

**WARWICK  
UNDERGRADUATE  
LAW JOURNAL**

**ISSUE I  
2021**

# Contents

<b>Whose Interests Prevail in Tort Law: The Individual's or the Public's?</b> .....	3
John Choi	
<b>Federalising tendencies of the Principle of Sincere Cooperation in the area of Common Foreign and Security Policy</b> .....	19
Desiree van Iersel and Carlos Mota	
<b>Should trade secrets be considered as property rights of the owner, or as relational obligations?</b> .....	65
Gea Donadoni	
<b>Revisiting European Trade Mark Law and the Approach of the CJEU: Should Highly Distinctive Marks Receive Broader Protection Against Confusion?</b> ..	81
Aleksandra Szram	
<b>Are Robots Deserving of Rights?</b>	
A critical analysis of how human technological innovation may result in an extension of rights to autonomous cyborg living .....	101
Lucy Young	
<b>Assimilation and Exclusion</b>	
<b>Analysis of the impact of the War on Drugs on Black Americans</b> .....	119
Krzysztof Mateusz Myśliński	
<b>Vanishing Habitats</b>	
A critical discussion of the significance of climate induced displacement within international environmental law and what needs to be done .....	139
Aastha Walia	
<b>Trade Secrets</b>	
<b>Property rights or relational obligations?</b> .....	177
Charlotte Chan	
<b>The impact of the UK's post-Brexit divergence from the Digital Single Market Directive</b> .....	200
Daniel Leung	
<b>Troubles with Samples – Music Sampling as Quotation and Pastiche under UK Copyright Law</b> .....	227
Ching Wang (Michael) Lam	

# **Whose Interests Prevail in Tort Law: The Individual's or the Public's?**

John Choi\*

\* BCL candidate at the University of Oxford and LLB Law graduate UCL.  
Contact at: [john.choi@some.ox.ac.uk](mailto:john.choi@some.ox.ac.uk)

## Introduction

Tort law is a branch of private law, and it is often said that private law's first principle involves the correction and reparation of a committed wrong.<sup>1</sup> Viewed exclusively from this bilateralist perspective, it may appear that tort law is only concerned with individuals, and more specifically, the parties before the court. This article however, seeks to demonstrate that whilst it may very well be true that tort law prioritises individual entitlements, it does not inappropriately do so at the expense of the public interest. In *Part I*, we explore the primacy of individual considerations in the law of tort and its apparent neglect of wider community welfare concerns. In *Parts II* and *III*, two lines of argument are offered to refute this claim. The first approach relies on a careful analysis of the case law in showing that judges do, when deciding tort cases, accord due weight to relevant public-interest factors. The second argument given in *Part III* is that the concept of tort liability is inherently contributory to the public interest.

### I. The priority of individual entitlements<sup>2</sup>

As mentioned, tort law's primary concern has to do with righting a civil wrong, and as Jules Coleman put it, "tort law

---

<sup>1</sup> H Sheinman, 'Tort Law and Distributive Justice' in J Oberdiek, *Philosophical Foundations of the Law of Torts* (Oxford University Press 2014), 371. See also E Weinrib, *The Idea of Private Law* (Harvard University Press 1995); E Weinrib, *Corrective Justice* (Oxford University Press 2012).

<sup>2</sup> For the purposes of this article, 'entitlement' shall be interpreted to mean *legal* entitlement, as opposed to moral entitlement.

is best explained by corrective justice.”<sup>3</sup> Tort liability is imposed when the defendant violates a claimant’s right to which he had a correlative obligation; and therefore the defendant is imposed on a duty to compensate for causing that damage. From this perspective alone, it is hard not to view tort disputes as a matter purely related to individual interests. Indeed, it would be both untrue and unhelpful to say that tort law does *not* prioritise individual entitlements. Such prioritisation can also be found manifested in the case law: under the former two-stage approach in *Annes v Merton LBC*, interparty factors, such as the proximity between parties or the remoteness of harm, enjoy a priority in the process of determining a duty of care.<sup>4</sup>

A different, and more difficult, question is whether tort law prioritises these individual factors *to the neglect of the wider public interest*. The appearance of such dereliction may be attributed to two reasons. Firstly, under the *Annes* approach, and the similarly pluralist approach suggested by Andrew Robertson,<sup>5</sup> community welfare considerations are relevant only if the courts deem that interpersonal justice supports the finding of liability. This can lead to the impression that cases are decided on the basis *solely* on interpersonal factors, especially in cases where interpersonal factors are sufficient in themselves to deny liability, such as where the harm is too remote. The second reason has to do with judges’ interests in promoting their authority and independence. Understandably, judges have a stake in creating the appearance that their decisions are shaped entirely by the application of legal principles onto individual facts. If the influence of policy seems apparent, they may risk giving right purists, an opening to criticise the judiciary for being

---

<sup>3</sup> J Coleman, *The Practice of Principle: In Defense of a Pragmatist Approach to Legal Theory* (Oxford University Press 2001), 9.

<sup>4</sup> [1977] UKHL 4. Overruled by *Murphy v Brentwood District Council* [1991] UKHL 2.

<sup>5</sup> A Robertson, ‘Rights, Pluralism and the Duty of Care’ in D Nolan and A Robertson, *Rights and Private Law* (Hart Publishing 2011).

unauthorised lawmakers.<sup>6</sup> Today, judges in many recent Supreme Court decisions have openly downplayed the relevance of policy considerations in their decision-making processes. In *Robinson v Chief Constable of West Yorkshire Police*, Lord Reed emphasised that the courts should apply established principles of law, rather than basing their decisions on their assessment of public policy.<sup>7</sup>

However, forceful these comments may be, the concerns of Lord Mance in his dissenting speech in *Robinson* are self-evident. His Lordship was sceptical that “the courts are not influenced by policy considerations,” and thought that it would be “unrealistic to suggest that.”<sup>8</sup> Indeed, Lord Reed’s comments seem inconsistent with past developments where the courts have duly given weight to relevant policy considerations. To demonstrate this, the next Part shall outline four common thematic public-interest considerations that have dictated, or at least heavily influence, the outcomes of tort cases.

## II. The precedent argument: public-interest concerns form part of the judicial reasoning in tort cases

### *a. Avoiding conflict with other legal or moral obligations*

Firstly, courts will avoid imposing liability where it will result in a conflict of legal or moral duties on the part of the

---

<sup>6</sup> See, for instance, A Beever, *Rediscovering the Law of Negligence* (Hart Publishing 2013).

<sup>7</sup> [2018] UKSC 4. This was summarised in *Poole Borough Council v GN* [2019] UKSC 25, [64] (Lord Reed).

<sup>8</sup> *Ibid*, [84].

defendant.<sup>9</sup> This is most obvious in the law of defamation, where an aptly named defence of ‘publication on the matter of interest’ is recognised under section 4 of the Defamation Act 2013.<sup>10</sup> Formerly known at common law as the *Reynolds* privilege, named after *Reynolds v Times Newspapers Ltd*,<sup>11</sup> this grants publishers immunity from liability if the statement complained of was on a matter of public interest and the publisher reasonably believed that releasing the statement was in such public interest.<sup>12</sup> Lord Nicholls warned that “the court should be slow to conclude that a publication was not in the public interest and, therefore, the public had no right to know, especially when the information is in the field of political discussion.”<sup>13</sup> Unlike the affairs of private citizens, of which publication rarely goes without liability, affairs of government and public servants are privileged because everyone in a community, in theory at least, is concerned with their conducts and activities. Accordingly, the public has a right to discuss them and receive reports of their behaviours through the media. This provides a striking example of an instance where matters of the community interest are prioritised over individualistic considerations (here, the defamee’s right to reputation). Simon Brown LJ in *Al-Fagih v HH Saudi Research* went so far as to say that the media’s right to freedom of expression, especially in the field of political discussion “is of a higher order... [than] the right of an individual to his good reputation.”<sup>14</sup>

Another instance where imposition of liability might be at odds with our other legal and moral duties are the

---

<sup>9</sup> See, for instance, the policy rationales proposed for the illegality defence in private law, one of which includes avoiding inconsistencies in the law which would jeopardise the integrity of the legal system: *Patel v Mizra* [2016] UKSC 42, [1] and [93].

<sup>10</sup> Defamation Act 2013, s 4.

<sup>11</sup> [2001] 2 AC 127.

<sup>12</sup> Defamation Act 2013, s.4(1).

<sup>13</sup> n 9, 205.

<sup>14</sup> [2002] EMLR 13, [26].

defamation cases involving the report of crimes, as illustrated in *Byrne v Deane*.<sup>15</sup> In that case, a poem was hung on the bulletin board of the defendant's club proclaiming that the claimant had informed the police about the slot machines in the clubhouse. Slessor LJ, holding that no liability in defamation can arise, said, "to allege of a man... that he has reported certain acts, wrongful in law, to the police, cannot possibly be said to be defamatory of him in the minds of the general public."<sup>16</sup>

*b. Ensuring just compensation for victims and efficient allocation of loss*

Secondly, courts have also demonstrated an inclination in placing the burden of liability on the party who is better positioned to prevent the harm or is insured, to provide a practical remedy for those who have suffered injury.

This is apparent in the sector of law as regards liability for asbestos-induced illnesses. As a starting point, a claimant who sues for negligence must prove that her injury had the necessary causal connection with the defendant's tortious conduct. Although the orthodox 'but for' test serves claimants well in relatively standard cases,<sup>17</sup> the crop of cases involving asbestos-induced illnesses have proven more difficult. The well-known facts of *Fairchild v Glenhaven Funeral Services* best illustrate this.<sup>18</sup> The claimants contracted mesothelioma after being exposed to asbestos by multiple employers during the course of employment, however medical knowledge could not associate the disease with any one employer. Facing this "rock of uncertainty" as Lord Bingham put it, the House of Lords turned to *McGhee v*

---

<sup>15</sup> [1937] KB 818.

<sup>16</sup> *Ibid*, 832.

<sup>17</sup> See *Barnett v Chelsea & Kensington Hospital Management Committee* [1969] QB 428.

<sup>18</sup> [2003] AC 32.



*National Coal Board* for hope, and concluded that the defendants could be made liable for merely increasing the *risk* of the claimants' injury.<sup>19</sup>

When formulating this principle, Lord Bingham was very much aware of the potential injustice it may cause to the defendants. His Lordship acknowledged that there was a possibility that "an employer may be held liable for damage he has not caused", and as was the case in *Fairchild*, "[t]he risk is the greater where all the employers potentially liable are not before the court."<sup>20</sup> Nonetheless, his Lordship held that,

*"there is a strong policy argument in favour of compensating those who have suffered grave harm, at the expense of their employers who owed them a duty to protect them against that very harm and failed to do so, when the harm can only have been caused by breach of that duty and when science does not permit the victim accurately to attribute, as between several employers, the precise responsibility for the harm he has suffered."*<sup>21</sup>

The important point in this case is that proof of causation was physically impossible on the basis of current medical knowledge.<sup>22</sup> Under the orthodox rules of causation, the defendants in *McGhee*<sup>23</sup> and *Fairchild*<sup>24</sup> were *entitled* to have the benefit of doubt given to them, as it could not be proven on the balance of probabilities which of them actually caused the injury. The courts, however, felt compelled not to adhere strictly to such principles, as it would lead to an injured claimant bearing the loss of a risk she did not create.

---

<sup>19</sup> [1973] WLR 1.

<sup>20</sup> n 18, [33].

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*, [153].

<sup>23</sup> n 19.

<sup>24</sup> n 18.

Effective victim compensation can also be seen as the underlying motivation behind Lord Rodger's dissent in *Barker v Corus*, the next episode of the asbestos saga. His Lordship opined that if the majority's position, that liability under *Fairchild* should be several, was taken, "claimants will often end up with only a small proportion of the damages which would normally be payable for their loss."<sup>25</sup> Instead, his Lordship advocated for joint and several liability, even though this might lead to, in his words, "a form of rough justice" on the part of the defendants.<sup>26</sup> Indeed, when section 3 of the Compensation Act 2006 eventually gave effect to Lord Rodger's position,<sup>27</sup> the "draconian consequences" that subsequently followed did not prevent the Supreme Court in *Sienkiewicz v Grief* from allowing the claimants' claim for redress.<sup>28</sup>

### *c. Avoiding the overburdening of defendants*

Thirdly, and quite opposite to the previous consideration, the courts are wary of 'opening up the floodgates of liability', potentially resulting in a situation where numerous individual claims are brought against a large number of defendants, or where the burden of liability would be disproportionate.

The latter was the prevailing consideration in *Barker*.<sup>29</sup> Four of the five Law Lords thought that if liability under the *Fairchild* principle mimicked the joint and several nature of liability under the usual causation rules, the result would have been out of proportion to the defendants' contribution to the chance of the disease. One of the key motivators in the majority's conclusion is the fact that at the time of the appeal, many asbestos-using employers have

---

<sup>25</sup> [2006] 2 AC 572, [89].

<sup>26</sup> *Ibid*, [90].

<sup>27</sup> Compensation Act 2016, s 3.

<sup>28</sup> [2011] 2 AC 229, [58] (Lord Phillips).

<sup>29</sup> n 25.

become insolvent, uninsured or untraceable. This was explicitly recognised by Lord Walker, who said that “[i]n such cases a single solvent employer... might be faced, in the absence of proportionately limited liability, with a very heavy liability for a relatively short period of tortious exposure during employment with that employer.”<sup>30</sup>

The concern about exposing a disproportionate amount of liability to an indeterminate class of defendants is also one of the traditional policy arguments given to justify the law’s reluctance to impose a duty of care in omissions cases. In *Stovin v Wise*, this took the form of Lord Hoffmann’s “why pick on me?” argument.<sup>31</sup> A duty to prevent harm to others, his Lordship said, “may apply to a large indeterminate class of people who happen to be able to do something. Why should one be held liable rather than another?”<sup>32</sup> And in the specific context of failures to act by the police force, Lord Templeman in *Hill v Chief Constable of West Yorkshire*<sup>33</sup> was critical of the fact that if such a duty existed, “every citizen will be able to require the court to investigate the performance of every policeman.”<sup>34</sup>

#### *d. Preventing the manifestation of adverse behavioural effects*

Finally, the courts also consider whether recognising liability may encourage negative practices and/or discourage beneficial ones. Where imposing liability for failure to act might motivate defensive practices or the diversion of resources from otherwise beneficial activities, for example, courts have

---

<sup>30</sup> n 20, [108].

<sup>31</sup> [1996] AC 923.

<sup>32</sup> Ibid, 944. Cf S Tofaris and S Steel, ‘Negligence Liability For Omissions And The Police’ (2016) 75(1) CLJ 128.

<sup>33</sup> [1989] AC 53.

<sup>34</sup> Ibid, 65.

in some instances refused to recognise a duty of care.<sup>35</sup> In *Hill*, Lord Keith refused to exclude the possibility that a recognition of liability may lead to policing activities being carried out in a “detrimentally defensive frame of mind.”<sup>36</sup> Similarly, when considering whether a landlord owed a duty of care to warn a tenant of potential danger, Lord Hope in *Mitchell v Chief Constable of South Wales Police*<sup>37</sup> expressed worries that an affirmative duty would “deter social landlords from intervening to reduce the incidence of anti-social behaviour” and that if a claim was allowed, such legal proceedings “would involve them in a great deal of time, trouble and expense which would be more usefully devoted to their primary functions.”<sup>38</sup> In these instances, the court’s concern is evidently not with the implications that a finding of liability may have on the correlative rights and duties of the claimant and the defendant in a given case, rather it looks beyond that to consider the effects of tortious liability on the wider population.

Admittedly, however, this consideration is considered to be relatively weak and is often readily dismissed by the courts mostly for its speculative basis. This was recognised by Lord Toulson in *Michael v Chief Constable of South Wales Police*,<sup>39</sup> who said that “the court has no way of judging the likely operational consequences of changing the law of negligence in the way that is proposed.”<sup>40</sup> His Lordship draws attention to the fact that former disciplinary proceedings are already present in cases of police negligence and “it is speculative whether the addition of potential liability at common law would make a practical difference.”<sup>41</sup> The courts’ relative reluctance to invoke adverse behavioural

---

<sup>35</sup> See n 4, 442.

<sup>36</sup> n 31, 63.

<sup>37</sup> [2009] UKHL 11.

<sup>38</sup> *Ibid*, [28].

<sup>39</sup> [2015] UKSC 2.

<sup>40</sup> *Ibid*, [121].

<sup>41</sup> *Ibid*.

reasons can further be seen in the expansive developments on vicarious liability. In *Armes v Nottinghamshire County Council*,<sup>42</sup> Lord Reed was unconvinced by counsel's argument that a finding of vicarious liability would discourage local authorities from using the foster care system, and instead resort to apparently less effective residential care. In response, his Lordship thought that such a result would only occur if, and only if, the local authorities were satisfied that the incidence of child abuse were lower in the latter than the former, and "[n]o evidence has been produced as to whether that is the position."<sup>43</sup> Similarly in *Cox v Ministry of Justice*,<sup>44</sup> counsel for the defendant prison service sought to argue that the imposition of vicarious liability in this case would lead to prisons adopting an unduly cautious approach when allocating other types of rehabilitation activities. Lord Reed, again, dismissed this proposition for being "entirely speculative."<sup>45</sup>

*e. Final remarks*

The last observation illustrates an important point, that public-interest considerations when raised, do not always guarantee a policy-favourable outcome. Nevertheless, even though such policy considerations are sometimes dismissed, it does not follow that tort law is operated at the expense of the public interest. Sometimes, policy factors are displaced by other countervailing policy factors, as already illustrated by the conflict between compensating victims of asbestos exposure and preventing a disproportionate burden of liability on employers.

---

<sup>42</sup> [2017] UKSC 60.

<sup>43</sup> *Ibid*, [68].

<sup>44</sup> [2016] UKSC 10.

<sup>45</sup> *Ibid*, [44].

### III. The conceptual argument: tort liability itself is in the public interest

Let us imagine *arguendo* a body of tort law that is shaped entirely by interpersonal considerations, without appeal to the public interest. Imagine also, if one may, that in this system of tort law, judicial decisions are purely based on interparty factors, and policy-based reasoning is never resorted to. (Such a system of law may well exist in theory, but as demonstrated in *Part II*, it is not the law of tort as have been developed in this jurisdiction. In our tort law, community welfare considerations have played a prominent role in driving doctrinal developments.) It is submitted that even in such a fictional system of tort, the mere recognition of liability is aligned with the wider public interest, irrespective of whether the decision to impose such liability are made with explicit resort to policy considerations.

The first reason is that individual rights and entitlements, at least those protected by the law of tort, can be traced back to some wider public-interest justification. The claim that tort law gives effect to individual entitlements in lieu of the public interest assumes that, somehow, it is possible to draw a distinction between those two factors. However, the possibility of that distinction has been thrown into question. Peter Cane, for example, wrote that “all rules and principles that state individuals’ legal rights and obligations are underpinned by policy arguments.”<sup>46</sup> James Plunkett gives the example of an assault:

*“So the interpersonal right not to be assaulted by another person, for example, whilst justifiable on the ground of principle (I would not wish to be assaulted by you therefore I have no right to assault you) could be seen as actually justified on the policy-based grounds that permitting assault would, amongst other*

---

<sup>46</sup> P Cane, ‘Another Failed Sterilisation’ (2004) 120 LQR 83, 92.

*things, lead to higher taxes to recover the associated costs of medical treatment, could indirectly lead to more serious crimes being committed, and may make people less likely to interact with others, thereby making the world a worse place to live – in other words, on the basis that it would be bad for the community.”<sup>47</sup>*

As this quote shows, absent a meaningful way to distinguish individual versus public matters, the forcefulness of the argument that tort law neglects issues of community welfare is diminished.

Secondly, in addition to its primary aim of compensation, tort law is also instrumental to other public interest aims. The imposition of tort liability in itself has non-compensatory effects; most notably, it can serve as a deterrent to wrongful conduct.<sup>48</sup> When tortious conduct is penalised, it serves to increase the cost of the activity, thereby discouraging wasteful behaviour in society. So, whilst the decision to impose liability may be made with reference to individual entitlements, it may nonetheless have an external effect that benefits other members of society. Although the compatibility between tort (and generally, private) law and punishment has long been a bone of academic contention, the modern prevailing view seems to be that a function of punishment is at least accommodable within the structure of tort (private) law.<sup>49</sup> One of the traditional arguments against the adoption of a penal paradigm in tort law is the assertion that tort (private) law, with its roots in corrective justice, is concerned with the dual interaction between claimant and defendant.<sup>50</sup> Punishment, on the other hand, is a one-sided

---

<sup>47</sup> J Plunkett, ‘Principle and Policy in Private Law Reasoning’ (2016) 75(2) CLJ 366, 376.

<sup>48</sup> G Williams, ‘The Aims of the Law of Tort’ (1951) 4 CLP 137, 144-151.

<sup>49</sup> See generally E Bant, W Courtney, J Goudkamp and J Paterson (eds), *Punishment and Private Law* (Hart Publishing 2021).

<sup>50</sup> E Weinrib, n 1.

consideration which focuses only on the defendant, and therefore is incapable of explaining tort (private) law. However, as the editors of *Punishment and Private Law* reveal, this involves a *non sequitur*: “the fact that a particular model may explain the law or a good portion of it as it presently stands does not mean that the law should be changed so as to bring it into increased conformity with that model... [in other words,] simply pointing to respects in which private law is bilaterally orientated identifies no reason in support of its being so structured.”<sup>51</sup>

## Conclusion

Whilst it is apt to say that tort law prioritises individual interests, it would be wrong to say that it neglects the wider public interest. Not only have community welfare considerations been at the heart of much judicial decision-making, tort liability, as a concept, cannot be said to be misaligned with the public interest. The latter has to do with the inseparable community welfare justifications that ground individual rights, as well as the public functions tort law play in the community.

---

<sup>51</sup> n 49, 5.



## Bibliography

### Cases

- Armes v Nottinghamshire County Council* [2017] UKSC 60
- Cox v Ministry of Justice* [2016] UKSC 10
- Reynolds v Times Newspapers Ltd* [2001] 2 AC 127
- Al-Fagih v H H Saudi Research & Marketing (UK) Ltd* [2002] EMLR 13
- Byrne v Dean* [1937] 1 KB 818
- Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4
- Poole Borough Council v GN* [2019] UKSC 25
- Darnley v Croydon Health Services NHS Trust* [2018] UKSC 50
- Stovin v Wise* [1996] AC 923
- Hill v Chief Constable of West Yorkshire* [1989] AC 53
- Mitchell v Glasgow City Council* [2009] UKHL 11
- Michael v Chief Constable of South Wales* [2015] UKSC 2
- Kent v Griffiths* [2001] QB 36
- Capital and Counties plc v Hampshire County Council* [1997] QB 1004
- Barrett v Ministry of Defence* [1995] 1 WLR 1217
- Van Colle v Chief Constable of Hertfordshire; Smith (FC) v Chief Constable of Sussex Police* [2008] UKHL 50
- Barnett v Chelsea & Kensington Hospital Management Committee* [1969] 1 QB 428
- McGhee v National Coal Board* [1973] 1 WLR 1
- Wilsher v Essex Area Health Authority* [1988] AC 1074
- Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 AC 32
- Barker v Corus UK Ltd* [2006] 2 AC 572

*Sienkiewicz v Greif (UK) Ltd* [2011] 2 AC 229

*Durham v BAI (Run Off) Ltd* [2012] 1 WLR 867

*Heneghan v Manchester Dry Docks* [2016] EWCA Civ 86

*Patel v Mizra* [2016] UKSC 42

## **Statutes**

Compensation Act 2006

Defamation Act 2013

## **Journal articles and book chapters**

P Cane, *Another Failed Sterilisation* (2004) 120 LQR 83

J Plunkett, *Principle and Policy in Private Law Reasoning* (2016) 75(2) CLJ 366

H Sheinman, 'Tort Law and Distributive Justice' in John Oberdiek, *Philosophical Foundations of the Law of Torts* (OUP 2014),

S Tofaris and S Steel, *Negligence Liability For Omissions And The Police* (2016) 75(1) CLJ 128

A Robertson, 'Rights, Pluralism and the Duty of Care' in D Nolan and A Robertson, *Rights and Private Law* (Bloomsbury Publishing 2011)

G Williams, *The Aims of the Law of Tort* (1951) 4 CLP 137

## **Books**

A Beever, *Rediscovering the Law of Negligence* (Hart Publishing 2013)

E Bant, W Courtney, J Goudkamp and J Paterson (eds), *Punishment and Private Law* (Hart Publishing 2021)

J Coleman, *The Practice of Principle: In Defense of a Pragmatist Approach to Legal Theory* (Oxford University Press 2001)

E Weinrib, *The Idea of Private Law* (Harvard University Press 1995)

E Weinrib, *Corrective Justice* (Oxford University Press 2012)

# **Federalising tendencies of the Principle of Sincere Cooperation in the area of Common Foreign and Security Policy**

Desiree van Iersel  
and  
Carlos Gabriel Ramaglia Mota\*

\*Desiree van Iersel- LLM Tilburg University

Contact at: [desiree\\_iersel@hotmail.nl](mailto:desiree_iersel@hotmail.nl)

Carlos Gabriel Ramaglia Mota - LRM Utrecht University

Contact at: [c.g.ramagliamota@students.uu.nl](mailto:c.g.ramagliamota@students.uu.nl)

## Introduction

The unique governmental structure of the European Union is known as a ‘supranational organization’, an organization that goes beyond state borders and has legislative powers of its own. Today, the European Union (‘EU’ or ‘Union’) encompasses 27 Member States and hundreds of legal acts are created in Brussels every year.<sup>1</sup> The Member States and EU institutions work together to carry out the tasks laid down in the founding treaties of the Union and are governed in that process by article 4(3) Treaty on the European Union (‘TEU’). This article provides the principle of sincere cooperation between the Member States and the Union.

The text of the article is as follows:

*Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall*

---

<sup>1</sup>‘Legal Acts – Statistics’ EUR-Lex, 2021) <https://eur-lex.europa.eu/statistics/legislative-acts-statistics.html> accessed 7 September 2021.

*facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.*<sup>2</sup>

This broadly formulated article is one of the most important provisions of the Treaty, from which a large number of obligations can and have been derived. It contains three obligations with different natures. Two of these are positively formulated and the other has been formulated in a negative manner.<sup>3</sup> Firstly, Member States are required to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising from the Treaty or resulting from the acts of the institutions of the Union. Secondly, member States must facilitate the achievement of the Union's tasks. These are the positive obligations flowing from the treaty article. The negative obligation present in the article can be found in the last part of the last sentence, which states that the Member States should refrain from any measure that could jeopardise the attainment of the Union's objectives.

This article has formed the (subsidiary) basis for many ground-breaking judgments of the European Court including but not limited to the judgments in *Costa/ENEL*, *Frankovich*, *Pupino*, *Factortame*, *Greek Maize*, and *Marleasing*. All these cases consider different questions and different facts but all rely on article 4(3) TEU. It seems to have become some sort of many-headed hydra or 'magic box'; an amalgam of all sorts of obligations that can be pulled out of a hat as one pleases' and has been considered to be an article

---

<sup>2</sup> Consolidated version of the Treaty on European Union [2012] OJ C 326/13, art. 4(3).

<sup>3</sup> Marcus Klamert. *The Principle of Loyalty in EU Law* (1<sup>st</sup> edn, OUP 2014), 10

with federalising tendencies.<sup>4</sup> These federalising tendencies will be discussed within the framework of the ‘three pillars’ that were in place from 1992 until 2009. At the forefront of this article is the question if ‘Article 4(3) TEU has federalising tendencies in the area of Common Foreign and Security Policy?

The former ‘pillar structure’ of the Union provides a clear framework to subdivide the case-law in and makes it possible to analyse the impact article 4(3) TEU had in all these cases. Besides this, the ‘pillar structure’ was still in place when most of the judgements were rendered and are therefore part of the framework within which these cases and article 4(3) TEU need to be considered.

## I. The Three Pillars of the European Union

This structure was provided by the Treaty of Maastricht, signed in 1992. The first pillar grouped the articles of the old Treaty that established the European Economic Community (‘EEC’), the European Coal and Steel Community (‘ECSC’), and the European Atomic Energy Community (‘EAEC’), each still retaining their legal personality. By substituting the ‘European Economic Community’ for ‘European Community’, it became official: the Community had adopted an objective with a much wider scope than the economic field. The EC now had a new set of responsibilities in many different fields such as the promotion of environmentally friendly economic growth,

---

<sup>4</sup> Ole Due, ‘Artikel 5 van het EEG-Verdrag: een bepaling met een federaal karakter?’ (1992) 5 SEW 355. ; Sacha Prechal, ‘Case C-374/89, *Commission v Belgium*, Judgment of the Court of 19 February 1991’ [1992] 2 CML 371, 375.

employment, social welfare, quality of life and economic and social cohesion.<sup>5</sup>

The second pillar, Common Foreign and Security Policy ('CFSP') was intergovernmental in nature due to the sensitive matters it entailed. It aimed to establish 'common values, fundamental interests, independence and integrity of the Union in conformity with the principles of the United Nations Charter; to strengthen the security of the Union in all ways; to promote international cooperation; to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms'.<sup>6</sup> The area of Justice and Home Affairs ('JHA'), later renamed as Police and Judicial Co-operation in Criminal Matters ('PJCC'), was the third pillar created by the Maastricht Treaty. In article 1(5) of the treaty of Amsterdam, it is stated that the European Union had to 'maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures concerning external border controls, asylum, immigration and the prevention and combating of crime.'<sup>7</sup>

The third pillar consisted of key areas that belonged to the Union's objective of providing EC citizens with a

---

<sup>5</sup> Étienne Deschamps, 'The First Pillar of the European Union' (2016) CVCE

<[http://www.cvce.eu/obj/cooperation\\_in\\_the\\_fields\\_of\\_justice\\_and\\_home\\_affairs-en732e4d22-5fbb-4fb8-896d-b5673195fc43.html](http://www.cvce.eu/obj/cooperation_in_the_fields_of_justice_and_home_affairs-en732e4d22-5fbb-4fb8-896d-b5673195fc43.html)> accessed 3 November 2019.

<sup>6</sup> 'Fact Sheets on the European Union – The Maastricht and Amsterdam Treaties' (*European Parliament*, 2021) <[https://www.europarl.europa.eu/ftu/pdf/en/FTU\\_1.1.3.pdf](https://www.europarl.europa.eu/ftu/pdf/en/FTU_1.1.3.pdf)> accessed 7 September 2021, 2.

<sup>7</sup> Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts [1997] OJ C 340/1.

high level of safety, such as determining rules and the exercise of control on the Community's external borders, combating terrorism, serious crime, drug trafficking and international fraud, judicial cooperation in criminal and civil matters, creation of a European Police Office ('EUROPOL') with a system for exchanging information between national police forces, controlling illegal immigration, and establishing a common asylum policy.<sup>8</sup> In 2009, with the Treaty of Lisbon, the pillar structure was abolished, reuniting the areas separated by the treaties of Amsterdam and Maastricht.

Considering that this pillar structure was in place when most of the judgements were rendered, it will be used as a frame of reference and subdivision in this article. In the past, the areas that were broadened most in scope fell within the former pillars one and three and created new obligations for the Member States and the Union. These obligations were often created by the Court by balancing its argumentation on the duty of sincere cooperation as laid down in article 4(3) TEU and will be discussed below. It is less clear if a similar trend has occurred in the former second pillar, the area of Common Foreign and Security Policy. Therefore, this article aims to address the following matter: does article 4(3) TEU have federalising tendencies in the area of Common Foreign and Security Policy? First, the framework for assessing federalising tendencies will be discussed. Secondly, the landmark cases in the former pillars one and three will be analysed. Thirdly, the area of CFSP will be outlined followed by an analysis of several cases falling within the area. Finally, conclusions regarding the federalising tendencies in the area of CFSP will be drawn.

---

<sup>8</sup> The Treaty on the European Union [1992] OJ C 191/1. ; Ibid.



## II. Assessing federalising tendencies

The European Union is a *sui generis* organization with supranational and intergovernmental aspects. From the very start of project Europe, further integration has been discussed and pleaded for. A very famous example is the speech made by Winston Churchill in 1946, in which he indeed refers to a ‘United States of Europe’. This was the only way that he thought peace could be maintained in Europe after World War II.<sup>9</sup> Even though a ‘United States of Europe’ never came to be, some federalising tendencies are noticeable in the legislation of the European Union. This may be surprising as federalism is generally thought of in light of the constitutional relationship between States and their central government instead of in the context of the EU.<sup>10</sup> The Union is clearly not a federal state as the Member States retain their sovereignty as well the clear lack of a constitutional provision binding states to a federal government. Instead, the Union was established through treaties.<sup>11</sup> Even though this is the case, the Union, and primarily the Court, seems to have been widening the scope of Union law, a practice and notion that is referred to as ‘federalising tendencies’.<sup>12</sup>

One of the provisions in the Union treaties that is often connected to or even accused of such tendencies is the

---

<sup>9</sup> ‘Winston Churchill: calling for a United States of Europe’ <[https://europa.eu/european-union/sites/europaeu/files/docs/body/winston\\_churchill\\_en.pdf](https://europa.eu/european-union/sites/europaeu/files/docs/body/winston_churchill_en.pdf)> accessed 7 September 2021.

<sup>10</sup> Elke Cloots et al. (eds), *Federalism in the European Union* (Bloomsbury Publishing 2012), 84.

<sup>11</sup> Ibid.

<sup>12</sup> Ole Due, ‘Art. 5 van het EEG-Verdrag. Een bepaling met federaal karakter?’ [1992] SEW, 355.

duty of sincere cooperation and how the Court has strategically used it on multiple occasions. The duty of sincere cooperation is a fundamental principle of Union law that has fulfilled many different functions already. It has been considered an EU version of the international principle of *pacta sunt servanda*, a federalising principle, and a multi-faceted legal principle aimed at coherence.<sup>13</sup> Three approaches can be distilled from the functions this principle has embodied up until now. According to Justice Ole Due, the principle has been considered 1.) an interpretation-tool that substantiates more specified provisions; 2.) as the sole legal basis for obligations arising from the objectives of the Union and; 3.) as the expression of a general principle that binds the Member States and the Union institutions vis-à-vis one another to cooperate loyally and sincerely to ensure the attainment of the Union's objectives.<sup>14</sup> These three functionalities of the duty of sincere cooperation will first be discussed and then be used to categorize and analyse a number of EU landmark cases within the overarching framework of the former three-pillar structure of the EU.

*i. The duty of sincere cooperation as an interpretation-tool:*

The duty of sincere cooperation as an interpretation-tool was first used by the Court in the *Deutsche Grammophon* case. In this case, the Court held that

*'According to the second paragraph of Article 5 (now 4(3) TEU) of the treaty, Member States 'shall abstain from any measure which could jeopardize the*

---

<sup>13</sup>Andrés Delgado Casteleiro and Joris Larik, 'The Duty to Remain Silent: Limitless Loyalty in EU External Relations?' (2011) 36 E.L. Rev 522, 524.

<sup>14</sup> Due (n 12) 356.

*attainment of the objective of this treaty'. This provision lays down a general duty for the Member States, the actual tenor of which depends in each individual case on the provisions of the Treaty or on the rules derived from its general scheme'<sup>15</sup> (emphasis added).*

In *Deutsche Grammophon* as well as *Commission v Belgium*, the Court found that there was not only a breach of the specific provision in question but also of the duty of sincere cooperation, which specifies the notion that the objectives of the treaties must be safeguarded.<sup>16</sup> Those objectives are extremely broad, as well as the use of article 4(3) TEU, which has, for instance, formed a basis for recovery of unduly paid sums, in situations in which a regulation does not put forth a sanction for a violation of criminal law, and in situations of recognition of foreign diplomas.<sup>17</sup> In name of ensuring the attainment of the objectives of the Treaties, the Court has granted itself leeway in interpreting the issues that were brought before it and made use of the provision of Article 4(3) TEU as a way to facilitate said interpretation.

*ii. The duty of sincere cooperation as the sole legal basis for obligations for Member States:*

The use of the duty of sincere cooperation in this regard has the most far-reaching federalising tendencies of the three functions mentioned above. It has been used in a number of

---

<sup>15</sup> C-78/70 *Deutsche Grammophon Gesellschaft mbH v Metro-SB-Großmärkte GmbH & Co. KG* [1971] ECLI: EU:C:1971:42 489, 499.

<sup>16</sup> C-374/89 *Commission v Belgium* [1991] I-367.

<sup>17</sup> C-48/89 *Commission v Italy* [1990] I-2425. ; C-74/86 *Commission v Germany* [1988] I-2139. ; C-71/76 *Jean Thieffry v Conseil de l'ordre des avocats à la cour de Paris* [1977] ECR I-00765.

judgements as the sole legal basis to come to a conclusion that widens the scope of European Union law, without any further substantiation or specification by any other legal provision. This is at the basis of many ground-breaking judgments of the Court such as *Factortame*, *Francovich*, *Marleasing*, and *Commission v Greece*. In these cases, obligations for the Member States have been created based on the duty of sincere cooperation. These include, for instance, the doctrine of state liability, the creation of interim measures, the principle of consistent interpretation, and the duty to provide the Commission with information.<sup>18</sup> These far-reaching obligations created by the Court have had a lasting impact on the way in which European Law has developed.

*iii. The duty of sincere cooperation as a general principle that binds the Union and the Member States vis-à-vis each other:*

This function of the principle has the lowest impact with regard to federalising tendencies and has even been codified in article 4(3) TEU. It mostly encapsulates the interrelationship between the levels of the European Union and that of the Member States. For instance, it covers the general duty of Member States to consult and inform the Commission. This duty of cooperation does not only play a role between the Member States and the EU institutions but also between the Member States themselves. It has for

---

<sup>18</sup> C-213/89 *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* [1990] ECR I-02433. ; Joined cases C-6/90 and C-9/90 *Andrea Francovich and Danila Bonifaci and others v Italian Republic* [1991] ECR I-05357. ; C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-04135. ; C-132/88 *Commission of the European Communities v Hellenic Republic* [1990] ECR I-01567.

instance played a role in cases involving the right of movement of workers and the recognition of foreign diplomas.<sup>19</sup>

*iv. Broadening the scope of EU law*

These three aspects of the duty of sincere cooperation show that the principle has federalising tendencies and goes beyond a mere duplication of *pacta sunt servanda* in European Union law. Merely considering it to be the European Law version of that international principle would disregard the role it has played in fleshing out the European legal order with effect utile reasoning as a justification in many judgements.<sup>20</sup> Such federalising tendencies have resulted in a broadening of the reach of the European Union and sometimes even pushing beyond duties that are generally only reserved to Member States. Through this federalising rhetoric was based on the duty of sincere cooperation, many important notions of Union law have been developed, sometimes even throwing off the balance between the levels of the Union and straining the relationship between the Member States and the Union due to the encroachment upon State sovereignty.

The duty of sincere cooperation and the three-pronged federalising notion that is part of the application of the article in case law will be applied below to landmark judgements rendered by the Court. This will be done through a historical analysis of these cases that have widened the scope of Union law in the first and the third pillars. The following cases fall within the former first pillar and are subdivided based on their general theme: the application of EU law; (in) effective judicial protection; and the duty to enforce Union law. The third pillar is focused on the sub-

---

<sup>19</sup> Due (n 12) 365.

<sup>20</sup> Ibid 366.

theme of trans-pillar interpretation. All sub-themes are capped off by an interim conclusion and application of the three federalising aspects of the duty of sincere cooperation.

### III. Federalising tendencies in the former first pillar

#### *i. The application of European Law in the Member States*

##### *Costa/ENEL*

The principle of supremacy was created in the judgment of a conflict between Mr. Costa, an Italian citizen who owned shares in the electricity company Edisonvolta, and the nationalization of the electricity sector in Italy. Costa argued that the practice of the nationalization of the electricity industry violated the Treaty of Rome and the Italian Constitution.<sup>21</sup>

The Italian Constitutional Court in the judgement of March 1964 ruled that the Treaty of Rome, which was incorporated into Italian Law in 1958, could not prevail over the law that stipulated the nationalization of the electricity industry, which was enacted in 1962.

The Giudice Conciliatore decided to ask a preliminary ruling of the Court of Justice, which was immediately met with protests from the Italian Government

---

<sup>21</sup> C-6/64 *Flaminio Costa v E.N.E.L.* [1964] ECLI: EU:C:1964:66.

and ENEL, stating that there were no grounds for raising the questions referred.<sup>22</sup>

The milestone decision that consolidated the principle of supremacy had at the foundation of its arguments the principle of sincere cooperation. The Court stated: ‘The Executive force of Community Law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardizing the attainment of the Treaty set out in Article 5(2) and giving rise to the discrimination prohibited by Article 7.’<sup>23</sup>

Klamert argues that the aforementioned passage is the core of the Court’s reasoning.<sup>24</sup> Article 5(2) EC (now 4(3) TEU), obliged Member States to ‘abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.’ The abstention obligation regarding loyalty discarded the public international law principle of *lex posterior derogat priori*, this being the conflict-avoidant function of loyalty - a function that only could have been derived from Article 5(2) EC. This was the only Treaty-based justification that could be used to explain why national law must yield to Union law. That rationale established the principle of sincere cooperation as a major tool to Europeanize national law. It was the sole legal basis used for the creation of one of the most important harmonizing principles of EU Law: supremacy.

### *Marleasing*

The questions in the *Marleasing* case were brought forth after a dispute arose between Marleasing SA, the plaintiff in the main proceedings, and several defendants including La

---

<sup>22</sup> Ibid.

<sup>23</sup> *Costa v Enel* (n 21) 594.

<sup>24</sup> Klamert (n 3) 72.

Comercial Internacional de Alimentación SA (La Comercial) about contractual matters.<sup>25</sup> Marleasing SA's primary claim was that contracts without cause, or whose cause is unlawful, have no legal effect. This was stated regarding a founder's contract establishing 'La Comercial', which Marleasing required to be declared void as the establishment of the company lacked cause and was a sham transaction carried out in order to defraud the creditors of Barviesia SA, a co-founder of the defendant company.

The national court observed that in accordance with article 395 of the Act concerning the Conditions of Accession of Spain and the Portuguese Republic to the European Communities, Spain was under an obligation to put the directive into effect from the date of accession onward, which had not been done. Taking the view that the dispute raised a problem concerning the interpretation of Community law, the national court referred to the Court of Justice. The question was whether the directive, which had not been implemented in national law, was directly applicable to preclude a declaration of nullity of a public limited company on a ground other than those set out in the directive. The Court of Justice decided that 'a national court hearing a case which falls within the scope of Council Directive 68/151/EEC is required to interpret its national law in the light of the wording and the purpose of that directive in order to preclude a declaration of nullity of a public limited company on a ground other than those listed in the Directive'.<sup>26</sup>

Thus the Court acknowledged that, based on the principle of sincere cooperation as the sole legal basis,

---

<sup>25</sup> C-106/89 *Marleasing SA v La Comercial Internacional de Alimentación SA* [1990] ECR I-04135, paras 2-3.

