right to privacy.

## CONCLUDING REMARKS

In this book, the author not only explored theories underpinning the right to data protection, she also shed light on three key limitations that appear to prevent data protection law from realising its full potential and operating as a fully functional fundamental right, with a normative value of its own.<sup>56</sup> By recognising the limitations, Dr. Tzanou presents sensible recommendations that may help develop the right to data protection as an autonomous right. Whether data protection needs to be developed as an independent right is a different question that will be considered shortly.

<sup>54</sup> Judgment of 1 July 2008, *Case of Liberty and others v. The United Kingdom* (Application no. 58243/00).

<sup>55</sup> Judgment of the Court Case C-131/12, par. 91.

<sup>56</sup> Maria Tzanou, *The Fundamental Right to Data Protection* (Bloomsbury Publishing PLC 2017).

While Dr. Tzanou amplifies the overlap through her four case study analyses which demonstrate how both rights are commonly treated as one and the same in academia, in practice and apparently by the judiciary, the exploration of the normative significance of data protection as a fundamental right is limited. It will be a struggle for courts to decide a matter purely on the basis of right to data protection alone, without reference to privacy law principles. Nevertheless, Tzanou has given substance to a conversation that aims to strengthen the right to data protection. There may be a need for judges to receive professional training to develop on the technical aspects of data protection and privacy breaches to enable them to more easily draw the distinction. Data subjects will also be required to have the requisite data protection skills to identify the tell tale signs of data breaches and steps they can take to mitigate their losses. How will such technical knowledge and expertise be given to online users, including the new special class of data subject – children? Technical developments are clever ways of getting access to the user data that invade their online privacy.

It is no longer sensible for courts and advocates being reluctant to raise and deal with data protection law issues and arguments. In appropriate cases, data protection law principles should be considered alongside the right to privacy as this will ultimately ensure a higher level of protection for online users. To conclude, Dr. Tzanou's case study approach reveals important data protection issues that continue to be subsumed and buried in the law of privacy.

MOBEEN SHAH\*

## NLS STUDENT ESSAY PRIZE

### TATTOOS – STRETCHING THE DEFINITION OF ART?

ALEXANDER LUCAS\*

“The law has been bedevilled by attempts to widen out the field covered by the Copyright Acts”.<sup>1</sup>

#### ABSTRACT

Are tattoos, a form of body art, capable of protection under UK copyright law? At first glance this question appears a simple one. However, as one delves deeper into the legislation and relevant case law, and considers the influence of European Union jurisprudence as well as social and contextual dimensions, the situation is invariably more complex. This article provides an introductory overview of copyright law including an analysis of the only known UK case to deal with copyright and body art. This analysis will raise a number of issues in relation to the main criteria to be met for copyright to subsist in a tattoo, namely: subject matter and originality. Other requirements of copyright subsistence including authorship, ownership, qualification, moral rights, infringement and enforcement of copyright will be examined in turn. This analysis will demonstrate that although the legal requirements may be met objectively, in the author’s view it is unlikely that the courts would widen the field of protection far enough to encompass tattoos although a definitive answer to the overarching question may remain elusive.

#### COPYRIGHT AND BODY ART

Classified as a property right by the Copyright, Designs and Patents Act (CDPA) 1988,<sup>2</sup> copyright grants to the creator the right to control the use and distribution of their work. There is potential for every original work to be protected by copyright, however the Berne Convention,<sup>3</sup> the international agreement on copyright, affords member states the discretion to grant protection to certain categories of works, for example, applied art and industrial designs.<sup>4</sup> In the United Kingdom (UK), for copyright to subsist in any given work, it must fit into one of the categories listed in section 1 of the CDPA 1988 – sometimes described as the “closed list” approach.<sup>5</sup> If the work falls into the category of literary, dramatic, musical or artistic works, it must also be original, in the sense that it has not been copied from another source.<sup>6</sup> However, following recent judgments of the Court of Justice of the European Union (CJEU),<sup>7</sup> debate has arisen

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<sup>1</sup> *Metix (UK) Limited and Another v G.H. Maughan (Plastics) Limited and Another* [1997] FSR 718 (HC Pat) 721 (Laddie J).

<sup>2</sup> Copyright, Designs and Patents Act (CDPA) 1988, s 1(1).

<sup>3</sup> Berne Convention for the Protection of Literary and Artistic Works 1886.

<sup>4</sup> *Ibid* Article 2(7).

<sup>5</sup> Tanya Aplin, Jennifer Davis, *Intellectual Property Law Texts, Cases, and Materials* (2<sup>nd</sup> edn, OUP 2013) 63.

<sup>6</sup> CDPA 1988 (n 2) s 1(1)(a).

<sup>7</sup> *Infopaq International AIS v Danske Dagblades Forening* (Infopaq I) Case C-5/08 [2009] ECDR 16 (CJEU Fourth Chamber); *Bezpečnostní softwarová asociace – Svaz softwarové ochrany v Ministerstvo Kultury* (Case C-393/09) [2011] FSR 18, [2011] ECDR 3 (CJEU Third Chamber); *Football Association Premier League Ltd and others v QC Leisure and others*; *Murphy v Media Protection Services Ltd* (Joined Cases C-403/08 and C-429/08) [2012] FSR 1, [2012] ECDR 8 (CJEU Grand Chamber).

as to whether strict adherence to the closed list approach is sustainable. It has been suggested that the sole criterion for copyright subsistence is that the work be the author's own intellectual creation.<sup>8</sup>

Copyright protects the expression of an idea, not the idea itself.<sup>9</sup> This is important as claiming the ownership of the idea would severely limit the creative output of authors. Copyright attempts to strike a balance between protecting the rights of the author of a work and those of the wider public who benefit from dissemination of the work.<sup>10</sup> Moreover, it is often opined that the protection copyright affords is necessary to encourage the production of future works; without it there would be little incentive for authors to be creative.<sup>11</sup>

The closest the UK's legal system has come to discussing copyright in relation to the subject matter of body art is the case of *Merchandising Corporation of America Inc v Harpbond*.<sup>12</sup> Considered in the early 1980s, the case involved the pop singer Adam Ant (of the band Adam and the Ants) and a new 'Prince Charming' look he created for himself during the height of his musical career.<sup>13</sup> As well as dressing in striking clothes similar to those worn during the Regency period in England, with his hair styled akin to how certain tribes of North American Indians had appeared in the past (combined with a kiss curl and what are described as Valentino sideburns), his image included extensive facial makeup. The makeup comprised three painted lines down one cheek, running from the nose to the jaw, a heart over the left eye brow and a beauty spot by the left nostril. Photographs were taken of the singer's new get-up and the images licensed to various publications for promotional purposes. However, one particular publication, wishing to keep up with rivals but without a licensed image, amended certain older photos of the singer to show the new facial makeup. The firm printed these images in its magazine which subsequently sold in large numbers. Representatives for the singer brought an action for copyright infringement based on, inter alia, the copying of the makeup.