<sup>26</sup> *Ibid*, para 13.



domestic courts of the Member States are under the duty to interpret national law in a way that gives effect to European Law, to ensure they do not compromise the common objective of the treaties, which is now known as ‘consistent interpretation’. The Court expanded on that, stating that the obligation to interpret EU law consistently applies, regardless of the question of whether the national provisions were adopted before or after the rules of European law that are at stake. Moreover, it is not necessary that the relevant provisions of national law have been introduced with the aim of complying with European law: all national laws must be interpreted in conformity with the applicable EU law.<sup>27</sup>

## *ii. (In)effective judicial protection*

### *Francovich*

Andrea Francovich and Danila Bonifaci were two Italian citizens that suffered economic hardship because the companies that they worked for went insolvent. After successfully suing their former employers in the Italian courts, both decided to start proceedings against the Italian State, claiming that the Italian Republic had failed to implement Directive 80/987 that guaranteed employees a minimum level of protection under Community law in the event of the insolvency of their employer.<sup>28</sup>

The ‘Pretura di Vicenza’ and the ‘Pretura di Bassano del Grappa’ then referred to the Court of Justice for a preliminary ruling and posed a number of questions on the interpretation of the EEC Treaty and Council Directive

---

<sup>27</sup> Jan H. Jans and others, *Europeanisation of Public Law*. Europa Law Publishing, 2015, 76-77.

<sup>28</sup> C-6/90 and C-9/90 *Andrea Francovich and Danila Bonifaci and others v Italian Republic* [1991] ECR I-05357, paras 3-6.

90/987 regarding the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer.<sup>29</sup> In its decision, the Court of Justice made clear that Union law required the existence of state liability, stating that the basis for this liability was to be found in Article 4(3) TEU, based on which the states are required to exercise their powers in accordance with Union law and in respect of Union loyalty.<sup>30</sup>

After the Court recognized state liability as a principle of Union law, it formulated the conditions for state liability. If a Member State fails to fulfil its obligation to take all measures necessary to achieve the prescribed result from a directive, there will be a right for reparation if the three specific conditions are fulfilled.<sup>31</sup> *Francovich* was a very important case in the history of EU law because it was shown for the first time that there was a direct obligation for states to give compensation for unlawful acts of the national administration based on EU law. It is also relevant to remember that the interpretation tool utilised to Europeanize the area of state liability was the principle of loyal cooperation, which has been a very important tool for the Court of Justice to explore areas once unheard of from EU law's domain and ensure effective judicial protection.

### *Factortame*

The claimants, ship-owners from Spain, made use of the fish reserves of the United Kingdom, utilising loopholes in the Merchant Shipping Act of 1894 which allowed them to fish

---

<sup>29</sup> Ibid.

<sup>30</sup> Jans (n 21) 439.

<sup>31</sup> Ibid 440.

in the UK's waters and then sell the fish caught in Spain.<sup>32</sup> The Secretary of State for Transport decided to modify the Merchant Shipping Act of 1894, thus creating the Merchant Shipping Act 1988, which corrected past loopholes, preventing Spanish ship-owners from using UK's fishing quotas. The Spanish ship-owners objected to the modified act, which consisted of very strict controls over ship registration, and claimed it was discriminatory. The claimant ship owners then sought an injunction to prevent the Merchant Shipping Act 1988 from coming into force. The House of Lords urgently referred the matter to the Court of Justice, because UK courts are not empowered to issue injunctions against the Crown.

In the judgement of 19 June 1990, the Court of Justice decided that, based on the principle of sincere cooperation and the principle of precedence of Community law, and in accordance with its case-law, 'Community law must be interpreted as meaning that a national court which, in a case before it concerning Community law, considers that the sole obstacle which precludes it from granting interim relief is a rule of national law must set aside that rule'.<sup>33</sup> This ruling was a very important milestone in EU law, since the Court of Justice established that the Member States must provide for the possibility of immediate and

---

<sup>32</sup> C-213/89 *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* [1990] ECR I-02433, para 2.

<sup>33</sup> C-213/89 *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* [1990] ECR I-02433, para 25. ; See C-106/77 *Amministrazione delle finanze dello Stato v Simmenthal* [1978] ECLI:EU:C:1978:49. ; C-811/79 *Amministrazione delle finanze dello Stato v Ariete* [1980] ECLI:EU:C:1980:195. ; C-826/79 *Amministrazione delle finanze dello Stato v Sas Mediterranea importazione, rappresentanze, esportazione, commercio (MIRECO)* [1980] ECLI:EU:C:1980:198.

provisional judicial protection in a procedure through interim relief, and based this on the principle of sincere cooperation. The Court stated that: ‘in accordance with the case-law of the Court, it is for the national courts, in application of the principle of cooperation laid down in Article 5 of the EEC Treaty, to ensure the legal protection which persons derive from the direct effect of provisions of Community law.’<sup>34</sup>

*‘The Court has also held that any provision of a national legal system and any legislative, administrative, or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent, even temporarily, Community rules from having full force and effect are incompatible with those requirements, which are the very essence of Community law.’*<sup>35</sup>

In *Factortame*, the Court of Justice used the principle of sincere cooperation as the sole legal basis to ensure effective judicial protection in areas of interest of Union law. Besides showing a clear tendency of federalization of EU law in formerly uncharted areas, in this particular case, it also had a massive impact in the UK national courts. This becomes clear when considering *M v. Home Office*, in which the House of Lords determined that a court can grant an interim injunction against the Crown in a case governed exclusively by national law. According to the Lords, the fact that judicial protection of persons in a national context would be

---

<sup>34</sup> *Factortame* (n 27) para 19.

<sup>35</sup> *Ibid* paras 19-20.

worse than a case that had a European dimension was unacceptable.<sup>36</sup>

This decision made by a domestic court shows that the federalising effects of the principle of sincere cooperation has a wider scope than ever could have been expected. As a result of its flexibility for interpretation in a multitude of themes (state liability, interim relief) it is evident that it can even mutate the domestic law of the Member States, giving indirect effect to Union law in the national judicial systems.

### *Unibet*

Unibet, an online gambling platform from the UK, purchased advertising space in a number of different Swedish media with the objective of promoting its gaming services on the internet. In accordance with the Law on Lotteries, the Swedish State took a number of measures, including obtaining injunctions and commencing criminal proceedings against those media companies, which had agreed to provide advertising space to Unibet.<sup>37</sup> The online gambling company considered that the prohibition was contrary to Article 49 EC on the freedom to provide services and sought a declaration that the domestic law on lotteries was contrary to EU law before the Swedish administrative Courts in separate proceedings. The Swedish courts held that Unibet could not bring such an action, but instead had to challenge Swedish law in the course of the criminal or administrative proceedings concerning the specific sanctions taken against Unibet.<sup>38</sup>

---

<sup>36</sup> Jans (n 21) 423.

<sup>37</sup> C-432/05 *Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern* [2007] ECR I-02271, para 17.

<sup>38</sup> *Ibid* para 19.

The case was brought to the Supreme Court of Sweden, which referred to the Court of Justice to ask whether the principle of effective judicial protection under EU law required that there would be a separate self-standing action in national law to review measures of a legislative nature which were alleged to be contrary to EU law, or if it was adequate that they be questioned indirectly, in the court of enforcement proceedings.<sup>39</sup> In its decision, the Supreme Court based its arguments on the principle of sincere cooperation and ruled that the principle of effective judicial protection does not require the national legal order of a Member State to set up a free-standing action for an examination of incompatibility of national provisions with EU law, provided that other effective legal remedies (which may not be less favourable than those governing similar domestic actions) make it possible that a question of compatibility can be determined as a preliminary issue.

The Court also held that the principle of effective judicial protection must require the possibility to obtain interim relief and suspend the application of the national measure until the competent court has ruled on the compatibility with EC law (as in *Factortame*). Once again, the Court used the principle of sincere cooperation as the legal basis to expand another principle: 'effective judicial protection'. This again demonstrates the flexibility of this principle and its wide scope that governs the integration of the legal systems of the Union and the Member States.

---

<sup>39</sup> Ibid para 30.

*iii. The Duty to enforce Union law**Greek Maize*

The Commission of the European Communities discovered that two consignments of ‘allegedly’ Greek maize, which a company registered in Greece had exported to Belgium, in fact, consisted of Yugoslavian maize. As a result of this fraud, which had the support of Greek civil servants, levies that were supposed to be paid to the European Union under a Union regulation had not been collected.<sup>40</sup>

The Commission called on the Greek authorities to take particular measures to resolve the issue, such as payment of the levies of Yugoslav maize to the Commission and the institution of criminal or disciplinary proceedings against the authors of the fraud and their accomplices. Because the Greek authorities failed to fulfil their obligations, the Commission initiated proceedings under article 238 TFEU (new). It submitted that Greece had failed to fulfil its obligations under Article 4(3) TEU (new) by omitting to initiate all the criminal or disciplinary proceedings provided for by the national law against the perpetrators of the fraud and all those who collaborated in its commission and concealment.<sup>41</sup> In its decision, the Court of Justice upheld the claim brought by the Commission, stating that:

*“(...) Article 4.3 TEU (new) of the Treaty requires the Member States to take all measures necessary to guarantee the application and effectiveness of Community law. For that purpose, whilst the choice of penalties remains within their discretion,*

---

<sup>40</sup> C-68/88 *Commission of the European Communities v Hellenic Republic (Greek Maize)* [1989] ECR 02965, paras 1-4.

<sup>41</sup> Jans (n 21) 270.

*they must ensure in particular that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive. Moreover, the national authorities must proceed with respect to infringements of Community law, with the same diligence as that which they bring to bear in implementing corresponding national laws.*<sup>42</sup>

In this decision, the Court of Justice used the general principle of sincere cooperation once again as the sole legal basis to expand its reach, introducing the duty to enforce Union law under an obligation to employ measures and penalties that fulfil the requirements of equivalence, effectiveness, proportionality, and dissuasiveness. This obligation applies to all national authorities involved in implementing Union law, including the judicial authorities, who need to assure that sanctions will comply with the requirements set forth by the European Court of Justice.<sup>43</sup>

---

<sup>42</sup> *Greek Maize* (n 34) paras 23-24.

<sup>43</sup> *Jans* (n 21) 271.



## IV. Consistent ‘trans-pillar’ interpretation and federalising tendencies in the former third pillar

### *Pupino*

The Pupino case produced important effects in the area of the former third pillar, regarding the federalist tendencies of the duty of sincere cooperation in once uncharted areas, such as PJCC. In 2001, criminal proceedings were started in Italy against Maria Pupino, a kindergarten teacher suspected of inflicting ‘serious injuries’ against a number of her pupils that were younger than five years at the time.<sup>44</sup> Under Italian law, a criminal procedure comprises two distinct stages. During the first stage, the Public Prosecutor’s office makes enquiries and, under the supervision of a judge in charge of preliminary enquiries, gathers evidence on the basis of which it will assess whether the prosecution should be abandoned or the matter should proceed to trial.<sup>45</sup> A decision to send the investigated person to trial starts the second stage of the proceedings (the adversarial stage) in which the judge in charge of preliminary enquiries does not take part. The proceedings properly begin in this stage. From this stage onwards, the parties’ submissions may be accepted as evidence in the technical sense of the term. This setup exists because, in this phase, the evidence must be subjected to cross-examination in order to acquire the value of ‘evidence’ in the full sense of the word.<sup>46</sup>

---

<sup>44</sup> C-105/03 *Criminal Proceedings against Maria Pupino* [2005] ECR 05285, para 12.

<sup>45</sup> *Ibid* para 13.

<sup>46</sup> *Criminal Proceedings against Maria Pupino* (n 38) para 14.

However, there are exceptions to that rule, most importantly as laid down by article 392 of the Italian Criminal Procedure Code ('CPP'), which allows evidence to be established early, during the preliminary enquiry period, when taking evidence from victims of certain restrictively listed offences of a sexual nature that are under the age of 16 years. According to Italy's national court, those additional derogations are designed to protect, first, the dignity of a minor witness, and, secondly, the authenticity of the evidence.<sup>47</sup> In this case, the Public Prosecutor's Office asked the judge in charge of preliminary enquiries to take the testimony of eight children that fell under the protective scope of Article 392 of the CPP. Under national provisions in question, the application of the Prosecutor's office would have been dismissed, but considering that, 'apart from the question of the existence or otherwise of a direct effect of Community law', the national court must 'interpret its national law in the light of the letter and the spirit of Community provisions', and, having doubt as to the compatibility of the mentioned articles to the Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings, the national court referred the case to the European Court of Justice.

The Court of Justice held that the principle of sincere cooperation between the Union and its Member States requires that all appropriate measures are taken to ensure the fulfilment of their obligations under European law. Consequently, the principle of sincere cooperation must also be binding between Member States and Union institutions in the area of police and judicial cooperation.<sup>48</sup>

---

<sup>47</sup> Ibid para 15.

<sup>48</sup> Stefan Lorenzmeier, *The Legal Effect of Framework Decisions – A Case note on the Pupino Decision of the European Court of Justice*. Zeitschrift für Internationale Strafrechtsdogmatik 583, 2006, 12, 584.

Due to the ruling in the *Pupino* case, it became clear that the principle of sincere cooperation had an important role to play as an interpretation tool to Europeanise areas that were previously considered to be independent, such as the former third pillar that was inherently based on an intergovernmental network. The Court stated in its decision in *Pupino*:

*'It would be difficult for the Union to carry out its task effectively if the principle of loyal cooperation, requiring in particular that Member States take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under European Union law, were not also binding in the area of police and judicial cooperation in criminal matters, which is moreover entirely based on cooperation between the Member States and the institutions, as the Advocate General has rightly pointed out in her opinion.'*<sup>49</sup>

The Advocate General stated:

*'That is apparent from an overview of the provisions of the Treaty on European Union article 1 EU lays down the objective of creating a new stage in the process of achieving an ever closer union among the peoples of Europe, on the basis of which relations between the Member States and between their peoples can be organized in a manner demonstrating consistency and solidarity. That objective will not be achieved unless the Member States and*

---

<sup>49</sup> *Criminal Proceedings against Maria Pupino* (n 38) para 42.

*institutions of the Union cooperate sincerely and in compliance with the law. Loyal cooperation between the Member States and the institutions is also the central purpose of Title VI of the Treaty on European Union, appearing both in the title – Provisions on Police and Judicial Cooperation in Criminal Matters – and again in almost all the articles.*<sup>50</sup>

When reading the aforementioned reasoning, it becomes evident that the principle of loyal cooperation was used as a legal basis in the federalization of the pillars toward European Union law. In the words of Klamert, ‘these indirect effects and this a certain unity of the former first and third pillars were, in principle, confirmed by the Court’s decision of 2005 in *Pupino*. (...) even though framework decisions did not have direct effect, they had an indirect effect in national law.’<sup>51</sup> All these cases highlight the role the duty of sincere cooperation played in the former pillars one and three and show that the impact of this duty cannot be overestimated.

## V. Sincere cooperation and jurisdiction in the area of CFSP

In 1969, the area of Common Foreign and Security Policy (‘CFSP’) was created. Back then, this area was governed by international law and decisions were only taken by

---

<sup>50</sup> C-105/03 *Criminal proceedings against Maria Pupino* [2005] ECR I-05285, Opinion of AG Kokott, para 26.

<sup>51</sup> Klamert (n 3) 94.

unanimity. In the Maastricht Treaty, it was laid down that this area would fall under the pediment of the Union and would form the second of the three pillars. This meant that suddenly, the Union also played a role in an area that used to be the sole competence of the Member States. Even when the pillar structure was abolished, the fact remained that this area was still intergovernmental by nature, thus remaining different from the former areas of Police and Judicial Cooperation and the Communities. These were supranational in nature, whereas the former CFSP area is still excluded from a number of EU competencies. For example, the use of 'legislative acts' is not permitted in this field; it is still subject to specific rules and procedures as stipulated in article 24(2) TEU. This includes, among others, a complete exclusion of the regular legislative procedure which leads to regulations and directives.<sup>52</sup> This means that the regular decision-making process of the Union ('QMV') is not used and instead, unanimity prevails and that the Court of the EU does not have jurisdiction with regards to specific CFSP matters. Although, it is surprising that decisions falling within the scope of CFSP made in accordance with article 28(2) TEU are binding and limit the Member States in their capacity to act contrary to it or adopt a national policy on this matter.<sup>53</sup> Indeed, they must even amend or adapt their own policy to ensure conformity with what was decided at the EU level. These two sides of the same coin are surprising, to say the least. Yet, the binding nature and reach of article 28(2) TEU can be explained as even before Lisbon, the Court rendered a verdict on the binding nature of these acts (formerly named Common Positions). In *Segi*, the Court stated that:

---

<sup>52</sup> Ramses A. Wessel 'Legal Acts in EU Common Foreign and Security Policy: Combining Legal Bases and Questions of Legality' (2019) < <https://research.utwente.nl/en/publications/legal-acts-in-eu-common-foreign-and-security-policy-combining-leg> > accessed at 2 November 2019, 3.

<sup>53</sup> Ibid.

*‘A common position requires the compliance of the Member States by virtue of the principle of the duty to cooperate in good faith, which means in particular that Member States are to take all appropriate measures, whether general or particular to ensure fulfilment of their obligations under European Union law.’<sup>54</sup>*

Perhaps it does not come as a surprise that the Court once again refers to the duty of sincere cooperation to broaden the scope and reach of the EU law and thereby created the binding nature of these CFSP decisions. The core of this principle is of such a broad nature that it requires unconditional cooperation between the Member States and the Union, which is used in *Segi* to ensure compliance and conformity of national policy with these decisions. This is not the only atypical occurrence within the area that is connected with the duty of sincere cooperation.

Title I of the TEU contains the common provisions applicable to the entirety of the treaty and the objectives that flow from it.<sup>55</sup> Within this Title, the duty of sincere cooperation can be found. Title V, general provisions on the CFSP, contains a mirror provision of article 4(3) TEU in article 24(3) TEU: The Member States shall support the

---

<sup>54</sup> C-355/04 *Segi, Araitz Zubimendi Izaga and Aritza Galarraga v Council of the European Union* [2007] ECLI:EU:C:2007:116, para 52.

<sup>55</sup> Klamert (n 3) 11. ; Christophe Hillion, ‘Tous pour un, un pour tous! Coherence in the External Relations of the European Union’ in M. Cremona (ed), *Developments in EU External Relations Law, Collected Courses of the Academy of European Law* (OUP, 2008), 67.

common foreign and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity and shall comply with the Union's action in this area.<sup>56</sup> The repetition of this duty seems in many regards a relic left in the text as a reminder of the pre-Lisbon days in which such repetition was necessary.<sup>57</sup> Its function at this point in time is not entirely clear, nor is its role in relation to article 4(3) TEU. When considering the placing of the article in Title V, it becomes clear that article 24(3) TEU and the duty that flows from it is at the very basis of CFSP and, just as its Title I counterpart, governs the relationship between the Member States and the Union.

Article 24(3) and 4(3) TEU concern the same duty of sincere cooperation and encapsulate the Member States' positive obligation to support the Union's CFSP prohibition to do anything that could jeopardise the attainment of the Union's tasks.<sup>58</sup> This duty to support and the obligation to refrain from acts that could jeopardise the fulfilment of Union tasks derive from article 4(3) TEU and are not merely applicable to areas other than CFSP. Although both articles are codifications of the duty of sincere cooperation,

---

<sup>56</sup> Consolidated version of the Treaty on European Union (n 1) art. 24.

<sup>57</sup> Peter van Elsuwege 'The Duty of Sincere Cooperation and Its Implications for Autonomous Member State Action in the Field of External Relations: Member State Interests and European Union Law' (2019)

<[https://www.researchgate.net/publication/330961755\\_The\\_Duty\\_of\\_Sincere\\_Cooperation\\_and\\_Its\\_Implications\\_for\\_Autonomous\\_Member\\_State\\_Action\\_in\\_the\\_Field\\_of\\_External\\_Relations\\_Member\\_State\\_Interests\\_and\\_European\\_Union\\_Law](https://www.researchgate.net/publication/330961755_The_Duty_of_Sincere_Cooperation_and_Its_Implications_for_Autonomous_Member_State_Action_in_the_Field_of_External_Relations_Member_State_Interests_and_European_Union_Law)> accessed at 2 November 2019, 287.

<sup>58</sup> Christophe Hillion and Ramses A. Wessel, 'Restraining External Competences of EU Member States under CFSP' in M Cremona and B. De Witte (eds), *EU Foreign Relations Law: Constitutional Fundamentals* (Oxford: Hart Publishing 2008).

differences still exist. One of the main differences between the provisions on the duty of sincere cooperation is the institution tasked to ensure compliance with the provision. The Commission has to ensure the Member States abide by the duty as laid down in article 3(4) TEU whereas for article 24(3) TEU, the High Representative and the Council are tasked with that responsibility.<sup>59</sup> From a practical point of view, this means that the Commission cannot initiate a legal action against a Member State in case of a breach of its CFSP duties. Nonetheless there are situations in which this would occur still which fall within the jurisdiction of the Court due to the overarching scope of article 4(3) TEU.<sup>60</sup> This means that if a Member State were to fail in its duty to cooperate because it failed to comply with a CFSP obligation -which would jeopardise the attainment of the EU's objectives- the Commission would not be able to bring the Member State to Court due to non-compliance with the CFSP objectives under Article 24(3) TEU because the Court has no jurisdiction over those matters as per article 24(1) TEU.<sup>61</sup> Instead, the Commission could bring the Member State to Court based on the overarching principle as laid down in article 4(3) TEU. As previously acknowledged, this provision can stand alone as a legal basis for litigation without referring to other, more specific Treaty obligations.<sup>62</sup>

Even though it remains peculiar that a specialist of the duty of sincere cooperation is reiterated in the title on

---

<sup>59</sup> Consolidated version of the Treaty on European Union (n 1) art. 24(3).

<sup>60</sup> Van Elsuwege (n 50) 287.

<sup>61</sup> Ibid.

<sup>62</sup> Christophe Hillion, 'A Powerless Court? The European Court of Justice and the EU Common Foreign and Security Policy' (2014) <<https://ssrn.com/abstract=2388165>> accessed at 2 November 2019, 68.



CFSP and some differences can be noted, it does not mean that article 24(3) TEU may limit or hinder the principle as laid down in Article 4(3) TEU. In the pre-Lisbon era, it was determined already that Member States cannot rely on the *lex specialis* to justify infringement of article 4(3) TEU and the horizontal application of this principle was acknowledged.<sup>63</sup>

### I. Analysis of *Rosneft*, *H v Council*, and *Elitaliana*

As discussed earlier, article 24(1) TEU states that the Court has no jurisdiction in the area of CFSP. This is surprising when considering the development taking place in recent case-law, which shows that the Court is slowly but steadily interfering in this area. Below, three recent cases will be analysed that show this development and the widening of the jurisdiction of the Court on the basis of reference to article 4(3) TEU and its affiliate provisions.

#### i. *H v Council*

In 2014, the General Court decided that it had no jurisdiction in *H v Council* as it concerned a matter that fell within the scope of CFSP. When considering article 24(1) TEU *strictu sensu*, that conclusion would be correct. The case at hand dealt with the matter of jurisdiction of the Court to rule on a staff dispute in Bosnia and Herzegovina and was raised by a functionary of the European Union Police Mission ('EUPM'), thereby falling within the former area of CFSP.<sup>64</sup> This would mean that the Court has no

---

<sup>63</sup> Hillion and Wessel (n 52) 95.

<sup>64</sup> C-455/14 *H v Council of the European Union, European Commission and European Union Police Mission (EUPM) in Bosnia and Herzegovina* [2016] ECLI:EU:C:2016:569.

jurisdiction in the matter due to the derogation as laid down in article 24(1) TEU. In his Opinion on *H v Council*, AG Wahl argued that the lack of jurisdiction of the Court of Justice means that the Member State courts have jurisdiction to deal with the matter at hand.<sup>65</sup> The AG referred to *Unibet*, *Rewe*, and *Unión de Pequeños* to show that national courts have this responsibility. As was stated in *Unibet*, national courts are responsible to provide remedies (subject to the *Rewe*-criteria) to ensure effective judicial protection in areas of Union law. In *Unibet*, the Court decided that, based on the principle of sincere cooperation, effective judicial protection needed to be offered by the Member States if no Union rule existed on the matter. National courts need to establish remedies and procedures that made sure effective judicial protection is ensured.<sup>66</sup>

The national courts had to

*‘interpret the procedural rules governing actions brought before them ... in such a way as to enable those rules, wherever possible, to be implemented in such a manner as to contribute to the attainment of the objective ... of ensuring effective judicial protection of an individual’s rights under [Union] law.’<sup>67</sup>*

The principle of effective judicial protection is, as affirmed in *Unión de Pequeños Agricultores v Council*, an expression of the principle of sincere cooperation as laid down in article

---

<sup>65</sup> C-455/14 *H v Council of the European Union*, European Commission and European Union Police Mission (EUPM) in Bosnia and Herzegovina [2016] ECLI:EU:C:2016:569, Opinion of AG Wahl, para 89.

<sup>66</sup> Anthony Arnall, ‘The Principle of Effective Judicial Protection in EU law: An Unruly Horse?’ (2011) 36(1) ELR 51, 54.

<sup>67</sup> *Unibet* (n 31) para 44.

4(3) TEU.<sup>68</sup> In *H v Council* and the Opinion of AG Wahl, this was reiterated once more. Problematic is though that in the case at hand, the decision had to be confirmed or invalidated by a court. In *Foto-Frost*, it was decided that only the Court of Justice has the authority to invalidate norms of Union law - national courts do not. According to the Court: ‘Divergences between courts in the Member States as to the validity of Community acts would be liable to place in jeopardy the very unity of the Community legal order and detract from the fundamental requirement of legal certainty.’ This would mean that in *H v Council*, the Court of Justice does not have jurisdiction to consider the matter and national courts do not have the competence to invalidate the decision in question.<sup>69</sup> This would leave a lacuna in the system of legal protection as neither national nor EU Courts can be the final arbiter. In the case at hand, the Court came to the conclusion that:

*“[T]he scope of the limitation, (...) on the Court’s jurisdiction [...] cannot be considered to be so extensive as to exclude the jurisdiction of the EU judiciary to review acts of staff management relating to staff members seconded by the Member States the purpose of which is to meet the needs of that mission at theatre level, when the EU judiciary has, in any event, jurisdiction to review such acts where they concern staff members seconded by the EU institutions.”<sup>70</sup>*

---

<sup>68</sup> C-50/00 *Unión de Pequeños Agricultores v Council* [2002] EU: C:2002:462, para 41. ; Constanța Mătușescu and Steluta Ionescu, ‘Effective Judicial Protection. Landmarks of Recent Case Law of the Court of Justice of the European Union’ in T. Ciulei, G. Gorghiu (eds), *Communicative Action & Transdisciplinarity in the Ethical Society* (Romania: Lumen Proceedings, 2018), 158.

<sup>69</sup> Opinion of AG Wah (n 60) paras 102-103.

<sup>70</sup> *H v Council* (n 59), paras 32, 42-43.

But, as AG Wahl said, it is:

*[...] the result of a conscious choice made by the drafters of the Treaties, which decided not to grant the CJEU general and absolute jurisdiction over the whole of the EU Treaties. The Court may not, accordingly, interpret the rules set out in the Treaties to widen its jurisdiction beyond the letter of those rules or to create new remedies not provided therein.*<sup>71</sup>

As for the jurisdiction of the Court, the AG affirmed that:

*'But the general rule that, (...), the CJEU lacks jurisdiction in the field of CFSP may not be overlooked. I do not believe that Articles 24(1) TEU and 275 TFEU can be interpreted as allowing any alleged infringement of a non-CFSP provision by a CFSP act to be heard by the CJEU.'*<sup>72</sup>

When comparing the Opinion of AG Wahl with the judgement of the Court, it becomes clear that the AG remains close to the wording in article 24(3) TEU and 275 TFEU and the Court actually diverges from such a narrow reading. The Court acknowledges that this matter falls within the scope of CFSP yet considers it relevant that the staff members that are the focal point of the dispute in *H v Council* are in fact on a mission related to an operational action of the European Union.<sup>73</sup> It decides that even though an act may be based on a CFSP provision, it does not automatically mean that the Court has no jurisdiction over the matter. In fact, as this concerned an administrative

---

<sup>71</sup> Opinion of AG Wahl (n 60).

<sup>72</sup> Ibid paras 71, 50.

<sup>73</sup> *H v Council* (n 59), para 42.

matter of staff management no different than that of the other Union bodies, the Court held that the derogation of Article 24(1) TEU does not prevent the Court's jurisdiction. The mere CFSP basis does not automatically side line the European Court – it takes more to do that.

## *ii. Elitaliana*

In *Elitaliana*, the Court stated that the expenditures for the European Rule of Law Mission in Kosovo ('EULEX Kosovo') were paid for by the Union, in accordance with the Financial Regulation. This regulation falls squarely within the jurisdictional scope of the Court and is used in a similar manner as staff management was in *H v Council*. Although article 24(1) TEU provides a derogation from jurisdiction in matters relating to CFSP, the mere fact that in *Elitaliana*, expenditures as per the Financial Regulation were discussed, gave the Court jurisdiction and once again, the derogation laid down in Article 24(1) TEU was deemed irrelevant.<sup>74</sup>

What is surprising in this case is that the Court did not discuss the duty of sincere cooperation yet the AG mentioned it in his opinion. AG Jääskinen noted in his opinion that when it comes to the jurisdiction of the Court in the area of CFSP:

*[...] it is worth noting the importance of the constitutional principles to which the EU institutions must adhere when they act in the field of external action, observance of which must be monitored by the Court. Together with the principle of sincere cooperation now laid down in Article 4(3)*

---

<sup>74</sup> C-439/13 *Elitaliana SpA v Eulex Kosovo* [2015] ECLI: EU:C:2015:753, para 49.

*TEU, observance of those principles is required for the purpose of attaining European Union objectives, which comprise, inter alia, the CFSP.*<sup>75</sup>

### *iii. Rosneft*

A similar line of reasoning on the jurisdiction of the Court was used in *Rosneft*. In this case, the Court was asked to rule on the validity of economic sanctions imposed on Russia after the annexation of Crimea took place. It was the first time that a request for a preliminary ruling on the validity of a CFSP act came before the Court. Again, the derogation of Article 24(1) TEU came into play with regard to this matter. This derogation applicable to CFSP is not as strict as it may seem, as it actually excludes ‘certain decisions’ that are ‘[...] provided for by the second paragraph of article 275 TFEU’ from the scope of the derogation.<sup>76</sup> This means that the legality of ‘certain decisions’ are actually open to being reviewed by the Court and do not fall within the derogation on jurisdiction. This ‘exception to the exception’ combined with the integration of the area of CFSP actually gives the Court more power in the area than before. Crucial to the scope and reach of the Court is the core question addressed in *Rosneft*: can the Court issue a preliminary ruling regarding the legality of an act based on a CFSP provision? The act in question is based on Regulation 833/2014 which is based on article 215 TFEU. The latter falls squarely within the scope of review by the Court. In *Rosneft*, the Court hooks onto the last sentence of Article 24(1) TEU, which refers to certain decisions that fall within its jurisdiction. This refers

---

<sup>75</sup> C-439/13 *Elitaliana SpA v Eulex Kosovo* [2015] ECLI: EU:C:2015:753, Opinion of AG Jääskinen, para 28.

<sup>76</sup> C-72/15 *PJSC Rosneft Oil Company v Her Majesty's Treasury and Others* [2017] ECLI: EU:C:2017:236, para 65.

not to the type of procedure searched after but the type of decision. The Court thereby interprets this provision broadly and extended its jurisdiction. This broad reading on the jurisdiction of the Court is based on a selective reading of the Treaty provisions and seems to go against the spirit of the provisions to support an integrationist approach taken by the Court.<sup>77</sup> This becomes clear when considering the starting point of the judgement. The Court did not start with the exemption to the rule of jurisdiction, in fact, the need to have a complete legal system and remedies in place to review the legality of certain acts was first emphasised. The *effet utile* reasoning through reference to the need to ensure effective judicial protection again narrows the scope of the carve-out created by article 24(1) TEU. Just as in *H v Council*, the Court's reasoning followed the *Foto-Frost* logic: only the Court of Justice is allowed to rule on the validity of EU measures.

*iv. Federalising tendencies and the expansion of Union law*

These judgments helped narrow the exclusion of jurisdiction in the area of CFSP. Instead of arguing that the exception of jurisdiction as laid down in article 24(1) TEU was the general rule –which would have been consistent with the peculiar nature of the area of CFSP– the Court decided to interpret the exception narrowly and refer to the principle of effective judicial protection, a principle derived from the duty of sincere cooperation, and separate the question from the

---

<sup>77</sup> Panos Koutrakos, 'Judicial Review in the EU's Common Foreign and Security Policy' (2018) ICLQ 67 < [https://www.cambridge.org/core/services/aop-cambridge-core/content/view/9570284E9D3285480CE2FC6006422B93/S0020589317000380a.pdf/judicial\\_review\\_in\\_the\\_eus\\_common\\_foreign\\_and\\_security\\_policy.pdf](https://www.cambridge.org/core/services/aop-cambridge-core/content/view/9570284E9D3285480CE2FC6006422B93/S0020589317000380a.pdf/judicial_review_in_the_eus_common_foreign_and_security_policy.pdf) > accessed at 2 November 2019, 25.

original legal basis.<sup>78</sup> Different from earlier landmark cases, these judgements mostly refer to the principle of effective judicial protection instead of the duty of sincere cooperation. It is sometimes, such as in *Rosneft*, referred to but often not pursued further. In this case, AG Wathelet even explicitly referred to the principle of sincere cooperation in the paragraph on the legal framework but did not pursue this line of reasoning.<sup>79</sup> The main focus of the judgment remained the question of effective judicial protection.<sup>80</sup>

This approach was used to provide a complete and composite system of legal protection as laid down in article 19 TEU. This article does not specify in what areas of Union law effective judicial protection must be offered and therefore does not exclude the area of CFSP. AG Kokott affirmed this view in Opinion 2/13 and stated that:

*[...] in matters relating to the CFSP, effective legal protection for individuals is afforded partly by the Courts of the EU (...) and partly by national courts and tribunals (...).*<sup>81</sup>

The Court uses the principle of effective judicial protection and the rule of law to ensure that the objectives flowing from the Treaties are guaranteed. In the aforementioned cases, the Court hardly ever refers to article 4(3) TEU even though the principle is mentioned in passing by the AG or

---

<sup>78</sup> Mătușescu and Ionescu (n 63) 158.

<sup>79</sup> C-72/15 *PJSC Rosneft Oil Company v Her Majesty's Treasury and Others* [2017] ECLI: EU:C:2017:236, opinion of AG Wathelet, para 6.

<sup>80</sup> Ibid 212, 170.

<sup>81</sup> Opinion of AG Kokott, *Opinion procedure 2/13 initiated following a request made by the European Commission* [2014] ECLI:EU:C:2014:2475, para 103.



the Court itself. Interestingly, the Court does not discuss this principle when discussing the aforementioned cases even though the AG explicitly refers to it in his opinion. The reason behind this might be that the Court first needs to establish jurisdiction in the area before looking into the duty of sincere cooperation, but this is pure speculation. What must be kept in mind when reading the reasoning of the Court in the aforementioned cases is the implicit duty to ensure, in full mutual respect, the attainment of the objectives of the Union which, in these cases is providing a complete system of legal protection. Instead of focusing on the duty of sincere cooperation as it did in the former pillars one and three, the Court used the more specific provision of Article 19(1) TEU instead which, as affirmed in *Rewe*, flows from the duty of sincere cooperation.<sup>82</sup> Indeed, Member States must ensure the application and respect for EU law within their territories. Their national courts must collaborate with the Court of Justice to ensure the application of the treaties. What this means is that the federalising traits of article 4(3) TEU are less clear in the area of CFSP when compared to the former pillars one and three. Instead of article 4(3) TEU, Article 19(1) TEU seems to serve the function of the competence-creep – the article used to broaden the scope of EU law - in this area. This is due to the fact that is used by the Court to chisel away at the exception to jurisdiction formed by article 24(1) TEU and to integrate the area in the legal system of the Union.

Again, the Court has used a general principle to expand its jurisdiction. Where article 4(3) TEU played a major role in expanding Union law in the former pillars one and three, it seems to play second fiddle to article 19(1) TEU in the area of CFSP. Having said that, it cannot be forgotten that article

---

<sup>82</sup> C 33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* [1976] ECR I-01989, para 5. ; Mătușescu and Ionescu (n 64) 158. ; *Unibet* (n 31) 54.

19(1) TEU was derived, among others, from article 4(3) TEU. This was affirmed in *Rewe* and *Unión de Pequeños Agricultores v Council*. The principle of effective judicial protection flows forth from the duty of mutual sincere cooperation, which must therefore be considered as an interpretation tool which facilitates the interpretation of the questions that come before the Court. The duty of sincere cooperation as an interpretation tool shows a similar federalising nature in the area of CFSP as in former pillars one and three, but it does not take center stage. Instead, article 19(1) TEU plays the leading role in the area.

This is not surprising when looking back on the landmark cases of the past. For instance, in *Factortame* and *Francovich*, remedies were created based on Article 4(3) TEU to ensure effective judicial protection. What the landmark cases in the former pillars one and three and the current changes made in former pillar two have in common is that the Court focuses on the attainment of the goal of effective judicial protection. Instead of using article 4(3) TEU as a legal ground, the Court now bases itself on article 19(1) TEU, the specials-rule that only (relatively) recently became part of the Treaties. This article in itself has been used by the Court as the sole legal basis to argue that the exclusion of jurisdiction in the area of CFSP must be interpreted strictly and counts as the general rule in that area instead of the derogation on jurisdiction as laid down in article 24(1) TEU. It can therefore tentatively be concluded that article 19(1) TEU has federalising tendencies in the area of CFSP as it forms the sole legal basis for jurisdiction. Article 4(3) TEU, from which article 19(1) TEU was derived, functions as an interpretation tool that is kept in mind by the Court when deciding on matters that fall within the area of Common Foreign and Security Policy. This development again shows that these general principles of Union law can broaden the reach of the law and the Court more specifically, and contributes to the integration of the former area of CFSP into the mainstream Union law.

## Conclusion

The exclusion of Article 24(1) TEU concerning jurisdiction of the European Court shows the peculiar nature and history of the former area of CFSP within the larger framework of the Treaties. Recent case-law has shown that the Court is slowly chiselling away at this exemption to jurisdiction through reference to the importance of ensuring effective judicial protection. This principle, encapsulated in article 19 TEU, has been used as the sole legal basis of a judgement on multiple occasions. This principle shows clear federalising tendencies and has facilitated the further expansion of EU competence. The principle of sincere cooperation, which was used as a basis for numerous landmark cases, such as *Factortame* and *Frankovich*, only plays a secondary role in recent cases regarding the former area of CFSP. It is used as an interpretation tool which provides further substantiation for Article 19 TEU. The Court has used both principles as federalising tools to further EU competence and the way in which they were and are used differ from the past to the present. How this will develop in the future still remains to be seen.

## Bibliography

### European Cases

- C-811/79 Amministrazione delle finanze dello Stato v Ariete  
[1980] ECLI:EU:C:1980:195
- C-826/79 Amministrazione delle finanze dello Stato v Sas  
Mediterranea importazione, rappresentanze, esportazione,  
commercio (MIRECO) [1980] ECLI:EU:C:1980:198
- C-106/77 Amministrazione delle finanze dello Stato v Simmenthal  
[1978] ECLI:EU:C:1978:49
- C-300/89 Commission of the European Communities v Council of  
the European Communities [1991] EU:C:1991:244
- C-132/88 Commission of the European Communities v Hellenic  
Republic [1990] ECR I-01567
- C-804/79 Commission of the European Communities v United  
Kingdom of Great Britain and Northern Ireland [1981]  
ECR I-01045
- C-374/89 Commission v Belgium [1991] I-367
- C-74/86 Commission v Germany [1988] I-2139
- C-48/89 Commission v Italy [1990] I-2425
- C-105/03 Criminal proceedings against Maria Pupino [2005] ECR  
I-05285
- C-78/70 Deutsche Grammophon Gesellschaft mbH v Metro-SB-  
Großmärkte GmbH & Co. KG [1971] ECLI: EU:C:1971:42
- C-439/13 Elitaliana SpA v Eulex Kosovo [2015] ECLI:  
EU:C:2015:753
- C-6/64 Flaminio Costa v E.N.E.L. [1964] ECLI:EU:C:1964:66
- C-455/14 H v Council of the European Union, European  
Commission and European Union Police Mission (EUPM)  
in Bosnia and Herzegovina [2016] ECLI:EU:C:2016:569

- C-71/76 Jean Thieffry v Conseil de l'ordre des avocats à la cour de Paris [1977] ECR I-00765
- Joined cases C-6/90 and C-9/90 Andrea Francovich and Danila Bonifaci and others v Italian Republic [1991] ECR I-05357
- C-106/89 Marleasing SA v La Comercial Internacional de Alimentacion SA [1990] ECR I-04135
- C-33/76 Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland [1976] ECR I-01989
- C-72/15 PJSC Rosneft Oil Company v Her Majesty's Treasury and Others [2017] ECLI: EU:C:2017:236
- C-355/04 Segi, Araitz Zubimendi Izaga and Aritza Galarraga v Council of the European Union [2007] ECLI:EU:C:2007:116
- C-213/89 The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others [1990] ECR I-02433
- C-432/05 Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern [2007] ECR I-02271
- C-50/00 Unión de Pequeños Agricultores v Council [2002] EU: C:2002:462

## Opinions

- C-105/03 *Criminal proceedings against Maria Pupino* [2005] ECR I-05285, Opinion of AG Kokott
- C-439/13 *Elitaliana SpA v Eulex Kosovo* [2015] ECLI: EU:C:2015:753, Opinion of AG Jääskinen
- C-455/14 *H v Council of the European Union, European Commission and European Union Police Mission (EUPM) in Bosnia and Herzegovina* [2016] ECLI:EU:C:2016:569, Opinion of AG Wahl
- Opinion of AG Kokott, Opinion procedure 2/13 initiated following a request made by the European Commission [2014] ECLI:EU:C:2014:2475
- Opinion of the Court (full Court) of 8 March 2011, Opinion pursuant to Article 300(6) EC, Creation of a unified patent litigation system [2011] ECLI: EU:C:2011:123

Opinion 1/75 Opinion given pursuant to Article 228 (1) of the EEC Treaty [1975] ECR I-01355

C-72/15 PJSC Rosneft Oil Company v Her Majesty's Treasury and Others [2017] ECLI: EU:C:2017:236, opinion of AG Wathelet

## **Legislation**

The Treaty on the European Union [1992] OJ C 191/1

Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts [1997] OJ C 340/1

Consolidated version of the Treaty on European Union [2012] OJ C 326/13

## **Secondary Sources**

Arnulf A, 'The Principle of Effective Judicial Protection in EU law: An Unruly Horse?' (2011) 36(1) ELR 51

Deschamps E, 'The First Pillar of the European Union' [2016] CVCE European Navigator <  
<https://www.cvce.eu/obj/the-first-pillar-of-the-european-union-en-2b2d7680-9225-4ecf-9ec6-83af952c06a6.html>>  
accessed at 2 November 2019

Delgado Casteleiro A and Larik J, 'The Duty to Remain Silent: Limitless Loyalty in

EU External Relations?' (2011) 36 E.L. Rev 522

Due O, 'Artikel 5 van het EEG-Verdrag: een bepaling met een federaal karakter?' (1992) 5 SEW 355

van Elsuwege P, 'The Duty of Sincere Cooperation and Its Implications for Autonomous Member State Action in the Field of External Relations: Member State Interests and European Union Law' (2019) <[https://www.researchgate.net/publication/330961755\\_The\\_Duty\\_of\\_Sincere\\_Cooperation\\_and\\_Its\\_Implications\\_for\\_Autonomous\\_Member\\_State\\_Action\\_in\\_the\\_Field](https://www.researchgate.net/publication/330961755_The_Duty_of_Sincere_Cooperation_and_Its_Implications_for_Autonomous_Member_State_Action_in_the_Field)>

- of External Relations Member State Interests and European Union Law > accessed at 2 November 2019
- Gerbert P, 'Cooperation in the fields of justice and home affairs' (2016) [http://www.cvce.eu/obj/cooperation in the fields of justice and home affairs-en732e4d22-5fbb-4fb8-896d-b5673195fc43.html](http://www.cvce.eu/obj/cooperation_in_the_fields_of_justice_and_home_affairs-en732e4d22-5fbb-4fb8-896d-b5673195fc43.html) accessed on 3 November 2019.
- Hillion C, 'Tous pour un, un pour tous! Coherence in the External Relations of the European Union' in M. Cremona (ed), *Developments in EU External Relations Law, Collected Courses of the Academy of European Law* (OUP, 2008)
- Hillion C and Wessel R A, 'Restraining External Competences of EU Member States under CFSP' in M. Cremona and B. De Witte (eds), *EU Foreign Relations Law: Constitutional Fundamentals* (Oxford: Hart Publishing 2008)
- Hillion C, 'A Powerless Court? The European Court of Justice and the EU Common Foreign and Security Policy' (2014) < <https://ssrn.com/abstract=2388165> > accessed at 2 November 2019
- Jans J H and others, *Europeanisation of Public Law* (2<sup>nd</sup> edn, Europa Law Publishing 2015)
- Klamert M, *The Principle of Loyalty in Union Law* (1<sup>st</sup> edn, OUP 2014)
- Koenig J and others, *International Police Cooperation: A World Perspective* (Lexington Books 2001) 239.
- Koutrakos P, 'Judicial Review in the EU's Common Foreign and Security Policy' (2018) ICLQ 67 < [https://www.cambridge.org/core/services/aop-cambridge-core/content/view/9570284E9D3285480CE2FC6006422B93/S0020589317000380a.pdf/judicial\\_review\\_in\\_the\\_eus\\_common\\_foreign\\_and\\_security\\_policy.pdf](https://www.cambridge.org/core/services/aop-cambridge-core/content/view/9570284E9D3285480CE2FC6006422B93/S0020589317000380a.pdf/judicial_review_in_the_eus_common_foreign_and_security_policy.pdf) > accessed at 2 November 2019
- Lorenzmeier S, 'The Legal Effect of Framework Decisions – A Case note on the Pupino Decision of the European Court of Justice' [2006] Zeitschrift für Internationale Strafrechtsdogmatik 583 (note)
- Mătușescu C and Ionescu S, 'Effective Judicial Protection. Landmarks of Recent Case Law of the Court of Justice of the European Union' in T. Ciulei, G. Gorghiu (eds),

*Communicative Action & Transdisciplinarity in the Ethical Society* (Romania: Lumen Proceedings, 2018)

Prechal S, 'Case C-374/89, *Commission v Belgium*, Judgment of the Court of 19 February 1991' [1992] 2 CML 371

Temple Lang J, 'Community Constitutional Law: article 5 EEC Treaty' (1990) 27 CML 645

Wessel R A, 'Legal Acts in EU Common Foreign and Security Policy: Combining Legal Bases and Questions of Legality' (2019) <  
<https://research.utwente.nl/en/publications/legal-acts-in-eu-common-foreign-and-security-policy-combining-leg> >  
accessed at 2 November 2019



# **Should trade secrets be considered as property rights of the owner, or as relational obligations?**

Gea Donadoni\*

\*MSc Candidate at The London School of Economics and Political  
Science and BA degree at the University of Warwick

Contact at: [gea.donadoni@warwick.ac.uk](mailto:gea.donadoni@warwick.ac.uk).

## Preface

Trade secrets are a riddle. For over a century, courts, scholars, and lawyers have grappled over how to fit this relatively new legal dimension into the broader structure of legal doctrine.<sup>1</sup> While trade secret law qualifies as a species of intellectual property (I.P.), critics have argued that the differences with copyrights, trademarks, and patents seem to be far more overwhelming than their similarities. Specifically, it has been suggested that its relational focus fits poorly within the dimension of I.P. rights, begging the question of whether trade secrets may be better understood through the lens of personal obligations defined by contract or tort law. To make sense of this identity crisis, it is important to take a step back and remind ourselves what the purpose of trade secret law is and why this legal dimension was created in the first place. Taking a utilitarian stance, this paper will assume from the outset that the broadly stated objectives for trade secret law include commercial morality regulation, incentivising innovation, as hinted at in the case of *Kewanee Oil Co. v Bicron Corp.*,<sup>2</sup> and ensuring employee mobility. Ultimately, the question must be approached by asking what understanding of trade secret law will enable it to best achieve these overarching policy goals compared to the alternative mechanism.

The central argument advanced by this paper is that a property rights approach must be favoured as it stresses the centrality and instrumentality of secrecy and ownership to

---

<sup>1</sup> Mark A Lemley, 'The Surprising Virtues of Treating Trade Secrets as IP Rights' (2008) vol. 61, issue 2, Stanford Law Review, 311,312.

<sup>2</sup> See *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974).

trade secret law. Solely by acknowledging these two aspects is it possible to serve its policy objectives and limit common law claims that undermine the purpose of this legal dimension.<sup>3</sup> To be certain that this conclusion is the correct one, it is nonetheless essential to acknowledge and evaluate the apparent benefits of conceiving trade secrets under the relational obligations approach. The purpose of this discussion is therefore three-fold. The first section will refute the idea that relational obligations seem to lie at the heart of trade secret law, arguing instead that a relational duty stems from the need to acquire control and ownership over secret information. Having determined this, the purpose of the second section is to analyse the apparent effectiveness of the evidentiary role of contracts for procedural purposes. This is followed by a negative thesis arguing that a complete reliance on the probative value of relationally specific duties does not cover the full extent of the scope of trade secret law, which often concerns improper-means cases and covers the relations between strangers. Finally, the third section of this paper will conclude by evaluating which approach seems to best balance the protection of trade secrets with trade secret law's policy goals. Ultimately, the benefits of a relational understanding of trade secrets seem to be minimised, if not eliminated, when employers take advantage of contractual duties to advance their subjective understanding of trade secrets. On the other hand, a property rights approach must be favoured due to its instrumentality to trade secret law: by stressing the centrality of secrecy and ownership of this legal doctrine, it is possible to encourage innovation, generate a non-hierarchical balance between the rights of employers and employees, and promote overall commercial morality by preventing unfair competition.

Before closely studying the relative advantages and disadvantages of employing one conception of trade secrets

---

<sup>3</sup> Lemley (n1) 347.

compared to the other, a few clarifications are necessary to fully comprehend the approach and purpose of this paper. Firstly, this discussion is contingent on an understanding of trade secrets as information that is likely to generate a competitive advantage for rival companies or individuals when it is undisclosed to the public.<sup>4</sup> Secondly, the arguments in this study are supported by U.S. case law and legislation, specifically, the 2016 U.S. Defend Trade Secrets Act (DTSA)<sup>5</sup> – the most recent treaty that finalised the U.S. regulatory framework with a federal private action for trade secret misappropriation. In this context, this paper will refer to relational obligations as those that fall within the duties imposed by contracts, employment statuses, or fiduciary duties. On the other hand, property rights are understood explicitly as those that govern intangible rather than tangible information.<sup>6</sup> Lastly, while this paper does acknowledge that there are multiple scenarios in which trade secrets emerge, including competitive intelligence and business transactions, for a matter of consistency and clarity, it will explain the practical differences between the two approaches predominantly by referring to the traditional employer-employee model.

### *Placing property at the heart of trade secret law*

At the beginning of the twentieth century, in the well-known case of *E.I. Du Pont de Nemours Powder Co. v.*

---

<sup>4</sup> Smriti Tripathi, 'Treating trade secrets as property: a jurisprudential inquiry in search of coherency' (2016) vol. 11, issue 11, *Journal of Intellectual Property Law & Practice*, 841, 843.

<sup>5</sup> Defend Trade Secrets Act of 2016, Pub. L. No. 114-153, 130 (2016).

<sup>6</sup> Eric Goldman, 'The Defend Trade Secrets Act isn't an "Intellectual Property" Law' (2017) vol. 33, fasc. 4, *Santa Clara High Technology Law Journal*, 541, 542.

*Masland*,<sup>7</sup> the Supreme Court rejected the nineteenth-century conception of possession and ownership that had been traditionally employed to approach trade secret law cases. Instead, the judges shifted their consideration towards the breach of duty between the two parties. In a frequently quoted passage, Justice Holmes claimed: ‘Whether the plaintiffs have any valuable secret or not, the defendant knows the facts, whatever they are, through a special confidence that he accepted. The property may be denied, but the confidence cannot be.’<sup>8</sup> This tort-based view, also supported by The Restatement of Torts,<sup>9</sup> firmly upholds the idea that the breach of confidentiality between the plaintiff and defendant is what warrants legal protection, not the act of mimicking or disclosing secret intangible information. From this perspective, trade secret law seems to rather represent a legal hybrid between contract and tort law; as voiced by Robert Bone, trade secret law is ‘parasitic’<sup>10</sup> on these legal norms. Indeed, it is arguable that the judges in *Masland* were unwilling to expand trade secret law beyond the confines of these ‘host theories’<sup>11</sup> as it was unable to stand as a normatively autonomous legal body.

On the other hand, this paper argues that relying solely on a relational conception of trade secrets essentially disregards the instrumentality of secrecy and ownership when evaluating legal and social problems. As explained by Mark Lemley, a purely duty-based view is void and does not provide any explanation of the wrong other than that it

---

<sup>7</sup> E. I. Du Pont de Nemours Powder Co. v. Masland, 244 U.S. 100 (1917).

<sup>8</sup> Ibid.

<sup>9</sup> Restatement (First) of Torts § 757 cmt. b (1939).

<sup>10</sup> Robert G Bone, ‘A New Look at Trade Secret Law: Doctrine in Search of Justification’ (1998) vol. 86, issue 2, California Law Review, 241, 245.

<sup>11</sup> Ibid, 247.

arose from a contractual obligation.<sup>12</sup> In this way, trade secret law is limited to a conceptual structure that focuses on punishing wrongful behaviour rather than on the pursuit of its overarching policy and social purposes.<sup>13</sup> Moreover, contrary to Justice Holmes' and Bone's understanding, it is interesting to consider whether it could actually be the possession of information that drives the need for relational obligations, not vice versa.<sup>14</sup> Arguably, only in the existence of something worth protecting is there a mutual intent and need to be bound. Therefore, a relational duty emerges *as a consequence* of the owner's informed decision to share his intellectual property knowingly and willingly with a third party; the obligation not to breach some information's secrecy stems from the owner's need to ensure control over it for commercial purposes.<sup>15</sup> This consideration suggests that trade secret law adjusts and shapes social relations that arise from the production and communication of secret information,<sup>16</sup> thus placing the idea of property at the core of trade secrets. If this claim stands, then either the outcome of the *Masland* case is significantly outdated and should be reversed,<sup>17</sup> or the idea of property was merely irrelevant to

---

<sup>12</sup> Lemley (n 1) 321.

<sup>13</sup> Mark A Lemley, Peter S. Menell and Robert P. Merges, 'Intellectual Property in the New Technological Age: 2019' (2019), 1, 46, available at SSRN: <https://ssrn.com/abstract=3415161>, accessed: 21<sup>st</sup> March 2021.

<sup>14</sup> Eric R Claeys, 'Private Law Theory and Corrective Justice in Trade Secrecy' (2011) vol. 4, issue 2, Journal of Tort Law, George Mason Law & Economics Research Paper Series, 1, 15, available at SSRN: <https://ssrn.com/abstract=1799554>, accessed: 16<sup>th</sup> April 2021.

<sup>15</sup> Steven Wilf, 'Trade Secrets, Property, and Social Relations' [2002] University of Connecticut School of Law, Faculty Articles and Papers, 787, 794.

<sup>16</sup> Joseph W Singer, *Entitlement: The Paradoxes of Property* (New Haven: Yale University Press, 2015), 10.

<sup>17</sup> Lemley (n 1) 344.

its resolution. Indeed, addressing the issue over sixty years later in the case of *Ruckelshaus v. Monsanto*,<sup>18</sup> the Supreme Court resurrected the property view by concluding that trade secrets constituted a form of property within the meaning of the Fifth Amendment to the Constitution.

### *The evidentiary role of contracts in trade secret law*

This section of the paper now turns to evaluate the idea that trade secret law is not only dependent on relationally specific duties for normative support but also on their evidentiary role. Most commonly, the relational obligations approach regulates the interactions between parties involved in business transactions and between employers and employees in departing employee cases. In these contexts, contract law governs the disposition of trade secrets through employment, non-disclosure, and non-competition agreements, which become valuable evidence of the plaintiffs' compliance with the requirements that ought to be fulfilled to advance a successful trade secret misappropriation claim. Indeed, the DTSA requires that the plaintiff demonstrate he took 'reasonable secrecy precautions'<sup>19</sup> to prevent the disclosure of the information to the broader public. For example, in a 2019 case, the Northern District of Illinois Court determined that if the plaintiff had not required the defendant to sign a non-disclosure agreement and had not established the confidentiality of the information, then the 'reasonable measures' condition would not be achieved.<sup>20</sup> For this reason,

---

<sup>18</sup> *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984)

<sup>19</sup> See 18 U.S.C. § 1839(3); Unif. Trade Secrets Act § 1(4) (2016).

<sup>20</sup> Steven Grimes and Shannon T Murphy, 'Trade Secrets 2019 Year in Review' (2020) vol. 32, issue 3, *Intellectual Property & Technology Law*, 1, 3 citing *Abrasic 90 Inc. v. Weldcote Metals, Inc.*, 364 F.Supp.3d 888, 898-99 (N.D. Ill. Mar. 4, 2019).

scholars such as David Almeling and his colleagues have argued that confidentiality agreements act as the most crucial element when courts determine the cogency of trade secret disputes.<sup>21</sup>

Furthermore, it is essential to note that the DTSA has failed to clarify and expand on what necessary steps have been taken to ensure the information retains its confidential quality. Consequently, its vague nature may imply that so long as a loose commercial definitional requirement is met, there is no limit to what can qualify and be protected as a trade secret. Critics have argued that this stretches the confines of trade secret law excessively and that the conception of trade secrets must be narrowed and managed through a contractual approach.<sup>22</sup> This will help stir courts away from vague, set-in-stone notions and standards of commercial morality.

Nevertheless, while this paper does agree that contracts have significant evidentiary value, the objectives of trade secret law necessitate an approach that allows it to reach where relationally specific duties alone cannot. For instance, contract law is unable to cover ‘improper means’<sup>23</sup> cases and those situations where strangers acquire the secret by accident or mistake. This loophole is too important to disregard when considering the question at hand. At best, contractual relations only can serve a limited, evidentiary role when determining the existence of an explicitly legal confidential relationship between the owner of the information and a third party with whom he shares that

---

<sup>21</sup> David S Almeling and others, ‘A Statistical Analysis of Trade Secret Litigation in Federal Courts’ (2010) vol. 46, issue 1, *Gonzaga Law Review*.

<sup>22</sup> Bone (n 10) 304.

<sup>23</sup> See Defend Trade Secrets Act of 2016, Pub. L. No. 114-153, 130 Stat. 381 (2016).



information. On the other hand, extending beyond the privity of contract to all subjects who ‘knew or had reason to know’<sup>24</sup> the information was improperly obtained provides greater flexibility for courts to stress that the breach is related to the commercial value of secrecy of the information rather than to an abuse of trust. A similar reasoning also applies to tort law. In interpreting the wording of the DTSA, it would seem somewhat odd if by ‘improper’ the courts had intended to exclusively refer to acts that are already governed by tort law, including trespass and theft, as this would make the existence of trade secret law essentially redundant. Instead, this term seems to cover a more comprehensive array of situations, such as accidental disclosures, that only a property approach to trade secret law has the necessary tools and underlying rationale to handle.

This argument is best exemplified through the case of *E.I. Du Pont de Nemours & Co. v. Christopher*,<sup>25</sup> where the defendants misappropriated a trade secret by photographing the plaintiff’s chemical engineering plant while under construction. This act of industrial espionage was understood as an improper ‘school boy’s trick’<sup>26</sup> that threatened commercial morality and hindered healthy industrial competition. Given the absence of a pre-existing relationship between the two parties and considering that no law had effectively been broken, this case does not seem to fit very well within the framework of either contract or tort law. Instead, understanding this misappropriation through the lens of a property rights approach helps determine the existence of a breach arising from the claimant’s fundamental right to exclude and impose an in rem duty on strangers not to improperly steal his secret intellectual work to gain a

---

<sup>24</sup> Ibid.

<sup>25</sup> *E. I. Du Pont de Nemours & Co. v. Christopher*, 431 F.2d 1012 (5th Cir. 1970).

<sup>26</sup> Ibid.

competitive advantage.<sup>27</sup> Furthermore, David Friedman suggested that in such cases, trade secret law provides a more affordable alternative compared to a more substantial investment in physical secrecy that the claimants might have otherwise had to undertake.<sup>28</sup>

### *Balancing the protection of secrets and policy goals*

Having elucidated the limited usefulness of the evidentiary role of contract and tort law for the scope of trade secret law, this final section turns to the employer-employee model to explain the critical fairness and equity grounds to limit the relational model. Indeed, relational duties play a conflicting role in trade secret law, as they can be used to evade and circumvent the limitations imposed by this legal theory.<sup>29</sup> To avoid and limit the court's objective reasoning to determine the existence of trade secret misappropriation, employers often provide broadly worded contracts that enlarge the protectable subject matter, avoid secrecy precautions, and lack a clearly defined public domain exception. In this way, it is possible to restrict the former employee's rights to the employer's entirely subjective definitions of trade secrets that will most likely serve their own or their firm's goals.

Furthermore, trade secret owners seek to curb their employees' actions by taking advantage of their lack of negotiating power. By formulating non-competition contracts masked strategically as trade secrets, they are able

---

<sup>27</sup> Claeys (n 14) 48.

<sup>28</sup> David D Friedman, 'Trade Secret', in: P. Newman (eds), *The New Palgrave Dictionary of Economics and the Law*, Volume 3, (London, New York: Palgrave MacMillan 1998), 604.

<sup>29</sup> Deepa Varadarajan, 'The Trade Secret-Contract Interface' (2018) vol. 103, issue 4, *Iowa Law Review*, 1543, 1563-1564.

to devise ‘pre-emptive strikes’<sup>30</sup> against the risk of the misuse of information. Recent empirical studies have also demonstrated that many employees are not even granted access to the secrets covered by such contracts,<sup>31</sup> further weakening the connection between non-competes and their trade-secret protection justification. From this perspective, if the breach of a relational duty becomes the central justification for trade secret law, the potential for enforcement abuse significantly invalidates the countervailing benefits of trade secret law. Employing a relational approach fails to balance the trade secret owner’s interest to protect confidential information against the promotion of employee mobility and innovation. Arguably, this approach is unsettling and does not sit comfortably with notions of commercial morality. To resolve this tension, the contract should aim to explicitly define what constitutes a trade secret and what instead is mere confidential information, in this way becoming not only evidentiary but co-extensive and consistent with the policy objectives of trade secret law.

In light of the arguments that have been considered, this paper suggests that a property rights approach is more prone and better equipped to fulfil the broader functions and scope of trade secret law and I.P. law. Firstly, a property rights understanding of trade secrets provides a more balanced relationship between the plaintiff and the defendant,

---

<sup>30</sup> Ibid, 1572, *citing* Charles T Graves, ‘Trade Secrecy and Common Law Confidentiality: The Problem of Multiple Regimes’, in: Rochelle C. Dreyfuss & Katherine J. Strandburg (eds.), *The Law and Theory of Trade Secrecy: A Handbook of Contemporary Research* (Cheltenham: Edward Elgar Publishing Limited 2011) 85.

<sup>31</sup> Evan Starr, JJ Prescott and Norman Bishara, ‘Noncompete Agreements in the US Labor Force’ [2020] *Journal of Law and Economics*, available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2625714](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2625714), accessed: 22nd March 2021.

thus safeguarding commercial morality by avoiding the ‘catch-all’<sup>32</sup> trap that protects any and all information the employer subjectively claims to be confidential. While a relational approach would begin by asking whether the former employee accessed the information via the employer, a property approach would instead start by objectively assessing whether the information is secretive and protectable in the first place, regardless of how the employee learned it.<sup>33</sup> If the information objectively fails to qualify as a secret, a property-based approach would disregard whether and why the employer subjectively perceived it to be confidential, treating the information under a more expansive view as the general baggage of skills, knowledge, and experience that the employee can transfer from one job to the other in the pursuit of innovation. In this way, the emphasis is placed on the commercial value of the secrecy of the information and does not contribute to reinforcing the hierarchical relationship between employer and employee. Hence, by framing trade secrets as property rights, courts are compelled to base their judgement on what the law is attempting to protect, and most importantly, for what reasons it requires protection, something that the relational obligations approach fails to consider.<sup>34</sup>

Secondly, there also seems to be a reward-like function in attributing an ownership right to the discovery or creation of new information, which – as originally argued by John Locke – comes in the form of a *prima facie* right to use and control the fruits of one’s labour to their own

---

<sup>32</sup> Charles T Graves, ‘Trade Secrets as Property: Theory and Consequences’ (2007) vol. 15, issue 1, *Journal of Intellectual Property Law*, 39, 60.

<sup>33</sup> *Ibid*, 48.

<sup>34</sup> Lemley (n 1) 314.

commercial advantage.<sup>35</sup> Granting this type of ownership protection provides even more incentive for the holder of a secret to disclose information that he would have otherwise been reluctant to reveal, thus encouraging the creation of inventions by promoting more regulated business negotiations. By imposing a single, clear standard on claims that would otherwise be supported by a multitude of different, conflicting legal theories and claims of free-riding, a property rights approach advances the goal of innovation without having to curtail the competition that is integral to a functioning market economy.<sup>36</sup>

### *Final remarks*

Ultimately, the answer to this question must be instrumental to considerations of social and legal utility. This paper has argued that trade secret law must be developed and understood beyond the confines of a theory of relational obligations because this approach fails to achieve its underlying policy objectives. To pursue this argument, the purpose of this paper has been three-fold. In the first section, property rights were placed at the heart of trade secret law by reversing the common conception that a trade secret misappropriated is only in the light of a special confidence. Instead, this paper argued that a relationally specific duty arises from the owner's need to control the information. The second section turned to evaluate the suitability of the evidentiary role of contract and tort for the scope of trade secret law, concluding that a relational obligations approach is limited and does not cover the full scope of trade secret law, including the 'improper means' cases. The purpose of this paper's final section was to demonstrate that in the

---

<sup>35</sup> John Locke, *The Second Treatise of Civil Government* (Indianapolis: Bobbs-Merrill, 1690), chap. 5.

<sup>36</sup> Lemley (n 34).

employer-employee context, a relational obligations approach to trade secrets fails to balance the employer's desire to protect his trade secrets with the overarching purpose of trade secret law. On the other hand, treating trade secrets as a property right dependent on proof of secrecy and ownership ensures that courts are focused on protecting and advancing the policy stakes of trade secret law. As trade secret law continues to expand in scope and importance, it will be interesting to examine what approach U.S. judges will opt for when deciding upon future cases and evaluate whether an analogy can be drawn between their reasonings and the arguments presented in this paper.

## Bibliography

### Books

- Locke J, *The Second Treatise of Civil Government* (Indianapolis: Bobbs-Merrill, 1690)
- Singer J W, *Entitlement: The Paradoxes of Property* (New Haven: Yale University Press, 2015)Chapters in edited books
- Friedman D D, 'Trade Secret' in Newman P (eds), *The New Palgrave Dictionary of Economics and the Law*, Volume 3, (London, New York: Palgrave MacMillan, 1998)

### Journal articles

- Almeling D S, Snyder D W, Sapoznikow M, McCollum W, Weade J, 'A Statistical Analysis of Trade Secret Litigation in Federal Courts' (2010) vol. 46, issue 1, Gonzaga Law Review
- Bone R G, 'A New Look at Trade Secret Law: Doctrine in Search of Justification' (1998) vol. 86, issue 2, California Law Review
- Goldman E, 'The Defend Trade Secrets Act isn't an "Intellectual Property" Law' (2017) vol. 33, issue 4, Santa Clara High Technology Law Journal
- Graves C T, 'Trade Secrets as Property: Theory and Consequences' (2007) vol. 15, issue 1, Journal of Intellectual Property Law
- Grimes S and Murphy S T, 'Trade Secrets 2019 Year in Review' (2020) vol. 32, issue 3, Intellectual Property & Technology Law
- Lemley M A, 'The Surprising Virtues of Treating Trade Secrets as I.P. Rights' (2008) vol. 61, issue. 2, Stanford Law Review
- Tripathi S, 'Treating trade secrets as property: a jurisprudential inquiry in search of coherency' (2016) vol. 11, issue 11, Journal of Intellectual Property Law & Practice
- Varadarajan D, 'The Trade Secret-Contract Interface' (2018) vol. 103, issue 4, Iowa Law Review

**Research papers**

Claeys E R, 'Private Law Theory and Corrective Justice in Trade Secrecy' (2011) vol. 4, issue 2, *Journal of Tort Law*, George Mason Law & Economics Research Paper Series, available at SSRN: <https://ssrn.com/abstract=1799554>

Lemley M A, Menell P S and Merges R P 'Intellectual Property in the New Technological Age: 2019' (2019) available at SSRN: <https://ssrn.com/abstract=3415161>

Starr E, Prescott J J and Bishara N, 'Noncompete Agreements in the U.S. Labor Force' [2020] *Journal of Law and Economics*, available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2625714](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2625714)

Wilf S, 'Trade Secrets, Property, and Social Relations' [2002] *University of Connecticut School of Law, Faculty Articles and Papers*

**Cases**

*E. I. Du Pont de Nemours Powder Co. v. Masland*, 244 U.S. 100 (1917)

*E. I. Du Pont de Nemours & Co. v. Christopher*, 431 F.2d 1012 (5th Cir. 1970)

*Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974)

*Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984)

**Legislation**

Defend Trade Secrets Act of 2016, Pub. L. No. 114-153, 130 (2016)

Restatement (First) of Torts (1939)

U.S.C. § 1839(3); Unif. Trade Secrets Act § 1(4) (2016).



**Revisiting European Trade Mark Law  
and the Approach of the CJEU: Should  
Highly Distinctive Marks Receive  
Broader Protection Against Confusion?**

Aleksandra Szram\*

\* LLM BPP Law School and LLB at the University of Warwick Contact  
at: [aleksandraszram.contact@gmail.com](mailto:aleksandraszram.contact@gmail.com)

## Introduction

Since the Court of Justice of the European Union (CJEU) has generally argued that "the more distinctive the earlier mark, the greater the likelihood of confusion"<sup>1</sup> when establishing the relative ground for refusal of registration, the contours of European trade mark principles have changed, becoming increasingly distanced from the context of an actual marketplace. This paper sets out to examine the desirability of this under-explored criterion in the light of contemporary marketing studies and new jurisprudence. My argument is twofold. Drawing on scholarly debates, I contend that the extent to which the CJEU preserves legal fictions and provides room for making normative corrections has recognisable benefits. Secondly, I argue that whilst deservedly protecting the source-identifying function of distinctive marks, this approach appears imbalanced and generates troublesome implications associated with market competition. The paper concludes that solutions from emerging jurisprudence only reinforce the need to recalibrate previous normativity so that more thought will be given to the effective balancing of interests when determining the degree of distinctiveness.

---

<sup>1</sup> Case C-251/95 *Sabel BV v Puma AG and Rudolf Dassler Sport* [1998] ECR I-6191 [24]

## Principles of the Confusion Analysis

It is crucial to emphasise that Article 5(1)(b) of the Trade Marks Directive prescribes a three-limb test whereby the proprietor of an already registered trade mark may prevent the registration of a later sign or initiate infringement proceedings<sup>2</sup> if: a) the earlier registered mark and the later sign are identical or similar; b) the goods and services covered by them are identical or similar; and c) there exists a likelihood of confusion on the part of the public. Interestingly, given the formulaic nature of these provisions, the CJEU embarked on a Sisyphean task of providing greater clarity through developing the so-called ‘global appreciation approach’ for assessing the likelihood of confusion, with a number of guiding principles that stress the need to take into account all factors relevant to the circumstances of each case<sup>3</sup>. For the purposes of this paper, note that ‘confusion’ refers to situations in which the public directly mistakes one mark for the other, or makes a broader economic connection between both marks, wrongly assuming that the respective goods originate from linked undertakings<sup>4</sup>. Generally, the matter must be judged through the eyes of average consumers who are ‘reasonably well-informed, observant and circumspect’<sup>5</sup> but have imperfect recollection of the marks as a whole. One of the most controversial principles developed by the CJEU in the case

---

<sup>2</sup> Directive (EU) 2015/2436 of the European Parliament and of the Council to Approximate the Laws of the Member States Relating to Trade Marks (Recast), Article 5(1)(b)

<sup>3</sup> Case C-251/95 *Sabel BV v Puma AG and Rudolf Dassler Sport* [1998] ECR I-6191 [22]

<sup>4</sup> Lionel Bently, Brad Sherman, Dev Gangjee, and Phillip Johnson “Intellectual Property Law” (5th edn, OUP, 2018), 1046

<sup>5</sup> T. Aplin and J. Davis “Intellectual Property Law: Text, Cases and Materials” (3rd edn, OUP, 2017), 412

of *Sabel v Puma* revolves around the notion of distinctiveness and stipulates that “the more distinctive the earlier mark, the greater the likelihood of confusion”<sup>6</sup>. When determining the degree of distinctiveness, the court makes an assessment of the ability of the mark to distinguish the commercial origin of goods for which it has been registered<sup>7</sup>. Marks with a highly distinctive character, either from inherent characteristics or because of the reputation they possess on the market (acquired distinctiveness), enjoy broader protection against confusion than marks with a less distinctive character<sup>8</sup>. It then follows that there can be a likelihood of confusion, notwithstanding a lesser degree of similarity between the marks, if the goods covered by them are similar and the earlier mark is highly distinctive.

## Towards Imbalanced Policy Implications?

Many scholars claim that highly distinctive marks should not receive broader protection against confusion under this guiding approach of the CJEU from *Sabel v Puma* because it suffers from alleged arbitrariness and remains heavily detached from reality<sup>9</sup>. According to empirical perspectives, consumers are less likely to be confused when encountered

---

<sup>6</sup> Case C-251/95 *Sabel BV v Puma AG and Rudolf Dassler Sport* [1998] ECR I-6191 [24]; Case C-425/98 *Marca Mode v Adidas AG* [2000] ECR I-4861 [38]

<sup>7</sup> Case C-342/97 *Lloyd Schuhfabrik Meyer v Klijsen Handel BV* [1999] ECLI:EU:C:1999:323 [22]

<sup>8</sup> Case C-39/97 *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc.* [1998] ECR I-5507 [18]

<sup>9</sup> Kimberlee Weatherall “The Consumer as the Empirical Measure of Trade Mark Law” (2017) 80 *Modern Law Review* 57, 59

with some sign that resembles a well-known trade mark<sup>10</sup>. The likelihood of confusion *decreases* in proportion to the distinctiveness of the mark. For example, consumers are hitherto more prone to purchase the wrong goods when it comes to "less distinctive signs such as Eudermis and Eucerin for body care products"<sup>11</sup> rather than those of the biggest market players where nobody will think that Starbucks has suddenly rebranded itself as Charbucks. Borrowing insights developed from recent marketing studies, such behavioural tendency stems from the mere exposure effect, whereby humans easily recognise and develop positive attitudinal relationships towards objects that have become familiar through repeated perceptual stimulus<sup>12</sup>. Hence, distinctive marks are much better stored in memory than weaker marks because their companies maximise the sending of non-obtrusive signals, which increases the exposure of the mark and fosters credibility as well as consumer preference for their products<sup>13</sup>. Although some cases may justify offering additional protections, there has been a consensus within critical scholarship that the ruling of the CJEU remains symptomatic of a deeper disjunction between law and scientific research into consumer habits and therefore perpetuates "legal fiction that replaces empirical proof to

---

<sup>10</sup> Annette Kur and Martin Senftleben "European Trade Mark Law: A Commentary" (1st edn, OUP, 2017), 326

<sup>11</sup> Lotte Anemaet "The Many Faces of the Average Consumer: Is It Really So Difficult to Assess Whether Two Stripes Are Similar to Three?" (2020) 51 IIC 187, 193-194

<sup>12</sup> Kristin A. Scott and Margaret A. White "Mere Exposure as a Signal: Company Objectives and Research Propositions" (2016) 24 Journal of Marketing Theory & Practice 411, 417

<sup>13</sup> Kimberlee Weatherall "The Consumer as the Empirical Measure of Trade Mark Law" (2017) 80 Modern Law Review 57, 59

protect highly distinctive trademarks”<sup>14</sup>. But what is missing from such epistemological critique is a broader understanding of *why* there has been selective resistance to empiricism within European jurisprudence. Having identified a high dose of presumptive scepticism which was injected into the model of an average consumer, this paper suggests that the guiding approach of the CJEU effectively prevents the emergence of a self-serving mechanism for the branded goods industry<sup>15</sup>. Since valuable proprietary entitlements are allocated during the course of the ‘confusion’ analysis, the overreliance on empirical findings would encourage all companies to dedicate disproportionate costs to consumer surveys demonstrating the likelihood of confusion<sup>16</sup>. This has the potential to disincentivise all stakeholders. Instead of making investments into genuine marketing campaigns that strengthen the distinctiveness of their marks, resources may be diverted towards ‘quick and dirty evidence’. Using such tactics carries a potential risk of the manipulation of percentages or tainting the evidence by leading questions, with the aim of shaping the desired scope of protection in the company’s favour<sup>17</sup>. This risk illustrates that arguments made by critical scholars like Weatherall are not entirely convincing. Weatherall overlooked an important question posed by the decontextualized approach from *Sabel v Puma* - whether an average consumer *ought* to be confused. Hence, the CJEU deliberately preserves legal

---

<sup>14</sup> Lotte Anemaet “The Many Faces of the Average Consumer: Is It Really So Difficult to Assess Whether Two Stripes Are Similar to Three?” (2020) 51 IIC 187, 197

<sup>15</sup> Ibid. 188

<sup>16</sup> Lotte Anemaet “The Fairy Tale of the Average Consumer: Why We Should Not Rely on the Real Consumer When Assessing the Likelihood of Confusion” (2020) 69 GRUR International 1008, 1011

<sup>17</sup> Kimberlee Weatherall “The Consumer as the Empirical Measure of Trade Mark Law” (2017) 80 Modern Law Review 57, 65-66

fictions to accommodate normative inflections when evaluating the responses of hypothetical consumers<sup>18</sup>. Without the room for normative corrections within this global assessment, performing the role of a gatekeeper and balancing *broad* advantages flowing from establishing the likelihood of confusion would be a much harder task for the law. By juxtaposing those two streams of literature, I agree with the extent to which CJEU's jurisprudence adopts a normative approach, which could be perceived as an evolutionary shift that enables the incorporation of policy considerations under its wings.

Nonetheless, there are some remaining difficulties associated with market competition. The categorization of trade marks needs to be considered in order to fully understand these difficulties. Whilst granting broader protection against confusion from fanciful words and inherently distinctive logos, this broader protection does not necessarily translate into competitive advantages over third parties. On the other hand, *non-traditional and figurative marks* continue to be problematic in that the law is overly restrictive when it comes to marks from this category<sup>19</sup>. Those non-traditional marks with *acquired distinctiveness*, such as the three-stripe motif of Adidas or certain colour combinations, are not available in unlimited numbers<sup>20</sup> and tend to optimise the

---

<sup>18</sup> Lotte Anemaet "The Many Faces of the Average Consumer: Is It Really So Difficult to Assess Whether Two Stripes Are Similar to Three?" (2020) 51 IIC 187, 210

<sup>19</sup> Lotte Anemaet "The Fairy Tale of the Average Consumer: Why We Should Not Rely on the Real Consumer When Assessing the Likelihood of Confusion" (2020) 69 GRUR International 1008, 1020

<sup>20</sup> Joined Cases T-101/15 and T-102/15 Red Bull v EUIPO [2017] ECLI:EU:T:2017:852 [21]

appearance of certain goods like sports clothing<sup>21</sup>. Granting them broader protection on the basis of high distinctiveness and enabling trade mark owners to assert exclusive rights may affect the availability of aesthetically functional elements on the market and therefore generate entry barriers for small and medium enterprises (SMEs) or newly established businesses<sup>22</sup>. Despite the aforementioned restrictive issue, in the case of *Adidas AG v Marca Mode*, the judges ruled that normative corrections should not be made in favour of interests of third parties, being reluctant to attach importance to the policy argument that competitors may also need freedom to use similar signs to decorate their products<sup>23</sup>. By assuming that both categories of distinctiveness should be treated the same for the purposes of the ‘confusion’ analysis, the CJEU failed to appreciate that they may not share analogous implications.

Unsurprisingly, the judges opted for an investment-based justification as they emphasised that market reputation acquired by the three-stripe motif was the fruit of intense investments<sup>24</sup> into branding campaigns, which incentives investment in such campaigns. This inclination resonates with the guidance from *Lloyd Schuhfabrik v Klijsen* where the CJEU held that, when assessing the degree of distinctiveness, factors like “the market share and the amount invested by the undertaking in promoting the mark’ should be taken

---

<sup>21</sup> Case C-102/07 *Adidas AG v Marca Mode* [2008] ECLI:EU:C:2008:217

<sup>22</sup> Max Planck Institute for Intellectual Property and Competition Law, “Study on the Overall Functioning of the European Trade Mark System” (2011), 52

<sup>23</sup> Case C-102/07 *Adidas AG v Marca Mode* [2008] ECLI:EU:C:2008:217 [50]

<sup>24</sup> *Ibid* [17]; Lotte Anemaet “The Many Faces of the Average Consumer: Is It Really So Difficult to Assess Whether Two Stripes Are Similar to Three?” (2020) 51 IIC 187, 198



into account<sup>25</sup>. The focus has been on protecting the primary function of trade marks as a badge of origin indicating the commercial identity of marked goods and lowering search costs for consumers<sup>26</sup>. From this perspective, stronger protection should be afforded to marks that are more distinctive after rounds of investment since those marks are more likely to be regarded as source-identifying in the marketplace<sup>27</sup>. Nevertheless, this justification of the CJEU does not exhibit sufficient consequentialist reasoning because protecting *non-traditional marks* has additional negative implications. Firstly, enforcing normative corrections only in favour of trade mark owners encourages standardisation of aesthetic features of goods to acquire the necessary level of market recognition (distinctiveness), and therefore receive broader protection against confusion<sup>28</sup>. Such monolithic effect undoubtedly hinders creativity and innovation. Secondly, apart from adversely affecting design innovation for new products for both trade mark owners and their competitors, protecting *non-traditional marks* may contribute towards smaller investment into product quality for existing goods<sup>29</sup>. This means that capitalising on the attractive power of their marks presents businesses with a

---

<sup>25</sup> Case C-342/97 *Lloyd Schuhfabrik Meyer v Klijsen Handel BV* [1999] ECLI:EU:C:1999:323 [23]

<sup>26</sup> T. Aplin and J. Davis “Intellectual Property Law: Text, Cases and Materials” (3rd edn, OUP, 2017), 412

<sup>27</sup> Case C-361/04 *P Ruiz-Picasso and Others v OHIM* [2006] ECLI:EU:C:2006:25 [30]; Lotte Anemaet “The Many Faces of the Average Consumer: Is It Really So Difficult to Assess Whether Two Stripes Are Similar to Three?” (2020) 51 IIC 187, 199

<sup>28</sup> Irene Calboli “Hands Off “My” Colors, Patterns, and Shapes! How Non-Traditional Trademarks Promote Standardization and May Negatively Impact Creativity and Innovation” in I. Calboli and M. Senftleben (eds), *The Protection of Non-Traditional Trademarks: Critical Perspectives* (OUP, 2018), 288

<sup>29</sup> *Ibid.* 288-289

more effective short-term strategy to attract consumers towards their products and guarantee profitability, rather than devoting huge amounts to long-term product quality<sup>30</sup>. Hence, the approach of the CJEU that grants broader protection against confusion when a mark is highly distinctive appears imbalanced and may generate dysfunctional twofold implications, both from the perspective<sup>31</sup> of market competitors and trade mark owners. Although the CJEU leaves room for investment-based normative corrections in favour of trade mark owners, without giving equal weight to the policy consideration of keeping certain signs free<sup>32</sup> (corrections in favour of competitors), their approach may unfortunately impede achieving undistorted competition, and the proper functioning of markets.

One may question whether this imbalance has not been dictated more by happenstance than well-thought-out judicial reasoning. In recent decades, the original notion of distinctive character seems to have become somewhat looser<sup>33</sup>. Even though trade marks were previously required to be unequivocally distinctive from existing products, distinctiveness has come to mean little more than simply having a *potential* to be distinctive – something that is

---

<sup>30</sup> Max Planck Institute for Intellectual Property and Competition Law, “Study on the Overall Functioning of the European Trade Mark System” (2011), 100

<sup>31</sup> Lotte Anemaet “The Many Faces of the Average Consumer: Is It Really So Difficult to Assess Whether Two Stripes Are Similar to Three?” (2020) 51 IIC 187, 210

<sup>32</sup> Ibid. 192

<sup>33</sup> Irene Calboli “Hands Off “My” Colors, Patterns, and Shapes! How Non-Traditional Trademarks Promote Standardization and May Negatively Impact Creativity and Innovation” in I. Calboli and M. Senftleben (eds), *The Protection of Non-Traditional Trademarks: Critical Perspectives* (OUP, 2018), 294-295

original, interesting, or appealing to human senses<sup>34</sup>. In other words, previously mentioned non-traditional and aesthetically functional marks are not genuinely distinctive of goods, they are integral parts of the goods, if not the entire goods themselves. Additionally, given that the Trade Marks Regulation has recognised the changed realities of the digital age and liberalised the requirement for graphic representation, the number of new registered multimedia signs is highly likely to increase<sup>35</sup>. Such gradual expansion of non-traditional trade marks across Europe has correspondingly produced uncertainty over (the ironically) low threshold of *high distinctiveness* when establishing the likelihood of confusion<sup>36</sup>. These changes strengthen the foregoing realisation that market difficulties generated by the presumption of broader protection against confusion if the mark is highly distinctive are more relevant today than ever before. On this basis, confining the reasoning towards investment-based justifications in *Sabel*<sup>37</sup> and *Adidas*<sup>38</sup> appears dubious and shows more concern with mindless box-ticking that rewards the notoriety of dominant brands at all costs. Nonetheless, in the seminal case of *Chocoladefabriken Lindt & Sprüngli v OHIM* concerning the registration of the shape of a chocolate bunny wrapped in golden foil, the reasoning

---

<sup>34</sup> Ibid.