The case was eventually heard in the Court of Appeal where it was argued on behalf of the claimant that the facial makeup was a painting, therefore an artistic work, and subsequently covered by section 3 of the Copyright Act 1956. Lawton LJ found this a rather "fantastic" assertion, the dictionary definition of painting did not cover makeup, and agreed with counsel for the defendants that a painting must be on a surface of some kind. Here, the singer's face could not be regarded as a surface. Moreover, if the makeup was a painting, it disappeared as soon as it was removed from the face.<sup>14</sup> Subsequently, the makeup was not protected by section 3 of the 1956 Act, therefore there was no copyright infringement by publishing the amended photographs.

The judgment has attracted criticism. Legal scholars Bently and Sherman disapproved of the court's reasoning explaining that Adam Ant's face is as much a surface as any piece of canvas.<sup>15</sup> They offer alternative justifications for Lawton LJ's findings: a

<sup>8</sup> Paul Torremans, *Holyoak & Torremans Intellectual Property Law* (8<sup>th</sup> edn, OUP 2016) 192.

<sup>9</sup> *Baker v Seldon* 101 US 99 (1879) (US Supreme Court); Agreement on Trade-related Aspects of Intellectual Property Rights 1994 (TRIPS Agreement) Article 9(2); World Intellectual Property Office Copyright Treaty 1996, Article 2; *Baigent v The Random House Group Ltd* [2007] EWCA Civ 247, [2008] EMLR 7 [5] (Lloyd LJ).

<sup>10</sup> Gillian Davies, *Copyright and the Public Interest* (2<sup>nd</sup> edn, Sweet & Maxwell 2002) [14–001] 354.

<sup>11</sup> William Landes, Richard Posner, 'An Economic Analysis of Copyright Law' (1989) 18 J Legal Stud 325, 326; Michael Spence, 'Justifying Copyright' in Daniel McClean and Karsten Schubert (eds), *Dear Images, Art, Copyright and Culture* (Ridinghouse 2002).

<sup>12</sup> [1983] FSR 32 (CA).

<sup>13</sup> *Ibid* 33 (Walton J).

<sup>14</sup> *Ibid* 46 (Lawton LJ).

<sup>15</sup> Lionel Bently, Brad Sherman, *Intellectual Property Law* (4<sup>th</sup> edn, OUP 2014) 73.

painting must be permanent; the makeup was too trivial to meet the criteria of originality required for copyright protection;<sup>16</sup> and that the case could be explained on the grounds of a “merger of idea and expression”.<sup>17</sup> Further, Justices Laddie, Prescott and Vitoria also found the judgment unsatisfactory and submitted their preference for the basis of the decision that copyright was not infringed because the makeup lacked the required originality,<sup>18</sup> while academic Torremans leans towards the lack of permanency in the makeup as its downfall.<sup>19</sup>

Despite being subjected to critical analyses at many levels, it is not suggested the outcome was incorrect. Further, it is submitted that too much focus on the intricacies of the reasoning serves to divert attention from the core issue: copyright has an ever-broadening remit of application,<sup>20</sup> the burden of which “vastly outweighs any original benefit”.<sup>21</sup> There is much value in intellectual property (IP). Cases such as *Harpbond* are a product of the structure and application of UK copyright law, it exemplifies the attempts that are made to stretch the boundaries of copyright as a form of IP. The discussion such cases provoke illustrates many of the issues that will need to be addressed when considering whether tattoos can be protected under UK copyright legislation.

Although the *Harpbond* case is brought under the Copyright Act 1956, decisions made under the old copyright law remain relevant to establishing the true construction of any provision in the new law.<sup>22</sup> It is submitted that body art, including tattoos, would still not meet the everyday definition of a painting. However, the scope of protection provided by the new law under section 4 of the CDPA 1988 appears to be wider, possibly wide enough to accommodate tattoos. Lack of permanency should not pose a problem, but the originality criterion and potential issues arising from the idea and expression dichotomy may provide a stumbling block. These copyright law issues will be considered further below.

### *Body art – stretching the legal definition of art?*

A consequence of the closed list approach to the subsistence of copyright is the necessity to fit creative works into one of the categories listed in the legislation: original literary, dramatic, musical or artistic works; sound recordings; films; broadcasts; and typographical arrangements of published editions.<sup>23</sup> The exact definition of each of these categories is unclear and has been the catalyst for a number of cases where the courts have been required to establish some limitations, indeed there is evidence to suggest this is as the legislature intended.<sup>24</sup> Litigation has defined examination papers as literary works,<sup>25</sup> classed performing editions that allow old compositions to be performed on modern instruments as original musical works,<sup>26</sup> decided in principle that a film can be a dramatic work,<sup>27</sup> and declared a circuit diagram to be both a literary work and

<sup>16</sup> *Ibid* 93.

<sup>17</sup> *Ibid* 69.

<sup>18</sup> Charlotte May and others, *Laddie, Prescott and Vitoria: The Modern Law of Copyright and Designs* (4<sup>th</sup> edn, LexisNexis 2011) paras 4.21, 4.40.

<sup>19</sup> *Torremans* (n 8) 190.

<sup>20</sup> James Griffin, ‘Copyright evolution – creation, regulation and the decline of substantively rational copyright law’ (2013) 3 *IPQ* 234.

<sup>21</sup> Lawrence Lessig, *Free Culture* (The Penguin Press 2004) 19.

<sup>22</sup> CDPA 1988, s 172(3).

<sup>23</sup> CDPA1988, s 1.

<sup>24</sup> HL Deb 29 March 1988, vol 495, col 611.

<sup>25</sup> *University of London Press, Limited v University Tutorial Press, Limited* [1916] Ch 601 (HC).

<sup>26</sup> *Sawkins v Hyperion Records Ltd* [2005] EWCA Civ 565, [2005] 1 WLR 3281.

<sup>27</sup> *Norowzian v Arks Ltd (No 2)* [2000] FSR 363 (CA).

an artistic work.<sup>28</sup> However, an Imperial Stormtrooper helmet made for one of the Star Wars films was held not to be capable of classification as a sculpture for copyright protection purposes.<sup>29</sup>

The Copyright Act 1956 lacked a definition of “painting” and the same is true of the CDPA 1988. What constitutes a painting will be a question of fact in any particular case.<sup>30</sup> Counsel for Adam Ant tried to establish his makeup was a form of painting (an artistic work) as this was the only category within the Copyright Act 1956 that could potentially be stretched to include the makeup. The CDPA 1988 is drafted more broadly and allows for a greater variety of works to be classified as artistic works. The Copyright Act 1956 defines artistic works in section 3:

3. Copyright in artistic works.

(1) 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;

...