<sup>35</sup> Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark [2017] OJ L154/1, Article 4

<sup>36</sup> Irene Calboli “Hands Off “My” Colors, Patterns, and Shapes! How Non-Traditional Trademarks Promote Standardization and May Negatively Impact Creativity and Innovation” in I. Calboli and M. Sentleben (eds), *The Protection of Non-Traditional Trademarks: Critical Perspectives* (OUP, 2018), 294-295

<sup>37</sup> Case C-251/95 *Sabel BV v Puma AG and Rudolf Dassler Sport* [1998] ECR I-6191

<sup>38</sup> Case C-102/07 *Adidas AG v Marca Mode* [2008] ECLI:EU:C:2008:217

of the CJEU explicitly emphasised the fact that those marks are “common phenomena on the market which correspond to the customs of the industry”<sup>39</sup> that safeguard freedom of competition. Neither the shape of a bunny nor aesthetically functional elements were able to enjoy trade mark protection, even if wrapped into the cloak of a combination mark<sup>40</sup>. Hence, this exemplifies that providing more room for competition-friendly arguments within European jurisprudence is certainly plausible and would not result in stretching the boundaries of law to their breaking point, both when assessing absolute and relative grounds for refusal<sup>41</sup>. Whilst the CJEU adopted desirable corrections, at the same time, it has conveniently *sidestepped* and *resisted* engaging with more difficult and substantive questions. Its approach remains therefore largely unhelpful when delivering a transparent <sup>42</sup> and supported process of reasoning. Without analogous attempts to counterbalance the automatism of granting more protection against confusion for distinctive marks, alleviating troublesome policy implications may be indeed perceived as a construed fallacy that cannot be achieved in practice.

---

<sup>39</sup> Case C-98/11 P *Chocoladefabriken Lindt & Sprüngli AG v OHIM* [2012] EU:C:2012:307 [48]

<sup>40</sup> Dev S. Gangjee “Paying the Price for Admission: Non-Traditional Marks across Registration and Enforcement” in I. Calboli and M. Senftleben (eds), *The Protection of Non-Traditional Trademarks: Critical Perspectives* (OUP, 2018), 84

<sup>41</sup> Case C-98/11 P *Chocoladefabriken Lindt & Sprüngli AG v OHIM* [2012] EU:C:2012:307 [48]; Case C-206/01 *Arsenal Football Club Plc v Matthew Reed* [2002] EU:C:2002:373 [47]

<sup>42</sup> Irene Calboli “Hands Off “My” Colors, Patterns, and Shapes! How Non-Traditional Trademarks Promote Standardization and May Negatively Impact Creativity and Innovation” in I. Calboli and M. Senftleben (eds), *The Protection of Non-Traditional Trademarks: Critical Perspectives* (OUP, 2018), 294-295

## New Jurisprudence, Yet Unresolved Problems

On the other side of the debate is the view that risks associated with reducing choices available to competitors when granting broader protection for highly distinctive marks could be overstated. What about the increasingly *procedure-centred approach* towards acquired distinctiveness? Drawing on Article 1(2) of the Trade Marks Regulation, the CJEU in *Nestlé* tailored a strict geographical requirement for registering non-traditional marks which are unlikely to be inherently distinctive and must therefore evidence an equal effect of their market reputation throughout the European Union<sup>43</sup>. Instead of evaluating whether the overall population, reflecting a substantial part of Europe, would perceive the mark as performing the source-identifying function, that analysis shifted towards markets of individual member states<sup>44</sup>. Any burdened party must produce evidence of acquired distinctiveness for every part of the European Union, and some further evidentiary basis for extrapolating that evidence<sup>45</sup> if several member states are grouped for marketing purposes. Following the recent judgement from *Adidas AG v EUIPO*, there were some additional revisions of

---

<sup>43</sup> Joined Cases C-84/17 P, C-85/17 P and C-95/17 P *Société des Produits Nestlé SA and Others v Mondelez UK Holdings & Services Ltd* [2018] ECLI:EU:C:2018:596 [14]

<sup>44</sup> Joined Cases C-84/17 P, C-85/17 P and C-95/17 P *Société des Produits Nestlé SA and Others v Mondelez UK Holdings & Services Ltd* [2018] ECLI:EU:C:2018:596 [78]; Joseph Jones “Can't Get a Break, Can't Have a Kit Kat: Court of Appeal Rejects Acquired Distinctiveness for Kit Kat Shape” (2017) 39 *European Intellectual Property Review* 783, 787

<sup>45</sup> J. Strath and K. Cameron “Go figure! GC Strikes out Three-Stripes: *Adidas v EUIPO* (T-307/17)” (2019) 41 *European Intellectual Property Review* 719, 723

the European Union Intellectual Property Office (EUIPO) guidelines<sup>46</sup> that could make acquired distinctiveness even more difficult to establish. Given that the dictum elaborated that “the simpler the mark, the less likely it is to have a distinctive character and the more likely it is for an alteration to that mark to affect one of its essential characteristics”<sup>47</sup>, it is clear that evidence which demonstrates distinctiveness based upon use of an insignificant variation of the applied mark cannot be admissible<sup>48</sup>. On that basis, the court dismissed numerous pieces of persuasive evidence produced by Adidas because they covered products which bore signs other than the applied mark<sup>49</sup>. Drawing on rigorous formalism from new jurisprudence, saying that non-traditional marks are set up to fail is not an understatement. This viewpoint is echoed by Conde who poses an intriguing question: “will it become more frequent to question the use of other well-known trademarks with a low level of or non-existent distinctive character?”<sup>50</sup> Given that these threshold filters increase transactional costs of registration to the point of deterring stakeholders, they might contribute to the pre-emption of dysfunctional implications at the stage of the ‘confusion’ analysis. Hence, critical arguments regarding the approach of the CJEU from *Sabel* could be exaggerated because the new jurisprudence appears to have taken steps towards addressing former difficulties associated with competition.

---

<sup>46</sup> EUIPO, “Guidelines for Examination of European Union Trade Marks” (February 2020)

<sup>47</sup> Case T-307/17 Adidas AG v EUIPO [2019] ECLI:EU:T:2019:427 [72]

<sup>48</sup> EUIPO, “Guidelines for Examination of European Union Trade Marks” (February 2020), §8.5 of Chapter 14

<sup>49</sup> Aida Conde “The General Court Says No to (One of) the Adidas Three-Stripe Mark(s)” (2019) 14 Journal of Intellectual Property Law & Practice 746, 747

<sup>50</sup> Ibid. 748

Whilst the cumulative effect of those developments certainly reduces the number of non-traditional signs that may be registered at the European level, that *procedural strictness* does not make previous policy considerations entirely redundant. According to Gangjee, companies will simply adapt to overcome hurdles that risks producing a substantial spill-over of marks to national registration systems which require proving market reputation merely within respective national borders<sup>51</sup>. Proliferation of national registrations makes potential invalidity challenges increasingly difficult because third parties will be obliged to initiate proceedings in several countries which may naturally come to conflicting resolutions on matters of distinctiveness or functionality<sup>52</sup>. Building on the impact assessment study from the European Commission, this legal patchwork arguably leads to “discrimination and artificial barriers, since small companies find it increasingly difficult to compete with big multinationals”<sup>53</sup> because they spend considerably larger sums when attempting to question the use of particular marks across multiple countries. While laudable efforts into the development of electronic databases increased access to national registers, challenging non-traditional marks within that fragmented system is more complex and requires advice from external counsel, the costs of which tend to reflect the

---

<sup>51</sup> Dev S. Gangjee “Paying the Price for Admission: Non-Traditional Marks across Registration and Enforcement” in I. Calboli and M. Senftleben (eds), *The Protection of Non-Traditional Trademarks: Critical Perspectives* (OUP, 2018), 59

<sup>52</sup> L.H. Porangaba “Acquired Distinctiveness in the European Union: When Nontraditional Marks Meet a (Fragmented) Single Market” (2019) 109 *Trademark Reporter* 619, 648

<sup>53</sup> European Commission, “Impact Assessment Accompanying Document to the Proposal for a Regulation of the European Parliament and of the Council SWD (2013) 95 final, 32

number of jurisdictions involved<sup>54</sup>. As a result, larger-sized enterprises, with significant resources at their disposal, are more likely to absorb transactional costs that this framework entails<sup>55</sup>. Somewhat paradoxically, devising alternative barriers through evidential avenues translates into the same competitive advantages of trade mark monopoly that the new jurisprudence was trying to alleviate. In this way, the normative approach from *Sabel v Puma* continues to generate troubling twofold implications, both from the perspective of market competitors and trade mark owners. My analysis suggests that the issue of acquired distinctiveness cannot therefore be framed as a binary choice between keeping non-traditional marks freely available for others and complete removal from the EU market<sup>56</sup>. Instead of perpetuating all-or-nothing rationale prevailing at the time of procedural registration, the jurisprudence of the CJEU should give more thought to the balancing of interests when determining the degree of distinctiveness in the enforcement context<sup>57</sup>. This illustrates that distinctive marks should receive broader protection against confusion. Recalibrating this principle and departing from the rather unfortunate *Adidas/Marca* ban on adopting normative corrections in favour of third parties' interests should be seriously reconsidered.

---

<sup>54</sup> Ibid.

<sup>55</sup> L.H. Porangaba "Acquired Distinctiveness in the European Union: When Nontraditional Marks Meet a (Fragmented) Single Market" (2019) 109 Trademark Reporter 619, 649

<sup>56</sup> L.H. Porangaba "Acquired Distinctiveness in the European Union: When Nontraditional Marks Meet a (Fragmented) Single Market" (2019) 109 Trademark Reporter 619, 653

<sup>57</sup> Dev S. Gangjee "Paying the Price for Admission: Non-Traditional Marks across Registration and Enforcement" in I. Calboli and M. Senftleben (eds), *The Protection of Non-Traditional Trademarks: Critical Perspectives* (OUP, 2018), 59



## Conclusion

This paper has attempted to evaluate whether stronger protection should be afforded to marks that are highly distinctive. Whilst the approach of the CJEU facilitates desirable normative corrections in favour of trademark proprietors, confining their reasoning towards investment-based justifications remains both unsatisfactory and dubious. My argument suggests that more weight should be explicitly given to another consideration of keeping certain non-traditional signs free for competitors. Hence, if possible reforms of the approach are not revisited, achieving the trade mark policy of balanced functioning of markets alongside fair competition will remain the greatest unseized opportunity of all.

## Bibliography

### Legislation

Directive (EU) 2015/2436 of the European Parliament and of the Council to Approximate the Laws of the Member States Relating to Trade Marks (Recast) [2015] OJ L336/1

Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark [2017] OJ L154/1

### Cases

Case C-251/95 *Sabel BV v Puma AG and Rudolf Dassler Sport* [1998] ECR I-6191

Case C-39/97 *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc.* [1998] ECR I-5507

Case C-425/98 *Marca Mode v Adidas AG* [2000] ECR I-4861

Case C-102/07 *Adidas AG v Marca Mode* [2008] ECLI:EU:C:2008:217

Joined Cases C-84/17 P, C-85/17 P and C-95/17 P *Société des Produits Nestlé SA and Others v Mondelez UK Holdings & Services Ltd* [2018] ECLI:EU:C:2018:596

Case C-361/04 P *Ruiz-Picasso and Others v OHIM* [2006] ECLI:EU:C:2006:25

Case C-98/11 P *Chocoladefabriken Lindt & Sprüngli AG v OHIM* [2012] EU:C:2012:307

Case C-206/01 *Arsenal Football Club Plc v Matthew Reed* [2002] EU:C:2002:373

Case C-342/97 *Lloyd Schuhfabrik Meyer v Klijsen Handel BV* [1999] ECLI:EU:C:1999:323

Joined Cases T-101/15 and T-102/15 *Red Bull v EUIPO* [2017] ECLI:EU:T:2017:852

Case T-307/17 Adidas AG v EUIPO [2019] ECLI:EU:T:2019:427

### Books

T. Aplin and J. Davis “Intellectual Property Law: Text, Cases and Materials” (3rd edn, OUP, 2017)

P. Torremans “Holyoak and Torremans Intellectual Property Law” (9th edn, OUP, 2019)

Lionel Bently, Brad Sherman, Dev Gangjee, and Phillip Johnson “Intellectual Property Law” (5th edn, OUP, 2018)

Irene Calboli “Hands Off “My” Colors, Patterns, and Shapes! How Non-Traditional Trademarks Promote Standardization and May Negatively Impact Creativity and Innovation” in I. Calboli and M. Senftleben (eds), *The Protection of Non-Traditional Trademarks: Critical Perspectives* (OUP, 2018)

Dev S. Gangjee “Paying the Price for Admission: Non-Traditional Marks across Registration and Enforcement” in I. Calboli and M. Senftleben (eds), *The Protection of Non-Traditional Trademarks: Critical Perspectives* (OUP, 2018)

Annette Kur and Martin Senftleben “European Trade Mark Law: A Commentary” (1st edn, OUP, 2017)

### Journal Articles

Lotte Anemaet “The Many Faces of the Average Consumer: Is It Really So Difficult to Assess Whether Two Stripes Are Similar to Three?” (2020) 51 IIC 187

Kristin A. Scott and Margaret A. White “Mere Exposure as a Signal: Company Objectives and Research Propositions” (2016) 24 Journal of Marketing Theory & Practice 411

Lotte Anemaet “The Fairy Tale of the Average Consumer: Why We Should Not Rely on the Real Consumer When Assessing the Likelihood of Confusion” (2020) 69 GRUR International 1008

Aida Conde “The General Court Says No to (One of) the Adidas Three-Stripe Mark(s)” (2019) 14 Journal of Intellectual Property Law & Practice 746

- J. Strath and K. Cameron “Go figure! GC Strikes out Three-Stripes: Adidas v EUIPO (T-307/17)” (2019) 41 European Intellectual Property Review 719
- Kimberlee Weatherall “The Consumer as the Empirical Measure of Trade Mark Law” (2017) 80 Modern Law Review 57
- Joseph Jones “Can't Get a Break, Can't Have a Kit Kat: Court of Appeal Rejects Acquired Distinctiveness for Kit Kat Shape” (2017) 39 European Intellectual Property Review 783
- L.H. Porangaba “Acquired Distinctiveness in the European Union: When Nontraditional Marks Meet a (Fragmented) Single Market” (2019) 109 Trademark Reporter 619

### **Other Sources**

- EUIPO, “Guidelines for Examination of European Union Trade Marks” (February 2020)
- European Commission, “Impact Assessment Accompanying Document to the Proposal for a Regulation of the European Parliament and of the Council SWD (2013) 95 final
- Max Planck Institute for Intellectual Property and Competition Law, “Study on the Overall Functioning of the European Trade Mark System” (2011)

# **Are Robots Deserving of Rights?**

**A critical analysis of how human  
technological innovation may result in an  
extension of rights to autonomous cyborg  
living**

Lucy Young\*

\* BA Law with Sociology at the University of Warwick  
Contact at: [Lucy.Young.1@warwick.ac.uk](mailto:Lucy.Young.1@warwick.ac.uk)

**Abstract-** The human condition started to be defined by enlightenment thinkers, during the height of philosophical indulgence and theological sanctity. Something that 18th and 19th centuries could not predetermine was the haste in which the existence of mankind would develop past flesh and bone, and towards steel and artificial coding. This article observes the journey towards a cyborg existence, starting from the early days of Kant and Locke to the more recent era of Parfit, Harraway and Singer. Ultimately, I develop a more technical discussion surrounding the realities of technological enhancement, starting with the distinction between human, animal and transhumanist rights, evolving into a practical discussion about legislative implementation of these sociological values. I also take on a discussion of Western regulation, compared with the developing world and its approach to data use and technological leapfrogging. I conclude on the motion that public policy is lacking on the regulatory front, leaving the door wide open for new transhumanist enhancements, whilst still lacking protections for developing nations.

## Introduction

**I**n order to understand the appropriate scope of the law on this issue, I will define what it means to be a ‘socially recognised agent’, both in today’s modern technological society and in previous ages. In doing so, I will address the developing abundance of artificial intelligence we see present amongst all walks of life, and whether AI machines are capable of consciousness, or deemed to be socially recognised agents; in contemplation of this, I will discuss whether rights should be afforded to AI machines, and on which grounds should they be based upon. I will raise questions regarding legal boundaries of AI altered humans, through reference to

various biomedical and commercial practices that have largely excelled as a result of technological advancements, and how governing bodies have attempted to regulate or liberate cyborg freedom as a result. As Donna Haraway stated within *The Cyborg Manifesto*, “the difference between machine and organism is thoroughly blurred; mind, body, and tool are on very intimate terms”<sup>1</sup>. I will look to explore this in legal and philosophical contexts.

## I. Defining Rights throughout Contextual History and Modernity

Primarily, we must establish what it means to be a ‘socially recognised agent’, both historically and within today’s society. In order to do this, we must understand rights from a normative and ontological perspective. ‘Human rights’ began as a 17th and 18th century European concept, tailored on the basis of religious values, with hastened development throughout England, in response to an oppressive monarchy which resulted in The Glorious Revolution and subsequently, the Bill of Rights (1689). Oliver Wendell Holmes stated that “when we speak of human rights, we mean to mark the limits of interference of individual freedom that we prescribe to our conscience”<sup>2</sup>; this is still paralleled in modern legal definitions today, as “a right, in its most general sense, is either the liberty (protected by law) of acting or abstaining from acting in a certain manner, or the power (enforced by law) of compelling a specific person to

---

<sup>1</sup> Donna Haraway, *A Cyborg Manifesto: Science, Technology and Socialist-Feminism in the Late 20th Century* (University of Minnesota Press 2016) 36

<sup>2</sup> Oliver Wendell Holmes, *The Path of Law* (Harvard Law Review 1897) 457

do or abstain from doing a particular thing”<sup>3</sup>. In the 18th century, John Locke prescribed God’s natural law to protect all humans from harm in life, health and liberty. Acknowledging Locke, Rivero suggests, “it is nature that founds human rights; they are inherent to man, prior, consequently, to any society”. Kant believed human beings held a heightened sense of dignity and intrinsic worth, thus an increased degree of autonomy and a greater urgency for rights to define a societal moral order<sup>4</sup>. This advocates the stance of speciesism, acknowledged by Peter Singer<sup>5</sup>, where human beings are deemed more worthy of moral contemplation above all other creatures and agents. Alternatively, Engelhardt<sup>6</sup> understands the legal protection of animals (and by proxy AI machines) to be unjustified, and a breach of human rights and liberties. He simultaneously believes that although all people are human beings, not all human beings constitute as persons - newborn babies, the severely disabled and vegetative patients are ‘non-persons’. Therefore, integrating rights for manmade intelligence is degrading for human beings who may not be classified as socially recognised agents. Bentham’s utilitarianism, that prescribed human rights as ‘nonsense on stilts’, would concur with this perspective<sup>7</sup>.

---

<sup>3</sup> Jowitt’s Dictionary of English Laws (5th edn, 2019)

<sup>4</sup> Linda MacDonald Glenn, *Biotechnology at the Margins of Personhood: An Evolving Legal Paradigm* (Journal of Evolution and Technology, 2003) Vol. 13.

<sup>5</sup> Peter Singer, *Speciesism and Moral Status* (Blackwell Publishing, 2009) Vol. 40, 572 - 576.

<sup>6</sup> H. Tristram Engelhardt, Jr., *Mind-Body: A Categorical Relation* (Springer, 1973) and “Bioethics and Secular Humanism: The Search for a Common Morality” (Trinity Press International, 1991)

<sup>7</sup> Bentham, Jeremy, *Principles of International Law*, in *The Works of Jeremy Bentham*, ed. John Bowring, vol. 2, (New York: Russell & Russell, 1962) 535-560



Many philosophers see human rights regulation as a representation of cosmopolitan, western ideology that developed after the Enlightenment. Whilst Kant argued that this entailed application of human rights both within the state and externally, Pogge believed that human rights should be enforced ‘vertically’, replacing the wholly encompassing international bodies<sup>8</sup>. More substantively, the Universal Declaration of Human Rights 1948 governs the rights and duties of ‘humans’ yet fails to identify what being ‘human’ legally entails. In 2017, motions towards the European Commission argued for robots to receive the status of ‘electronic persons’, yet unsurprisingly failed due to the ever changing nature of tech innovation.

## II. Contextual Definitions of Socially Recognised Agency

Defining and identifying the scope of what it means to be a ‘socially recognised agent’ requires reference to synonymous terms used throughout ethical debate. Daniel Dennett proposes criteria for ‘personhood’, which includes rationality, consciousness, ability to reciprocate and communicate<sup>9</sup>. A reductionist perspective, adopted by Derek Parfit, observes personal identity as a bridge of continuity between mind and body, and suggests we should not assume that humans exist outside of this realm<sup>10</sup>. Speaking upon functionalist grounds, Dwight van de Vate clearly states that there is a distinction between personhood and ‘thinghood’,

---

<sup>8</sup> Thomas Pogge, *World Poverty and Human Rights* (Ethics & International Affairs, 2006) 19(1):1-7.

<sup>9</sup> Daniel Dennett, *Conditions of Personhood* (Contemporary Issues in Biomedicine, Ethics and Society [CIBES], 1988).

<sup>10</sup> Derek Parfit, *Reasons and Persons* (Clarendon Press, Oxford, 1984).

and this is highlighted when “we say that they [children, corporations, mentally ill] too have their rights. On the other hand, they are not allowed to defend their rights; we persons do that for them”<sup>11</sup>. Yielding this ability to assert rights on other beings is something we, as humans and as socially recognised agents, can use to distinguish ourselves from other potential agents worthy of ‘personhood’. Where Peter Singer argued for the personhood of Koko the gorilla<sup>12</sup>, drawing upon traits acknowledged by Dennett, many philosophers have debated whether one can draw rational and synonymous ethical conclusions with AI machines and robotics; and if so, what types of rights should be afforded to machines if they are to continue the journey of technological enhancement. Where we may believe animals to have personhood, AI robots are different - machines are an extension of human nature. Therefore, if we continue to programme our identity into AI machines, one must also consider the ethical implications of having a ‘conscious’ humanlike moral compass enshrined in everyday, dependable tech.

Advancements have been made with ‘careworthy’ tech throughout many specialist universities. The Washington Post revealed that the US army deemed a robotics experiment inhumane after a machine’s ‘legs’ were blown off, but it kept crawling to safety. Ted Bogosh, a U.S. army robotics technician, even stated there were emotional connections to the robots, and that it is “like having a pet dog... It becomes part of the team, gets a name. They get upset when anything happens to one of the team. They identify with the little robot quickly. They count on it a lot

---

<sup>11</sup> Dwight van de Vate Jr., *The Problem of Robot Consciousness* (*Philosophy and Phenomenological Research*, 1971) 32, No. 2: 149-65.

<sup>12</sup> Peter Singer and Paola Cavalieri, *The Great Ape Project* (St. Martin’s Press, 1993) 58-77.

in a mission”<sup>13</sup>. This is something that Margaret Boden has specifically warned us against - “there is no such thing as an ethical robot, or ethical online AI system. There is no such thing, there never will be such a thing”<sup>14</sup>. This suggests that AI machines are simply making morally relevant decisions based upon what humans have programmed into them, thus meaning it is impossible for them to be moral agents as they hold no autonomous responsibility. In divulging on similarities between humans and robots, one may conclude that “if the mind just is a complex algorithm, then we may eventually have little choice but to grant the same moral status to certain machines that humans have”<sup>15</sup>. One could explore Zoopolis (Donaldson and Kymlicka, 2014) and find similarities between ethical dilemmas concerning animals and robots - in the future, cyborgs may not have an easy off-switch, they could be made from organic materials and store human consciousness.

### III. The Changing Nature of Society, Law and Technology

In 1999, brain chips were created to enhance the senses; in 2000, a device was created to control the central nervous system of a living creature<sup>16</sup>. Kevin Warwick, developed

---

<sup>13</sup> Joel Garreau, *Bots on The Ground: In the Field of Battle (Or Even Above It), Robots are a Soldier's Best Friend* (The Washington Post, 6 May 2007)

<sup>14</sup> Future of Life Institute (2017) AI and Ethics [Online Video] Available at: <https://www.youtube.com/watch?v=KVp33Dwe7qA> > [Accessed 12 April 2020]

<sup>15</sup> Mathias Risse, Human Rights and Artificial Intelligence (Carr Center for Human Rights Policy, 2018) 3.

<sup>16</sup> B. D. Reger, K. M. Fleming, V. Sanguinetti, S. Alford and F. A. Mussa-Ivaldi, *Connecting brains to robots: an artificial body for*

methodology to connect the human mind to machines, through technical upload to a new physical form<sup>17</sup>. Objectively speaking, the persistent development of tech is far exceeding expectations established under Moore's Law, with specialists like Dr Hans Moravec predicting computers will exceed capacity, thus human intelligence, by 2030. The international instrument allowing for humans to continuously benefit from scientific exploration under Article 15(1)(b) of the International Covenant on Economic, Social and Cultural Rights facilitates the necessary development of a human rights-based approach (HRBA) to rationalise and substantiate 'consciousness' within AI machines<sup>18</sup>. Both Canada<sup>19</sup> and Australia<sup>20</sup> have both acknowledged the growing likelihood of basing AI legislation on Human Rights, including reference to ensuring programming organisations of AI are held accountable through 'Algorithm Review Boards' and 'Algorithmic Impact Assessments'.

This now associates with the main debate amongst specialists - should AI machines (if held to be socially recognised agents) be deemed worthy of individual cyber rights and

---

*studying the computational properties of neural tissue* (Artif Life, 2000) 6: 307-324.

<sup>17</sup> Kevin Warwick, *The disappearing human-machine divide* (Springer, 2013) Vol.3 No.2, pp 3-15.

<sup>18</sup> Lorna McGregor, et al, "The Universal Declaration of Human Rights at 70: Putting Human Rights at the Heart of the Design, Development, and Deployment of Artificial Intelligence" (HRBDT, 2018) 2-24.

<sup>19</sup> *Directive on Automated Decision-Making* (2019) under Section 7 Financial Administration Act and Section 6.4.9 Policy on Management of Information Technology (Canada), available at <<https://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=32592>>.

<sup>20</sup> Australian Human Rights Commission, *Human Rights and Technology Issues Paper* (2018) 17-35.

responsibilities, or should governing bodies of said AI machines be held morally and legally responsible for any potential wrongdoing? An interesting distinction, made by Matthew Liao (2010)<sup>21</sup>, highlighted a theory surrounding moral status that suggested the possibility for AI to hold higher moral status than humans, with consideration that knowledge and capacity of AI is due to exceed that of humans in the near future. This compliments the requirement of species neutrality and overarching scientific empiricism, encouraged by the Universal Declaration of Human Rights (1948). More recently, the European Parliament's Committee on Legal Affairs called for a new category of individual within the recent motion for resolution (2016)<sup>22</sup>, but assessment of consequences under Paragraph 31(f) resulted in drawing liability towards creators. Rather, "the development of robot technology should focus on complementing human capabilities and not on replacing them", as recommended by the European Parliament<sup>23</sup>, reflects eurocentric leniency in technological innovation, and their awareness that the autonomy of the robot is an extension of the autonomy of its creator. Bryson (2010) argues for liability to be placed upon the shoulders of AI creators as opposed to their subjects, simply leaving AI tech to be "tools we use to extend our own abilities".<sup>24</sup>

---

<sup>21</sup> Matthew Liao, Agency and Human Rights. *Journal of Applied Philosophy* (Oxford University, 2010) 27, 15-25.

<sup>22</sup> Nathalie Nevejans, *European Civil Law Rules in Robotics* (European Commission, 2016) 14-19.

<sup>23</sup> European Parliament, *Recommendations to the Commission on Civil Law Rules on Robotics* (2017) 4-6.

<sup>24</sup> Joanna Bryson, *Robots Should Be Slaves. Close Engagements with Artificial Companions: Key social, psychological, ethical and design issues* (John Benjamins, 2010) 11, 63-74.

## IV. Practical Application of Cyborg Laws, Rights and Responsibilities

The US has grown one of the largest AI markets in the world, prioritising weaponry and national defence. Christine Fox advocates the use of AI within the military, arguing on behalf of the Laws of Armed Conflict. Various American defence directives are still in place to control the capabilities of autonomous drones<sup>25</sup>, some even referring to lethal autonomous weapon systems, but keeping language indistinct for widened interpretation. It is due to the hastily growing AI market that policy makers are struggling to maintain the relevancy of legislation, nor can they understand the evolving depth of AI potential. This results in minimal constraints over the scope of AI development and use, and an exacerbated and highly competitive international market.

AI which is available for the public market includes eyegear, voice activation devices and autonomous cars. The role of driving usually depends upon the active agent's perception and decision making skills, yet this application of individual judgement has been mastered by an automated system, and sold to ordinary citizens throughout the public domain. But where should the liability fall if an autonomous car were to crash on a busy highway? Although the manufacturer could be seen as 'ultimately responsible for the final product'<sup>26</sup>, this would either deter companies from striving for innovation, or result in higher costs for consumers. The U.S. judicial system may simultaneously find that autonomous vehicles

---

<sup>25</sup> Specifically 'Autonomy in Weapon Systems', also known as DODD 3000.09.

<sup>26</sup> Gary Marchant and Rachel Lindor, *The Coming Collision Between Autonomous Vehicles and the Liability System* (Santa Clarita Law Review, 2012) Vol 52. No.4 Art.6, 1321-1340.

are more socially beneficial than they are detrimental - but this must be done with consideration to various Acts adopted by the U.S. Congress, which limits the possibility for courts to intervene.

The U.K. has since published two papers in consideration of autonomous vehicles, yet neither address cases for potential litigation and ethical implications regarding both the autonomous agency within the vehicle, nor the safety of individuals driving in the general vicinity.<sup>27</sup> The government anticipates a £13 billion global market for AI systems by 2025. Whilst other countries like Russia and China heavily prioritise AI defence, the U.K. has prioritised 5G networks and Data Trusts, as well as greater focus on developing the technological capabilities in the NHS. Whilst the UK Ministry of Defence has discussed human-machine teams, as seen already in the States, this is not anticipated for a few decades to come. This indicates the fact that although tech is thriving in different ways on national scales, the lack of synchronicity will create many difficulties for foreign policy and international law. Current tensions already exist, as a result of the 2016 US election hacking and misappropriation of data, as well as the currently unpredictable debris fragmenting in every area of global functionality as a result of COVID-19.

## V. Limitations of Existing Cyborg Law

The global south is yet to catch up with Western understandings, and are often seen to ‘leap-frog’ past the developmental stages of tech innovation, resulting in a serious lack of national security. Many nations, such as India and Brazil, even rely upon national security to disrupt and

---

<sup>27</sup> The Department for Transport, *The Pathway to Driverless Cars: A Code of Practice for Testing* [Governmental Review] (2015) 3-14

ultimately shut down the internet without ethical consideration. For the West to assert cyber rights, but fundamentally abandon those who are still legislating digital security, could create foreign policy disruptions and create a rift between international economies.

The first common law consideration of cyber rights in connection with humans was the case of *Riley v California* (2014). This case established the general principle that police officers cannot conduct a warrantless arrest of a mobile phone, in the incident of arrest. Chief Justice Roberts justified this by stating the device is an “important feature of human anatomy”<sup>28</sup>, thus concluding the mobile phone held the same rights to privacy as the human being - the phone is simply an extension of the person who owns it. *U.S. v Schlingloff*<sup>29</sup> held that a computer forensic practitioner could not use automated data filters to find criminalising evidence that is external to the original basis of arrest. Both cases are highly problematic for legal enforcement, as this sets constraints which heavily impact their ability to properly protect the general public. In consideration of this, the higher courts have failed to find common ground between the two cases, meaning there is still much speculation and debate in relation to police rights of warrants and examining digital evidence.

One discrepancy of legal coverage is medical AI<sup>30</sup>, whereby the implant or robotic limb is the subject of regulatory development, rather than the patient. The governing British legislation is found under Medical Devices Regulations

---

<sup>28</sup> (2014) 573 U.S. 373

<sup>29</sup> 901 F.Supp.2d 1101 (2012)

<sup>30</sup> Muireann Quigley and Semande Ayihongbe (2018) Everyday Cyborgs: On Integrated Persons and Integrated Goods [Medical Law Review] Vol. 26, No. 2, pp.276-308



2002<sup>31</sup>, and it refers to ‘accessory’, ‘system or procedure pack’ or ‘single-use combination pack’, proving reluctance for ethical discussion. Not only does this prioritise the requirements and characteristics of the technology itself, but it also fails to recognise the rights of humans in the ownership of such technology, and whether the AI constitutes part of the person, or whether it has its own separate agency. Alternatively, in the States, medical prosthetics are currently regulated under the FDA, which typically applies to commercialised food and other everyday items. This is problematic if one wishes to assert a strong ethical basis for AI machines - autonomous agents may be essentially paralleled with the typical supermarket product in the eyes of the overarching regulatory body. The same could be argued in relation to UDHR 1948 - the sole focus is the human species, yet the historic UN document fails to define what being ‘human’ entails.

Barfield and Williams (2017) explored the distinction between rights for property and rights for humans once a person has attached a cyborg machine to their person. What most researchers fail to acknowledge is the rights of the device itself, and whether it is capable of being lawfully wronged. This may be because adapting a prospective legal foreground could limit AI development, thus limiting international innovation. Alternatively, creating black letter legislation which either limits or extends the rights of cyber robots would set a definitive standard, one which is still highly conflicted within the cyber specialist community. But if one were to establish rights of AI tech, for machines capable of ‘autonomous’ thought and action, they would need to first refer to human rights; subsequently, another may recognise this as over-identification with cyborgs, and degradation of human beings as entirely sentient and moral agents.

---

<sup>31</sup> 2002 No. 618

## Conclusion

Afterall, AI is created and programmed by human beings, and everything that makes AI what it is, results from an extension of our collected nature and culture. Although I agree with the statement that AI cyborgs may be capable of adopting the title of being ‘socially recognised agents’, along the same tangent as human beings, I believe there is still a long road ahead for technological enhancement before they become self-sustainable, autonomous and independent; resulting in a greater journey for legal rights as a species of being. It would go against our own human nature and conscience to create beings that think, act and look similarly to us, yet afford them no rights of identity and essentially believe them to be slaves<sup>32</sup>. In conclusion, assigning rights to creatures which are not self-aware is nonsensical, and extends the scope to an unnecessary extent.

---

<sup>32</sup> Joanna J. Bryson, “Robots Should be Slaves” (2010) Chpt 11, pp. 63-74

## Bibliography

1. Barfield, W. and Williams, A., *Law, Cyborgs and Technologically Enhanced Brains* (Philosophies, 2017)
2. Bendett, S., *Here's How the Russian Military is Organising to Develop AI* (Defense One, 20 July 2018)  
<<https://www.defenseone.com/ideas/2018/07/russian-militarys-ai-development-roadmap/149900/>>

*Bioethics and Secular Humanism: The Search for a Common Morality*  
(Trinity Press International, 1991)

3. Bryson, J. J., "Robots Should Be Slaves. Close Engagements with Artificial Companions: Key social, psychological, ethical and design issues" (2010)
4. Carneiro, R.L., "The transition from quantity to quality: A neglected causal mechanism in accounting for social evolution." (2000)
5. Dennett, D., "Conditions of Personhood." in Goodman M.F. (eds) "What is a Person?. Contemporary Issues in Biomedicine, Ethics, and Society." (1988)
6. Department for Transport, *The Pathway to Driverless Cars: A Code of Practice for Testing* (Oxford Mobile Robotics Group, 2015)
7. Directorate-General for Internal Policies, *European Civil Law Rules in Robotics* (Policy Department for 'Citizens' Rights and Constitutional Affairs, 2016)
8. Fox, C., *The Ethical Dilemma we Face n AI and Autonomous Tech* (TEDx Talks, 11 May 2017)  
<[https://www.youtube.com/watch?v=3oE88\\_6jAwc](https://www.youtube.com/watch?v=3oE88_6jAwc)>
9. Fuller, S. *What do you Think About Machines that Think?* (2015, Edge Foundation)
10. Garreau, J., *Bots on the Ground* (Washington Post, 6 May 2007)  
Accessed at  
<[https://www.washingtonpost.com/wp-dyn/content/article/2007/05/05/AR2007050501009\\_pf.html](https://www.washingtonpost.com/wp-dyn/content/article/2007/05/05/AR2007050501009_pf.html)>

11. Glenn, L. M. *Biotechnology at the Margins of Personhood: An Evolving Legal Paradigm* (2002, Biomedical Ethics Unit)
12. Gould, M. *Marx and Weber and the logic of historical explanation: The rise of machine capitalism* (2016)

GSK puts faith in AI to make more successful drugs more quickly (25 December 2019, The Guardian) Accessed at <<https://www.theguardian.com/business/2019/dec/25/glaxosmithkline-gsk-artificial-intelligence-ai-drug-development>>

13. H. Tristram Engelhardt, Jr., *Mind-Body: A Categorical Relation* (Springer, 1973)
14. Haraway, D. J. *A Cyborg Manifesto* (University of Minnesota Press, 2016)
15. Hevelke, A. Nida-Rumelin, J., *Responsibility for Crashes of Autonomous Vehicles: an Ethical Analysis* (Springer, 2014)
16. Holmes, O. W., *The Path of Law* (Harvard Law Review 1897)
17. Kollwe, J. *Oxford firm to screen 15,000 drugs in search for coronavirus cure* (31 March 2020, The Guardian) Accessed at <<https://www.theguardian.com/business/2020/mar/31/oxford-firm-to-screen-15000-drugs-in-search-for-coronavirus-treatment>>
18. Lawlor, M., *Robots Take the Heat* (Signal, March 2005) Accessed at <<https://www.afcea.org/content/robots-take-heat>>
19. Liao, M. S. *Agency and Human Rights* (2010, Journal of Applied Philosophy)
20. Maccrimmon, S., *UK Defence's Artificial Intelligence Landscape: is More Effort Required?* (10 July 2019, King's College London) <<https://defenceindepth.co/2019/07/10/uk-defences-artificial-intelligence-ai-landscape-is-more-effort-required/>>
21. Marchant, G.E. and Lindor, R. A. *The Coming Collision Between Autonomous Vehicles and the Liability System* (Santa Clarita Law Review, Vol 52, No. 4, 2012)
22. McGregor, L. et al, *The Universal Declaration of Human Rights at 70: Putting Human Rights at the Heart of the Design, Development, and Deployment of Artificial Intelligence* (HRBDT, 20 December 2018)

23. Minogue B.P. (Ed.), Palmer-Fernandez G. (Ed.), Reagan J. E.(Ed.), *Reading Engelhardt* (Kluwer Academic Publishers, 1997)
24. Müller, V. C. "Legal vs. ethical obligations – a comment on the EPSRC's principles for robotics, (2017)
25. Nevejans, N., "European Civil Law Rules in Robotics" (European Commission) (2016)
26. Moore, J. L. and Langton, J. and Pochron, J. *The Cost of Privacy: Riley v. California's Impact on Cell Phone Searches* (DeSales University, 2014)
27. Parfit, D., *Reasons and Persons* (Clarendon Press [Oxford], 1984)
28. Pichai S., *Coronavirus: How we're helping* (6 March 2020, Google, The Keyword)   
 <<https://www.blog.google/inside-google/company-announcements/coronavirus-covid19-response/>>
29. Quigley, M. and Ayihongbe, S. *Everyday Cyborgs: On Integrated Persons and Integrated Goods* (Medical Law Review, 2018)
30. Rawls, J. *The Law of Peoples* (Harvard University Press, 1999)
31. Reger, B. D., K. M. Fleming, V. Sanguineti, S. Alford and F. A. Mussa-Ivaldi, "Connecting brains to robots: an artificial body for studying the computational properties of neural tissue." (2000)
32. Risse, M. *Human Rights and Artificial Intelligence, an Urgently Needed Agenda* (Carr Center for Human Rights Policy, 2018)
33. Santow, E. and Farthing, S and Paleologos, Z. and Webber Corr, L., *Human Rights and Technology Issues Paper* (Australian Human Rights Commission, 2018)
34. Schwab, K. *Shaping the Future of the Fourth Industrial Revolution* (World Economic Fund, Geneva, 2018)
35. Singer, P., "Speciesism and Moral Status" (2009) and Cavalieri P., "The Case for the Personhood of Gorillas, The Great Ape Project" (1993)
36. The Berkman Klein Center for Internet & Society, *Cyberlaw and Human Rights: Intersections in the Global South* (Youtube, F12 February 2019)
37. UNIDIR, *The Weaponization of Increasingly Autonomous Technologies: Artificial Intelligence* (United Nations, 2018)

38. Van De Vate, D. , "The Problem of Robot Consciousness." *Philosophy and Phenomenological Research* (1971)
39. Various Research Bodies, *Digital Technology and Healthcare: Which Ethical Issues for Which Regulations?* (French National Ethical Consultative Committee (CCNE) and the Committee for Ethics of Research (CERNA), 2018)
40. Veatch R.M., *The Foundations of bioethics* (Blackwell Publishers, 1999)
41. Wallach, W. and Allen, C., Can (Ro)bots really be Moral? (Oxford Scholarship Online, 2009)
42. Warwick, K., "The disappearing human-machine divide" (Springer, 2013)
43. Webster, G. et al, *Full Translation: China's 'New Generation Artificial Intelligence Development Plan' [2017]* (1 August 2017, New America) <<https://www.newamerica.org/cybersecurity-initiative/digichina/blog/full-translation-chinas-new-generation-artificial-intelligence-development-plan-2017/>>
44. Wittes, B. and Chong, J., *Our Cyborg Future: Law and Policy Implications* (Center for Technology Innovation at Brookings, September 2014)

### Legislation and Statute

- a. International Covenant on Economic, Social and Cultural Rights 1966
- b. Medical Devices Regulations 2002
- c. Universal Declaration of Human Rights 1948
- d. Directive on Automated Decision-Making (2019) under Section 7 Financial Administration Act and Section 6.4.9 Policy on Management of Information Technology (Canada), available at <<https://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=32592>>

### Case Law

- a. Riley v California 573 U.S. 373 (2014)
- U.S. v Schlingloff 901 F.Supp.2d 1101 (2012)

# **Assimilation and Exclusion**

## **Analysis of the impact of the War on Drugs on Black Americans**

Krzysztof Mateusz Myśliński\*

\* LLB student at the University of Warwick. Contact at: [m.m.krzys@gmail.com](mailto:m.m.krzys@gmail.com)

**Abstract** - The death of George Floyd on 25<sup>th</sup> May 2020 put the Black Lives Matter Movement in the spotlight in the Anglo-Saxon countries and resurfaced the issue of systemic racism in the Western World. The concept of state-sanctioned racism was not novel and was gaining momentum before that incident. In 1991, David Lloyd published his essay “Race under representation”, in which he argued that the state’s purpose is always assimilation of its citizens, but this can only be achieved by excluding those who cannot assimilate and become the desired citizen. Thus, he argued, the state policies are the source of racism. This article analyses David Lloyd’s article “Race under representation” in light of the impact of the war on drugs implemented during Ronald Reagan’s incumbency on Black Americans. It argues that its focus on crack cocaine instead of uniting the nation divided it along racial lines.

## Introduction

In the essay “Race under representation”, David Lloyd argued that there is one principal objective of the state and it is to unify its citizen-subjects in the state culture. He argued, that assimilation cannot be achieved by culture alone, which in itself is a half-measure to reach the desired objective<sup>1</sup>. Although culture is a broad term to describe the method of assimilation, in this context it could be understood as “the ideas, customs, and social behaviour of a particular people or society”<sup>2</sup>. The means of enforcing it are different. Firstly, the culture can be indirectly enforced by the social acceptance given or not to our behaviour, art, customs. Secondly, it can be reinforced on the state level.

---

<sup>1</sup> David Lloyd, “Race under Representation” [1991] 13(1) Oxford Literary Review 62, 86.

<sup>2</sup> “Culture: Definition of Culture by Oxford Dictionary on Lexico.com also meaning of culture” (*Lexico Dictionaries*) <<https://www.lexico.com/definition/society>> accessed on 3 August 2021.



This enforcement is a direct one and is achieved through the law. From the reading of “Race under representation”, the author referred to the latter method of cultural assimilation.

David Lloyd continued that “(...) the process of assimilation, whether in bringing two distinct but equivalent elements into identity or in absorbing a lower into a higher element as by metastasis requires that which defines the difference between the elements to remain over as a residue.”<sup>3</sup> For him, “(...) although it is possible to conceive formally of an equable process of assimilation in which the original elements are entirely equivalent, the product of assimilation will always necessarily be in a hierarchical relation to the residual (...)”<sup>4</sup>. As a result, racism originates on the state level. In a detailed analysis of David Lloyd’s work, Laura Chrisman explained that the process of unification is therefore achieved by promoting “exclusivism and individualism”<sup>5</sup>, hence alienating citizen-subjects who are not capable of adapting to the state’s concept of the citizen. In that way, social diversity is thwarted and the state indirectly generates ostracism and racism towards individuals who can be assigned to Lloyd’s “residue”<sup>6</sup>.

This essay will analyse David Lloyd’s idea on the example of the war on drugs implemented in the United States of America in the 1980s. For the purposes of clarity, I divided the essay into four parts. Part One will outline the purposes of criminal law and how they relate with David Lloyd’s objectives of the state. Part Two will describe how the war on drugs was implemented and what was its impact. Part Three will show that in the course of the war on drugs, criminal law deviated from its primary purpose and thus

---

<sup>3</sup> David Lloyd, “Race under Representation” (n 1), 73.

<sup>4</sup> Ibidem.

<sup>5</sup> Laura Chrisman, “Theorizing ‘Race’, Racism and Culture: Pitfalls of Idealist Tendencies” [1993] 16(1) Paragraph 78, 89.

<sup>6</sup> Ibidem.

created the “residue” within the society that was prevented from becoming a group of assimilated citizens. It will be concluded that the measures implemented in the course of the war on drugs constituted a prime example of exclusionary politics that depreciated the notion of equality of citizens by alienating the drug offenders who primarily consisted of Black individuals from various areas of social and political life, effectively creating a group of second-class citizens.

## I. PURPOSES OF CRIMINAL LAW

To understand the war on drugs, it is necessary to examine the primary function of the major weapon deployed by the US government against drugs, criminal law. John Stuart Mill argued that the principal objective of the law is to preserve and enhance the utility of the society, to advance “the permanent interest of mankind as a progressive being”<sup>7</sup>. A more recent view, offered in criminal law textbook by Smith & Hogan and Ormerod, explains that the underlying purpose of criminal law is to forbid and prevent conducts that threaten or may threaten an individual or public safety<sup>8</sup>. These two views justify the operation of criminal law. What is harmful to a person, or other people is counter-productive and, thus, the function of criminal law is to ensure that the productivity and utility of an individual and society are maintained and preserved.

Therefore, in David Lloyd’s words, the purpose of criminal law would be to “assimilate” individuals with law-breaking inclinations by correcting and restraining their

---

<sup>7</sup> Patrick Riley, “The Legal Thought of J.S. Mill” in Enrico Pattaro (ed), *A Treatise of Legal Philosophy and General Jurisprudence* (Dordrecht: Springer Netherlands 2009), 267.

<sup>8</sup> John Child and David Ormerod, *Smith, Hogan, & Ormerod’s Essentials of Criminal Law* (Oxford University Press 2019), 5.

deviant behaviour under sanctions conferred by criminal law upon commission of an illegal act. Having said that, the criminalisation of drugs that have serious adverse effects on their users preserves the safety of their potential consumers' physical and mental capacities<sup>9</sup>. As a result, drug-taking is discouraged and, if done already, prevented in the future. On the other hand, the criminal justice system ensures that criminal law is enforced and transgressors are corrected. Subsequently, both criminal law and the criminal justice system ensure that the citizen-subjects are unified and capable of being governed, having had their counter-productive behaviours restrained and corrected.

## II. THE IMPACT OF THE WAR ON DRUGS

The concept of the war on drugs was not novel in American society. The “war” rhetoric was firstly introduced by Richard Nixon in 1971 as a response to mounting anxiety over the relationship between drug addiction and crime<sup>10</sup>. Nevertheless, the war on drugs gained its infamy during Ronald Reagan’s incumbency. He reintroduced it in 1982 to reduce the number of drugs being illegally transported to and consumed in the USA. He adopted a two-pronged approach. Firstly, he focused on the domestic level by fighting cocaine which became popular among the white middle and upper classes. Secondly, the US government wanted to reduce the drug flow from countries producing

---

<sup>9</sup> Doug Bandow, “War on Drugs or War on America” [1991] 3 Stanford Law & Police Review 242, 242.

<sup>10</sup> Richard Nixon, “President Nixon Declares Drug Abuse ‘Public Enemy Number One’” (29 April 2016) (Speech in the Briefing Room at the White House, 17 June 1971) <<https://www.youtube.com/watch?v=y8TGLLQID9M&t=10s>> accessed 31 July 2021.

them<sup>11</sup>. As it turned out, the war not only failed to uproot the drug problem in the USA but had devastating effects on certain groups in society, particularly Black Americans. In this essay, I will focus solely on the domestic approach.

Even though the use of drugs had been in decline since the early 1980s, President Ronald Reagan declared the war on drugs in 1982 as a direct response to the anxiety shared by American society as well as the vast majority of the political class over the drug use in the USA<sup>12</sup>. However, a new incentive to wage it was delivered in 1986 when the media “discovered” crack cocaine<sup>13</sup>. Reagan's administration conducted a poll that indicated that the general population was concerned about the new intoxicant<sup>14</sup>. For the politicians, it meant that the anxiety presented an opportunity to gain public support and, at the same time, address a public health issue. As a result, the subject almost instantly received extra attention from the politicians, including the incumbent president Ronald Reagan<sup>15</sup>. By taking advantage of the public concern, they made crack cocaine the top domestic enemy of the USA<sup>16</sup>.

---

<sup>11</sup> Kyle Grayson, “Discourse Identity, and the U.S. ‘War on Drugs’” in M E Beare (ed), *Critical Reflections on Transnational Organized Crime, Money Laundering, and Corruption* (University of Toronto Press 2003), 151-152.

<sup>12</sup> Lotte Berendje Rozemarijn Westhoff, “Ronald Reagan’s War on Drugs: a Policy Failure but a Political Success” (MSc thesis, Leiden University 2013), 11.

<sup>13</sup> Michelle Alexander, *The new Jim Crow: mass incarceration in the age of colorblindness* (New Press 2010), 5.

<sup>14</sup> Lotte Berendje Rozemarijn Westhoff, “Ronald Reagan’s War on Drugs: a Policy Failure but a Political Success” (n 12), 22.

<sup>15</sup> Kyle Grayson, “Discourse Identity, and the U.S. ‘War on Drugs’” (n 11), 151.

<sup>16</sup> Lotte Berendje Rozemarijn Westhoff, “Ronald Reagan’s War on Drugs: a Policy Failure but a Political Success” (n 12), 22.

For a long time, scholars have been aware, and so the politicians, that the rises in social anxiety are accompanied by “surges in punitive attitudes and support for punitive policies”<sup>17</sup>. In 1986, Reagan’s administration and political parties, including Democrats<sup>18</sup>, were presented with an opportunity to show that the drug issue was being addressed, and that drugs use would not go unpunished. As a result, the legislative passed new measures, such as mandatory minimum sentences, and set up new drug-controlling institutions. Moreover, it rejuvenated older drug-tackling measures’ use, including Rockefeller drug laws or “three strikes and you are out” policy, which had triggered serious and fierce public debates on their effectiveness<sup>19</sup>. New federal and governmental funds, such as Edward Byrne Memorial State and Local Law Enforcement Assistance, were granted to the law enforcement agencies to specifically increase the resources available to fighting the drug epidemic<sup>20</sup>.

Kyle Grayson argued that the “drug laws and the war rhetoric intended to form the American identity by demonstrating what is not American”<sup>21</sup>. The fundamental objective of the war was uniting the nation by showing that the true American would not succumb to drugs so that his social and economic utility would be preserved, however

---

<sup>17</sup> Henrique Carvalho and Anastasia Chamberlen, “Why punishment pleases: punitive feelings in a world of hostile solidarity” [2018] 20(2) *Punishment & Society* 217, 221.

<sup>18</sup> Lotte Berendje Rozemarijn Westhoff, “Ronald Reagan’s War on Drugs: a Policy Failure but a Political Success” (n 12), 9.

<sup>19</sup> Daniel Patten, “The Mass Incarceration of Nations and the Global War on Drugs: Comparing the United States’ Domestic and Foreign Drug Policies” [2016] 43(1) *Social Justice* 85, 85.

<sup>20</sup> Michelle Alexander, *The new Jim Crow: mass incarceration in the age of colorblindness* (n 13), 73.

<sup>21</sup> Kyle Grayson, “Discourse Identity, and the U.S. ‘War on Drugs’” (n 11), 151-152.

depersonalising this may sound. For the legislative, the measures implemented during the war were designed not only to deter the use of drugs but also to reinforce values that oppose their use<sup>22</sup>. However, due to the government's focus on crack cocaine, the protection of the individual deviated to exclusionary protection from the individual. Crack cocaine was the cheaper variant of cocaine<sup>23</sup>, however, there was no scientific difference between the two<sup>24</sup>. Due to its low price, it was more easily accessible and, therefore, its use and negative consequences were more likely to affect more people. Moreover, it contributed to the spread of sexually-transmitted diseases, HIV in particular<sup>25</sup>. However, because of its lower price, it was primarily used by Black communities who had lower household incomes than their White counterparts who consumed more powder cocaine<sup>26</sup>. Consequently, the anti-drug policies introduced after 1986 had a disproportionate impact on Black communities, and in the methods of conducting the war and the entirety of its impact, the war on

---

<sup>22</sup> Michael Tonry, "Race and the War on Drugs" [1994] 1994(1) University of Chicago Legal Forum 25, 42.

<sup>23</sup> Heather Schoenfeld, "The War on Drugs, the Politics of Crime, and Mass Incarceration in the United States" [2012] 15(2) Journal of Gender, Race and Justice 315, 318.

<sup>24</sup> Carl L. Hart, Joane Csete and Don Habibi, "Methamphetamine: Fact vs. Fiction and Lessons from the Crack Hysteria" [2011] Open Society Foundations, 29.

<sup>25</sup> Lotte Berendje Rozemarijn Westhoff, "Ronald Reagan's War on Drugs: a Policy Failure but a Political Success" (n 12), 20.

<sup>26</sup> Felicity Barringer, "White-Black Disparity in Income Narrower in 80's Census Shows" (*The New York Times*, 24 July 1992) <<https://www.nytimes.com/1992/07/24/us/white-black-disparity-in-income-narrowed-in-80-s-census-shows.html>> accessed 21 April 2021 and Michelle Alexander, *The new jim Crowe: mass incarceration in the age of colorblindness*, (n 13), 5.

drugs became not a war against the crack, but a war against its users, primarily African Americans.

As mentioned earlier, the media's discovery of crack cocaine triggered a full-scale offensive against the drugs by law enforcement. The legislation was passed, and the new funds and grants made it profitable for law enforcement agencies to hunt for drug consumers. As a result, law enforcement agencies, in particular police, deployed the stop-and-frisk tactics<sup>27</sup>. Consequently, on paper, between 1980 and 1989, the number of drug arrests rose from 377 000 to 850 000, and the prison population more than doubled<sup>28</sup>. Moreover, at the height of the war in 1990, 46% of the prison population consisted of drug offenders<sup>29</sup>. However, deployment of the stop-and-frisk tactics had two catastrophic consequences. Firstly, the majority of new admissions consisted of non-violent drug users, seen by the state as criminals, as "almost 80% of drug offenders sent to prison in New York in 1999 had never been convicted of a violent crime"<sup>30</sup>. Secondly, stop-and-search frisk policy primarily targeted Afro-Americans because the police considered them more likely to be found in possession of crack cocaine, therefore, perceived as a lucrative source of subsidies to the local law enforcement agencies. Consequently, by 1992, almost every person admitted to prison for a drug offence was Black.

---

<sup>27</sup> Michelle Alexander, *The new Jim Crow: mass incarceration in the age of colorblindness* (n 13), 77.

<sup>28</sup> Doug Bandow, "War on Drugs or War on America" [1991] (n 9), 243.

<sup>29</sup> Heather Schoenfeld, "The War on Drugs, the Politics of Crime, and Mass Incarceration in the United States" (n 23), 317.

<sup>30</sup> Deborah Small, "The War on Drugs Is a War on Racial Justice" [2001] 68(3) The Johns Hopkins University Press 896, 900.

Overall admissions of Black Americans grew by 117%, whereas for Whites only by 21%<sup>31</sup>.

Due to the rapid increase in conviction and prison admission rates, the number of prison bed spaces proved to be insufficiently large. In her study, Heather Schoenfeld refers to the case study of Florida, where due to such a shortage early release programme was introduced for drug offenders in the late 1980s. The programme caused the politicians to create a narrative that the law was “siding with criminals over hard-working Floridians”<sup>32</sup>, which resulted, between 1987 and 1991, in an aggressive prison-building scheme, to accommodate the influx of prisoners, victims of the war on drugs<sup>33</sup>. This enabled the states to convict more drug offenders and incarcerate them for longer periods.

Here, it is worth recalling David Lloyd’s words that “all the measures taken by liberal cultural institutions in the name of assimilation are at best half measures”<sup>34</sup>. It is true, the drug users needed help as they posed a threat to themselves and, possibly, to others. However, the majority of them needed a different kind of treatment than the one received in form of incarceration. Unfortunately, the state legislators did not consider alternative methods of tackling crack cocaine problem, such as education or medical and psychological therapy<sup>35</sup>. They opted for locking up drug users indiscriminately to their reasons of its use, what enabled them to predicate that the drug problem was

---

<sup>31</sup> Heather Schoenfeld, “The War on Drugs, the Politics of Crime, and Mass Incarceration in the United States” (n 23), 332.

<sup>32</sup> Heather Schoenfeld, “The War on Drugs, the Politics of Crime, and Mass Incarceration in the United States” (n 23), 334.

<sup>33</sup> *Ibidem*.

<sup>34</sup> David Lloyd, “Race under Representation” (n 1), 86.

<sup>35</sup> Doug Bandow, “War on Drugs or War on America” [1991] (n 9), 246.



effectively addressed and that the drug users were being placed where they should be placed, in prison. Consequently, prisons became institutions that “assumed response to a wide spectrum of deviant behaviour”<sup>36</sup>. They became instruments in the hands of the state politicians to advance their own political agenda by showing that drug users are punished and no longer threaten law-abiding citizens. Indiscriminate convicting and incarcerating of often vulnerable individuals turned out not to assimilate the drug offenders with the rest of the law-abiding society but to effectively exclude them from it.

However, huge conviction and imprisonment rates were only one dark side of a coin. The life of a drug offender was irreversibly changed after his sentence was served. As a result of collateral consequences, following a conviction and release from prison, the convict was tainted with the stigma of a drug offender for the rest of his life, and his reintegration with society was virtually impossible. In a study published by Jamila Jefferson-Jones, it was noted that by May 2018, there were over 48 000 collateral consequences of a criminal conviction, many of which date back to the 1980s and 1990s<sup>37</sup>. Among these, 74% relate to employment-related restrictions, 8% to housing-related restrictions, and 12% to political and civic-participation restrictions, whereas other include education and governmental benefits<sup>38</sup>. These directly impeded any efforts of a convicted individual to re-join the society on equal terms with non-convicted citizens upon his release from prison.

---

<sup>36</sup> Heather Schoenfeld, “The War on Drugs, the Politics of Crime, and Mass Incarceration in the United States” (n 23), 347.

<sup>37</sup> Jamila Jefferson-Jones, “‘Community Dignity Taking’: Dehumanization and Infantilization of Communities Resulting from the War on Drugs” [2018] 66(5) *Kansas Law Review* 993, 999.

<sup>38</sup> Jamila Jefferson-Jones, “‘Community Dignity Taking’: Dehumanization and Infantilization of Communities Resulting from the War on Drugs” (n 37), 1003.

### III. FORMATION OF THE RESIDUE

To understand the long term impact of the war on individuals convicted of drug offences, it is worth mentioning Jeremy Bentham's idea of a prison. In the 18<sup>th</sup> century, he developed the idea of a panopticon prison which construction would cause the convicts to develop a feeling of being constantly surveilled by the prison guards. In Bentham's mind, it would effectively reform the prisoners as their criminal inclinations would be hampered by that feeling<sup>39</sup>. If the account is taken not only of the prison but of the entire operation of the criminal justice system, from incarceration to the post-release life of a convict, Bentham's general idea of surveillance could be said to have been realised during Reagan's war on drugs. For the drug offenders, the legal consequences of their conviction came forward at every step of their lives, creating an impression of being constantly watched. Nevertheless, its purpose was skewed, and instead of reform, it was used for surveillance and maintenance of exclusion.

Jamila Jefferson-Jones argued that the collective impact of incarceration and collateral consequences was dehumanisation and infantilisation. The former refers to the lack of recognition of the convict's life value as a citizen. The latter refers to depriving the individual of his complete autonomy and hence sanctioning his legally recognised lack of capacity to govern himself or the country. With respect to dehumanisation, the collateral consequences ensured that the ex-convict could not join the society on equal terms with non-convicts. That was achieved by various economic and social restrictions. He was deprived of many public housing benefits, and his ability to find employment was always

---

<sup>39</sup> Thomas McMullan, "What does the panopticon mean in the age of digital surveillance" (*The Guardian*, 23 July 2015) <<https://www.theguardian.com/technology/2015/jul/23/panopticon-digital-surveillance-jeremy-bentham>> accessed 13 July 2021.

impeded by his status of an ex-criminal. On the other hand, infantilisation is best illustrated on the example of political and civic-participation restrictions. The most common form of collateral consequence imposed upon convicts was barring them from their right to vote<sup>40</sup>, a right that is fundamental in the democratic society and is a guarantee of the equality of citizens before the law. As a result, convicts could not choose their representatives who would seek change on their behalf, and essentially were deprived of their share in running the country. They were virtually treated as non-citizens.

In light of that, criminal law and the criminal justice system created a surveillance and management scheme for convicted drug offenders. On release from prison, the system allocated individuals to a social group with the “convict label”. Although such allocation was invisible, criminal law and justice system ensured that their belonging there would be maintained. It restricted their social and economic mobility, thus maintained their dehumanised and infantilised status. A good illustration of that is the law introduced in 1991, under which anyone convicted of a drug offence had his driving licence suspended. Firstly, the law was directly discriminatory as there was no significant evidence of its effectiveness<sup>41</sup>. Secondly, it significantly affected individual’s ability to economically and socially re-join society. It created problems with the accessibility of often distant jobs to which ex-convicts travelled. Because many metropolitan areas do not have an expansive transport system, not to mention the rural areas which often lack one, “86% of Americans use a

---

<sup>40</sup> Jamila Jefferson-Jones, “‘Community Dignity Taking’: Dehumanization and Infantilization of Communities Resulting from the War on Drugs” (n 37), 999.

<sup>41</sup> Joshua Aiken, “Reinstating Common Sense: How driver’s license suspensions for drug offences unrelated to driving are falling out of favor” (*Prison Policy Initiative*, 12 December 2016) <[https://www.prisonpolicy.org/driving/national.html#bad\\_policy](https://www.prisonpolicy.org/driving/national.html#bad_policy)> accessed 13 July 2021.

motor vehicle to reach their place of employment”<sup>42</sup>. The policy of suspending a driving licence for individuals who committed a drug offence narrowed the range within which ex-convicts could choose available jobs. What is more, financial status of an individual could further exacerbate this problem. Prison Policy Initiative found that “93% of jobs in Palm Beach, Florida aren’t reasonably accessible to low-income communities relying on public transportation”<sup>43</sup>. As a result, they were significantly disadvantaged in improving their economic status as they had to choose the jobs that they could access, not the ones they wanted. Policies like that, together with other collateral consequences, had a long-term financial impact and, as a result, individuals who had been convicted of a crime earned less than individuals with non-offender status, therefore creating an economic division. Accordingly, ex-convicts often had to move to poorer neighbourhoods with a large number of other individuals bearing an ex-offender status who had found themselves under similar circumstances. Jamila Jefferson-Jones argued that the creation of such neighbourhoods, even though consisting of technically reformed individuals, suffered from the “courtesy stigma”<sup>44</sup>. In line with that, Henrique Carvalho contended that in times of anxiety and insecurity, such as those of the war on drugs, non-criminal communities are more unified as they share revulsion against those tainted with drug offender status<sup>45</sup>. Consequently, the ranks of law-abiding citizens were closed to those who were associated with crime and, even more so, to those who could be

---

<sup>42</sup> Ibidem.

<sup>43</sup> Ibidem.

<sup>44</sup> Jamila Jefferson-Jones, “‘Community Dignity Taking’: Dehumanization and Infantilization of Communities Resulting from the War on Drugs” (n 37), 1004.

<sup>45</sup> Henrique Carvalho and Anastasia Chamberlen, “Why punishment pleases: punitive feelings in a world of hostile solidarity” (n 17), 223.

associated with the above-mentioned neighbourhoods. As a result, it made the ex-convicts less likely to create and maintain relationships outside their neighbourhood bubble, leading to “social and economic isolation”<sup>46</sup>. Effectively, every move of an ex-convict that could potentially break relationship with the assigned “convicts group” was, in a sense, inconspicuously observed by the law, and impeded whenever a chance occurred. It prevented him from obtaining better employment, social housing, increased political participation, or expanding social circles. It operated on the basis of Bentham’s panopticon prison with only change that the prison extended outside of its walls to the convict’s daily post-release life, in order to exclude him from the society by keeping his social and economic movement in check.

Having in mind the disproportionate targeting of Black communities and subsequent stigmatisation of life and its degradation after conviction, it is difficult to disagree with Michelle Alexander’s contention that the war on drugs was the New Jim Crowe<sup>47</sup>. Both, criminal law and the criminal justice system departed from their original purpose of preserving and enhancing the economic utility of the society by reforming and reintegrating individuals who did not fit the concept of the desired citizen-subject so that they could assimilate with others. Instead, an individual who stepped off the path of a righteous American was criminalised and incarcerated, not to protect him and his utility from the dangerous effects of drug use, but rather to ensure that he would not be a part of the society he lived in. Criminal law and the criminal justice system ensured that individuals with ex-convict status would be much worse off in life than those

---

<sup>46</sup> Jamila Jefferson-Jones, “‘Community Dignity Taking’: Dehumanization and Infantilization of Communities Resulting from the War on Drugs” (n 37), 1006.

<sup>47</sup> Michelle Alexander, *The new Jim Crow: mass incarceration in the age of colorblindness* (n 13), 3.

without it, what resulted in enforced segregation based on the existence of the criminal conviction. Conclusively, the disproportionate targeting of Black communities uncannily resembled the apartheid introduced by the Jim Crow Laws. Subsequently, a two-class society was created. The first class consisting of those who had no criminal conviction for a drug offence, whereas the second class of those who had one, overwhelmingly people of colour convicted because of the state's focus on crack cocaine.

## Conclusion

This leads me to the ending of my analysis. David Lloyd's contention that the unificatory policies of the state, the half-measures, promote racist exclusivism and individualism, on the example of the impact of the war on drugs, I believe to be correct. The war on drugs may have partly enforced the strong American identity and may have partly united people in their attitude towards drugs. However, the operation of both criminal law and the criminal justice system deployed in the war failed to achieve its ultimate goal, which was to eradicate the drug problem from the American society, and consequently united only a part of the society, primarily White, non-offending Americans. Crack cocaine users, who happened to be primarily Black, were neither united nor corrected to be able to be assimilated but, instead, were incarcerated and later tainted with their ex-convict status for the rest of their lives. As a result, upon release, they were excluded from the social, political and economic participation of the citizen's life and their lives were subject to surveillance by criminal law and the justice system to prevent them from re-joining the rest of the non-convicted society, creating a class division. Those who happened to be tainted with the convict status suffered from the same division and exclusion that existed under Jim Crowe Laws.

## Bibliography

### Journals

- Bandow D, "War on Drugs or War on America" [1991] 3 Stanford Law & Police Review 242
- Chrisman C, "Theorizing 'Race', Racism and Culture: Pitfalls of Idealist Tendencies" [1993] 16(1) Paragraph 78
- Carvalho H and Chamberlen A, "Why punishment pleases: punitive feelings in a world of hostile solidarity" [2018] 20(2) Punishment&Society 217
- <<https://www.annualreviews.org/doi/full/10.1146/annurev.publhealth.012809.103600>> accessed on 25 April 2021
- Hart C L, Csete J and Habibi D, "Methamphetamine: Fact vs. Fiction and Lessons from the Crack Hysteria" [2011] Open Society Foundations
- Jefferson-Jones J, "'Community Dignity Taking': Dehumanization and Infantilization of Communities Resulting from the War on Drugs" [2018] 66(5) Kansas Law Review 993
- Lloyd D, "Race under Representation" [1991] 13(1) Oxford Literary Review 62
- Patten D, "The Mass Incarceration of Nations and the Global War on Drugs: Comparing the United States' Domestic and Foreign Drug Policies" [2016] 43(1) Social Justice 85
- Schoenfeld H, "The War on Drugs, the Politics of Crime, and Mass Incarceration in the United States" [2012] 15(2) Journal of Gender, Race and Justice 315
- Small D, "The War on Drugs Is a War on Racial Justice" [2001] 68(3) The Johns Hopkins University Press 896
- Tonry M, "Race and the War on Drugs" [1994] 1994(1) University of Chicago Legal Forum 25



## Web resources

Aiken J, “Reinstating Common Sense: How driver’s license suspensions for drug offences unrelated to driving are falling out of favor” (*Prison Policy Initiative*, 12 December 2016)  
< [https://www.prisonpolicy.org/driving/national.html#bad\\_policy](https://www.prisonpolicy.org/driving/national.html#bad_policy) > accessed 13 July 2021

Barringer F, “White-Black Disparity in Income Narrower in 80’s Census Shows” (*The New York Times*, 24 July 1992)  
< <https://www.nytimes.com/1992/07/24/us/white-black-disparity-in-income-narrowed-in-80-s-census-shows.html> > accessed 21 April 2021

McMullan T, “What does the panopticon mean in the age of digital surveillance” (*The Guardian*, 23 July 2015)  
< <https://www.theguardian.com/technology/2015/jul/23/panopticon-digital-surveillance-jeremy-bentham> > accessed 13 July 2021

Nixon R, “President Nixon Declares Drug Abuse ‘Public Enemy Number One’” (29 April 2016) (Speech in the Briefing Room at the White House, 17 June 1971)  
< <https://www.youtube.com/watch?v=y8TGLLQLD9M&t=10s> > accessed 31 July 2021

“Culture: Definition of Culture by Oxford Dictionary on Lexico.com also meaning of culture” (*Lexico Dictionaries*)  
< <https://www.lexico.com/definition/society> > accessed on 3 August 2021

## Books

Alexander M, *The new Jim Crow: mass incarceration in the age of colorblindness* (New Press 2010)

Child J and Ormerod D, *Smith, Hogan, & Ormerod’s Essentials of Criminal Law* (Oxford University Press 2019)

Grayson K, “Discourse Identity, and the U.S. ‘War on Drugs’” in M E Beare (ed), *Critical Reflections on Transnational*

*Organized Crime, Money Laundering, and Corruption*  
(University of Toronto Press 2003)

Riley P, “The Legal Thought of J.S. Mill” in Enrico Pattaro (ed), *A Treatise of Legal Philosophy and General Jurisprudence*  
(Dordrecht: Springer Netherlands 2009)

### **Theses**

Westhoff L B R, “Ronald Reagan’s War on Drugs: a Policy Failure but a Political Success” (MSc thesis, Leiden University 2013)

# **Vanishing Habitats**

**A critical discussion of the significance  
of climate induced displacement within  
international environmental law and  
what needs to be done**

Aastha Walia\*

\*LLB student at the University of Warwick

## Introduction

Anthropogenic influence has a staggering impact upon the environment. Modern production and consumption levels have rapidly increased greenhouse gas (GHG) emissions, consequently catalysing rising sea levels; water shortages; and desertification. Meyers estimates that these changes in the climate will increase the number of those environmentally displaced to 150 million within fifty years.<sup>1</sup> This equates to 1.5% of the predicted global population (10 billion) of 2050.<sup>2</sup> This emphasises a necessity to address human mobility as a result of environmental degradation, ensuring those displaced do not continue to suffer. Current frameworks have been unsuccessful in addressing the issue due to opaque binding frameworks, incapable of ascertaining a solution for climate induced displacement. The latter due to the combination of failing to acknowledge the severity of environmental displacement coupled with political and social obstacles. Consequently, a lack of focus exists within the international community to ensure the protection of those affected by climate displacement. This is detrimental for those affected as they lack appropriate rights recognised under international environmental law. The international community must therefore establish effective, long-term mechanisms to aid those threatened with climate induced displacement. This dissertation will emphasise the significance of climate induced displacement, considering actions previously undertaken by the international

---

<sup>1</sup> Norman Meyers and Jennifer Kent, *Environmental Exodus: An Emergent Crisis in the Global Arena* (Washington DC: Climate Institute, 1995)

<sup>2</sup> Ibid

community and the extent of their effectiveness. Upon analysis of current actions, I will consider the nature of displacement, subsequently proposing reforms and alternate frameworks to better govern the issue. This shall include recommendations to better identify those relocating, as well as imposing preventative measures that improve the mitigating and adaptive capacities of vulnerable states. This way, displacement can be successfully addressed within international environmental law in the short and long-term.

## I. Understanding climate induced displacement

### 1. Causes

Human mobility is arguably the greatest impact from climate change<sup>3</sup>. 2020 recorded 30.7 million displaced due to weather-related events<sup>4</sup>. Increased greenhouse emissions accelerated environmental degradation, exceeding precious forecasts. Gradual and sudden environmental pressures, such as prolonged droughts; rising sea levels; and mudslides exemplify the changing climate. Thus, land masses most vulnerable to environmental fluctuations are becoming uninhabitable. For example, Sub-Saharan Africa is predicted

---

<sup>3</sup> World Meteorological Organisation and United Nations Environmental Programme, *Climate Change: The 1990 and 1992 IPCC Assessments* (Intergovernmental Panel on Climate Change, 1992)

<sup>4</sup> Internal Displacement Monitoring Centre, 'Grid 2021: Global Report on Internal Displacement' (IDMC, Norwegian Refugee Council, 2021) [https://www.internal-displacement.org/sites/default/files/publications/documents/grid2021\\_idmc.pdf](https://www.internal-displacement.org/sites/default/files/publications/documents/grid2021_idmc.pdf) accessed 27 August 2021

to experience a reduced availability of water due to environmental degradation<sup>5</sup>. Contrastingly, South Asia and the Middle East are suffering from water stress and rising sea levels<sup>6</sup>. Such extremes in climate have undoubtedly resulted in habitat damage, severely affecting people's access to resources and standard of living. The rapid rate of environmental displacement is therefore a global phenomenon, rendering aspects of human mobility irreversible and difficult to mitigate. Should the average global temperature continue increasing at 2-degrees Celsius, coastal areas such as Osaka, Japan will risk becoming entirely uninhabitable<sup>7</sup>. Furthermore, low-lying islands such as the Maldives, will be entirely submerged.<sup>8</sup>

## 2. Severity

Environmental degradation has had a severe impact upon developing and developed countries alike. Although, the vulnerabilities of developing countries augment its detrimental impacts. The general lack of understanding regarding the link between climate change and certain population movements has resulted in its severity being overlooked. To illustrate, Bangladesh is considered most susceptible to climate induced displacement. Due to its high population density and two-thirds of the land mass being less than 5 metres above sea level (common characteristics for

---

<sup>5</sup> Internal Displacement Monitoring Centre, 'Grid 2018: Global Report on Internal Displacement' (IDMC, Norwegian Refugee Council, 2018) <https://www.internal-displacement.org/global-report/grid2017/pdfs/2017-GRID-part-1.pdf> accessed 9 June 2020

<sup>6</sup> Ibid

<sup>7</sup> Scott A. Kulp and Benjamin H. Strauss, 'New Elevation Data Triple Estimates of Global Vulnerability to Sea-level Rise and Coastal Flooding' (2019) 10 *Nature Communications* 4884

<sup>8</sup> Matthew Wadey, Sally Brown, Robert J. Nicholls and Ivain Haigh, 'Coastal flooding in the Maldives: an assessment of historic events and their implications' (2017) 89 *Natural Hazards* 131

low-lying developing countries), Bangladesh anticipates a 50-centimetre rise in sea level by 2050, resulting in 11% of its land being submerged<sup>9</sup>. The absence of preventative measures will increase this percentage. Extreme weather, combined with limited adaptive capacities, elucidate the detrimental impacts of climate change upon mobility in developing countries. It must additionally be noted, displacement is not a future consequence. Current riverbank erosion along the Bay of Bengal has pushed 50% of their rural population inland due to salinization.<sup>10</sup> Cyclones Alia (2007) and Sidr (2009) decimated housing, communication, and other infrastructures in Bangladesh, with an estimation of 2.3 million households affected as a result<sup>11</sup>. Similar population movements have occurred in Sri Lanka<sup>12</sup>. Insufficient resources within vulnerable, developing countries underlines the necessity for the international

---

<sup>9</sup> 'Human Development Report 2011: Sustainability and Equity: A Better Future for All' (United Nations Development Programme, 2011)

[http://hdr.undp.org/sites/default/files/reports/271/hdr\\_2011\\_en\\_complete.pdf](http://hdr.undp.org/sites/default/files/reports/271/hdr_2011_en_complete.pdf) accessed 29 June 2020

<sup>10</sup> Justin Ginnetti and Chris Lavell, 'The Risk of Disaster-Induced Displacement in South Asia' (Internal Displacement Monitoring Centre, Technical Paper, 2015) <https://www.internal-displacement.org/sites/default/files/publications/documents/2015-04-ap-south-asia-disaster-induced-displacement-risk-en.pdf> accessed 29 June 2020

<sup>11</sup> 'Cyclone Sidr in Bangladesh: Damage, Loss, and Needs Assessment for Disaster Recovery and Reconstruction' (Government of Bangladesh, Report, 2008) [https://reliefweb.int/sites/reliefweb.int/files/resources/F2FDFF067EF49C8DC12574DC00455142-Full\\_Report.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/F2FDFF067EF49C8DC12574DC00455142-Full_Report.pdf) accessed 15 June 2020

<sup>12</sup> Abhaya Balasurya, 'Coastal Area Management: Biodiversity and Ecological Sustainability in Sri Lankan Perspective' in Chandrakasan Sivaperuman, Ayyam Velmurugan, Swindra Kumar Singh and Iyyappan Jaisankar, *Biodiversity and Climate Change: Adaptation in Tropical Islands* (Academic Press, 2018)

community to comprehend and respond to climate induced displacement. Comprehension will allow for measures by the international community to be imposed, assisting states who are unable to do so independently.

### 3. Concerns surrounding displacement

The link between displacement and climate change is apparent. It can be argued that the international community has intentionally neglected the issue due to the pressure imposed upon areas to provide housing for those seeking refuge. Regarding rural-to-urban mobility, an influx of people can strain urban infrastructure. The International Organisation for Migration (IOM) recognises climate induced displacement is likely to result in overpopulation in already dense areas<sup>13</sup>. Developing countries, many already suffering from overpopulation, are likely to jeopardise the availability of health and education services for the existing urban community due to displacement. While this may not be prevalent in developed countries, forced mobility can further result in periods of civil unrest and political concern for states. The latter and former can inhibit long-term development, an especially detrimental consequence for developing countries. McLeman notes a growing hostility against immigration policies from countries, resulting in restrictive international migration<sup>14</sup>. The US have exemplified this by hardening their southern borders under President Trump's immigration deterrence policies, as well as Australia's mandatory detention policy for unauthorised migrants<sup>15</sup>. Developing countries seemingly mirror this

---

<sup>13</sup> Oli Brown, *Migration and Climate Change* (IOM Migration Research Series No 31, 2008) Mc32

<sup>14</sup> Robert McLeman, 'International migration and climate adaptation in an era of hardening borders' (2019) 9 *Nature Climate Change* 911

<sup>15</sup> *Ibid*



notion; Following the 2019 election, India partook in discussions regarding stringent criminalisation for unauthorised immigrants. Countries predicted to be entirely uninhabitable, for example Bangladesh, will resultantly struggle to relocate to neighbouring borders (primarily India and Myanmar) due to hostilities. In light of these attitudes, a question is raised: for populations denied cross-border rehabilitation, where can they go?

## **II. Current frameworks governing displacement and their limitations**

### **1. The United Nations Framework Convention on Climate Change (UNFCCC)**

The extent to which existing frameworks address climate induced displacement must be examined to determine its current significance within international environmental law. Further, recommendations considering their limitations can be determined. The UNFCCC is a principal mechanism regarding climate deliberations, establishing numerous frameworks acknowledging displacement. Regardless, the UNFCCC overall fails to specifically outline how displacement is to be addressed, a further elucidation of the lack of focus on displacement by the international community.

### **2. The Cancun Agreements**

The 2010 Climate Change Conference in Cancun underlines preliminary acknowledgement of climate induced displacement. The adoption of the Cancun Agreements advocated undertaking 'measures to enhance understanding,

coordination and cooperation with regard to climate change induced displacement, migration and planned relocation.<sup>16</sup> As an initial step towards addressing climate displacement, the Agreements effectively understands the impact of environmental degradation upon human mobility. The Green Climate Fund exemplifies this. Financing projects in vulnerable countries to improve disaster prevention, it implements policies to address displacement in the long-term.<sup>17</sup> Furthermore, the Cancun Adaptation Framework underlines the necessity of international cooperation to improve mitigation and adaptive capacities, improving response measures against displacement.<sup>18</sup> These proposals suggest an acknowledgement of the severity of displacement, particularly in developing countries. Therefore, the Cancun Agreements can diminish the severity of displacement as it establishes a cooperative outlook to ensure the prevention of economic disparity between countries when combatting displacement.

As a preliminary mechanism, the Agreements denote encouraging progress towards combatting displacement. There are, however, hindrances to its success. Primarily, international cooperation is not regulated. State commitment is essential, otherwise success of the Agreements is limited. Without a binding provision, it is uncertain whether a state will uphold their climate commitments due to prioritisation of other matters. Indeed, the nature of international law is wholly non-obligatory and non-binding in nature, limiting the success of any agreement. Messing proposes near-binding arrangements; establishing an understanding between involved parties that their

---

<sup>16</sup> UNFCCC 'Report of the Conference of the Parties on its sixteenth session, held in Cancun from 29 November to 10 December 2010', FCCC/CP/2010/7/Add.1, s.14(f)

<sup>17</sup> Ibid

<sup>18</sup> Ibid

obligations are legally feasible, thus ensuring a pressure is maintained upon Parties<sup>19</sup>. Given that states often do not willingly prioritise climate action, an agreement of this nature will ensure displacement remains of significance and obligations are enforced under international law. Additionally, a process for transferring technologies and finance has not been sufficiently outlined. The Agreement states, ‘developing countries that are particularly vulnerable’ to the adverse effects of climate change should be highlighted.<sup>20</sup> This fails to objectively determine which countries should be prioritised when allocating resources. Hence, some countries may be disregarded. Therefore, the Cancun Agreements are vague in their guidelines and so limited due to their potential to allocate resources unequally. Consequently, climate induced displacement will be insufficiently addressed under this framework.

### 3. The Paris Agreement

The 2015 Paris Agreement is an additional achievement of the UNFCCC, underlining the requirement of improving states’ vulnerabilities by ‘mobilising support for adaptation in developing countries’ in relation to environmental degradation<sup>21</sup>. This indicates that the international community recognises the significance of climate induced displacement. This is highlighted by the Agreement encouraging the allocation of technology frameworks,

---

<sup>19</sup> Aaron Messing, ‘Nonbinding Subnational International Agreements: A Landscape Defined’ (2012) 30 *The Georgetown Environmental Law Review* 173, 185

<sup>20</sup> *Ibid* s.11

<sup>21</sup> UNFCCC ‘Report of the Conference of the Parties on its twenty-first session, held in Paris from 30 November to 13 December 2015’, opened for signature 12 December 2015 (entered into force 29 January 2016) 3

infrastructure and financial resources as aid.<sup>22</sup> These provisions suggest climate induced displacement could be tackled under the Paris Agreement.

Whilst its mechanisms could be applicable in principle; the Paris Agreement fails to go beyond recognition of the severity of displacement. There is little acknowledgment of the rights of climate displaced populations, and how such rights can be supported under international law. What is more, the Agreement lacks specificity concerning the process by which displacement is to be combatted. For example, it lacks details on the extent to which aid should be provided. This ambiguity renders the Agreement inept because states are not provided with sufficient guidelines outlining their environmental displacement duties. States, therefore, could only fulfil a portion of their obligations. Instead, the Paris Agreement focuses on limiting the temperature increase from greenhouse emissions to 2 degrees Celsius above pre-industrial levels.<sup>23</sup> Indeed, this target will contribute to diminishing the rate of environmental degradation; and in extension, the rate of related displacement. Conversely, focusing on emissions does not allow for focus in the issue of population movements. For the framework to be effective, the lack of specificity must first and foremost be reformed. Thus, specific guidelines targeting climate induced displacement is necessary.

Paralleling the Cancun Agreements, the non-binding nature of the Paris Agreement should be critiqued. It indicates a lack of legal enforceability, providing little motivation for states to adhere to the Agreement's provisions and address displacement. In addition to this, a lack of motivation inhibits the maintenance of concrete and

---

<sup>22</sup> Ibid

<sup>23</sup> Ibid

deliberate action, preventing effective international cooperation. Subsequently, it is necessary for such Agreements to be binding in nature in order to improve their efficacy. Messing's proposals would thus also be applicable to the Paris Agreement.<sup>24</sup> Related policy frameworks are thus more likely to be effective in combatting the issue. Additionally, a binding nature must consider the procedure by which obligations are enforced, such as transparency and reviews of action taken as well as impacts on domestic policies. Without consideration of these factors, it is unlikely states will remain committed to frameworks. As previously mentioned, this will severely inhibit successfully combatting of displacement.