The CDPA 1988 defines artistic works in section 4:

4. Artistic works.

(1) In this Part “*artistic work*” means —

(a) a graphic work, photograph, sculpture or collage, irrespective of artistic quality,

...

(2) In this Part—

... “*graphic work*” includes—

(a) any painting, drawing, diagram, map, chart or plan;

...

The potential to argue that a tattoo is a graphic work and therefore can attract copyright protection is certainly there, the wording in section 4(2) of the CDPA 1988 provides a non-exhaustive list of examples.<sup>31</sup> A little “creative interpretation”<sup>32</sup> could allow tattoos to be recognised and afforded property rights. Even if it is accepted that a tattoo can be classed as an “artistic work” which is protected irrespective of artistic quality,<sup>33</sup> the range of body art currently available necessitates further analysis; other criteria need to be considered before a conclusion can be drawn and, in any event, the courts would likely approach this on a case by case basis.<sup>34</sup> Decisions by the courts in relation to other subject matter provide some guidance as to how works that do not fit neatly into the current categories may be assessed. Laddie J in the High Court described a sculpture as “a three-dimensional work made by an artist’s hand”,<sup>35</sup> while the Supreme Court favoured a “multi factorial approach”<sup>36</sup> but put much emphasis on the intention behind the creation, for example, something made for purely utilitarian purposes (i.e. functional

<sup>28</sup> *Anacon Corporation Limited and Another v Environmental Research Technology Limited and Another* [1994] FSR 659 (HC).

<sup>29</sup> *Lucasfilm Ltd and others v Ainsworth and another* [2012] UKSC 39, [2012] 1 AC 208.

<sup>30</sup> *Merchandising Corp v Harpbond* (n 12) 46 (Lawton LJ).

<sup>31</sup> *Bently & Sherman* (n 15) 76.

<sup>32</sup> *Ibid* 60.

<sup>33</sup> CDPA 1988, s 4(1)(a).

<sup>34</sup> *Biotrading & Financing OY v Biohit Ltd* [1998] FSR 109 (CA) 116.

<sup>35</sup> *Metix v Maughan* (n 1) 722 (Laddie J).

<sup>36</sup> *Lucasfilm v Ainsworth* (n 29) [47] (Lord Walker JSC and Lord Collins).



objects) cannot be a sculpture.<sup>37</sup> In *Interlego AG v Tyco Industries Inc. and Others*<sup>38</sup> the Privy Council stated that “[e]ssentially artistic copyright is concerned with visual image”.<sup>39</sup> Therefore, the purpose behind the creation of the tattoo is paramount; one must ask whether it was created with artistic purpose in mind and whether the result is one of visual significance.

Justine Pila explains how UK copyright law categorises works in relation to a formalist theory of art and that this is justified as in order to appreciate a work as being a work one must perceive it in relation to a category.<sup>40</sup> But Justine does go on to highlight some deficiencies with this approach and proposes an alternative theory that encompasses considerations of the form of the work but also the history and context within which the work is created. One example that is offered during the course of discussion is that “paint on the body is more likely to be recognized as painting in indigenous Australian than British societies”.<sup>41</sup> Indeed, as the preceding discussion demonstrates, the courts invariably do consider a wider range of factors when approaching issues of subsistence applied to non-standard subject matter or that which is not easily categorised. Society’s opinion of tattoos has certainly changed in recent times and those that sport the ink adornments can no longer be defined purely by class; with claims that one in five adults now have a tattoo including former Prime Minister David Cameron’s wife, Samantha Cameron,<sup>42</sup> perhaps the more appropriate view is that persons visit tattoo studios to commission “a themed, long-term, coherent piece of artwork”.<sup>43</sup> Furthermore, there is certainly a long and colourful history behind the practice, the earliest accounts of tattoos dating back to the prehistoric era.<sup>44</sup> Captain James Cook returned from his first voyage across the South Pacific with a tattooed man from Tahiti called Omai who attracted much attention and interest from all, including the upper classes. As well as meeting King George III and attending the state opening of Parliament, he sat for a portrait by Sir Joshua Reynolds. This portrait was sold at auction for more than ten million pounds in 2010.<sup>45</sup> According to an article in *The Harmsworth Monthly Pictorial Magazine – Queer Stories of a Queer Craze* – tattoos were very much associated with the aristocracy in the late nineteenth century.<sup>46</sup> The same article explains the, as it was then, modern procedure of a needle aided by electric current to apply the ink while “the genius of the artist suppl[ies] the rest of the operation”. Given this early history and recognition of tattoos as a form of art, at least in society’s view rather than in law, it appears they fell out of fashion with “respectable” individuals and became more associated with convicts, bikers and punks for most of the 20<sup>th</sup> century, once again gaining popularity amongst the more affluent as the millennium approached.<sup>47</sup> This shifting between the classes and the changing opinion as to the respectability or otherwise of tattoos is potentially a reason behind them never

<sup>37</sup> *Ibid* [37] (Lord Walker JSC and Lord Collins).

<sup>38</sup> [1989] AC 217 (PC).

<sup>39</sup> *Ibid* 263 (Lord Oliver).

<sup>40</sup> Justine Pila, ‘Copyright and Its Categories of Original Works’ (2010) 30 OJLS 229.

<sup>41</sup> *Ibid* 249.

<sup>42</sup> Jon Henley, ‘The rise and rise of the tattoo’ *The Guardian* (London, 20 July 2010) <[www.theguardian.com/artanddesign/2010/jul/20/tattoos](http://www.theguardian.com/artanddesign/2010/jul/20/tattoos)> accessed 20 February 2017.

<sup>43</sup> *Ibid*.

<sup>44</sup> See generally Steve Gilbert, *Tattoo History: A Source Book: an Anthology of Historical Records of Tattooing Throughout the World* (Juno Books 2000).

<sup>45</sup> Karen Gold, ‘Beauty And The Beasts’ *The Times Educational Supplement* (London, 22 March 2002) 4.

<sup>46</sup> R J Stephen, ‘Tattooed Royalty. Queer Stories of a Queer Craze’ (*The Harmsworth Monthly Pictorial Magazine* Vol 1, 1898) <[www.vanishingtattoo.com/tattoo\\_museum/tattooed\\_royalty\\_1898.html](http://www.vanishingtattoo.com/tattoo_museum/tattooed_royalty_1898.html)> accessed 20 February 2017.