#### **4. Warsaw International Mechanism for Loss and Damage (WIM)**

WIM (2013) addresses the imminent impacts of climate change upon human mobility, by highlighting losses and damage in vulnerable states. It functions to provide support services (including finance, technology and capacity-building) and promoting a greater understanding of climate displacement.<sup>25</sup> By enabling states to make risk-informed decisions and take pre-emptive action, WIM can be considered a feasible mechanism by which the adaptive capacities of states can be developed to combat displacement. In comparison to aforementioned frameworks, the Mechanism understands the need to impose immediate measures to tackle displacement, alongside preventing future

---

<sup>24</sup> Messing (no 19)

<sup>25</sup> 'Loss and Damage: Online Guide' (UNFCCC guide to Warsaw International Mechanism for Loss and Damage)  
[https://unfccc.int/sites/default/files/resource/Online\\_Guide\\_feb\\_2020.pdf](https://unfccc.int/sites/default/files/resource/Online_Guide_feb_2020.pdf)

accessed 4 July 2020

risks. Like other UNFCCC mechanisms, however, WIM does not adequately outline the severity of displacement. Anisimov and Vallejo report a greater need for the facilitation of dialogue on the magnitude of climate impacts to successfully undertake disaster risk reduction.<sup>26</sup> This indicates that, despite recognition of the severity of displacement, WIM outlines policies in a general manner. Indeed, it has not been determined which countries are liable for financing policies and how they will be identified. Therefore, to strengthen the framework, WIM must establish context-specific guidelines for policy implementation. Similarly, Byrnes and Surminski note that WIM must be tailored to specific countries to effectively address the nuances of climate induced displacement<sup>27</sup>. They further recommend the Mechanism act as an ‘international overseer by monitoring and reporting on progress.’<sup>28</sup> A regulatory mechanism is necessary in order to uphold state responsibility and ensure the required transfer of funds and technologies to vulnerable states. Without such amendments, WIM will be limited in addressing climate induced displacement.

---

<sup>26</sup> Ariadna Anisimov and Lola Vallejo, ‘Loss and Damage under the UNFCCC: ways forwards for the Warsaw International Mechanism’ (2019) 13(19) IDDRI, Issue Brief <https://www.iddri.org/sites/default/files/PDF/Publications/Catalogue%20iddri/D%C3%A9cryptage/201911-IB1319-L%26D.pdf> Accessed 4 July 2020

<sup>27</sup> Rebecca Byrnes and Swenja Surminski, ‘Addressing the impacts of Climate Change through an effective Warsaw International Mechanism on Loss and Damage: Submission to the second review of the Warsaw International Mechanism on Loss and Damage under the UNFCCC’ (London: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science, 2019)

<sup>28</sup> Ibid

## 5. The Nansen Initiative

Conversely, the 2012 Nansen Initiative highlights some overarching success by the UNFCCC to address environmental displacement. The initiative can be credited for the shifting focus on climate action by specifically functioning to protect those displaced. The Initiative outlines policy responses concerned with upholding human rights for those displaced - a provision otherwise absent from the aforementioned frameworks. The Initiative further acknowledges displacement occurs at national and international levels, thus providing long-term and immediate solutions to addressing displacement, the primary ones being to develop adaptive capacities and technology.<sup>29</sup> Building on WIM, the Initiative expresses limitations regarding accountability.

According to the framework, responsibility is placed upon states, enabling them to build local and national structures as a response measure to displacement.<sup>30</sup> In addition, the Initiative generates greater international cooperation, generating interest from Norway, Switzerland and Mexico, all of whom pledged to 'cooperate with interested states, UNHCR and other relevant actors with the aim of obtaining a better understanding of such [...] movements.'<sup>31</sup> Should this willingness be maintained by the international community, climate induced displacement can be globally addressed.

---

<sup>29</sup> 'The Nansen Initiative Global Consultation Conference Report' (The Nansen Initiative, 2015) <https://www.nanseninitiative.org/wp-content/uploads/2015/02/GLOBAL-CONSULTATION-REPORT.pdf> accessed 10 July 2020

<sup>30</sup> Ibid

<sup>31</sup> Walter Kalin, 'From the Nansen Principles to the Nansen Initiative' (2012) 41 *Forced Migration Review* 48, 49

For the Initiative to be most effective, certain states must adhere to its guidelines. Major GHG emitters such as the US and China have remained accountable for approximately 27% and 11% of the world's CO<sub>2</sub> emissions over the last century respectively.<sup>32</sup> In the absence of their commitment to combatting displacement, the Initiative will only be partially viable. Conversely, McAdam argues international cooperation is insignificant in combatting displacement.<sup>33</sup> Rather, the Initiative must strive to amend existing international law to accommodate climate induced displacement. Given that, UNFCCC frameworks have been unsuccessful in combatting displacement under current legal regimes, perhaps reformations are indeed required. McAdams' assertions are therefore justified. Such reformations could be capable of accommodating for the rapid rate of displacement and the requirements of the international community to address it.

## 6. The Peninsula Principles

Paralleling the Nansen Initiative, the Peninsula Principles target climate induced displacement by espousing the protection of displaced populations under international human rights law, with a structured and preventative disposition. This includes enshrining the principles of non-discrimination, which likely addresses hostilities arising from cross-border movements. The Principles additionally appear better suited to addressing displacement as they initiate

---

<sup>32</sup> 'Global Historical Greenhouse Gas Emissions' *Climate Watch* (Web Page) <https://www.climatewatchdata.org/ghg-emissions> accessed 13 July 2020

<sup>33</sup> Jane McAdam, 'From the Nansen Initiative to the Platform on Disaster Displacement: Shaping International Approached to Climate Change, Disasters and Displacement' (2016) 39(4) UNSW Law Journal 1518



greater international cooperation. Countries such as the US, Australia, the United Kingdom and Germany - major greenhouse emitters - pledged to the Principles<sup>34</sup>. As a development upon these obligations, the Principles further advocate for vulnerable states to outline what they require in order to combat displacement.<sup>35</sup> Arguably, this is the most effective mechanism by which climate induced displacement can be addressed because it remedies aforementioned framework limitations. For example, the specific identification and allocation of resources for different countries coupled with a collaborative effort made by states to address displacement. The Principles, however, have not been established by a governmental organisation, unlike UNFCCC frameworks. Nor have they been approved by similar organisations. Given this, official implementation and enforcement appears difficult. Conversely, their detachment from institutions such as the UN arguably removes political prohibitions, ultimately inhibiting the international community from prioritising climate induced displacement. Enforcement mechanisms must be established, however, to legitimatise the Principles.

### III. Determining responsibility

#### 1. The “polluter pays” principle (PPP)

The International Organisation of Migrants (IOM) notes, the relation between greenhouse gas emissions and environmental degradation is directly proportional.

---

<sup>34</sup> *The Peninsula Principles: On Climate Displacement Within States* (Displacement Solutions, 18 August 2013)

<sup>35</sup> Ibid

<sup>36</sup>Primary polluters should consequently be held responsible for those forced to relocate. Similarly, US domestic law maintains that polluters are responsible for the effects of their pollution - ironically, the US are hesitant to uphold their responsibilities to mitigate their actions as major polluters of the international community.<sup>37</sup> There are multiple mechanisms, however, by which states can be held accountable for displacement in relation to their emissions. The PPP is a viable mechanism to assess this. Under international law, the PPP involves the imposition of taxation in accordance with polluters' emission percentage<sup>38</sup>. Arguably, a combination of America's and international law's definition would effectively identify who is responsible for addressing internal and cross-border displacement. This can be executed with a taxation mechanism, the finances of which can be used to invest in development projects for states vulnerable to displacement. Conisbee and Simms support this notion, arguing responsibility for the environmentally displaced should be regarded an extension of the PPP and those affected 'should be recompensed and protected by those responsible.'

<sup>39</sup>Furthermore, such taxations will deter current and future

---

<sup>36</sup> *Migration, Environment and Climate Change: Evidence for Policy (MECLEP) Glossary* (International Organisation for Migration, 2014) 27

[https://publications.iom.int/system/files/pdf/meclep\\_glossary\\_en.pdf?language=en](https://publications.iom.int/system/files/pdf/meclep_glossary_en.pdf?language=en) accessed 20 June 2020

<sup>37</sup> Stefanie Sommers, 'The Brownfield Problem: Liability for Lenders, Owners, and Developers in Canada and the United States' 19 [2008] J. INT'L ENVTL. L. & POL'Y 259

<sup>38</sup> *Polluter Pays Principle* (Organisation for Economic Cooperation and Development Publishing, 2008) <https://www.oecd-ilibrary.org/docserver/9789264044845-en.pdf?expires=1595345883&id=id&accname=guest&checksum=73DF1B54C60CF39DA143F62A530A2A3D> accessed 21 July 2020

<sup>39</sup> Molly Conisbee and Andrew Simms, *Environmental Refugees: The Case for Recognition* (New Economics Foundation, 2003) 29

emissions, due to the subsequent increase in the cost of polluting. The principle has been enshrined into numerous conventions regarding environmental degradation such as the Treaty on the Functioning of the European Union (TFEU) which explicitly states the cost of environmental degradation should be borne by the polluter.<sup>40</sup> In light of this, application of the PPP is a viable principle by which the international community can aptly recognise actors upon whom they should impose policy frameworks to address displacement. As emphasised by Mamlyuk, without this, responsibility to address the effects of environmental damage and related displacement becomes the burden of the general community<sup>41</sup>. Given the variances in mitigation and adaptive capabilities for states, this most certainly will inhibit climate induced displacement being effectively combatted.

Indeed, Mamlyuk's assertions can be disagreed with. Given that states are generally unwilling to comply with tax-imposing mechanisms, the PPP may be difficult to impose and is thus more a theoretical notion as opposed to a practical one. To illustrate, the United States' reluctance to embrace their environmental duties has been apparent with the Trump administration announcing its withdrawal from the Paris Convention by the end of 2020<sup>42</sup>. Certainly, this unreceptive disposition will greatly hinder actions taken to combat climate displacement. Thus, Conisbee's and Simms' argument regarding responsibility is rendered futile.

---

<sup>40</sup> Consolidated versions of the Treaty on the Functioning of the Europeans Union (TFEU) [2012] OJ L 129/35, art 191(2)

<sup>41</sup> Boris N. Mamlyuk, 'Analysing the Polluter Pays Principle through Law and Economics' 18(1) (2009) *Se Envtl LJ* 39, 42

<sup>42</sup> Michael R. Pompeo, Secretary of State, 'On the U.S. Withdrawal from the Paris Agreement' *U.S. Department of State* (Press Statement, 4 November 2019)

<https://www.state.gov/on-the-u-s-withdrawal-from-the-paris-agreement/> accessed 14 June 2020

Arguably, this may be rectified by making the PPP a near-binding mechanism.

## 2. The equity principle

Effectively combating displacement involves vulnerable states improving their adaptive capacities. Imposing the PPP is insufficient in satisfying this prerequisite as its emphasis is on major polluters whom, commonly, are developed countries capable of independently combatting displacement. Therefore, there is a “divide” between states more and less capable of preventing displacement. The equity principle acts as an appropriate mechanism to rectify this division. It advocates an equal distribution of responsibility, as well as the capacities, technologies and finances of states. Moreover, it is necessary for the international community to adopt an equitable response to addressing climate induced displacement as it was asserted that ‘the right to development must be fulfilled as to equitably meet developmental and environmental needs of present and future generations.’<sup>43</sup>

This “divide”, however, created conflicting perceptions regarding the severity of displacement and how to fairly address it. Developed countries have generally been dismissive of the prevalence and severity of displacement. Members of the industrialised world are commonly appointed to determine the sharing of resources, hence what they deem “fair” is likely to be skewed by their perception of displacement. The sharing of resources may resultantly be affected. Therefore, developing countries may receive limited or inappropriate resources to develop their adaptive

---

<sup>43</sup> John Ashton and Xueman Wang, ‘Equity and Climate: In Principle and Practice’ (Pew Center, Global Climate Change, 2003) <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.588.3093&rep=rep1&type=pdf> accessed 11 July 2020

capacities against displacement. Moreover, such disregard indicates a lack of incentive by the international community to address climate induced displacement. Indeed, the 2014 Intergovernmental Panel on Climate Change (IPCC) report emphasises the necessity of burden sharing to address displacement, but there is little information as to its application, rendering it a vague and inept adoption of the equity principle.<sup>44</sup> A divisive international community further hinders the combatting displacement because, Müller notes, the international community has no inclination regarding *how* to equitably manage burdens, such as future displaced Bangladeshis.<sup>45</sup> Therefore, successful implementation of the equity principle is possible only by lessening this divide with compromise and a restructuring of states' priorities.<sup>46</sup> Without such reformations, the absence of international cooperation will continue, inhibiting the combatting of climate induced displacement.

## IV. Suggestions for a way forward

### 1. Distinguishing displaced persons

There have been numerous terms of reference to describe environmentally induced mobility. Although they have been used interchangeably, it must be noted they are in fact

---

<sup>44</sup> Christopher B. Field and Vincente R. Barros (ed), *Climate Change 2014 Impacts, Adaption, and Vulnerability, Part A: Global and Sectoral Aspects* (Cambridge University Press, Intergovernmental Panel on Climate Change, 2014)

<sup>45</sup> Benito Müller, *Equity in Climate Change: The Great Divide* (Oxford Institute for Energy Studies with the support of the Shell Foundation, 2002)

<sup>46</sup> Ashton and Wang (n 43)

distinguishable, connoting differing consequences under international law. Debatably, the lack of a singular term has contributed to the international community failing to address and identify the severity of displacement. It is therefore necessary to establish a coherent term for climate induced displacement which ensures the population gain legal recognition and protection relevant to their circumstances. This can be obtained by amending existing legal terms, such as “migrants” and “refugees”. Alternatively, to guarantee variances of the displaced population are accounted for, it may be necessary for a separate term entirely

## 2. Environmental migrants

Amending migrant status to allow for *environmental migrants*, may enable appropriate rights for those forced to relocate. The UNHCR defines migrants as those choosing to move to improve their standard of living, often searching for better labour opportunities or education.<sup>47</sup> Under migrant status, individuals are subject to the legal framework of their new host country, although are generally protected from inhumane treatment or labour exploitation, which may arise from a hostile milieu. In a climate context, populations may predict displacement, and so pre-emptively decide to relocate. Thus, migrant status is applicable. To accommodate for environmental displaced people, the IOM have suggested migrants additionally be defined as those ‘who, predominantly for reasons of sudden progressive changes in the environment [...] are obliged to leave their habitual homes or choose to do so [...] and who move within their

---

<sup>47</sup> ‘UNHCR viewpoint: “Refugee” or “Migrant” – Which is Right?’  
UNCHR UK (Web Page, 11 July 2016)  
<https://www.unhcr.org/news/latest/2016/7/55df0e556/unhcr-viewpoint-refugee-migrant-right.html> accessed 26 June 2020

country or abroad.’<sup>48</sup> Existing migrant status must, in light of this, be revised to include those partially independent in deciding to move due to environmental degradation - not only those entirely independent (as inferred by the UNHCR’s definition).

The absence of these reforms makes the adoption of migrant status in the climate context invalid as it is not wholly inclusive of the displaced population. Migrant status can further be developed to predict the scale of displaced populations by examining migratory patterns. Ionesco proposes amending regular mobility pathways to determine migration strategies in relation to environmental degradation, subsequently imposing relevant protection policies to address climate displacement.<sup>49</sup> In this way, she maintains, environmental migrants can be granted humanitarian visas into countries pre-emptively, as well as ‘regional and bilateral free movement agreements’ to address border control hostilities.<sup>50</sup> Such a predictive framework can determine where displaced populations are likely to migrate, thus quickening the process for crossing borders and ensuring the protection for those already displaced.

On the other hand, an environmental migrant may be at a disadvantage, particularly post-relocation. This is because cross-border migration involves stringent immigration laws that are possessed by various countries and groups such as the United States, Australia and the European

---

<sup>48</sup> (n 36) 13

<sup>49</sup> Dina Ionesco, ‘Let’s Talk about Climate Migrants, Not Climate Refugees’ *United Nations Sustainable Development Goals* (Web Page, 6 June 2019) <https://www.un.org/sustainabledevelopment/blog/2019/06/lets-talk-about-climate-migrants-not-climate-refugees/> accessed 26 June 2020

<sup>50</sup> Ibid

Union. Hostile attitudes inhibit migrants from entering certain countries or fully assimilating into their new homes. For example, they could be prohibited from political participation. As mentioned earlier, climate migrants may aggravate political, economic and social tensions, in light of climate talks being historically volatile within the international community. Arguably, these issues would only emphasise the feeling of displacement experienced by this population, despite having relocated.

### 3. Environmental refugees

Adopting *environmental refugee* status may prove a more advantageous alternative for climate displaced people. Refugee status is a well-established term within international law, providing protection to those fleeing from states of conflict or persecution under the 1951 Refugee Convention<sup>51</sup>. As contended earlier, environmental degradation is the consequence of anthropogenic action, similar to armed conflict. Therefore, those suffering from environmental consequences should be similarly protected. Hermsmeyer emphasises the inadequacies of the international refugee mechanism due to its denial of rights for the environmentally displaced population.<sup>52</sup> Thus, numerous reforms are necessary for this term to be applicable. The necessity of internationally providing aid to environmentally displaced people has been repeatedly underlined. Given that rights granted under refugee status include support from aid agencies and the UNHCR,

---

<sup>51</sup> Convention Related to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention), art 1

<sup>52</sup> Heidi A Hermsmeyer, 'Environmental Refugees: A Denial of Rights' *Contemporary Topics in Forced Migration* (University of Chicago, 2005)



environmental refugee status will certainly contribute to achieving this,. Furthermore, state obligations to combat climate displacement is enforced. Should the rights of refugees expand for environmental circumstances, the Convention would ensure they are not expelled from another state or forced to return to their country whilst their lives still remain under threat.<sup>53</sup> This is unlike migrant status, which does not guarantee protection from expulsion. Refugee status would therefore be an appropriate action towards addressing climate induced displacement, providing sufficient protection for those relocating.

Climate refugee status, on the other hand, is not without limitations. Ionesco maintains, current climate population movements are generally internal.<sup>54</sup> Internal population movements, however, are not accommodated for under existing refugee law. Therefore, environmental refugee status does minimal to combat present, regional climate induced mobility. It is thus applicable solely in future instances when states become uninhabitable, resulting in cross-border movement. Additionally, considering the aforementioned political, social and economic tensions, it is undeniable environmental refugees would act as similar catalysts to these issues as environmental migrants. The United States, for example, is party to the 1951 Convention. Despite their commitments, the Trump administration has repeatedly expressed an unwillingness to accept refugees, claiming they '[do not] have any rights [in America].'<sup>55</sup> This

---

<sup>53</sup> Convention relating to the Status of Refugees (Adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention)

<sup>54</sup> Ionesco (n 49)

<sup>55</sup> USA: "You don't have any rights here", *Amnesty International* (Report, October 2018) <https://www.amnesty.org/en/latest/research/2018/10/usa-treatment-of-asylum-seekers-southern-border/> accessed 15 June 2020

suggests, if refugees escaping armed conflict are unwelcome, climate refugees are unlikely to be treated otherwise. Consequently, environmentally displaced people may not receive viable rights under refugee status. Moreover, refugee protection may undermine necessary preventative measures against displacement. The adoption of environmental refugee status connotes long-term relocation elsewhere, thus repatriation to their original country is void. Should the international community shift focus on providing protection under refugee status, it may limit resources directed towards preventing climate displacement before relocation occurs. It is necessary population movements are minimised or temporary where possible, not encouraged.

#### 4. Curating a new term

Upon deliberation of the terms above, curating a new term may be more appropriate. It is necessary, then, to advocate for a human rights-based approach by which international and internal displacement is addressed. Further, appropriate protections and resources must be legally recognised. While advocating the inclusion of environmental refugees within the protection of the Refugee Convention, Conisbee and Simms propose radical policy change to address the limitations of existing terms.<sup>56</sup> These policy changes could include the drafting of an entirely new Convention, specific to those suffering from environmental degradation.<sup>57</sup> Certainly, limitations in existing terms of recognition can be addressed to ensure various circumstances of displacement are accounted for. Additionally, they suggest incorporating displaced people into the Geneva Convention under 'environmental persecution', ensuring they are protected

---

<sup>56</sup> Molly Conisbee, Andrew Simms, 'Environmental Refugees: The Case for Recognition (2003), *New Economics Foundation* (2003)

<sup>57</sup> Ibid

from suffering.<sup>58</sup> Adherence to these prerequisites guarantees effective legal protection against displacement. Parallel to this, those responsible for the persecution – major polluters – would also be held responsible for their actions. This could include the imposition of a fine under international law, which could then be used to finance projects in relation to addressing displacement. Without appropriate legal recognition and protection under international law, displacement will not be successfully combatted.

## 5. The role of corporations

The international corporate sector plays an integral role in combating displacement-related climate action. A 2017 report concluded that 100 active fossil fuel-producing corporations are responsible for 71% of greenhouse gas emissions. Corporate polluting habits contribute to state emissions.<sup>59</sup> Hence, they are equally responsible for subsequent impacts on human mobility. Resultantly, a duty is owed, as members of the international community, to address displacement. Furthermore, international corporations tend to have a quasi-detachment from states and can function outside state control. This can address any political implications which arise due to environmental displacement. Additionally, emphasising the role of corporations can motivate state cooperation, due to corporate ability to influence states.<sup>60</sup> Some corporations are already taking remedial action to correct their polluting habits, such as the BP Oil Spill Fund, established subsequent

---

<sup>58</sup> Ibid 38

<sup>59</sup> Paul Griffin, 'The Carbon Majors Database: CDP Carbon Majors Report 2017' (Carbon Disclosure Project, July 2017)

<sup>60</sup> Marcel Kordos and Sergei Vojtovic, 'Transnational Corporations in the Global World Economic Environment' [2016] 230, *Procedia: Social and Behavioural Sciences*, 150

to the environmental harm caused by the Deepwater Horizon oil spill in 2010. Similarly, funds can be redirected into projects developing the adaptive capacities of states. Abate develops upon this, suggesting the establishment of investment projects by corporations to combat displacement in both the long and short term.<sup>61</sup>

## 6. Replacing vanishing habitats

Preventative measures are imperative to combat climate induced displacement. Should these measures be insufficient, however, mechanisms must be in place. To accommodate for inevitable displacement of vast populations, states can be “created”. An example is the artificial island of Hulhumale, in the Maldives. It was reclaimed and developed to be a more climate-resistance land mass, fortified with walls to protect against rising sea-levels. Hulhumale is predicted to be completed in 2026, following COVID-19 restrictions, and is projecting to house up to 130,000 displaced individuals.<sup>62</sup> Indeed, for states such as Bangladesh, the creation of a replacement habitat appears the most suitable solution. Factors, nonetheless, inhibit the completion of such projects. Director of the Maldives Marine Research Centre, Shiham Adam, claims the greatest inhibitor to the success of this

---

<sup>61</sup> Randall S. Abate, ‘Corporate Responsibility and Climate Justice: A Proposal for a Polluter-Financed Relocation Fund for Federally Recognised Tribes Imperilled by Climate Change’ [2013] 25(1) *Fordham Environmental Law Review* 10

<sup>62</sup> ‘Maldives Urban Development and Resilience Project (P163957) (The World Bank, Implementation Status & Results Report, 20 April 2020) <http://documents1.worldbank.org/curated/en/964061587382929293/pdf/Disclosable-Version-of-the-ISR-Maldives-Urban-Development-and-Resilience-Project-P163957-Sequence-No-01.pdf> accessed 13 July 2020

reconstructive framework is finance.<sup>63</sup> An obvious solution to this is the intervention of the international community to direct finance into such projects. Implementation of the Green Climate Fund would certainly aid in the development of such projects, as it would ensure capacity building for these states. But such geoengineering projects have not been globally recognised by the international community. Only the Maldives are currently undergoing such developments. These geoengineering projects must be expanded worldwide, particularly where relocation to the Maldives may otherwise prove arduous. This elucidates the necessity of international cooperation to address climate induced displacement, as additional projects require coordination and burden sharing to be successfully implemented globally.

---

<sup>63</sup> Nenad Jaric Dauenhauer, 'On front line of climate change as Maldives fights rising seas' *New Scientist* (Web Page, 20 March 2017) <https://www.newscientist.com/article/2125198-on-front-line-of-climate-change-as-maldives-fights-rising-seas/> accessed 13 July 2020

## Conclusion

In conclusion, the impact of climate change upon human mobility is of great significance. This has not been, however, appropriately brought to light under international environmental law. The international community is therefore obliged to make various reformations to current legal frameworks to successfully address the matter. It can be established, failure to act will universally result in detrimental consequences for people's standard of living. Analysis of existing frameworks designed to combat the impacts of environmental degradation suggests that international institutions are wary of imposing policies which may interfere with domestic policies. Indeed, there have been strong inhibitors against combatting displacement. Based on these conclusions, it is necessary to establish succinct and concrete frameworks by which displaced populations can be legally identified and protected under international and domestic law. Vague and unimposing policies will otherwise continue to inadequately address climate induced displacement. Despite such policies, actions will remain insufficient in the absence of international cooperation and an emphasis on burden sharing. Variations in the vulnerabilities and capacities of states will be accommodated for in this regard, thus enabling an appropriate allocation of resources. Additionally, maintaining this ideology will ensure effective strategies thus allowing for an equitable mechanism by which the issue can be addressed and further regulate states' commitment to combatting climate induced displacement. More extensive, concrete research may be required to outline the relation between state emissions and human mobility, and how polluting actions can be mitigated fairly to effectively adapt to displacement. In doing so, there can be an apt transfer of finances and technologies within the international

community. Extensive action is required to combat climate induce displacement, but the international community must begin by acknowledging its growing significance for any implementation to be effective.

## Bibliography

### Books, articles, journals

Abate R S, 'Corporate Responsibility and Climate Justice: A Proposal for a Polluter-Financed Relocation Fund for Federally Recognised Tribes Imperilled by Climate Change' [2013] 25(1) *Fordham Environmental Law Review* 10

Ahmed B, 'Who Takes Responsibility for the Climate Refugees?' (2017) *International Journal of Climate Change Strategies and Management*  
<https://www.emerald.com/insight/content/doi/10.1108/IJCCSM-10-2016-0149/full/html> accessed 29 May 2020

Allen M W and Craig C A, 'Rethinking Corporate Social Responsibility in the Age of Climate Change: A Communicative Perspective' (2016) 1 *Int J Corporate Soc Responsibility* 1  
<http://jcsr.springeropen.com/articles/10.1186/s40991-016-0002-8>  
 accessed 19 June 2020

Anisimov A and Vallejo L, 'Loss and Damage under the UNFCCC: ways forwards for the Warsaw International Mechanism' (2019) 13(19) *IDDRI, Issue Brief*  
<https://www.iddri.org/sites/default/files/PDF/Publications/Catalogue%20Iddri/D%C3%A9cryptage/201911-IB1319-L%26D.pdf> Accessed 4 July 2020

Arnall A, 'Resettlement as Climate Change Adaptation: What Can Be Learned from State-Led Relocation in Rural Africa and Asia?' (2019) 11(3) *Climate and Development* 253  
<https://doi.org/10.1080/17565529.2018.1442799> accessed 29 May 2020

Balasurya A, 'Coastal Area Management: Biodiversity and Ecological Sustainability in Sri Lankan Perspective' in Sivaperuman C, Velmurugan A, Singh S K and Jaisankar I,



*Biodiversity and Climate Change: Adaptation in Tropical Islands* (Academic Press, 2018)

Brown O, *Migration and Climate Change* (IOM Migration Research Series No 31, 2008)

Conisbee M and Simms A, *Environmental Refugees: The Case for Recognition* (New Economics Foundation, 2003)

Georgeson L, Maslin M, Poessinouw M and Howard S, 'Adaptation Responses to Climate Change Differ between Global Megacities' (2016) 6 *Nature Climate Change* 584  
<https://www.nature.com/articles/nclimate2944> accessed 17 June 2020

Hermesmeyer H A, 'Environmental Refugees: A Denial of Rights' *Contemporary Topics in Forced Migration* (University of Chicago, 2005)

Hermwille L, Obergassel W, Ott H E, Beuermann C, 'UNFCCC Before and After Paris – What's Necessary for an Effective Climate Regime?' (2017) 17(2) *Climate Policy* 150

Kalin W, 'From the Nansen Principles to the Nansen Initiative' (2012) 41 *Forced Migration Review* 48

Khan M R, 'Polluter-Pays-Principle: The Cardinal Instrument for Addressing Climate Change' (2015) 4(3) *Laws* 638  
<https://www.mdpi.com/2075-471X/4/3/638> accessed 16 June 2020

Kordos M and Vojtovic S, 'Transnational Corporations in the Global World Economic Environment' [2016] 230, *Procedia: Social and Behavioural Sciences*, 150

Kulp S A and Strauss B H 'New Elevation Data Triple Estimates of Global Vulnerability to Sea-level Rise and Coastal Flooding' (2019) 10 *Nature Communications* 4884  
<https://doi.org/10.1038/s41467-019-12808-z> accessed 29 June 2020

Maguire R, 'Incorporating International Environmental Legal Principles into Future Climate Change Instruments' (2012) 6(2)

Carbon & Climate Law Review 101

[https://www.jstor.org/stable/24324084?seq=1#metadata\\_info\\_tab\\_contents](https://www.jstor.org/stable/24324084?seq=1#metadata_info_tab_contents) accessed 16 June 2020

Mamlyuk B N, 'Analysing the Polluter Pays Principle through Law and Economics' 18(1) (2009) *Se Env'tl LJ* 39

McAdam J, 'From the Nansen Initiative to the Platform on Disaster Displacement: Shaping International Approaches to Climate Change, Disasters and Displacement' (2016) 39(4) *UNSW Law Journal* 1518

McLeman R, 'International Migration and Climate Adaptation in an Era of Hardening Borders' (2019) 9 *Nature Climate Change* 911

Messing A, 'Nonbinding Subnational International Agreements: A Landscape Defined' (2012) 30 *The Georgetown Environmental Law Review* 173

Meyers N and Kent J, *Environmental Exodus: an emergent crisis in the global arena* (Washington DC: Climate Institute, 1995)

Mohammed N, "Climate Change and Displacement in Bangladesh: Issues and Challenges" in Leal Filho W. (eds) *Handbook of Climate Change Adaptation* (Springer 2015)

Shabalala D, "Climate Change, Human Rights and Technology Transfer" in Molly K Land and Jay D Aronson (eds) *New Technologies for Human Rights Law and Practice* (Cambridge University Press 2018)

Sommers S, 'The Brownfield Problem: Liability for Lenders, Owners, and Developers in Canada and the United States' 19 [2008] *J. INT'L ENVTL. L. & POL'Y* 259

Terminiski B, 'Environmentally-Induced Displacement. Theoretical Frameworks and Current Challenges' (2012) Centre d'Etude de l'Ethnicité et des Migrations, Université de Liège Research Paper  
<https://www.weadapt.org/sites/weadapt.org/files/legacy->

[new/knowledge-base/files/1121/50e6b5828f417environmentally-induced-displacement-terminski-1.pdf](https://knowledge-base/files/1121/50e6b5828f417environmentally-induced-displacement-terminski-1.pdf) accessed 28 May 2020

Tol R S J, 'The Polluter Pays Principle and Cost-Benefit Analysis of Climate Change: application of Fund' (2006) FEEM Working Paper No.88.2006

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=907456](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=907456)

accessed 16 June 2020

Wadey M, Brown S, Nicholls R J and Haigh I, 'Coastal flooding in the Maldives: an assessment of historic events and their implications' (2017) 89 Natural Hazards 131

### **Additional publications**

Apap J, 'The Concept of "Climate Refugee": Towards a Possible Definition' (European Parliament briefing, February 2019)

[https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/621893/EPRS\\_BRI\(2018\)621893\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/621893/EPRS_BRI(2018)621893_EN.pdf) accessed 9 June 2020

Ashton J and Wang X, 'Equity and Climate: In Principle and Practice' (Pew Center, Global Climate Change, 2003)

<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.588.3093&rep=rep1&type=pdf> accessed 11 July 2020

Boano C, Prof Zetter R and Dr Morris T, 'Environmentally Displaced People: Understanding the Linkages between Environmental Change, Livelihoods and Forced Migration' (Refugees Studies Centre, November 2008)

Bodle R, Donat L and Duwe M, 'The Paris Agreement: Analysis, Assessment and Outlook' (Umwelt Bundesamt, Working Paper, 28 January 2016)

[https://www.ecologic.eu/sites/files/event/2016/ecologic\\_institute\\_2016\\_paris\\_agreement\\_assessment.pdf](https://www.ecologic.eu/sites/files/event/2016/ecologic_institute_2016_paris_agreement_assessment.pdf) accessed 10 June 2020

Byrnes R and Surminski S, 'Addressing the impacts of Climate Change through an effective Warsaw International Mechanism on Loss and Damage: Submission to the second review of the Warsaw International Mechanism on Loss and Damage under the

UNFCCC' (London: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science, 2019)

Field C B and Barros V R (ed), *Climate Change 2014 Impacts, Adaptation, and Vulnerability, Part A: Global and Sectoral Aspects* (Cambridge University Press, Intergovernmental Panel on Climate Change, 2014)

Gahre C, 'The Nansen Conference: Climate Change and Displacement in the 21<sup>st</sup> Century' (Norwegian Refugee Council, 2011) <https://www.unhcr.org/4ea969729.pdf> accessed 12 June 2020

Ginnetti J and Lavell C, 'The Risk of Disaster-Induced Displacement in South Asia' (Internal Displacement Monitoring Centre, Technical Paper, 2015) <https://www.internal-displacement.org/sites/default/files/publications/documents/2015-04-ap-south-asia-disaster-induced-displacement-risk-en.pdf> accessed 29 June 2020

'Loss and Damage: Online Guide' (UNFCCC guide to Warsaw International Mechanism for Loss and Damage) [https://unfccc.int/sites/default/files/resource/Online\\_Guide\\_feb\\_2020.pdf](https://unfccc.int/sites/default/files/resource/Online_Guide_feb_2020.pdf) accessed 4 July 2020

*Migration, Environment and Climate Change: Evidence for Policy (MECLEP) Glossary* (International Organisation for Migration, 2014) [https://publications.iom.int/system/files/pdf/meclep\\_glossary\\_en.pdf?language=en](https://publications.iom.int/system/files/pdf/meclep_glossary_en.pdf?language=en) accessed 20 June 2020

Müller B, *Equity in Climate Change: The Great Divide* (Oxford Institute for Energy Studies with the support of the Shell Foundation, 2002)

*The Peninsula Principles: On Climate Displacement Within States* (Displacement Solutions, 18 August 2013)

*Polluter Pays Principle* (Organisation for Economic Cooperation and Development Publishing, 2008) <https://www.oecd-ilibrary.org/docserver/9789264044845-en.pdf?expires=1595345883&id=id&accname=guest&checksum=73DF1B54C60CF39DA143F62A530A2A3D> accessed 21 July 2020

Pompeo M R, Secretary of State, 'On the U.S. Withdrawal from the Paris Agreement' *U.S. Department of State* (Press Statement, 4 November 2019) <https://www.state.gov/on-the-u-s-withdrawal-from-the-paris-agreement/> accessed 14 June 2020

Richards J and Bradshaw S, 'Uprooted By Climate Change: Responding to the Growing Risk of Displacement' (Briefing paper, Oxfam International, 2017) [https://www-cdn.oxfam.org/s3fs-public/file\\_attachments/bp-uprooted-climate-change-displacement-021117-en.pdf](https://www-cdn.oxfam.org/s3fs-public/file_attachments/bp-uprooted-climate-change-displacement-021117-en.pdf) 6 June 2020

Wilkinson E, Kirbyshire A, Mayhew L, Batra P and Milan A, 'Climate-induced Migration and Displacement: Closing the Policy Gap' (Overseas Development Institute, briefing, October 2016)

World Meteorological Organisation and United Nations Environmental Programme, *Climate Change: The 1990 and 1992 IPCC Assessments* (Intergovernmental Panel on Climate Change, 1992) 2.4.1

## EU legislation

Consolidated versions of the Treaty on the Functioning of the Europeans Union (TFEU) [2012] OJ L 129/35

## International legislation

Convention relating to the Status of Refugees (Adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention)

## Reports

‘Cyclone Sidr in Bangladesh: Damage, Loss, and Needs Assessment for Disaster Recovery and Reconstruction’ (Government of Bangladesh, Report, 2008)

[https://reliefweb.int/sites/reliefweb.int/files/resources/F2FDFF067EF49C8DC12574DC00455142-Full\\_Report.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/F2FDFF067EF49C8DC12574DC00455142-Full_Report.pdf) accessed 15 June 2020

Paul Griffin, ‘The Carbon Majors Database: CDP Carbon Majors Report 2017’ (Carbon Disclosure Project, July 2017)

‘Human Development Report 2011: Sustainability and Equity: A Better Future for All’ (United Nations Development Programme, 2011)

[http://hdr.undp.org/sites/default/files/reports/271/hdr\\_2011\\_en\\_complete.pdf](http://hdr.undp.org/sites/default/files/reports/271/hdr_2011_en_complete.pdf) accessed 29 June 2020

Internal Displacement Monitoring Centre, ‘Grid 2018: Global Report on Internal Displacement’ (IDMC, Norwegian Refugee Council, 2018) <https://www.internal-displacement.org/global-report/grid2017/pdfs/2017-GRID-part-1.pdf> accessed 9 June 2020

Internal Displacement Monitoring Centre, ‘Grid 2021: Global Report on Internal Displacement’ (IDMC, Norwegian Refugee Council, 2021) [https://www.internal-displacement.org/sites/default/files/publications/documents/grid2021\\_idmc.pdf](https://www.internal-displacement.org/sites/default/files/publications/documents/grid2021_idmc.pdf) accessed 27 August 2021

‘Maldives Urban Development and Resilience Project (P163957) (The World Bank, Implementation Status & Results Report, 20 April 2020)

<http://documents1.worldbank.org/curated/en/964061587382929293/pdf/Disclosable-Version-of-the-ISR-Maldives-Urban-Development-and-Resilience-Project-P163957-Sequence-No-01.pdf> accessed 13 July 2020

‘The Nansen Initiative Global Consultation Conference Report’ (The Nansen Initiative, 2015)

<https://www.nanseninitiative.org/wp->

[content/uploads/2015/02/GLOBAL-CONSULTATION-REPORT.pdf](#) accessed 10 July 2020

*Report of the Conference of the Parties on its twenty-first session, held in Paris from 30 November to 13 December 2015*, opened for signature 12 December 2015 (entered into force 29 January 2016)

UNFCCC ‘Report of the Conference of the Parties on its sixteenth session, held in Cancun from 29 November to 10 December 2010’, FCCC/CP/2010/7/Add.1

UNFCCC ‘Report of the Conference of the Parties on its twenty-first session, held in Paris from 30 November to 13 December 2015’, opened for signature 12 December 2015 (entered into force 29 January 2016)

USA: “You don’t have any rights here”, *Amnesty International* (Report, October 2018)

<https://www.amnesty.org/en/latest/research/2018/10/usa-treatment-of-asylum-seekers-southern-border/> accessed 15 June 2020

Prof Zetter R, ‘Protecting Environmentally Displaced People: Developing the Capacity of Legal and Normative Frameworks’ (Research Report, University of Oxford and Refugee Studies Centre, February 2011)

## Websites

Dauenhauer N J, ‘On front line of climate change as Maldives fights rising seas’ *New Scientist* (Web Page, 20 March 2017) <https://www.newscientist.com/article/2125198-on-front-line-of-climate-change-as-maldives-fights-rising-seas/> accessed 13 July 2020

‘Global Historical Greenhouse Gas Emissions’ *Climate Watch* (Web Page) <https://www.climatewatchdata.org/ghg-emissions> accessed 13 July 2020

‘Introduction to Climate Finance’ *UNFCCC News* (Web Page) <https://unfccc.int/topics/climate-finance/the-big-picture/introduction-to-climate-finance> accessed 6 June 2020

Ionesco D, 'Let's Talk about Climate Migrants, Not Climate Refugees' *United Nations Sustainable Development Goals* (Web Page, 6 June 2019)  
<https://www.un.org/sustainabledevelopment/blog/2019/06/lets-talk-about-climate-migrants-not-climate-refugees/> accessed 26 June 2020

McAdam J, 'Managing Displacement in the Era of Climate Change' *Georgetown Journal of International Affairs* (Article, 7 November 2019)  
<https://www.georgetownjournalofinternationalaffairs.org/online-edition/2019/11/6/managing-displacement-in-the-era-of-climate-change> accessed 9 June 2020

'UNHCR viewpoint: "Refugee" or "Migrant" – Which is Right?' *UNCHR UK* (Web Page, 11 July 2016)  
<https://www.unhcr.org/news/latest/2016/7/55df0e556/unhcr-viewpoint-refugee-migrant-right.html> accessed 26 June 2020

'What is the Polluter Pays Principle?' *LSE and Grantham Research Institute on Climate Change and the Environment* (Web Page, 11 May 2018)  
<https://www.lse.ac.uk/granthaminstitute/explainers/what-is-the-polluter-pays-principle/> accessed 9 June 2020



# **Trade Secrets**

**Property rights or relational obligations?**

Charlotte Chan \*

\* LLB student at the University of Warwick.  
Contact at: [Charlotte.I.Chan@warwick.ac.uk](mailto:Charlotte.I.Chan@warwick.ac.uk)

## Introduction

If ‘any claim is either *in rem* or *in personam* and there is an unbridgeable division between them’,<sup>1</sup> then trade secret claims are the anomaly. On the one hand, the information holder can insist upon being owed an obligation of good faith – that they confided the information in the other party and their trust is abused. On the other, they can assert a property right over the secret – that the misappropriation devalues the secret they own and deprives them of that right. Put briefly, it is a debate between ‘you should not use/disclose the secret because you owe me an obligation not to’ and ‘you should not use/disclose the secret because I own it’.

Choosing either argument matters; hence this essay will explore the rationale and objectives behind both the relational and property theories. Considering how the nature of trade secrets corresponds to these objectives, it is contended that the property-right approach offers a more accurate and complete justification, both theoretically and practically. More specifically, since trade secrets also serve to incentivise innovation like patents do, affording them protection under the umbrella of intellectual property (IP) rights grants the information holder more robust safeguards over the information, while better balancing the interests at stake in a trade secret litigation.