<sup>47</sup> Margo DeMello, Gayle S Rubin, ‘*Bodies of Inscription: A Cultural History of the Modern Tattoo Community*’ (Duke University Press 2000).

falling for consideration in the development of modern copyright legislation (since the Berne Convention 1886), the current trend adding weight to their acceptability as a recognised art form.

Notwithstanding the possibility that a tattoo is capable of being defined as an artistic work under the CDPA 1988, the implementation of European Union (EU) Directives<sup>48</sup> and consequential rulings by the CJEU provide a further argument that can be advanced in relation to copyright subsistence. Many countries do not employ a closed list approach to the issue of copyright subsistence, France protects “the rights of authors in all works of the mind”,<sup>49</sup> while Germany only protects works that constitute “the author’s own intellectual creations”.<sup>50</sup> Differences in standards and application of intellectual property rights across the EU was deemed to create a barrier to trade, for example “artificial partitioning in the Common Market” created by differences in the term of protection for sound recordings.<sup>51</sup> In response, and accepting that harmonisation of all aspects of copyright law across the whole of the EU would not be possible due to national variations, the European Commission instigated a piecemeal approach to reform focussing on a limited number of particular areas.

Directives were passed in relation to databases, photographs and computer programs. None of the three Directives contain any guidance on what requirements must be met for a work to exist and attract copyright protection other than the criterion of originality, which is defined by the term “author’s own intellectual creation”.<sup>52</sup> It was not long before national courts posed questions to the CJEU in order to clarify the extent and application of certain aspects of the Directives through the preliminary reference procedure.<sup>53</sup> The subsequent rulings of the CJEU in *Infopaq International A/S v Danske Dagblades Forening* (Infopaq I) (Case C-5/08),<sup>54</sup> *Bezpečnostní softwarová asociace – Svaz softwarové ochrany v Ministerstvo Kultury* (Case C-393/09)<sup>55</sup> and *Football Association Premier League Ltd and others v QC Leisure and others; Murphy v Media Protection Services Ltd* (Joined Cases C-403/08 and C-429/08)<sup>56</sup> followed. Although the court was not primarily concerned with issues of subsistence, each of the judgments recognised that works that fall outside of the standard categories are capable of attracting copyright protection as long as the work is an intellectual creation.<sup>57</sup>

Mireille van Eechoud provides a detailed analysis of the judgments in these cases combined with an assessment of the related academic literature and states “[c]ommentators are in broad agreement that the Court holds it a matter of European law that there is such a thing as a generalized work concept (‘the author’s own intellectual creation’).”<sup>58</sup>

<sup>48</sup> Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases [1996] OJ L77/20, Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights [2006] OJ L372/12, Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs [2009] OJ L111/16.

<sup>49</sup> Intellectual Property Code 1992, Literary and Artistic Property (Code de la propriété intellectuelle) Article L112–1.

<sup>50</sup> German Copyright Act 1965 (Gesetz über Urheberrecht und verwandte Schutzrechte) § 2(2).

<sup>51</sup> *EMI Electrola GmbH v Patricia Im- und Export Verwaltungsgesellschaft mbH and Others* Case 341/87 [1989] ECR 79 [8] (CJEU 6<sup>th</sup> Chamber).

<sup>52</sup> Council Directive 2006/116/EC Article 6; Council Directive 96/06/EC Article 3(2); Council Directive 2009/24/EC Article 1(3) (n 48).

<sup>53</sup> Treaty on the Functioning of the European Union Article 267.

<sup>54</sup> *Infopaq* (n 7).

<sup>55</sup> *Bezpečnostní* (n 7).

<sup>56</sup> *Football Association v QC Leisure; Murphy v Media Protection* (n 7).

<sup>57</sup> See generally *Aplin & Davis* (n 5) 64; *Bently & Sherman* (n 15) 61.

<sup>58</sup> Mireille van Eechoud, ‘Along the Road to Uniformity – Diverse Readings of the Court of Justice Judgments on Copyright Work’ (2012) 1 JIPITEC 60 [77].

However, in *SAS Institute Inc. v World Programming Ltd*,<sup>59</sup> despite Arnold J recognising that:

In the light of a number of recent judgments of the CJEU, it may be arguable that it is not a fatal objection to a claim that copyright subsists in a particular work that the work is not one of the kinds of work listed in s. 1(1)(a) of the Copyright, Designs and Patents Act 1988 and defined elsewhere in that Act.<sup>60</sup>

In the same paragraph he goes on to explain “it remains clear that the putative copyright work must be a literary or artistic work within the meaning of art.2(1) of the Berne Convention”.<sup>61</sup> Paragraphs [32]-[37] of the *Infopaq* decision are cited by Arnold J as authority for this conclusion with him providing further explanation that the definition of literary and artistic works is not “unlimited”.<sup>62</sup>

It is submitted that the current situation is unsatisfactory and continues to remain unclear, further consideration by the senior appellate court system in the UK is required to remove uncertainty in this area and confirm whether a strict application of the closed list approach to copyright subsistence still prevails. Further uncertainty exists in light of the UK’s exit from the European Union (Brexit). Nonetheless, a reasonable conclusion to draw at this stage is that the possibility of tattoos attracting copyright protection under a liberal interpretation of works listed within the CDPA 1988 or as an intellectual creation certainly exists. However, merely establishing a tattoo as a recognised work is not enough (or is it if the latter EU standard is used? see text to n 79), the UK system has long required artistic works to meet a further criterion to determine subsistence, that of originality, which will be considered further below.

### *Originality*

To attract copyright protection works listed under the CDPA 1988 section 1(1)(a), which includes artistic works, must also be original. The exact purpose of this particular requirement often provokes discussion.<sup>63</sup> Whether its importance relates to the balancing of competing interests considered in the justifications for copyright protection,<sup>64</sup> its role in infringement actions where only parts of a work are copied,<sup>65</sup> or its use as a tool to help determine whether copyright can subsist in a work that does not easily fit into the traditional categories,<sup>66</sup> it does provide an extra hurdle for artistic works to jump in order to attract protection. And it could be the most important criterion to consider when attempting to differentiate between the many forms tattoos can take; ultimately originality is fact sensitive and will be determined on a case by case basis.<sup>67</sup>

There is no definition of originality within the CDPA 1988, save for that which appears in section 3A in relation to databases, the wording of which was transposed into the Act to implement the EU Database Directive<sup>68</sup> and is where we find the words “author’s own intellectual creation”.<sup>69</sup> Whale on Copyright explains originality to mean “that there

<sup>59</sup> [2013] EWHC 69 (Ch), [2013] RPC 17.

<sup>60</sup> *Ibid* [27].

<sup>61</sup> *Ibid*.

<sup>62</sup> *Ibid*.

<sup>63</sup> *Aplin & Davis* (n 5) 94–95; *Bently & Sherman* (n 15) 95–96.

<sup>64</sup> See Edwin Hettinger, ‘Justifying Intellectual Property’ (1989) 18 *Philosophy & Public Affairs* 31.

<sup>65</sup> *Designers Guild Ltd. v Russell Williams (Textiles) Ltd. (trading as Washington D.C.)* [2000] 1 WLR 2416 (HL).

<sup>66</sup> *Laddie, Prescott and Vitoria* (n 18) regards *Merchandising Corp v Harpbond* (n 12).

<sup>67</sup> *Biotrading v Biohit* (n 34) 116.

<sup>68</sup> Council Directive 96/9/EC (n 48).

<sup>69</sup> CDPA 1988 s 3A(2).

is a direct connection between the intellectual and creative activities of the author, on the one hand, and the ultimate generation of the work, on the other”.<sup>70</sup> In other words that the work originated from he or she who claims to be the author.<sup>71</sup> Traditionally in the UK this is a *de minimis* standard not requiring “original or inventive thought”;<sup>72</sup> the work must not be copied and originate from the author,<sup>73</sup> who must only exercise independent skill, judgment and labour.<sup>74</sup> The effort applied needs to be more than minimal or negligible.<sup>75</sup> Moreover, minor alterations to an existing work will not confer originality however much labour or skill is expended.<sup>76</sup>

However, several rulings from the CJEU could be considered as changing the UK’s concept of originality. The case of *Infopaq International A/S v Danske Dagblades Forening*<sup>77</sup> is often regarded as the beginning of the debate. The court was asked questions in relation to the Information Society Directive<sup>78</sup> which aimed to harmonise certain aspects of copyright across member states. One specific question was whether the copying of an 11-word extract from a newspaper article could be classed as reproduction in part within the meaning of Article 2 of the Directive. The court decided that Article 2 applies to “a subject matter which is original in the sense that it is its author’s own intellectual creation”<sup>79</sup> and that parts of a work enjoy the same protection “provided that they contain elements which are the expression of the intellectual creation of the author of the work”.<sup>80</sup> Therefore, if the 11-word extracts could be classed as intellectual creations of the author then they would be protected by copyright. In reaching this conclusion, as there was no definition of originality in the Information Society Directive, the court drew upon the definition for originality given in the Database<sup>81</sup> and Software Directives,<sup>82</sup> which is “the author’s own intellectual creation”. At the time the potential impact of this decision on UK copyright law was noted, some seeing it “as a bomb in the UK copyright landscape”.<sup>83</sup>

In four subsequent rulings<sup>84</sup> the CJEU has reiterated that “the notion of the author’s own intellectual creation refers to the criterion of originality”.<sup>85</sup> But academics appear to be divided on the exact repercussions of these decisions. Rosati states that the CJEU have “taken a proactive approach to copyright and achieved harmonisation by means of judicial interpretation of a fundamental principle of copyright”,<sup>86</sup> while Rahmatian argues that this view is too extreme and that the rulings have not altered the concept of originality in UK law – the decisions only being applicable to the “special” types of

<sup>70</sup> Jeremy Phillips, Robyn Durie and Ian Karet, *Whale on Copyright* (4<sup>th</sup> edn, Sweet and Maxwell 1993) 36.

<sup>71</sup> *Dear Images* (n 11) 19 (Daniel McClean).

<sup>72</sup> *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273 (HL) 291 (Lord Pearce).

<sup>73</sup> *University of London Press* (n 25) 609 (Peterson J).

<sup>74</sup> *Ladbroke Football* (n 72).

<sup>75</sup> *Ibid* 287.

<sup>76</sup> *Interlego v Tyco* (n 38) 258 (Lord Oliver).

<sup>77</sup> *Infopaq* (n 7).

<sup>78</sup> 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 [2001] OJ L167/10.

<sup>79</sup> *Infopaq* (n 7) [37].

<sup>80</sup> *Ibid* [39].

<sup>81</sup> Directive 96/9/EC (n 48).

<sup>82</sup> Directive 2009/24/EC (n 48).

<sup>83</sup> Estelle Derclaye, ‘Case Comment: *Infopaq International A/S v Danske Dagblades Forening* (C-5/08): wonderful or worrisome? The impact of the ECJ ruling in *Infopaq* on UK copyright law’ (2010) 32(5) EIPR 247, 247.

<sup>84</sup> *Bezpečnostní* (n 7) [45]; *Football Association v QC Leisure; Murphy v Media Protection* (n 7) [97]; *Painer v Standard Verlags GmbH* (C-145/10) [2012] ECDR 6 (CJEU Third Chamber) [87]; *Football Dataco Ltd v Yahoo! UK Ltd* (Case C-604/10) [2013] FSR 1, [2012] ECDR 10 (CJEU Third Chamber) [37].

<sup>85</sup> *Football Dataco Ibid* [37].

<sup>86</sup> Eleonora Rosati, ‘Towards an EU-wide copyright? (Judicial) pride and (legislative) prejudice’ (2013) 1 IPQ 47, 64.

works the Directives relate to: computer programs, databases and photographs.<sup>87</sup> In light of this it may be concluded that the originality requirement is far from settled, but even before these pronouncements from the CJEU the concept of originality was a cause for discussion.<sup>88</sup> However, it has been pointed out that the instances where subject matter has been rejected on the basis of lack of originality are few.<sup>89</sup>

To determine whether a tattoo would have the requisite level of originality, a distinction must be drawn between tattoos that are created through a process of using thermographic transfer paper, which transposes the design of the image on to the skin where it can be traced by the tattoo needle,<sup>90</sup> and those designs that are drawn free-hand on the skin first.<sup>91</sup> The latter, it is submitted, requiring much more skill, labour and judgment (originality) than the former. Indeed, the former may just be copies of pre-existing works that come from an image library, although a preliminary sketch would not necessarily preclude copyright protection in the final piece.<sup>92</sup> Moreover, if the tattooist is merely tracing an image, it could be that the true author of the artwork is a different individual to that who applies it to the skin. In both instances of copying no original work has been created.<sup>93</sup> It may be necessary to consider the addition of colour and shading to a traced piece if only the outline has been copied; it could be argued that enough artistic expression has been added to create a new original work. It is worth repeating that copyright protects the expression of an idea, not the idea itself;<sup>94</sup> commonplace attributes are likely to be classed as ideas.<sup>95</sup> Therefore, any additional work on a tracing would need to be capable of standing alone as an artistic expression to meet the requisite level of originality. Furthermore, it is not uncommon for an individual to have a tattoo design added to, adapted or erased by the further application of ink, either by the same artist that applied the original or a new artist. Putting aside potential complications created by interference of an earlier protected work (see text to n 124), recent case law has confirmed that additions to an existing work can create a new work that attracts copyright protection.<sup>96</sup>

Notwithstanding artistic works can be protected by copyright “irrespective of artistic quality”,<sup>97</sup> it is submitted that it is not possible to state a general rule in relation to the criterion of originality and tattoos. Whether copyright subsists in any given tattoo would need to be decided on a case by case basis considering many aspects of how the work was created. And there are further issues beyond subsistence which now need to be considered that may cause problems for the enforcement of any rights claimed by a tattoo artist.