---

<sup>1</sup> Barry Nicholas, *An Introduction to Roman Law* (rev edn, OUP 2008), 100

## I.Relational Approach

Under the relational approach, the trade secret claim is grounded upon a (confidential) relationship between the claimant and the defendant. Often referred to as a breach of confidence,<sup>2</sup> this tort/contract-based approach reasons that the information holder has a right *in personam* against the other party arising out of such relationship; and they ought to be compensated in the event of an unlawful disclosure/use because the defendant has abused their confidential position. The ‘trademark’ of the relational approach can be attributed to Justice Holmes’ judgment in *E.I. Du Pont de Nemours Powder Co v Masland*:

*Whether the plaintiffs have any valuable secret or not, the defendant knows the facts [...] through a special confidence that he accepted. The property may be denied, but the confidence cannot be. Therefore the starting point [...] is not property or due process of law, but that the defendant stood in confidential relation with the plaintiffs.*<sup>34</sup>

---

<sup>2</sup> Following the rise of positive legal realism in the 20<sup>th</sup> century, the relational approach contract principles ascended as the dominant jurisprudence for trade secrets, such that trade secrets misappropriation were also claimed as breach of contract, unfair competition, torts related to trespass or unauthorised access to the claimant's property. Mark A Lemley, ‘The Surprising Virtues of Treating Trade Secrets as IP Rights’ (2008) 61 Stan L Rev 311, 316. Smriti Tripathi, ‘Treating trade secrets as property: a jurisprudential inquiry in search of coherency’ (2016) 11 JIPLP 841, 842

<sup>3</sup> *E.I. Du Pont de Nemours Powder Co v Masland* 244 US 100, 102 (1917) (hereinafter *Masland*)

<sup>4</sup> Lemley (n 2) 320; Kim Lane Scheppele, *Legal Secrets: Equality and Efficiency in the Common Law* (The University of Chicago Press 1988) 240; Lynn C Tyler, ‘Trade Secrets in Indiana: Property vs. Relationship’ (1998) 31 Ind L Rev 339, 340

In other words, it is the confidential or fiduciary relationship that should be protected, rather than the information *per se*.<sup>5</sup> The emphasis is not on the issue that a piece of information that should have been kept outside of the public domain is now disclosed/misused, but on the ‘asserted disloyalty’ and the alleged breach of a ‘one-way duty of fidelity’ to the information holder.<sup>6</sup> The essence of the wrong, therefore, is the obtainment of an ‘unfair competitive advantage *through inequitable conduct*’.<sup>7</sup>

## II. Legal Framework under TRIPS<sup>8</sup>

Despite the relatively modest provisions, Article 39(1) of the TRIPS Agreement also aims to protect trade secret holders from unfair competition. For information to qualify as a trade secret and to warrant protection ‘against disclosure, acquisition or use by others without consent and in a manner contrary to honest commercial practices’ in the IP pantheon, it must satisfy the three elements delineated under Article 39(2):

---

<sup>5</sup> Tripathi (n 2), Scheppele (n 4) 240; Tyler (n 4) 340, citing *Masland* (n 3) (‘Du Pont was entitled to protection against disclosure of its information by Masland, without regard to whether the information was in fact a trade secret, because Masland had acquired the information in a confidential (employment) relationship’)

<sup>6</sup> Lemley (n 2) 316; Charles Tait Graves, ‘Trade Secrets as Property: Theory and Consequences’ (2007) 15 J Intell Prop L 39, 41-42

<sup>7</sup> Scheppele (n 4) 242, citing *Atlantic Wool Combing Co v Norfolk Mills Inc* 357 F 2d 866, 869 (1st Cir 1966)

<sup>8</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization (signed 15 April 1994) 1869 UNTS 299

- a) *The information is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;*
- b) *It has commercial value because it is secret; and*
- c) *It has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.*<sup>910</sup>

Although the Article's objective to protect against unfair competition may give the impression of adopting a relational approach, especially considering that it has defined '[manners] contrary to honest commercial practices' to include 'practices such as breach of contract, breach of confidence and inducement to breach';<sup>11</sup> in actuality, the 3-prong definition depicts a property theory.

---

<sup>9</sup> Article 39(2), TRIPS Agreement (n 8)

<sup>10</sup> This definition of trade secrets under TRIPS has been transplanted into Article 2(1) of the EU Trade Secret Directive, which prompted the UK to enact the Trade Secrets (Enforcement, etc.) Regulations 2018. Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure ('EU Trade Secret Directive') [2016] OJ L 157/1

<sup>11</sup> Footnote 10, TRIPS Agreement (n 8). It also includes 'the acquisition of undisclosed information by third parties who knew, or were grossly negligent in failing to know, that such practices were involved in the acquisition'.

### III. Property Approach and the Centrality of Secrecy

Property rights, or rights *in rem*, are about the relationship between people and things<sup>12</sup> and ‘the way rights to use things may be parcelled out amongst a host of competing resource users’<sup>13</sup> – it is the idea of ‘me and the object against the world’. In that case, if the ultimate form of property rights is exclusive ownership, treating trade secrets as property and granting legal protection thereof means granting the information holder the right to restrict and exclude others from accessing the information. As such, insofar as it is possible to keep the information hidden, it is possible for the rightholder to *own* a piece of information.<sup>14</sup>

Therefore, at the heart of the property-right approach is that the information is *secret*;<sup>15</sup> hence the first element of the TRIPS standard.<sup>16</sup> Contrary to the relational approach, ‘the starting point [...] is not whether there was a confidential relationship, but whether, in fact, there was a trade secret to

---

<sup>12</sup> Nicholas (n 1); Tripathi (n 2) 843

<sup>13</sup> Bruce Ackerman, *Private Property and the Constitution* (Yale University Press 1978) 26

<sup>14</sup> James W Hill, ‘Trade Secrets, Unjust Enrichment, and the Classification of Obligations’ (1999) 4(1) VA J L & Tech 1 at [23], citing *Ruckelshaus v Monsanto Co* 467 US 986, 1002 (1984) (‘as trade secrets are intangible [...] the existence of a property right depends on the extent to which the owner protects the trade secret from disclosure’); Graves (n 6) 57 (‘if a court believes that a trade secret is a property interest, that interest stands or falls on its secrecy and disappears if shown to be non-secret’)

<sup>15</sup> Lemley (n 2) 342 ([‘the requirement of secrecy’] is a central part of what makes trade secret law work’); Hill (n 14), at [23], citing *Kewanee Oil Co v Bicron Corp* 416 US 470 (1974) (hereinafter *Kewanee*)

<sup>16</sup> Article 39(2)(a), TRIPS Agreement (n 9)

be misappropriated'.<sup>17</sup> While the property approach would agree with its counterpart to the extent that the type of information involved is not pivotal,<sup>18</sup> the *secrecy* is a prerequisite because it is what provides commercial and economic value to the information and the possessor's business;<sup>19</sup> as manifested in the second limb of Article 39(2). By keeping the information outside of the public domain, the secret holder gains a competitive edge – a commercial value – over their competitors who typically deal with that kind of information.<sup>20</sup> Without secrecy, not only might the owner suffer financial setbacks, but the information is also reduced to a mere piece of commonplace knowledge that the discoverer cannot commercially exploit. Accordingly, it is the monetary reward derived from the secrecy that justifies legal protection of secret information as property.<sup>21</sup>

---

<sup>17</sup> Accordingly, and as will be further discussed, if the alleged secret is already in the public domain, the defendant could not be liable under a trade secret claim even if the information was obtained through a breach of confidential relationship. See Tyler (n 4) 341, citing *Vans Prods Co v General Welding & Fabricating Co* 213 A 2d 769, 780 (Pa 1965)

<sup>18</sup> This is evident in the extremely wide range of information protected. Tripathi (n 2) 842; Kurt M Saunders, 'The Law and Ethics of Trade Secrets: A Case Study' (2006) 42 Cal W L Rev 209, 217-18

<sup>19</sup> Nuno Sousa e Silva, 'What exactly is a trade secret under the proposed directive?' (2014) 9(11) JIPLP 923, 929

<sup>20</sup> Indeed, many businesses rely predominantly on secrecy to survive. Saunders (n 18); 'Protecting confidential information and trade secrets' (Pinsent Masons Out-Law Guide, 2 April 2020) <[www.pinsentmasons.com/out-law/guides/confidential-information](http://www.pinsentmasons.com/out-law/guides/confidential-information)> accessed 14 April 2021 ('confidential information and trade secrets can be amongst the most valuable assets a business owns. A competitive edge in the marketplace may rely on a business having certain information which its competitors do not')

<sup>21</sup> Tripathi (n 2) 843 ('the protection of the information must result in improving the position of the owner of the information in contrast to the absence of protection'); Saunders (n 18) 219 ('the

In fact, when trade secrets were first recognised by Anglo-American courts in the 19<sup>th</sup> century, they were justified as property via classical property theories. Take, for example, the Lockean proviso: a person's labour is the foundation for property – they are a rightful owner of things taken from the common if they have joined their labour to those things.<sup>22</sup> Correspondingly, in the trade secrets context, before the information holder has, say, compiled the supplier list or created a chemical formula, the information exists in nature as raw facts; only after investing valuable time and resources in developing the information<sup>23</sup> – sourcing the suppliers or researching and developing the formula – that the information becomes the developer's property.<sup>24,25</sup> To further maintain the commercial viability of the information, they will continue propertising the information by taking subsequent protective and preventive

---

value might be measured by what the information yielded, such as increased market share, profits, or enhanced, production efficiency, or by the amount invested in developing the information'); Steven N S Cheung, 'Property Rights in Trade Secrets' (1982) 20 *Economic Inquiry* 40, 51 ('from the standpoint of economics, a trade secret can be said to constitute property inasmuch as it generates income to its owner and is competed for by other individuals in society')

<sup>22</sup> John Locke, *The Two Treatises of Government* (first published 1689, McMaster University Archive of the History of Economic Thought 1999) 116; Tripathi (n 2) 844; Hill (n 14) at [18]-[19]

<sup>23</sup> Scheppele (n 4) 39, citing Richard A Posner, *The Economics of Justice* (Harvard University Press 1981) ('corporations primarily want to conceal information that is the product of substantial investment'); Saunders (n 18) 212

<sup>24</sup> Hill (n 14) at [20], citing *Peabody v Norfolk* 98 Mass 452, 457 (1868) ('[i]f a man establishes a business and makes it valuable by his skill and attention, the good will of that business is recognised by the law as property')

<sup>25</sup> However, note that for the purposes of UK criminal law, information (in the form of an exam paper) is not property (*Oxford v Moss* (1978) 68 Cr App Rep 183).



measures<sup>26</sup> – more labour – to keep the information secret, thence Article 39(2)(c).

Not only does the actual and physical alienability of the information strikes a chord of proprietary interest,<sup>27</sup> the things people ordinarily do with trade secret resembles what people do with property.<sup>28</sup> Trade secret owners are often regarded as having the exclusive right to use the information however they want;<sup>29</sup> they can even publicly disclose it if they eventually decide to do so, whereas anyone else doing the same (without authorisation) would be condemned and would potentially attract liability.<sup>30</sup> This is reflected by the talk of dishonest acquisition/use/disclosure of trade secrets being *misappropriation*, hinting that trade secrets are *things* that can be taken away. Indeed, the competition is unfair because the ‘thief’ has not mixed in any ethical efforts in crafting the information; and to exploit it as if they were the

---

<sup>26</sup> Tripathi (n 2) 843, reasonable measures taken to maintain secrecy can be evidence of the information’s commercial viability.

<sup>27</sup> Graves (n 6) 76; Frederick Henry Lawson and Bernard Rudden, *The Law of Property* (3rd edn, OUP 2002) 14 ([‘a legal property right’] is used to describe those interests which, broadly speaking (a) can be alienated’)

<sup>28</sup> *Ruckelshaus* (n 14) 1002 ([‘t]rade secrets have many of the characteristics of more tangible forms of property. A trade secret is assignable [...] can form the *res* of a trust [...] and it passes to a trustee in bankruptcy’); Richard A Epstein, ‘the Constitutional Protection of Trade Secrets under the Takings Clause’ (2004) 71 U Chi L Rev 57

<sup>29</sup> Lemley (n 2) 325 (‘the “property”, then, is not merely a right to exclude others from something in the sole possession of the plaintiff, but a right to restrict the access, use, and disclosure of information’); Hill (n 14) at [24], citing *Envirotech Corp v Callahan* 872 P 2d 487, 494 (Utah 1994) (‘a trade secret is a property right, “with power in the owner thereof to make use of it to the exclusion of the world or to deal with it as he pleases”’)

<sup>30</sup> Tripathi (n 2) 844; Saunders (n 18) 243

creator amounts to stealing the other's property.<sup>31</sup> Although after misappropriation, the owner will still own the information in the sense that it will not be suddenly erased from their memory, they are nevertheless deprived of the economic values and competitive advantages attached to the secrecy.

Therefore, under the property-right view, it is not the manner in which the secret was acquired that is the most reprehensible. Regardless of whether the thief was finessing their confidential relationship with an employer or hacking a company's CCTV camera, or using some 'school boy's trick' that is legal but somehow improper,<sup>32</sup> the wrong of trade secret misappropriation is that the defendant has acquired something of substantial value to the holder, tipping the competitive playing field to their favour as a result.

## IV. Trade Secrets as Intellectual Property Rights

Given the free-flowing and intangible nature of information, opponents would question the sustainability of the property-right approach because it may turn out that multiple parties have each developed and propertised the same information,

---

<sup>31</sup> This would also explain why certain methods of appropriating the information, such as independent discovery, reverse engineering, or even 'learning a competitor's prices by walking through their store during business hours, or attempting to predict a competitor's business strategy' are excused because they are honest efforts contributed to the competition. Lemley (n 2) 322; Article 3 EU Trade Secret Directive (n 10)

<sup>32</sup> In *E.I. Du Pont de Nemours & Co v Christopher* 431 F 2d 1012 (5th Cir 1970), the defendant was hired by a third party to take aerial photographs of the claimant's chemical engineering plant. Whilst there were no laws preventing aerial photography, their conduct was held to be impermissible. Lemley (n 2) 318

making it impossible to identify the owner and offer them the appropriate protection.<sup>33</sup> In light of this, it would be useful to examine the nuance of trade secrets as a type of *intellectual* property.<sup>34</sup>

The requirement that the information must not be readily discoverable by the public indicates that the secret will inevitably ‘exhibit a degree of novelty’.<sup>35</sup> If the information is easily discoverable, it should not even be deemed a trade secret from the outset. Likewise, once someone else is also capable of developing the information, this acts as a signal to the owner that it is time to ‘up their game’ in the competitive market. The information’s uniqueness and profitability are weakened, so it no longer merits the same protection as it did when the owner was able to exclude the information from its competitors and the public domain.

To this end, trade secrets do not only bear the exclusivity hallmark of intellectual property protection, they also carry an incentive to innovate which, coincidentally, is the same rationale for protecting other intellectual property.<sup>36</sup> Some may argue that they are too different from intellectual property like patents and copyright – trade secret protection lacks a term of protection and a registration process<sup>37</sup> – but such differences are what make trade secrets a

---

<sup>33</sup> Tripathi (n 2) 845; Cheung (n 21)

<sup>34</sup> Lemley (n 2)

<sup>35</sup> Hill (n 14) at [24], citing *Hudson Hotels Corporation v Choice Hotels International* 995 F 2d 1173, 1178 (2d Cir 1993) (‘an idea ... must demonstrate novelty and originality to be protectible as a property right under “any cause of action for its unauthorized use”’); Cheung (n 21) 43

<sup>36</sup> Lemley (n 2) 326, 329; Saunders (n 18) 217

<sup>37</sup> Some may also attempt to apply the idea/expression dichotomy in IP law – copyright, patents and trademark are about protecting the ‘expression of ideas’ via public accessibility and disclosure (hence a registration process); however, trade secrecy protects the intangible ‘ideas’ itself.

convenient alternative. In fact, the virtues of treating trade secrets as an alternative IP are acknowledged in *Kewanee Oil Co v Bicron Corp*. Namely, trade secret law can '[reach into] corners patent law cannot'<sup>38</sup> as immediate and automatic protection allows protection over non-patentable subject matter or potentially patentable products under development.<sup>39</sup>

Given the appeal of the monopolistic power attached to property rights, the only way to buttress these incentives and to assure inventors that they will have the first-mover advantage is to treat trade secrets as (intellectual) property. Indeed, 'unless one gives to people property rights in the work that they have done, there will be insufficient incentives for investment in the production of that thing',<sup>40</sup> and '[w]hen secrets are necessary to ensure the production of information [...] the law should, if it values efficiency, grant property rights'.<sup>41</sup>

## V. Weaknesses of the Relational Approach

### Third-Party Cases

Furthermore, there are circumstances where no pre-existing relational obligations are involved. For example, where a secret holder (A) is trying to sell their ideas at the

---

<sup>38</sup> Lemley (n 2) 313, 331; Sousa e Silva (n 19)

<sup>39</sup> *Kewanee* (n 15) 485 ('competition is fostered and the public is not deprived of the use of valuable, if not quite patentable, information')

<sup>40</sup> Scheppele (n 4) 39, citing Posner (n 23); Graves (n 6) 80 ('allowing a property right in the product of inventive work encourages such invention by deterring free riding others')

<sup>41</sup> Scheppele (n 4) 41

negotiations stage, the potential investor or purchaser (B) would want to know about the secret in order to make an informed decision to deal. However, once the knowledge is disclosed, B no longer needs to pay A as the property has effectively been transferred. As a result, A will be reluctant to disclose the secret, and the transaction cannot be concluded unless they are 'secure in the knowledge that the other side is not free to take the idea without compensating'.<sup>42</sup> This is dubbed the Arrow's Information Paradox.<sup>43</sup>

In this paradox, the relational theory is arguably sufficient to form the basis of a claim if it is B who breaches the confidential relationship.<sup>44</sup> However, it would be much more challenging for A to protect the trade secret if B subsequently tells the secret to a third party (C) and C uses/discloses it dishonestly. Similarly, if A discloses the secret to a select few senior employees, and one of them sells it to C, A will not know whom to sue other than C. If all A has is a relational right against B, there will be virtually no direct route to claim against C – partly due to the lack of contractual privity,<sup>45</sup> and partly because their right *in*

---

<sup>42</sup> Lemley (n 2) 336

<sup>43</sup> Mario Piazza and Marco Pedicini, 'What Arrow's Information Paradox Says (to Philosophers)' in Don Berkich, Matteo Vincenzo d'Alfonso (eds) *On the Cognitive, Ethical and Scientific Dimensions of Artificial Intelligence: Themes from IACAP 2016* (Springer 2019) 84

<sup>44</sup> Even then the duty breached will most likely be one implied out of equity; however, the precise scope and basis for a breach of confidence action is very ambiguous. For example, in *A-G v Guardian Newspapers (No 2)* (the *Spycatcher* case) [1990] 1 AC 109 and *Douglas v Hello! Ltd (No 3)* [2007] UKHL 21, an obligation may exist independently of any contract on the basis of an independent equitable principle of confidence. This essay would argue that it is rather absurd to assert breach of confidence without a pre-existing relationship of confidentiality.

<sup>45</sup> Lemley (n 2)

*personam* is incapable of binding other parties who interfere with their secret.<sup>46</sup> Even if A risks asserting that C owes them an equitable duty of confidence, the loosened connection will make it harder to establish such a relationship of trust and confidence,<sup>47</sup> not to mention the intrinsically uncertain outcomes of equitable principles. This is even worse if the bad actor is a total stranger where no strings are attached, such as hackers or corporate spies.<sup>48</sup>

Therefore, without a property-right-based trade secret law providing the certainty that their secrets will be automatically protected from *the world at large*, businesses and developers will either be prone to overinvestment in maintaining physical secrecy or disincentivized to disclose their ideas to potential investors.<sup>49</sup>

### Risk of Protecting Non-confidential Information

It appears that not only does the property-right approach offers a more accurate reflection of how people treat trade secrets, it also provides more robust and comprehensive

---

<sup>46</sup> *Hill v Tupper* (1863) 2 H & C 122, a classic case demonstrating the distinction a personal right and a legal right. Because the contractual promise only gave rise to a personal right, the claimant had no claim against the third party. His only option is to assert his right against the contracting party, for example to ask for an injunction forcing promisor to take action against the third party or to pay damages on behalf of the third party.

<sup>47</sup> Scheppele (n 4) 240 ('only the person who is in a relation of trust and confidence with the secret-holder is liable if the secret escapes as a result')

<sup>48</sup> Lemley (n 2) 331-32

<sup>49</sup> Ibid 332-37. Lemley provides an insightful discussion as to how treating trade secrets as an IP helps to promote the dissemination of information. On the one hand, legal protection in trade secret serves as a substitute for investments in physical secrecy that companies might otherwise make. On the other hand, trade secret law serves to mitigate Arrow's Information Paradox.

protection than the relational approach. The latter is not wrong, but it is at best a secondary justification that is ultimately underpinned by a property theory.<sup>50</sup>

The fundamental weakness of the relational approach is that it does not explain *why* the law should protect the specific secret in the first place. For example, the English breach of confidence model requires that the information must: (a) ‘have the necessary quality of confidence about it’;<sup>51</sup> (b) be imparted in circumstances or on an occasion of confidence; and (c) be used in an unauthorized way to the claimant’s detriment.<sup>52</sup> It is clear that protection is attained ‘[o]nce the information crosses the threshold of confidentiality and is transmitted on ... an occasion of confidence’;<sup>53</sup> however, only (a) is related to the information itself, yet it does not provide any insight as to how this ‘quality of confidence’ justifies protecting the business information, nor when the threshold of confidentiality will be surpassed.

This model over-emphasizes the fact that the infringer has misbehaved by abusing the confidential relationship and the trust of the information holder, but ignores the value of the information and the kind of proprietary rights and interests attached. Thus, to deal with

---

<sup>50</sup> Even in *Prince Albert v Strange* (1849) 41 ER 1171, the leading case of breach of confidence, Lord Cottenham LC acknowledged (at 1178) that the action arose as an aspect of the claimant’s proprietary rights in the drawings. Paul Torremans, *Holyoak and Torremans Intellectual Property Law* (9th edn, OUP 2019) 554. Similarly, the US Supreme Court noted in *Ruckelshaus* (n 14) 1004 that in deciding *Masland* (n 3), ‘Justice Holmes did not deny the existence of a property interest; he simply deemed determination of the existence of that interest irrelevant to the resolution of the case’.

<sup>51</sup> *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* [1963] 3 All ER 413

<sup>52</sup> *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41, 47

<sup>53</sup> *Torremans* (n 50) 592

the breach of relational obligation and bad-faith conduct before identifying whether the alleged confidential information is a commercially valuable secret at all is to put the cart before the horse. As Lemley pointed out, a trade secret theory based purely on relational obligations is an empty logic as it ‘presupposes a wrong without offering any substantive definition of what that wrong is’.<sup>54</sup>

On top of that, the point of limiting the scope of information protected to those that are remunerative *and* not readily accessible is to ‘ensure that no one claims intellectual property protection for information commonly known in a trade or industry’.<sup>55</sup> Therefore, placing the relationship at the core of the claim instead of the boundaries of the information defeats the purpose of trade secret protection because it means that the claimant can prevail even if the information is not confidential.<sup>56</sup>

### Employer v Employee Cases

The risk of protecting non-secret information is particularly acute in circumstances involving departing employees, which make up the majority of trade secret litigation.<sup>57</sup> In a typical dispute, as per Graves, employers would attempt to apply the relational view and simply lament over the employee’s unfaithfulness.<sup>58</sup> If the courts do side with this assertion and deal with whether the information is acquired in ‘circumstances of confidence’ first, the employer could

---

<sup>54</sup> Lemley (n 2) 321

<sup>55</sup> Ibid 317, 321, 342; Graves (n 6) 50. Moreover, if the breach of a confidential relationship is the wrong, then trade secret law is nothing more than contract law. However, this is not true as trade secret provides incentives to innovate which is not necessarily an objective of contract law.

<sup>56</sup> Lemley (n 2) 313; Tyler (n 4); Graves (n 6) 47-57;

<sup>57</sup> Ibid (n 2) 318; Saunders (n 18) 212

<sup>58</sup> Graves (n 6) 49



subjectively dictate what information is confidential/secret<sup>59</sup> and ‘get by with a broad and vague list of general categories, rather than an identification of the actual trade secret’.<sup>60</sup> The onus will then be shifted onto the defendant employee to persuade the court how the specific information (and potentially the associated complex technology) does not have a quality of confidence, and that they are facing a catch-all tort accusation and not a trade secret claim.<sup>61</sup> Accordingly, the subjective tint of the relational approach ‘summons to mind a hierarchical power imbalance’<sup>62</sup> and enables employers to pursue quasi-trade secret claims under a tort/contract guise.

By contrast, property rights will have objective ‘metes and bounds’<sup>63</sup> – information developed and kept outside of the public domain is the holder’s property and deserves trade secret protection. In the same vein, information generally ascertainable in the public domain or forms part of the employee’s general ‘aptitude, skill, experience’ is not a trade secret and the claim can be dismissed regardless of what the employment contract says.<sup>64</sup> In cases where the employee defendant contributes a good deal to the creation of the knowledge,<sup>65</sup> their

---

<sup>59</sup> For example, encompassing all written and oral information and materials provided by the employer as confidential information in the non-disclosure agreement.

<sup>60</sup> Graves (n 6) 47

<sup>61</sup> Ibid 46, 60

<sup>62</sup> Ibid 45

<sup>63</sup> Ibid 47

<sup>64</sup> Ibid 47-48; Saunders (n 18) 218

<sup>65</sup> Torremans (n 50) 592 (‘In defining what is confidential, the law is defining the boundaries of truth that is protected from revelation, and, in drawing this line, it is setting out the balance between the right of the individual or firm to keep a secret and the right of the public at large.’)

<sup>66</sup> See the case study in Saunders (n 18) 213-14 for an illustration of the typical claim against a departing employee

knowledge and skills can be measured against those possessed by others working in the industry or those readily ascertainable by competitors through inspection.<sup>67</sup> For this reason, an outcome-determinative, property-based theory of trade secret protection is ‘most necessary to defeat attempts to turn non-secret, non-proprietary information into a basis for liability under a contract-based conception’.<sup>68</sup>

Prioritising the secrecy question will avoid compromising the scope of information employees are allowed to take from job to job and their ability to utilise their enhanced experience and skills learned on the job. Consequently, this is a more balanced approach to mitigate the tension between employees, who have an interest in the autonomy to choose new jobs or leave unpleasant jobs without being restricted from entire fields,<sup>69</sup> and employers, who have a proprietary interest that demands protection against exploitation by competitors. This way, a property conception that protects employee interests also serves a wider policy benefit of promoting employee mobility.<sup>70</sup> Just as treating trade secrets as intellectual property incentivises businesses to disclose and innovate, it will allow greater dissemination of non-secret information learned on the job, which stimulates more competition and ‘the [economic] growth of nimble, creative start-up enterprise’.<sup>71</sup>

---

<sup>67</sup> Saunders (n 18) 218

<sup>68</sup> Graves (n 6) 56, 76, citing Steven Wilf, ‘Trade Secrets, Property, and Social Relations’ (2002) 34 Conn L Rev 787 (‘viewing a trade secret claim as a property right focuses attention on the boundaries of the claim itself, and shifts attention away from a relational theory under which an employee might be liable for using anything valuable learned from the job’)

<sup>69</sup> Graves (n 6) 44

<sup>70</sup> Ibid 60, 83; Saunders (n 18) 244

<sup>71</sup> Graves (n 6) 43

## Conclusion

Long story short, the relational theory and the property theory are not mutually exclusive. However, the tension between them perpetuates a dilemma whereby having the confidential relationship as the starting point means that information will be protected as a trade secret even if it is not a secret; whereas placing the secrecy as the starting point will mean that the information will not be protected even if it was unlawfully acquired/used/disclosed.<sup>72</sup> Whilst the latter is a downside of the property approach, if claimants want to claim over a breach of trust or any misuse/disclosure of non-confidential information, they should ground the claim in another area of law, instead of alleging a trade secret misappropriation.

A deeper analysis into the nature of trade secrets and the way businesses treat them as being excludable, albeit not permanently, shows that trade secret law should be underpinned by a property conception. Indeed, those who argue that trade secret as a property right provides ‘patent-style protection to non-patentable subject matter’<sup>73</sup> may not realise the efforts invested in developing the secret and the commercial advantages it can add to the owner’s trade. Further, a property right in trade secrets allows the owner to ‘prepare’ for different scenarios more than a personal right does, as demonstrated in the examples involving third parties and departing employees. As such, the property approach offers more solid protection to both claimants and defendants and better balances their competing interests. Therefore, given the values of trade secrecy and incentives attached to trade secret protection, and the resemblance it

---

<sup>72</sup> Tyler (n 4)

<sup>73</sup> Torremans (n 50), citing *Morison v Moat* (1851) 9 Hare 241

shares with other IP protection, the elusive and ambiguous nature of information should not preclude it from being protected as an intellectual property right.

## Bibliography

### Table of Cases

#### United Kingdom

A-G v Guardian Newspapers (No 2) [1990] 1 AC 109  
Coco v A N Clark (Engineers) Ltd [1969] RPC 41  
Douglas v Hello! Ltd (No 3) [2007] UKHL 21  
Hill v Tupper (1863) 2 H & C 122  
Morison v Moat (1851) 9 Hare 241  
Prince Albert v Strange (1849) 41 ER 1171  
Saltman Engineering Co Ltd v Campbell Engineering Co Ltd  
[1963] 3 All ER 413

#### United States

Atlantic Wool Combing Co v Norfolk Mills Inc 357 F 2d 866 (1st  
Cir 1966)  
E.I. Du Pont de Nemours & Co v Christopher 431 F 2d 1012 (5th  
Cir 1970)  
E.I. Du Pont de Nemours Powder Co v Masland 244 US 100  
(1917)  
Envirotech Corp v Callahan 872 P 2d 487 (Utah 1994)  
Hudson Hotels Corporation v Choice Hotels International 995 F  
2d 1173 (2d Cir 1993)  
Kewanee Oil Co v Bicon Corp 416 US 470 (1974)  
Peabody v Norfolk 98 Mass 452 (1868)  
Ruckelshaus v Monsanto Co 467 US 986 (1984)  
Vans Prods Co v General Welding & Fabricating Co 213 A 2d 769  
(Pa 1965)

### Table of Legislation and International Agreement

Agreement on Trade-Related Aspects of Intellectual Property  
Rights, Annex 1C of the Marrakesh Agreement Establishing  
the World Trade Organization (signed 15 April 1994) 1869  
UNTS 299  
Directive (EU) 2016/943 of the European Parliament and of the  
Council of 8 June 2016 on the protection of undisclosed

know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure [2016] OJ L 157/1

Trade Secrets (Enforcement, etc.) Regulations 2018

### **Bibliography**

‘Protecting confidential information and trade secrets’ (*Pinsent Masons Out-Law Guide*, 2 April 2020) <[www.pinsentmasons.com/out-law/guides/confidential-information](http://www.pinsentmasons.com/out-law/guides/confidential-information)> accessed 14 April 2021

Ackerman B, *Private Property and the Constitution* (Yale University Press 1978)

Cheung S N S, ‘Property Rights in Trade Secrets’ (1982) 20 *Economic Inquiry* 40

Epstein R A, ‘the Constitutional Protection of Trade Secrets under the Takings Clause’ (2004) 71 *U Chi L Rev* 57

Fox B, ‘Tripping Over the EU Trade Secret Directive: “Reasonable Steps” to Get Back on Track’ (2020) 19(1) *Chi-Kent J Intell Prop* 67

Graves C T, ‘Trade Secrets as Property: Theory and Consequences’ (2007) 15 *J Intell Prop L* 39

Hill J W, ‘Trade Secrets, Unjust Enrichment, and the Classification of Obligations’ (1999) 4(1) *VA J L & Tech* 1

Lawson F H and Rudden B, *The Law of Property* (3rd edn, OUP 2002)

Lemley M A, ‘The Surprising Virtues of Treating Trade Secrets as IP Rights’ (2008) 61 *Stan L Rev* 311

Locke J, *The Two Treaties of Government* (first published 1689, McMaster University Archive of the History of Economic Thought 1999)

McFarlane B, Hopkins N and Nield S, *Land Law: Text, Cases and Materials* (4th edn, OUP 2018)

Nicholas B, *An Introduction to Roman Law* (rev edn, OUP 2008)

Piazza M and Marco Pedicini M, ‘What Arrow’s Information Paradox Says (to Philosophers)’ in Don Berkich, Matteo Vincenzo d’Alfonso (eds) *On the Cognitive, Ethical and Scientific Dimensions of Artificial Intelligence: Themes from IACAP 2016* (Springer 2019)

Posner R A, *The Economics of Justice* (Harvard University Press 1981)

Saunders K M, ‘The Law and Ethics of Trade Secrets: A Case Study’ (2006) 42 *Cal W L Rev* 209

- Scheppele K L, *Legal Secrets: Equality and Efficiency in the Common Law* (The University of Chicago Press 1988)
- Sousa e Silva N, 'What exactly is a trade secret under the proposed directive?' (2014) 9(11) JIPLP 923
- Torremans P, *Holyoak and Torremans Intellectual Property Law* (9<sup>th</sup> edn, OUP 2019)
- Tripathi S, 'Treating trade secrets as property: a jurisprudential inquiry in search of coherency' (2016) 11 JIPLP 841
- Tyler L C, 'Trade Secrets in Indiana: Property vs. Relationship' (1998) 31 Ind L Rev 339
- Wilf S, 'Trade Secrets, Property, and Social Relations' (2002) 34 Conn L Rev 787
- Wilkof N, 'Trade secrets: a perfect storm of unavoidable neglect?' (2012) 7(12) JIPLP 837

# **The impact of the UK's post-Brexit divergence from the Digital Single Market Directive**

Daniel Leung\*

\* Contact at: [Daniel.Leung@warwick.ac.uk](mailto:Daniel.Leung@warwick.ac.uk)



## Introduction

The Digital Single Market Directive<sup>1</sup> (the “DSM Directive”) is a directive which introduces substantial reforms to copyright law in the EU. The Directive, inter alia, introduces new exceptions to copyright law,<sup>2</sup> creates a new “press publishers right”,<sup>3</sup> repeals safe harbour protection for online content-sharing service providers (“OCSSPs”),<sup>4</sup> and introduces new remuneration rights for authors and performers.<sup>5</sup>

Despite mass protest, the DSM Directive was controversially passed into law.<sup>6</sup> Since its passage, the various provisions of

---

<sup>1</sup> Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L130/92 (DSM Directive).

<sup>2</sup> DSM Directive, art 3-7.

<sup>3</sup> DSM Directive, art 15; Pamela Samuelson, ‘Legally Speaking Europe’s Controversial Digital Copyright Directive Finalized ’ (2019) 62(11) Communications of the ACM 24, 26.

<sup>4</sup> DSM Directive, art 17.

<sup>5</sup> DSM Directive, art 18-23; Ted Shapiro, ‘Remuneration provisions in the DSM Copyright Directive and the audiovisual industry in the EU: the elusive quest for fairness ’(2020) 42(12) European Intellectual Property Review 778, 778-9.

<sup>6</sup> Till Kreutzer, ‘The EU Copyright Directive and its potential impact on cultural diversity on the internet ’(2020) 42(11) European Intellectual Property Law Review 715, 715; Michelle Kaminsky, ‘EU’s Copyright Directive Passes Despite Widespread Protests - - But It’s Not Law Yet ’*Forbes* (26 March 2019)

the Directive have been continually criticised in academia, with Article 17 (the repeal of safe harbour) drawing particular ire.<sup>7</sup> In light of this, the UK government has announced that it will not implement the DSM Directive and thereby diverge from it.<sup>8</sup>

As Shapiro and Hansson argued, one of the reasons for the divisiveness of the Directive was the fact that rightholders were being “pitted [...] against each other” in a zero-sum game.<sup>9</sup> Different stakeholders were left to fight for the “tidbits” of new rights and protections, producing “winners” and “losers” of the Directive.<sup>10</sup> While I agree with this analysis, in this article, I will argue why divergence from the Directive will actually lead to negligible benefits, if at all, for the purported beneficiaries of divergence (the “winners” of non-implementation): the UK’s OCSSP start-ups, small content creators, and internet users. On the flip side, non-

---

<<https://www.forbes.com/sites/michellekaminsky/2019/03/26/eus-copyright-directive-passes-despite-widespread-protests-but-its-not-law-yet/>> accessed 30 April 2021.

<sup>7</sup> See Julia Reda, ‘Article 17 of the Copyright Directive: a prohibited general monitoring obligation’ (2021) 43(4) *European Intellectual Property Review* 215; Nathan Guzé, ‘Net Neutrality and the European Union’s Copyright Directive for the Digital Single Market’ (2019) 43(1) *Loyola of Los Angeles International and Comparative Law Review* 63; Thomas Spoerri, ‘On Upload-Filters and other Competitive Advantages for Big Tech Companies under Article 17 of the Directive on Copyright in the Digital Single Market’ (2019) 10(2) *Journal of Intellectual Property, Information Technology and Electronic Commerce Law* 173.

<sup>8</sup> Yin Harn Lee, ‘United Kingdom Copyright Decisions and Post-Brexit Copyright Developments 2020’ (2021) 52(3) *International Review of Intellectual Property & Competition Law* 319, 326.

<sup>9</sup> Ted Shapiro and Sunniva Hansson, ‘The DSM Copyright Directive - EU copyright will indeed never be the same’ (2019) 41(7) *European Intellectual Property Review* 404, 404.

<sup>10</sup> *ibid*; See Guzé (n 7) 90-5.

implementation represents a lost opportunity for the “losers”, the UK’s music industry and news publishers, who will lose out on the opportunity to receive greater, and arguably fairer, remuneration.

To do this, first I will give the background by discussing the main contentious provisions of the DSM Directive and engage with the relevant criticisms of them. Next, I will examine the legality of divergence with respect to the EU-UK Trade and Cooperation Agreement.<sup>11</sup> And finally, I will conduct a cost-benefit analysis of divergence for the relevant stakeholders in the UK.

## 2. The DSM Directive

### 2.1. Article 15 — Press publisher’s right

Article 15, referred to as the “link tax”<sup>12</sup> or “press publisher’s right”<sup>13</sup>, gives press publishers the new right to charge information society service providers (“ISSPs”), such as search engines and news aggregators, for the use of their news articles.<sup>14</sup> This right, which lasts for two years, does not apply to “private or non-commercial uses”, “acts of

---

<sup>11</sup> Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part (TCA).

<sup>12</sup> See Maryna Manteghi, ‘The link tax under the EU Copyright Directive: seeking a balance of interests in the digital age’ (2021) 43(3) European Intellectual Property Review 145.

<sup>13</sup> See Samuelson (n 3) 26.

<sup>14</sup> DSM Directive, art 15(1); Samuelson (n 3) 26; Manteghi (n 12) 145.

hyperlinking”, and “use of individual words or very short extracts of a press publication”.<sup>15</sup>

Proponents of Article 15 (and its related right of fair compensation in Article 16) argue it reverses the CJEU’s decision in *Hewlett-Packard*<sup>16</sup> and re-establishes press publishers as rightholders under EU law so that they are entitled, rightly in their opinion, to a fair share of compensation.<sup>17</sup>

Opponents such as Manteghi, on the other hand, argue that the vague wording of the Article (e.g. “private or non-commercial use” is not defined, nor are “individual words or very short extracts”) would lead to a “possible inconsistency in the interpretation of art.15” which would “lead to a fragmentation in the application of this provision and disagreement between publishers and users”.<sup>18</sup> Others have raised concerns about the possible impediment of “the free flow of news and other information vital to a democratic society” as ISSPs would be deterred from sharing news articles to avoid licensing costs, which would exacerbate the issue of “fake news” being spread on the internet as a substitute.<sup>19</sup>

The reality of Article 15’s implementation is more nuanced though. While opponents can point to the failures of implementation of similar press publisher’s rights such as in Spain (where Google stopped its news service entirely) and in Germany (where news publishers lost so much revenue that many chose to publish their articles for free to restore

---

<sup>15</sup> DSM Directive, art 15(1), 15(4); Samuelson (n 3) 26; Manteghi (n 12) 145.

<sup>16</sup> Case C-527/13 *Hewlett-Packard Belgium SPRL v Reprobel* SCRL [2016] Bus LR 73.

<sup>17</sup> Shapiro and Hansson (n 9) 409.

<sup>18</sup> Manteghi (n 12) 146.

<sup>19</sup> Samuelson (n 3) 26; Manteghi (n 12) 146.

traffic on their sites),<sup>20</sup> proponents can equally point to successful examples of implementation such as in France where French news publishers were the first in the EU to reach a licensing agreement with Google.<sup>21</sup>

## 2.2. Article 17 — Repeal of safe harbour

Previously in the EU (and which still is the case under UK law), OCSSPs such as YouTube had “safe harbour” protection under the E-Commerce Directive.<sup>22</sup> Safe harbour protection shielded OCSSPs from secondary liability if their users uploaded copyright infringing material on their platforms as long as they were not aware of the specific infringing activities of their users and complied with “notice-and-takedown” procedures.<sup>23</sup>

Article 17 controversially repeals this safe harbour protection for OCSSPs and replaces it with a new liability regime.<sup>24</sup> Under this regime as outlined in Article 17(4),

---

<sup>20</sup> Manteghi (n 12) 146.

<sup>21</sup> Manteghi (n 12) 146-7; Timothy B Lee, ‘Google agrees to pay French news sites to send them traffic’ *Ars Technica* (21 January 2021) <<https://arstechnica.com/tech-policy/2021/01/google-agrees-to-pay-french-news-sites-to-send-them-traffic/>> accessed 19 February 2021.

<sup>22</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L178/1 (E-Commerce Directive), art 14(1); Samuelson (n 3) 24.

<sup>23</sup> Zsuzsa Detrekoi, ‘EU Copyright Directive: sounding the death knell for domestic video-sharing platforms’ (2020) 25(4) *Communications Law* 231, 232; Samuelson (n 3) 24.

<sup>24</sup> DSM Directive, art 17(3), 17(4); Shapiro and Hansson (n 9) 409, 411-2.

OCSSPs would be held directly liable for infringements by their users, unless they fulfilled three requirements:<sup>25</sup>

1. They sought to license the protected material with their “best efforts”,<sup>26</sup>
2. They used their “best efforts” to “ensure the unavailability” of protected material (sometimes referred to as a “notice-and-staydown” obligation) and,<sup>27</sup>
3. They continued to comply with takedown notices.<sup>28</sup>

This new liability regime has been heavily criticised. Notably, many have pointed out that the “notice-and-staydown” obligation under Article 17(4)(b) amounts to a de facto requirement for content filters.<sup>29</sup> This reliance on content filters is particularly concerning as they are notorious for, *inter alia*, producing a high level of false positives,<sup>30</sup> being unable to distinguish infringement from

---

<sup>25</sup> DSM Directive, art 17(1); Shapiro and Hansson (n 9) 409, 411-2.

<sup>26</sup> DSM Directive, art 17(4)(a); Shapiro and Hansson (n 9) 411-2; Samuelson (n 3) 26-7.

<sup>27</sup> DSM Directive, art 17(4)(b); Shapiro and Hansson (n 9) 412; see also Annemarie Bridy, ‘The Price of Closing the Value Gap: How the Music Industry Hacked EU Copyright Reform ’(2020) 22 *Vanderbilt Journal of Entertainment & Technology Law* 323, 353-5.

<sup>28</sup> DSM Directive, art 17(4)(c); Shapiro and Hansson (n 9) 412.

<sup>29</sup> See Reda (n 7) 215; Guzé (n 7) 85-6; Spoerri (n 7) 177; Bridy (n 27) 351; Samuelson (n 3) 24.

<sup>30</sup> See Toni Lester and Dessilava Pachamanova, ‘The Dilemma of False Positives: Making Content ID Algorithms More Conducive to Fostering Innovative Fair Use in Music Creation ’(2017) 24 *UCLA Entertainment Law Review* 51; Ben Depoorter and Robert Kirt Walker, ‘Copyright False Positives ’(2013) 89 *Notre Dame Law Review* 319, 333.

fair use,<sup>31</sup> and being extremely expensive to develop or license.<sup>32</sup>

The use of content filters is so problematic, Shapiro and Hansson describe Article 17 as having “internal conflicts” where its own provisions actively contradict each other.<sup>33</sup> For example, despite Article 17(8) requiring that the “application of this Article shall not lead to any general monitoring obligation”, the content filter mandate arguably leads to one.<sup>34</sup> Likewise, the guarantee under Article 17(7) that fair use exceptions are protected has been described as “aspirational window dressing” that is difficult to enforce in practice.<sup>35</sup>

Supporters of Article 17 would counter these assertions by arguing that the new liability regime is needed to plug the “value gap”.<sup>36</sup> The argument, as supported by UK musicians and music industry leaders, is that safe harbour provisions are being abused by OCSSPs.<sup>37</sup> As OCSSPs are shielded from liability, there is no incentive for them to seek to license the songs that are posted on their platforms. As a consequence, when they do (e.g. YouTube with Content ID), OCSSPs are able to set “bargain basement terms” on a take it or leave it

---

<sup>31</sup> *ibid* 56-7; Guzé (n 7) 87-8; Spoerri (n 7) 182-3; Bridy (n 27) 346-7; Samuelson (n 3) 25.