<sup>87</sup> Andreas Rahmatian, ‘Originality in UK Copyright Law: The Old “Skill and Labour” Doctrine Under Pressure’ (2013) 44(1) IIC 4, 6.

<sup>88</sup> Agustin Waisman, ‘Revisiting originality’ (2009) 31(7) EIPR 370.

<sup>89</sup> *Bently & Sherman* (n 15) 94.

<sup>90</sup> ‘The Stencil: Thermographic Printers’ (*S8 Tattoo* 26 May 2016) <<https://s8tattoo.com/blogs/stencil-science/120981953-the-stencil-thermographic-printers/>> accessed 06 April 2018.

<sup>91</sup> Beccy Rimmer, ‘What is a “free-hand tattoo”?’ (*Included* 11 January 2016) <[www.included.co.uk/2016/11/01/what-is-a-freehand-tattoo/](http://www.included.co.uk/2016/11/01/what-is-a-freehand-tattoo/)> accessed 04 March 2018.

<sup>92</sup> *Biotrading v Biohit* (n 34).

<sup>93</sup> *Interlego v Tyco* (n 38) 262–263 (Lord Oliver).

<sup>94</sup> *Baker v Seldon* (n 9); TRIPS Agreement (n 9) Article 9(2); World Intellectual Property Office Copyright Treaty 1996, Article 2; *Baigent v Random House* (n 9) [5] (Lloyd LJ).

<sup>95</sup> *Designers Guild* (n 65) 2423 (Lord Hoffman).

<sup>96</sup> *Sawkins* (n 26).

<sup>97</sup> CDPA 1988, s 4(1)(a).

*Authorship, Ownership and Qualification*

The author of a work is the person who creates it.<sup>98</sup> Unless a work is created in the course of employment, the author will be the first owner of the copyright.<sup>99</sup> This is the default position even if the work is commissioned, such as tattoos, the artist creating the work being under a contract for services not a contract of service. Ownership of copyright can be assigned in relation to existing<sup>100</sup> or future works.<sup>101</sup> If significant creative but not distinct contributions from more than one author have been made in the production of a work then it will be a work of joint authorship.<sup>102</sup> In this scenario both authors hold the copyright as tenants in common<sup>103</sup> and any dealings with the work would require the consent of both authors. There is certainly the potential for a tattoo to have more than one author involved in its creation, for example a larger piece requiring several appointments to complete where more than one artist is involved, but the artists would need to be “in prosecution of a preconceived joint design”.<sup>104</sup>

Copyright will only subsist in a work if the requirements of qualification are met.<sup>105</sup> Given the method by which tattoos are created this should occur through qualification by reference to the author.<sup>106</sup> An author can benefit from the provisions of the CDPA 1988 if they are a citizen, domiciliary or resident of the UK or other Convention<sup>107</sup> signatory.

In the absence of any agreement between the parties, the fact that the work is created on the human body may lead to problems with copyright ownership. The copyright owner of an artistic work has the right to restrict its copying, distribution and communication.<sup>108</sup> Artistic works are usually created on inanimate, tangible mediums, the tangible medium having a property right that is distinct from the artwork protected by the intangible copyright.<sup>109</sup> Not so with tattoos. Would it be in the contemplation of the person paying for the tattoo to be permanently applied to their body that the tattoo artist would retain some ownership over the work? Moreover, would the person commissioning the work continue if they understood the tattoo artist to retain rights in the image applied to their skin?

However, when a work is commissioned the circumstances may be such that the courts deem it necessary to imply either an assignment of the copyright or the grant of a licence to ensure to give full effect to the agreement between the parties.<sup>110</sup> Although it is recognised that an implied term should not exceed what is necessary in the circumstances, therefore an implied licence to allow the commissioner to use the copyright work would be sufficient,<sup>111</sup> in *R Griggs Group Ltd and others v Evans and others (No 1)*<sup>112</sup> the Court of Appeal acknowledged that situations may arise where strong arguments exist

<sup>98</sup> *Ibid* s 9(1).

<sup>99</sup> *Ibid* s 11.

<sup>100</sup> *Ibid* s 90.

<sup>101</sup> *Ibid* s 91.

<sup>102</sup> *Ibid* s 10(1); *Robin Ray v Classic FM Plc* [1998] FSR 622 (HC) [27] (Lightman J).

<sup>103</sup> *Lauri v Renad* [1892] 3 Ch 402 (CA) 413 (Kekewich J).

<sup>104</sup> *Levy v Rutley* (1870–71) LR 6 CP 523 (Court of Common Pleas) 528 (Byles J).

<sup>105</sup> CDPA 1988, s 153.

<sup>106</sup> *Ibid* s 154.

<sup>107</sup> *Berne Convention* (n 3).

<sup>108</sup> CDPA 1988, s 16.

<sup>109</sup> Enrico Bonadio, ‘Copyright Protection of street art and graffiti under UK law’ (2017) 2 IPQ 187, 198; *Torremans* (n 8) 258.

<sup>110</sup> *Clearsprings Management Ltd v Businesslinx Ltd* [2005] EWHC Ch 1487, [2006] FSR 3 [7] (Christopher Floyd QC).

<sup>111</sup> *Robin Ray v Classic FM* (n 102) [45] (Lightman J).

<sup>112</sup> [2005] EWCA Civ 11, [2005] ECDR 30.

for the implication of an assignment of the copyright in cases of commissioned works. Some feel the Court went too far, as an implied licence would have been sufficient,<sup>113</sup> and “[a]ny judicial interference . . . is bound to introduce uncertainty into dealings with copyright”,<sup>114</sup> but the precedent is potentially a big problem for tattoo artists. An assignment would completely remove any ownership of copyright from the author and any meaningful protection of their work.

### *Moral Rights*

If a work is protected by copyright then an author is also able to enforce what are called moral rights.<sup>115</sup> These rights remain intact even when copyright has been assigned or granted under an implied licence.<sup>116</sup> There are two which are most applicable to tattoos. Firstly, the right to be identified as the author of the work (paternity right).<sup>117</sup> This right is not automatic and must be asserted by the author.<sup>118</sup> In the case of artistic works this is usually done with a simple signature on the artwork itself,<sup>119</sup> problematic in respect of tattoos, but can also be asserted by an instrument in writing.<sup>120</sup> This right requires that the author be identified whenever the work is exhibited in public or a visual image or film including the work is shown in public.<sup>121</sup> Even accepting that the right is excluded in certain situations, for example in relation to incidental inclusion in other works,<sup>122</sup> this poses questions as to what the individual sporting the artwork on their body is supposed to do when visiting the beach or local swimming pool. Secondly, the author has the right to object to derogatory treatment of their work (integrity right).<sup>123</sup> Any addition to, deletion from, alteration or adaptation that amounts to distortion or mutilation of the work or is otherwise prejudicial to the honour or reputation of the author is classed as derogatory treatment.<sup>124</sup> Although proof that such treatment is prejudicial to the honour or reputation of the author is required,<sup>125</sup> this raises issues of competing rights between the author of the tattoo and the individual wishing to undergo cover-up work, alterations or have their tattoo removed by laser surgery.

Given these problems it is submitted that it is only reasonable that the author should desist from asserting their paternity right. Moreover, moral rights can be waived under UK law by instrument in writing.<sup>126</sup> It seems only appropriate in the circumstances that any artist wishing to assert copyright in a tattoo should waive their moral rights as part of a written agreement when the work is commissioned.

### *Infringement*

Many cases of alleged infringement are settled out of court, thus removing the need to assess the criteria discussed so far. The threat of an infringement action and the belief that the claimant has an enforceable case against a potential infringer being enough

<sup>113</sup> Rebecca Baines, ‘Copyright in Commissioned Works: A Cause for Uncertainty’ (2005) 3 EIPR 122.

<sup>114</sup> *Ibid* 123.

<sup>115</sup> CDPA 1988 Chapter IV.

<sup>116</sup> *Pasterfield v Denham and Another* [1999] FSR 168 (County Court).

<sup>117</sup> CDPA 1988, s 77.

<sup>118</sup> *Ibid* s 78.

<sup>119</sup> *Ibid* s 78(3)(a).

<sup>120</sup> *Ibid* s 78(2)(b).

<sup>121</sup> *Ibid* s 77(4).

<sup>122</sup> *Ibid* ss 31, 79(4)(b).

<sup>123</sup> *Ibid* s 80.

<sup>124</sup> *Ibid* s 80(2).

<sup>125</sup> *Confetti Records, Fundamental Records and Andrew Alcee v Warner Music UK Ltd (Trading as East West Records)* [2003] EWHC 1274 (Ch), [2003] ECDR 31 [157].

<sup>126</sup> CDPA 1988, s 87(2).

to secure a settlement between the parties. When a case does make it to court, issues of subsistence and qualification are considered before an assessment of whether the alleged infringer has interfered with the copyright owner's exclusive rights to deal with their work<sup>127</sup> is made.

Section 16 of the CDPA 1988 creates certain restricted acts which, if done without the copyright owner's permission, can result in primary infringement. Not all apply to artistic works and only making a copy of the work<sup>128</sup> need be considered in respect of tattoos; distribution<sup>129</sup> and electronic communication<sup>130</sup> necessarily requiring a copy to be made first. Acts of secondary infringement also exist which impose liability on those who distribute or provide the means to make infringing copies, but are of little relevance here.<sup>131</sup> A successful infringement action requires proof that: i) the copy was derived from the claimant's work (a causal connection); and ii) that either the whole or any substantial part was copied.<sup>132</sup>

A causal connection is usually shown through proof that the defendant had access to the copied work.<sup>133</sup> The same expression created independently will not infringe.<sup>134</sup> When the whole of a work is copied no problems arise, but assessing what amounts to a "substantial part" is more difficult. However, "[i]n the case of an artistic work, it is the artistic originality of that which has been copied".<sup>135</sup> This can only be decided on a case by case basis but, since *Infopaq*,<sup>136</sup> copying small parts of a work will be infringement if those parts "contain elements which are the expression of the intellectual creation of the author of the work".<sup>137</sup>

Copyright in a tattoo could be infringed in a number of ways, the most obvious being another artist copying the tattoo directly from one person to create a design that was either wholly or substantially the same on another person. Suddenly, procuring a tattoo just like your friend's but applied by a different artist appears fraught with problems. Furthermore, there is no need to have access to the original tattoo, infringement would also occur if the tattoo design is copied through reference to an image of the original such as a sketch or photograph. As mentioned above, if protected by copyright, the act of sketching or photographing the tattoo would amount to reproduction of the work and qualify as infringing acts if done without the copyright owner's permission. In fact, photographs of tattoos may be the greatest problem when considering infringement. Although a photograph for purely private use that is not disseminated is unlikely to be the foundation of a lawsuit, the prevalence of the Internet and social media where images are easily posted and shared provides huge potential for communicating copyright infringing photographs to the public. But the act of seeking the copyright owner's permission whenever one wishes to share an image which is essentially of their own body seems unreasonable and unlikely.

As already noted, the proof of an infringing act done in relation to a tattoo would not be the main issue at hand, whether the tattoo is protected in the first place would

<sup>127</sup> *Ibid* ss 16–21.

<sup>128</sup> *Ibid* s 17.

<sup>129</sup> *Ibid* s 18.

<sup>130</sup> *Ibid* s 20.

<sup>131</sup> *Ibid* ss 22–26.

<sup>132</sup> *Ibid* s 16(3)(a).

<sup>133</sup> *Temple Island Collections Ltd v New English Teas Ltd* [2012] ECDR 11, [2012] FSR 9 (PCC) [40] (HHJ Birss QC).

<sup>134</sup> *Francis Day & Hunter Ltd. and Another v Bron and Another* [1963] Ch 587 (CA) 617 (Upjohn LJ).

<sup>135</sup> *Newspaper Licensing Agency Ltd v Marks v Spencer Plc* [2001] UKHL 38, [2003] 1 AC 551 [19] (Lord Hoffman).

<sup>136</sup> *Infopaq* (n 7).

<sup>137</sup> *Ibid* [39].



form the bulk of any argument in a case that made it to court. Moreover, an act is only infringing if it is done without the copyright owner's permission, an implied grant of ownership or licence being capable of removing any actionable case. A further point to mention is that any preliminary sketches for a tattoo would qualify for protection as an artistic work. A case could be brought in relation to indirect copying<sup>138</sup> – if a copy of the tattoo is made from the tattoo rather than the drawings themselves this still amounts to infringement even if the infringer is unaware of the existence of the drawing.<sup>139</sup>

## CONCLUSION

With copyright intensive industries contributing billions to UK Gross Domestic Product<sup>140</sup> and the fact copyright exists automatically on creation of a work,<sup>141</sup> it is of no surprise that numerous attempts have been made to broaden the field of protection.<sup>142</sup> Political, social and cultural context play a big part in deciding which works copyright will protect.<sup>143</sup> Despite the existence of strong arguments supporting the notion that tattoos are capable of being art (Kate Moss sports a tattoo by late artist Lucian Freud<sup>144</sup>) and the shifting social attitude towards the culture, problems in relation to ownership, the enforcement of author's rights and the potential conflict with the tattoo wearer's personal autonomy cannot be avoided.<sup>145</sup>

That being said, these examples are at the extreme end of the spectrum and it is submitted only apply to a very limited number of tattoo artists and an even smaller number of their works. One-off arrangements such as Steiner's are a weak justification for copyright providing protection for tattoos in general; the impracticalities of a universal rule applying copyright protection to tattoos make it unworkable in practice. Furthermore, it must be borne in mind why copyright exists in the first place. The very first copyright statute speaks of "[a]n act for the encouragement of learning" and "for the encouragement of learned men to compose and write useful books".<sup>146</sup> Granted the law has developed dramatically since, but the underlying justifications for intellectual property laws are still highly relevant. And although "we should be wary of assuming that the utilitarian argument is the definitive basis for [copyright] laws in the UK",<sup>147</sup>

<sup>138</sup> CDPA 1988 s 16(3)(b).

<sup>139</sup> *L.B. Plastics Ltd v Swish Products Limited* [1979] FSR 145 (HL) 164 (Lord Salmon); *British Leyland Motor Corporation Ltd. and Another v Armstrong Patents Co. Ltd. and Another* [1986] AC 577 (HL) 614 (Lord Edmund-Davies).

<sup>140</sup> Intellectual Property Office, 'Fast Facts 2017' (WS0371 IPO, 2016) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/581279/Fast-Facts-2017.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/581279/Fast-Facts-2017.pdf)> accessed 10 April 2018.

<sup>141</sup> *Berne Convention* (n 3) Article 5(2).

<sup>142</sup> *Francis Day & Hunter v Bron* (n 134); *George Hensher Ltd. Appellants v Restawile Upholstery (Lanes.) Ltd. Respondents* [1976] AC 64 (HL); *Exxon Corporation and Others v Exxon Insurance Consultants International Ltd* [1982] Ch 119 (CA); *Merchandising Corp v Harpbond* (n 12); *Interlego v Tyco* (n 38); *Green v Broadcasting Corporation of New Zealand* [1989] RPC 700 (PC); *Metix v Maughan* (n 1); *Creation Records Limited and Others v News Group Newspapers Limited* [1997] EMLR 444 (HC); *Nova Productions Ltd v Mazooma Games Ltd and others* [2007] EWCA Civ 219, [2007] Bus LR 1032; *Lucasfilm v Ainsworth* (n 29).

<sup>143</sup> Martin Fredriksson, 'Copyright Culture and Pirate Politics' (2014) 28 *Cultural Studies* 1022; *Bently & Sherman* (n 15) 94–95.

<sup>144</sup> James Fox, 'The Riddle of Kate Moss' *Vanity Fair* (Condé Nast, November 19 2012). <<https://www.vanityfair.com/hollywood/2012/12/kate-moss-naked-emotions>> accessed 10 April 2018.

<sup>145</sup> However, potential solutions to these issues may exist. Assuming the tattoo remains unaltered and *in situ*, skin could be removed post mortem and preserved, the resulting work being more akin to a stereotypical painting – the Wellcome Collection in London already exhibits preserved tattooed skins. A fairly elaborate contractual agreement between artist and commissioner would be required, for example, Tim Steiner's tattoo was sold to a German art collector and he was paid a significant sum to exhibit his body several times a year. Further, reportedly he has consented to his skin being preserved and framed after death.

<sup>146</sup> Copyright Act 1710 (8 Ann c 19).

<sup>147</sup> *Aplin & Davis* (n 5) 13.

it is submitted the widely accepted modern view is that copyright encourages creativity and thus promotes dissemination of works that benefit the whole of society and is a “powerful driver of economic growth”.<sup>148</sup>

Too much restriction of the art form could have a negative impact. It has been suggested moral rights may “impede the efficient exploitation of works” which could lead to less investment in creation.<sup>149</sup> Unrestricted public display and communication of works linked with word of mouth promotion combined with freely disseminated images of tattoos in magazines and via the Internet can seriously raise the profile of a tattooist. Rather than wishing to copy a particular image from someone it is more likely that an individual will want to commission their own piece utilising the skills of a specific artist. A talented tattoo artist earns a living much in the same way any skilled craftsman does, rather than through royalties or licence fees generated by the use or repeat performance of a singular creation, financial reward and creative incentive stem from a steady flow of commissions where the underlying expertise is what holds the value. According to London based artist Mr Bütchi, commenting on the control of his works, “the value of the tattoo lies in the fact it does not belong to the artist in that way”.<sup>150</sup>

In light of these reasons, it is submitted the courts would not widen the field of protection far enough to encompass tattoos. Under EU jurisprudence, it must be ensured that the “burdens [of copyright law] do not outweigh the benefits.”<sup>151</sup> Even if a successful argument is advanced to establish that a tattoo meets the criteria for subsistence of copyright, the power of the court to impliedly assign copyright ownership to the person who commissioned the work gives them the perfect tool to remove any meaningful protection, without departing from CJEU precedent. For a tattoo artist wishing to invoke the legal protection afforded by UK copyright legislation, they would be best advised to record their works as drawings first. Nonetheless, to provide a definitive answer to the question posed at the start of this study and further develop the law in the UK, a test case involving a tattoo is required.

<sup>148</sup> Kamil Idris, ‘A Message from the Director General’ *WIPO Magazine* (Office of Global Communications and Public Diplomacy, World Intellectual Property Organization, February 2002 (WIPO publication No. 121 (E))).

<sup>149</sup> Jane C Ginsburg, ‘Moral rights in the common law system’ (1990) 4 Ent LR 121, 122.

<sup>150</sup> Emily Randall, ‘Tattooing Makes Transition from Cult to Fine Art’ *The New York Times* (New York, May 8 2013) <<https://www.nytimes.com/2013/05/10/arts/artsspecial/Tracing-the-transformation-of-tattoos-.html>> accessed 10 April 2018.

<sup>151</sup> Zechariah Chafee, Jr, ‘Reflections on the Law of Copyright: I’ (1945) *Colum L Rev* XLV 503, 506.