<sup>32</sup> Spoerri (n 7) 180-2; Bridy (n 27) 349-51.

<sup>33</sup> Shapiro and Hansson (n 9) 413.

<sup>34</sup> DSM Directive, art 17(8); Reda (n 7) 215-6; Shapiro and Hansson (n 9) 413.

<sup>35</sup> Samuelson (n 3) 25; Bridy (n 27) 356; Shapiro and Hansson (n 9) 412.

<sup>36</sup> Daniel L Lawrence, ‘Addressing the Value Gap in the Age of Digital Music Streaming’ (2019) 52 *Vanderbilt Journal of Transnational Law* 511, 540-1.

<sup>37</sup> *ibid*; Digital, Culture, Media and Sport Committee, Oral evidence: Economics of music streaming (HC 2019-21, 868) (DCMS Committee) Q423, 499.

basis, with the threat of leaving musicians without any remuneration if they decline.<sup>38</sup> This in turn has led to the “value gap” where musicians are not being paid their fair share.<sup>39</sup> While the concept of the “value gap” (along with its commonly accompanied statistic that for every penny paid by Spotify, YouTube pays 0.05p)<sup>40</sup> is heavily contested,<sup>41</sup> it remains a fact that OCSSPs do indeed have an unfair bargaining advantage due to safe harbour protection, which also poses other issues such as music streaming services having to compete in “an unlevel playing field”.<sup>42</sup> Such a comparison cannot be called “apples-to-oranges”<sup>43</sup> because music streaming services and OCSSPs are indeed in competition with one another;<sup>44</sup> whether or not the purposes of the platforms are different is immaterial to this fact.

All in all, while Article 17 does indeed have critical flaws, the UK’s non-implementation of it will leave the “value gap” unresolved. As I will argue later in this article, the cost of lost opportunity outweighs the actual benefits.

---

<sup>38</sup> Lawrence (n 36) 532; DCMS Committee (n 37) Q616-7.

<sup>39</sup> Lawrence (n 36) 542; IFPI, ‘Global Music Report 2017’ (IFPI, 2017)  
<[https://www.musikindustrie.de/fileadmin/bvmi/upload/06\\_Publikationen/GMR/GMR2017\\_press.pdf](https://www.musikindustrie.de/fileadmin/bvmi/upload/06_Publikationen/GMR/GMR2017_press.pdf)> accessed 23 April 2021, 25.

<sup>40</sup> DCMS Committee (n 37) Q421; IFPI, ‘Global Music Report 2017’ (n 39) 25; Lawrence (n 36) 517.

<sup>41</sup> Bridy (n 27) 326-7, 331-2; DCMS Committee (n 37) Q537, 541, 563.

<sup>42</sup> DCMS Committee (n 37) Q616-7; IFPI, ‘Global Music Report 2017’ (n 39) 25.

<sup>43</sup> Bridy (n 27) 327.

<sup>44</sup> Lawrence (n 36) 515-7; DCMS Committee (n 37) Q598.



### 2.3. Articles 18-23 — Remuneration provisions

Articles 18-23 (Chapter 3) of the Directive establishes new remuneration rights for authors and performers.<sup>45</sup> The stated purpose of the remuneration rights is to protect “[a]uthors and performers [who] tend to be in the weaker contractual position when they grant a licence or transfer their rights”.<sup>46</sup>

Article 18 introduces the right for authors to “receive appropriate and proportionate remuneration”.<sup>47</sup> Article 19 introduces a “transparency obligation” where authors have the right to information about the exploitation of their works including merchandise revenue.<sup>48</sup> Article 20 provides for a “contract adjustment mechanism” (also known as the “best seller” clause) where authors have the right to essentially rewrite their contracts if the remuneration they get is “disproportionately low” and can claim “additional, appropriate and fair remuneration” as a result.<sup>49</sup> Article 21 allows for authors to use alternative dispute resolution (ADR) instead of the courts.<sup>50</sup> Article 22 gives authors the “right of revocation” where authors can revoke exclusivity rights if their work is not being exploited.<sup>51</sup> And finally, Article 23 establishes that the transparency obligation, the contract adjustment mechanism, and the right to use ADR are mandatory and not waivable by contract.<sup>52</sup>

---

<sup>45</sup> Shapiro (n 5) 778-9.

<sup>46</sup> DSM Directive, recital 72; Shapiro (n 5) 779.

<sup>47</sup> DSM Directive, art 18(1); Shapiro (n 5) 780.

<sup>48</sup> DSM Directive, art 19; Shapiro (n 5) 781.

<sup>49</sup> DSM Directive, art 20; Shapiro (n 5) 782-3.

<sup>50</sup> DSM Directive, art 21; Shapiro (n 5) 783.

<sup>51</sup> DSM Directive, art 22; Shapiro (n 5) 783; Martin Kretschmer and Rebecca Giblin, ‘Getting creators paid: one more chance for copyright law’ (2021) 43(5) *European Intellectual Property Review* 279, 279.

<sup>52</sup> DSM Directive, art 23(1); Shapiro (n 5) 785.

Proponents of these remuneration provisions, such as Kretschmer and Giblin, argue that they are necessary in a world where “primary creators are being squashed” in a “global struggle between technology giants and large right holders”.<sup>53</sup> The ability to amend contractual terms offers much needed protection to authors and performers and can act as “an important safety valve”.<sup>54</sup> In contrast, critics like Shapiro argue that the provisions are a “blow to contractual freedom in the content sector” which would “undermine the ability of the EU film and TV industry to compete internationally”.<sup>55</sup> Shapiro also argues that this level of unprecedented legislative intervention in contracts would be completely alien to the UK’s common law copyright framework.<sup>56</sup>

Overall, non-implementation of Chapter 3 of the Directive, in theory, allows the UK’s media companies (and other exploiters of creative works) to remain competitive in the international stage due to its continued respect of contractual freedom. But it would also mean that content creators, especially smaller ones, will lose out on these new rights, as will be explained later in the article.

### 3. Legality of divergence

Determining the legality of the UK’s decision to diverge from the DSM Directive, especially in respect of the EU-UK Trade and Cooperation Agreement (TCA), is important in evaluating its impact, for if it were contrary to its provisions,

---

<sup>53</sup> Kretschmer and Giblin (n 51), 279.

<sup>54</sup> *ibid* 281.

<sup>55</sup> Shapiro (n 5) 779; Shapiro and Hansson (n 9) 414.

<sup>56</sup> Shapiro (n 5) 779.

the UK could be susceptible to retaliatory measures (and would therefore drastically increase the cost of divergence).<sup>57</sup>

Intellectual property law, which includes copyright law, is not subject to “level playing field” rules.<sup>58</sup> This means that there is no obligation for UK copyright law to roughly mirror EU copyright law so that divergences (such as non-implementation of the DSM Directive) do not give the UK unfair advantages in trade and investment (and if it was determined as such, the EU would be able to take so-called “rebalancing measures”).<sup>59</sup> Instead, it is subject to the minimum standards under Part II, Title V of the TCA, which act as a floor, not a ceiling.<sup>60</sup>

Nothing under Title V of the TCA precludes the UK from diverging from the DSM Directive. This is because Title V primarily serves to reaffirm both the UK’s and the EU’s commitment to complying with the TRIPS Agreement (and nothing within the TRIPS Agreement mandates the need for the reforms under the DSM Directive).<sup>61</sup>

Title V also reaffirms the UK’s commitment to other international intellectual property agreements,<sup>62</sup> notably the WIPO Copyright Treaty (WCT).<sup>63</sup> While the UK’s decision to diverge is consistent with the WCT, it can be argued that

---

<sup>57</sup> Stefano Fella, *The UK-EU Trade and Cooperation Agreement: governance and dispute settlement* (House of Commons Library Briefing Paper CBP-9139, 2021) <<https://commonslibrary.parliament.uk/research-briefings/cbp-9139/>> accessed 22 April 2021, 30-4.

<sup>58</sup> See TCA, art 1-8.

<sup>59</sup> Fella (n 57) 8.

<sup>60</sup> TCA, art IP.2.2.

<sup>61</sup> TCA, art IP.2.1.

<sup>62</sup> TCA, art IP.4.1(d).

<sup>63</sup> WIPO Copyright Treaty (WCT) (1996) 2186 UNTS 121 (WCT).

the EU's decision to adopt the Directive is inconsistent with it, thus also breaching Title V of the TCA.

Lawrence, for example, argues that Article 8 of the WCT, which provides for the "communication to the public" right, allows for ISSPs (and by extension, OCSSPs) to receive safe harbour protection.<sup>64</sup> In order to facilitate reform of safe harbour provisions worldwide, he advocates for amending Article 8 of the WCT.<sup>65</sup> By jumping the gun and unilaterally repealing safe harbour for OCSSPs, it can be argued that the EU acted inconsistently by not respecting the WCT-agreed interpretation that "mere provision of physical facilities [...] does not in itself amount to communication".<sup>66</sup>

Meanwhile, Shapiro and Hansson float the idea that the "super-UGC [user generated content] exception" under Article 17(7), which mandates that fair use of copyrighted material be respected, could be inconsistent with the three-step test for copyright limitations and exceptions under the WCT.<sup>67</sup> If that were the case, then the DSM Directive would also fall afoul of Article IP.15 of the TCA which codifies this three-step test.<sup>68</sup>

For the purposes of my evaluation below however, I will assume that the DSM Directive is consistent with the WCT and TCA and that it remains as EU law.

---

<sup>64</sup> Lawrence (n 36) 527.

<sup>65</sup> *ibid* 539.

<sup>66</sup> Lawrence (n 36) 527; Agreed Statements concerning the WIPO Copyright Treaty adopted by the Diplomatic Conference on December 20, 1996, art 8.

<sup>67</sup> Shapiro and Hansson (n 9) 413; WCT, art 10.

<sup>68</sup> TCA, art IP.15.

## 4. A cost-benefit analysis of divergence

### 4.1. The purported “winners”

#### 4.1.1. OCSSP start-ups

One of the recurring criticisms of Article 17 is how unkind the new liability regime is towards new start-ups. Content filters, which are de facto required, cost a huge amount of money to develop or license (the latter of which is more likely to be the case). For example, Audible Magic, a US-based company with a borderline monopoly on content filters for third-parties, charges medium sized OCSSPs between \$10,000 and \$50,000 USD a month for the use of their filters.<sup>69</sup> SoundCloud, who chose to develop their own filters, spent €5 million building their own and hired 7 dedicated employees to manage it (out of a total team of 300).<sup>70</sup> Not only would start-ups not be able to afford these high licensing fees or development costs, their ability to attract investments would also be hampered.<sup>71</sup>

The Directive does try to address this by exempting small businesses from the “notice-and-staydown” obligation (i.e. the content filter requirement),<sup>72</sup> but the way small businesses have been defined in the legislation is so restrictive that Bridy argued it is “too narrow to be meaningful”.<sup>73</sup> For example, she notes that it took YouTube less than 2 years to have more than 70 million unique monthly visitors — the exception only allows a maximum of 5 million.<sup>74</sup>

---

<sup>69</sup> Spoerri (n 7) 180.

<sup>70</sup> *ibid.*

<sup>71</sup> *ibid* 181-2.

<sup>72</sup> DSM Directive, art 17(6).

<sup>73</sup> Bridy (n 27) 355.

<sup>74</sup> *ibid* 355-6.

With small European-based OCSSPs already fighting for their survival,<sup>75</sup> some like Reda project that the UK's non-implementation "would make the UK more attractive for running platform businesses".<sup>76</sup> There are two reasons why I believe this will not be the case.

Firstly, as Erickson astutely pointed out, the UK's divergence from the DSM Directive does not, on its own, turn the UK into "some kind of haven for tech companies".<sup>77</sup> Non-implementation is a retention of the status quo (safe harbour protection for OCSSPs) — a status quo that is also present in many non-EU countries like the United States.<sup>78</sup> Divergence on its own is therefore not some innovative new step that will attract technological investment into the UK — that would require a more substantially ambitious regulatory overhaul or some other incentives like higher investment spending (both of which would need to respect the relevant rules under the TCA).

More importantly, however, is the fact that while UK-based OCSSPs could choose not to use content filters if they cater solely to UK (and non-EU) customers, if these OCSSPs ever want to cater to the European market, they will have to abide by the provisions of the DSM Directive. Start-ups could theoretically take the step of blocking European traffic, like how other companies had done in lieu of GDPR

---

<sup>75</sup> See Detrekoi (n 23) 237.

<sup>76</sup> Will Bedingfield, 'Here's why the UK is (finally) dumping Article 13 for good' *Wired* (28 January 2020) <<https://www.wired.co.uk/article/uk-article-13-copyright-brexit>> accessed 19 February 2021.

<sup>77</sup> *ibid.*

<sup>78</sup> Lucius Klobucnik and Thomas Y Lu, 'Noticeably different? Consequences of the DSM Directive's OCSSP liability regime on DSPs active in the EU and the US' (2020) 15(10) *Journal of Intellectual Property Law & Practice* 811, 815.

compliance in 2018.<sup>79</sup> But they will be in direct competition with larger OCSSPs, like YouTube, Facebook, and SoundCloud, who can afford to cater to the European market (and gain an even bigger market share as they will no longer be competing with start-ups, both UK and non-UK based). Therefore, the fears that these large OCSSPs would play an increasingly dominating role to the detriment of start-ups would not be alleviated by the UK's decision to retain safe harbour. The concerns that UK start-ups would get priced out are still very much real after divergence.

#### 4.1.2. Small content creators and internet users

Small content creators rely on fair use. Musicians, for example, regularly borrow and build on the works of previous composers to create new “innovative music” — a practice that was done even by Beethoven and Mozart.<sup>80</sup> If small content creators were unable to build on works of the past, “creators of the past [would have] veto power over creators of the present”.<sup>81</sup> And so protecting fair use is imperative—not just because of its reliance by small content creators—but because it is an outlet of free expression by internet users.<sup>82</sup>

---

<sup>79</sup> Rebecca Sentance, ‘GDPR: Which websites are blocking visitors from the EU?’ (Econsultancy, 31 May 2018) <<https://econsultancy.com/gdpr-which-websites-are-blocking-visitors-from-the-eu-2/>> accessed 2 May 2021; see also Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (OUP 2020) 165.

<sup>80</sup> Lester and Pachamano (n 30) 56.

<sup>81</sup> Bridy (n 27) 346.

<sup>82</sup> *ibid* 345; Paul Keller, ‘CJEU hearing in the Polish challenge to Article 17: Not even the supporters of the provision agree on how it should work’ (Kluwer Copyright Blog, 11 November 2020) <<http://copyrightblog.kluweriplaw.com/2020/11/11/cjeu-hearing-in-the-polish-challenge-to-article-17-not-even-the->

Arguably we could go one step further and argue that the internet as a whole relies on widespread copyright infringement.<sup>83</sup> As Kreutzer points out, “the internet is rich in content that is either illegal or has an unclear legal status under copyright law.”<sup>84</sup> But it’s precisely this environment which contributes to its “cultural diversity”.<sup>85</sup> Rightholders are willing to turn a blind eye to these regular infringements because the cost of lost remuneration comes with the benefit of “significant advertising effects” from fan remixes, tributes, and memes going viral and contributing to a vibrant fan culture.<sup>86</sup>

The issue with content filters, as mentioned before, is that they are unable to distinguish actual infringements from fair use. And so, one might reasonably be hopeful that UK divergence from the DSM Directive would protect fair use (or “fair dealing” in UK legal terms) as there would be no content filter mandate. Furthermore, the lack of content filters would mean that rightholders would retain the right to be tolerant of innocent infringements which help contribute to the “common good” of a “diverse online culture”.<sup>87</sup>

The reality of divergence unfortunately is not this rosy. While the UK will not have a content filter mandate, the lack of one does not preclude its use. YouTube will still use its Content ID system whether or not it has safe harbour protection. So all of its associated problems, such as erroneously putting claims on original music which use

---

supporters-of-the-provision-agree-on-how-it-should-work/ >  
accessed 19 February 2021.

<sup>83</sup> Kreutzer (n 6) 717.

<sup>84</sup> *ibid.*

<sup>85</sup> *ibid.*

<sup>86</sup> *ibid.*

<sup>87</sup> *ibid.*



royalty free audio loops (on the basis that a different creator used them), would still exist for any musicians that rely on YouTube, for example.<sup>88</sup>

Moreover, the EU's position as a global regulator, especially in the digital economy, means that it has the potential to make companies change their internal policies globally.<sup>89</sup> This happens because companies desire to have universal rules applicable to as many jurisdictions as possible for technical and economic reasons.<sup>90</sup> As such, the so-called "Brussels Effect"<sup>91</sup> would essentially push OCSSPs to use content filters in the UK even without being made to. Hence the issues from content filters for small content creators and internet users in the UK will remain unresolved even with the UK's divergence.

## 4.2. The "losers"

### 4.2.1. The music industry

#### 4.2.1.1. *The "value gap"*

Music streaming revenues in the UK in 2020 grew by 15.4% from 2019, generating a total of £736.5 million.<sup>92</sup> Due to the COVID-19 pandemic, many people moved to streaming services leading to it accounting for 80% of total UK music consumption that year.<sup>93</sup> But the revenue from streaming was not paid equally by online platforms — a substantial part

---

<sup>88</sup> Lester and Pachamanova (n 30) 60.

<sup>89</sup> Bradford (n 79) 164.

<sup>90</sup> *ibid* 164-5.

<sup>91</sup> *ibid* 164.

<sup>92</sup> BPI, 'BPI publishes its yearbook "All About The Music 2021 "' (BPI, 15 April 2021) <<https://www.bpi.co.uk/news-analysis/bpi-publishes-its-yearbook-all-about-the-music-2021/>> accessed 30 April 2021.

<sup>93</sup> *ibid*.

of that revenue was paid for by subscription-based services (e.g. Spotify and Apple Music) as opposed to OCSSPs which run on an ad-based model.<sup>94</sup>

As mentioned prior, the concept of the “value gap”, while endorsed by the UK music industry and prominent UK musicians like Paul McCartney,<sup>95</sup> is heavily contested. Bridy argues that comparing Spotify to YouTube is like comparing “apples-to-oranges”.<sup>96</sup> As Spotify is a “closed system”, it has control over who can post what content.<sup>97</sup> “No random subscriber in Paris—France or Texas—can upload a cat video to Spotify at three o’clock in the morning on a Sunday”.<sup>98</sup> Therefore, Spotify does not need safe harbour protection like YouTube which opens itself to liability risks by having an open system where anyone can upload anything.<sup>99</sup>

Her argument better justifies why the “value gap” exists as opposed to refuting the concept itself, which Bridy argues is merely a “slogan that music industry trade groups created”.<sup>100</sup> The fact that music streaming services pay more than OCSSPs is still very much true — even if the specific statistics are disputed.

And so, UK divergence from the DSM Directive means that this “value gap” will remain unplugged as OCSSPs will be able to rely on safe harbour provisions to negotiate for licensing deals that skew heavily towards their favour. And to make matters worse, as Elena Segal of Apple Music UK

---

<sup>94</sup> IFPI, ‘Global Music Report 2021’ (IFPI, 2021)

<[https://www.ifpi.org/wp-content/uploads/2020/03/GMR2021\\_STATE\\_OF\\_THE\\_INDUS TRY.pdf](https://www.ifpi.org/wp-content/uploads/2020/03/GMR2021_STATE_OF_THE_INDUS TRY.pdf)> accessed 24 April 2021, 13.

<sup>95</sup> IFPI, ‘Global Music Report 2017’ (n 39) 25.

<sup>96</sup> Bridy (n 27) 327.

<sup>97</sup> *ibid.*

<sup>98</sup> *ibid.*

<sup>99</sup> *ibid* 327-8.

<sup>100</sup> *ibid* 326.

argues, these licensing deals also affect the price at which subscription-based music streaming services can charge, since charging too high would lead to people to move to ad-based OCSSPs.<sup>101</sup> Thus, the “unlevel playing field” acts to the further detriment of the music industry as music streaming services are unable to increase their remuneration for music artists.<sup>102</sup>

#### *4.2.1.2. Remuneration rights*

Divergence also means that musicians lose out on the Chapter 3 remuneration rights. In particular, the emphasis of the remuneration provisions within the DSM Directive on collective bargaining agreements means that musicians, especially less established ones, would not be able to benefit from having a legal framework which incentivises their adoption.<sup>103</sup>

Arguably, UK-based musicians would not be precluded from exercising such rights for their music exploited in the EU.<sup>104</sup> But as Shapiro pointed out, this could lead to conflict of law issues, especially in regards to the contract adjustment right which could see UK musicians be held for breach of contract if the exercise of such a right is not recognised.<sup>105</sup>

But not adopting the remuneration rights is not as clear cut as the “value gap” issue. Shapiro argues that such rights would make media industries less competitive globally,<sup>106</sup> and so non-implementation can be equally argued to be beneficial to the music industry as it will keep English law’s respect for freedom of contract.

---

<sup>101</sup> DCMS Committee (n 37) Q598.

<sup>102</sup> *ibid* Q616.

<sup>103</sup> Shapiro (n 5) 779.

<sup>104</sup> *ibid* 785.

<sup>105</sup> *ibid*.

<sup>106</sup> *ibid* 779.

#### 4.2.2. News publishers

As discussed prior, implementation of a press publisher's right has had mixed results. On one side, you have French publishers successfully negotiating a licensing deal with Google;<sup>107</sup> and on the other, you have Google threatening to withdraw from Australia completely over its mere suggestion.<sup>108</sup>

If the UK were to implement such a right, I doubt Google would withdraw from the UK, considering its market is substantially larger than Australia's.<sup>109</sup>

The question is whether the right would actually benefit news publishers—and the answer is we do not know (at least from the current evidence that we have). If the right turns out to actually decrease traffic in news sites (and therefore revenue), news publishers can simply waive the right and publish for free like in Germany.<sup>110</sup> There would be no benefit overall, but there would neither be any permanent loss. In contrast, if the UK follows a more hardball approach like in France and manages to get ISSPs to negotiate licences under that right, press publishers would certainly benefit from it.

---

<sup>107</sup> Manteghi (n 12) 146-7; Timothy B Lee, 'Google agrees to pay French news sites to send them traffic' (n 21).

<sup>108</sup> Timothy B Lee, 'Google: We'll shut down Australian search before we pay news sites for links' *Ars Technica* (22 January 2021) <<https://arstechnica.com/tech-policy/2021/01/google-threatens-to-shut-down-australian-search-over-link-tax-proposal/>> accessed 19 February 2021.

<sup>109</sup> 'Australia vs. United Kingdom' (Index Mundi, 2017) <<https://www.indexmundi.com/factbook/compare/australia.united-kingdom/economy>> accessed 2 May 2021.

<sup>110</sup> Manteghi (n 12) 146.

Therefore, even though there is a chance for such an implementation to fail, the UK's divergence from the DSM Directive represents a lost opportunity for press publishers to earn possible further remuneration, as failure would not incur any permanent losses for the publishers anyways.

## 5. Conclusion

The UK's divergence from the DSM Directive will bring at most, negligible benefits to the stakeholders that were meant to be its beneficiaries. This is because even though the Directive is critically flawed, especially with respect to Article 17, the regulatory and market influence of the EU will set content filters as the global standard for OCSSPs, leading to the so-called "Brussels Effect".<sup>111</sup> The UK's divergence will not, on its own, preclude the use of content filters by large OCSSPs, and so all of the downsides of content filters from its unaffordable pricing for start-ups to its chilling effect on freedom of expression will remain in place.

But divergence would not necessarily incur direct costs either. Non-implementation of the Directive is fully compliant with the TCA and international intellectual property law agreements (whereas the converse, the EU's passage of the Directive, cannot be confidently said to be compliant). Instead, the cost of divergence is the lost opportunities for the UK music industry to plug the "value gap" by capitalising on what is already inevitable — the widespread adoption of content filters by OCSSPs. News publishers would also lose out on the potential for further remuneration with a press publisher's right, even if said remuneration is uncertain.

---

<sup>111</sup> Bradford (n 79) 164-5.

## Bibliography

### EU cases

Case C-527/13 Hewlett-Packard Belgium SPRL v Reprobel SCRL  
[2016] Bus LR 73

### EU legislation

Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L130/92

Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L178/1

### International treaties

Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part

WIPO Copyright Treaty (WCT) (1996) 2186 UNTS 121

### International declarations

Agreed Statements concerning the WIPO Copyright Treaty adopted by the Diplomatic Conference on December 20, 1996

### Books

Bradford A, *The Brussels Effect: How the European Union Rules the World* (OUP 2020)

### Parliamentary reports

Digital, Culture, Media and Sport Committee, Oral evidence: Economics of music streaming (HC 2019-21, 868)

### Parliamentary briefing papers

Stefano Fella, *The UK-EU Trade and Cooperation Agreement: governance and dispute settlement* (House of Commons Library Briefing Paper CBP-9139, 2021)  
<<https://commonslibrary.parliament.uk/research-briefings/cbp-9139/>> accessed 22 April 2021

### Journal articles

- Bridy A, 'The Price of Closing the Value Gap: How the Music Industry Hacked EU Copyright Reform '(2020) 22 Vanderbilt Journal of Entertainment & Technology Law 323
- Depoorter B and Walker R K, 'Copyright False Positives '(2013) 89 Notre Dame Law Review 319
- Detrekoi Z, 'EU Copyright Directive: sounding the death knell for domestic video-sharing platforms '(2020) 25(4) Communications Law 231
- Guzé N, 'Net Neutrality and the European Union's Copyright Directive for the Digital Single Market '(2019) 43(1) Loyola of Los Angeles International and Comparative Law Review 63
- Klobucnik L and Lu T Y, 'Noticeably different? Consequences of the DSM Directive's OCSSP liability regime on DSPs active in the EU and the US '(2020) 15(10) Journal of Intellectual Property Law & Practice 811
- Kretschmer M and Giblin R, 'Getting creators paid: one more chance for copyright law '(2021) 43(5) European Intellectual Property Review 279
- Kreutzer T, 'The EU Copyright Directive and its potential impact on cultural diversity on the internet '(2020) 42(11) European Intellectual Property Law Review 715
- Lawrence D L, 'Addressing the Value Gap in the Age of Digital Music Streaming '(2019) 52 Vanderbilt Journal of Transnational Law 511
- Lee Y H, 'United Kingdom Copyright Decisions and Post-Brexit Copyright Developments 2020 '(2021) 52(3) International Review of Intellectual Property & Competition Law 319
- Lester T and Pachamanova D, 'The Dilemma of False Positives: Making Content ID Algorithms More Conducive to Fostering Innovative Fair Use in Music Creation '(2017) 24 UCLA Entertainment Law Review 51



- Manteghi M, 'The link tax under the EU Copyright Directive: seeking a balance of interests in the digital age '(2021) 43(3) European Intellectual Property Review 145
- Reda J, 'Article 17 of the Copyright Directive: a prohibited general monitoring obligation '(2021) 43(4) European Intellectual Property Review 215
- Samuelson P, 'Legally Speaking Europe's Controversial Digital Copyright Directive Finalized '(2019) 62(11) Communications of the ACM 24
- Shapiro T, 'Remuneration provisions in the DSM Copyright Directive and the audiovisual industry in the EU: the elusive quest for fairness '(2020) 42(12) European Intellectual Property Review 778
- Shapiro T and Hansson S, 'The DSM Copyright Directive - EU copyright will indeed never be the same '(2019) 41(7) European Intellectual Property Review 404
- Spoerri T, 'On Upload-Filters and other Competitive Advantages for Big Tech Companies under Article 17 of the Directive on Copyright in the Digital Single Market '(2019) 10(2) Journal of Intellectual Property, Information Technology and Electronic Commerce Law 173

### News articles

- Bedingfield W, 'Here's why the UK is (finally) dumping Article 13 for good 'Wired (28 January 2020)  
< <https://www.wired.co.uk/article/uk-article-13-copyright-brexite> > accessed 19 February 2021
- Kaminsky M, 'EU's Copyright Directive Passes Despite Widespread Protests - - But It's Not Law Yet' Forbes (26 March 2019)  
< <https://www.forbes.com/sites/michellekaminsky/2019/03/26/eus-copyright-directive-passes-despite-widespread-protests-but-its-not-law-yet/> > accessed 30 April 2021
- Lee T B, 'Google agrees to pay French news sites to send them traffic 'Ars Technica (21 January 2021)  
< <https://arstechnica.com/tech-policy/2021/01/google->

agrees-to-pay-french-news-sites-to-send-them-traffic/ >  
accessed 19 February 2021

Lee T B, 'Google: We'll shut down Australian search before we pay news sites for links' *Ars Technica* (22 January 2021) <<https://arstechnica.com/tech-policy/2021/01/google-threatens-to-shut-down-australian-search-over-link-tax-proposal/>> accessed 19 February 2021

### Magazines and websites

—, 'Australia vs. United Kingdom' (Index Mundi, 2017) <<https://www.indexmundi.com/factbook/compare/australia.united-kingdom/economy>> accessed 2 May 2021

BPI, 'BPI publishes its yearbook "All About The Music 2021"' (BPI, 15 April 2021) <<https://www.bpi.co.uk/news-analysis/bpi-publishes-its-yearbook-all-about-the-music-2021/>> accessed 30 April 2021

IFPI, 'Global Music Report 2017' (IFPI, 2017) <[https://www.musikindustrie.de/fileadmin/bvmi/upload/06\\_Publikationen/GMR/GMR2017\\_press.pdf](https://www.musikindustrie.de/fileadmin/bvmi/upload/06_Publikationen/GMR/GMR2017_press.pdf)> accessed 23 April 2021

IFPI, 'Global Music Report 2021' (IFPI, 2021) <[https://www.ifpi.org/wp-content/uploads/2020/03/GMR2021 STATE OF THE INDUSTRY.pdf](https://www.ifpi.org/wp-content/uploads/2020/03/GMR2021_STATE_OF_THE_INDUSTRY.pdf)> accessed 24 April 2021

Keller P, 'CJEU hearing in the Polish challenge to Article 17: Not even the supporters of the provision agree on how it should work' (*Kluwer Copyright Blog*, 11 November 2020) <<http://copyrightblog.kluweriplaw.com/2020/11/11/cjeu-hearing-in-the-polish-challenge-to-article-17-not-even-the-supporters-of-the-provision-agree-on-how-it-should-work/>> accessed 19 February 2021

Sentance R, 'GDPR: Which websites are blocking visitors from the EU?' (*Econsultancy*, 31 May 2018) <<https://econsultancy.com/gdpr-which-websites-are-blocking-visitors-from-the-eu-2/>> accessed 2 May 2021

# **Troubles with Samples – Music Sampling as Quotation and Pastiche under UK Copyright Law**

Ching Wang (Michael) Lam\*

\*Final year LLB student at the University of Hong Kong

Contact at: [michaellamcw01@gmail.com](mailto:michaellamcw01@gmail.com)

## I. Introduction

Music sampling, the technique of incorporating portions of a past song into new songs, is a popular musical practice in hip hop and electronic music. Whether this form of reusing others' music constitutes "theft" or "art" has long been controversial, and its legal position has never been certain in the United Kingdom (UK). Sampling artists either assume unauthorised sampling would constitute copyright infringement, or fear being sued by record companies, so they would almost always pay licensing fees to record companies for authorised sampling uses. However, with the rise in licensing fees, sampling has become increasingly unaffordable, leading to concerns that copyright law has stifled such forms of creativity.

As the current legal position of music sampling is unsettled in the UK, this essay will discuss how the copyright law should ideally deal with this issue without excessively hampering artistic and cultural development. Although there is extensive literature about the issue in the United States (US), there has been little relevant literature in the UK and previous academic suggestions mainly focused on modifying the licensing practice.<sup>1</sup> Instead, this essay suggests that the existing statutory quotation<sup>2</sup> and pastiche<sup>3</sup> defences introduced in 2014 would already have great potential in accommodating fair sampling practices in the UK if the provisions are interpreted liberally. Past legal

---

<sup>1</sup> Sabine Jacques, 'Mash-Ups and Mixes: What Impact Have the Recent Copyright Reforms Had on the Legality of Sampling?' (2016) 27(1) Ent. L.R. 3.

<sup>2</sup> Copyright, Designs and Patents Act 1988 (CDPA), s 30(1ZA).

<sup>3</sup> CDPA 1998, s 30A.

literature also did not discuss in detail how the fair dealing mechanism should apply to sampling, so this essay will attempt to fill in the gap in the discourse with reference to both legal and musicological resources. The overall aim is to propose a liberal interpretation of the existing legal mechanism in the UK that would provide greater allowance for unlicensed but fair sampling practices.

The legal and factual background of the issue will first be examined in Section II, followed by explanations of why most instances of sampling fall under the quotation and pastiche defences in Sections III and IV respectively. The application of the “fair dealing” analysis to sampling will then be discussed in Section V, followed by a discussion of why the alternative solution of a compulsory licensing scheme is less desirable in Section VI. Section VII would finally summarise the arguments raised in this essay.

## II. Music Sampling and its Current Fate

Music sampling, or digital sampling, is the process of digitally copying a section of an existing sound recording (called a “sample”) and inserting it into a new recording.<sup>4</sup> The sample may be reproduced exactly or altered by changing its pitch, rhythm, speed, tone, timbre or volume.<sup>5</sup> The sample can be inserted at various intervals, or “looped” in continuous repetition as a rhythmic background.<sup>6</sup> The

---

<sup>4</sup> Spenser Clark, 'Hold up: Digital Sampling, Copyright Infringement, and Artist Credit through the Lens of Beyonce's Lemonade' (2019) 26 J Intell Prop L 131, 136.

<sup>5</sup> Rachael Carnachan, 'Sampling and the Music Industry: a Discussion of the Implications of Copyright Law' (1999) 8(4) Auckland U L Rev 1033, 1035.

<sup>6</sup> *ibid.*

overall sound can also be modified by combining different samples, superimposing one onto another and incorporating effects like reverse, reverb and echo.<sup>7</sup>

Music sampling originated in Jamaica in the early 1960s, was popularised in the US, and later introduced into the UK. It initially consisted of disc jockeys collaging the most danceable sections of songs for partygoers in dance clubs, which later developed into dedicated sampling recordings.<sup>8</sup> The musicians were initially free to use sampling as they pleased and often included sample-heavy beats in their pieces,<sup>9</sup> until sample clearance practices emerged in the late 1990s.<sup>10</sup> Since then, sampling artists have to “clear” their samples by seeking permission from record companies and paying licensing fees before sampling.

Since sampling involves the reproduction of another recording, music sampling, especially unlicensed sampling, is sometimes labelled as involving “theft”.<sup>11</sup> However, this negative label is unjustified as sampling has great artistic and

---

<sup>7</sup> Accusonus Blog, ‘The past and the future of music sampling’ (22 February 2017) <<https://blog.accusonus.com/past-future-music-sampling-118/>> accessed 27 August 2021.

<sup>8</sup> Kembrew McLeod, ‘Musical Production, Copyright, and the Private Ownership of Culture’ in Justin Lewis and Toby Miller (eds), *Critical Cultural Policy Studies: A Reader* (Wiley-Blackwell 2003) 246.

<sup>9</sup> *ibid.*

<sup>10</sup> Justin Morey, ‘Copyright Management and its Effect on the Sampling Practice of UK Dance Music Producers’ (2013) 3(1) IASPM Journal 48, 55 <[https://iaspmjournal.net/index.php/IASPM\\_Journal/article/view/589](https://iaspmjournal.net/index.php/IASPM_Journal/article/view/589)> accessed 27 August 2021.

<sup>11</sup> Olufunmilayo B Arewa, ‘From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context’ (2006) 84 NC L Rev 547, 580-581.

cultural value. Copying and borrowing from others is commonplace in music and can be found even among famous classical composers like Bach, Beethoven and Brahms.<sup>12</sup> For example, Brahms quoted sections from Wagner's "Tannhäuser" in his Symphony No.3, which was interpreted as a tribute to his deceased artistic rival, signifying an end to their artistic dissension.<sup>13</sup> Such practices of musical borrowing are not only considered acceptable, but are even hailed as great art.

In particular, sampling serves the cultural functions of paying tribute and homage to other musicians, bringing back forgotten tunes and breathing new life into the borrowed music. For example, different hip-hop artists sampled the works of the deceased rapper "The Notorious B.I.G." as a way to pay tribute,<sup>14</sup> and Ariana Grande paid homage to Brenda Russell by sampling the latter's "A Little Bit of Love".<sup>15</sup> Sampling may also help to preserve the legacy of the sampled author, like how the sampling of George Clinton's songs in the 1980s helped to repopularise his music among the new generation, leading to a republication of his old albums which were originally in risk of being

---

<sup>12</sup> J Michael Keyes, 'Musical Musings: The Case for Rethinking Music Copyright

Protection' (2004) 10 Mich Telecomm & Tech L Rev 407, 427.

<sup>13</sup> Charles Michael Carroll, 'Musical Borrowing — Grand Larceny or Great Art?' (1978) 18(1) College Music Symposium 11, 18.

<sup>14</sup> Thisisdig.com, 'Notorious B.I.G. Tributes: 10 Modern-Day Shout-Outs to Hip-Hop's Best Rapper' (15 September 2020) <[www.thisisdig.com/feature/notorious-big-tributes-hip-hop/](http://www.thisisdig.com/feature/notorious-big-tributes-hip-hop/)> accessed 27 August 2021.

<sup>15</sup> Rory Seydel, 'Stop Thinking of Sampling as Theft' (*Hypebot*, 1 January 2016) <<https://www.hypebot.com/hypebot/2016/07/stop-thinking-of-sampling-as-theft.html>> accessed 27 August 2021.

forgotten.<sup>16</sup> Sampling can therefore help the sampled pieces last in public memory for a longer duration. Moreover, sampling artists can build on previous musical pieces and breathe new life into the quoted music, so that the sampled music is not “stolen” but is revitalised in a new context. For instance, when “Electric Counterpoint” by Steve Reich was quoted in “Little Fluffy Clouds” by the Orb, Reich’s music was also given a different, psychedelic flavour because of the new context.<sup>17</sup> Music sampling therefore has great artistic and cultural value in paying homage to other artists, preserving the legacy of the sampled musicians and revitalising the sampled music.

Despite the substantial artistic and cultural value of music sampling, the current copyright framework does not accommodate this sampling culture well. Under the UK Copyright, Designs & Patents Act 1988 (CDPA), copyright owners, typically record companies, enjoy exclusive economic rights to reproduce, distribute, perform, adapt and communicate the copyright works to the public.<sup>18</sup> When a sampling artist takes a “substantial part” of a copyright-protected work,<sup>19</sup> such as a sound recording, they would have reproduced that portion of the work and violated the copyright owner’s exclusive reproduction right, unless they have obtained permission from the owner and acquired a “licence” to use the work.<sup>20</sup> They would also have violated

---

<sup>16</sup> William Michael Schuster, ‘Fair Use, Girl Talk, and Digital Sampling: An Empirical Study of Music Sampling’s Effect on the Market for Copyrighted Works’ (2015) 67(3) *Okla. L. Rev.* 443, 445-446.

<sup>17</sup> Kevin Holm-Hudson, ‘Quotation and Context: Sampling and John Oswald’s Plunderphonics’ (1997) 7 *Leonardo Music Journal* 17, 19.

<sup>18</sup> CDPA 1988, s 16(1).

<sup>19</sup> CDPA 1988, s 16(3)(a).

<sup>20</sup> CDPA 1988, s 16(2).



the distribution, performance and adaptation rights if they subsequently distribute and perform their sampling song, and have modified the sample without permission. Sampling artists would thus likely be liable unless they can rely on statutory defences.

In practice though, infringement lawsuits for sampling are rare in the UK, because sampling producers would almost always go through sample clearance processes and pay licensing fees, or would settle the cases outside court in fear of the high legal costs involved in litigation.<sup>21</sup> Nonetheless, the sample clearance process is costly and has arguably stifled creativity in the industry. In 2011, the clearance cost of a substantial sample had risen to around £10,000 to £20,000 in the UK, approximately ten times that in 1998.<sup>22</sup> Moreover, the copyright owners would often require a high percentage of the rights in the sampling song as the condition for granting publishing clearance. For example, a record company director once gave expert evidence in court that he had granted very few licences and would often require 50% or 100% ownership rights in the resultant piece in return for the clearance.<sup>23</sup> As the UK legal position has not been clarified by the courts, sampling artists often prefer to be prudent and seek clearance if in doubt. The threat of a court action would put the copyright owners in a very strong bargaining position so that sampling artists have to reluctantly accept unfavourable terms during the clearance process.<sup>24</sup>

When several British music producers were interviewed, some spoke of avoiding sampling altogether and

---

<sup>21</sup> Morey (n10) 52.

<sup>22</sup> *ibid* 55.

<sup>23</sup> *Ludlow Music Inc. v Williams (No.2)* [2002] EWHC 638; [2002] EMLR 29 [34].

<sup>24</sup> Morey (n10) 53.

merely using previous pieces as a source of inspiration. Some would have new musicians re-play the piece they want to sample, and others would only include unrecognisable snippets to avoid clearance.<sup>25</sup> Although these can be considered as creative ways to work around the restrictions, it remains the fact that the high clearance costs have restricted the development of this musical practice,<sup>26</sup> which could involve hundreds of samples in one album to create a dense collage in the past<sup>27</sup> but would now include only a few or no samples at all. If even professional artists fail to afford the clearance costs and have to avoid sampling, amateur samplers would be even more incapable to afford clearance costs and would be deterred from engaging in sampling. The artistic potential of sampling has therefore been limited by copyright and this culture cannot flourish unless the legal approach becomes relaxed.<sup>28</sup>

The courts have mentioned that copyright should not “become an instrument of oppression rather than the incentive for creation which it is intended to be”.<sup>29</sup> While copyright can provide protection to the copyright holders and incentivise upstream creative production, it must also not excessively restrict and deter derivative creativity from downstream producers. It is both common and important for musicians to build on existing musical materials and works, so the law should allow certain leeway for musical borrowing and copying to contribute to musical creativity and diversity. In the British sampling industry, the balance has currently tilted excessively towards the record

---

<sup>25</sup> *ibid* 57.

<sup>26</sup> Andrew Gowers, *Gowers Review of Intellectual Property* (The Stationery Office 2006), para 4.86.

<sup>27</sup> McLeod (n8) 248.

<sup>28</sup> *ibid* 249.

<sup>29</sup> *Nova Productions Ltd v Mazooma Games Ltd* [2007] EWCA Civ 219; [2007] Bus L R 1032 [55] (Jacob LJ).

companies, because the prohibitively high clearance costs have deterred creative production from sampling artists.

As music sampling has significant artistic and cultural value, the law should adopt a more liberal approach to accommodate and even encourage creativity from sampling artists, to readjust the balance between upstream rights and downstream creativity. The following sections will discuss how this balance can be readjusted properly with reference to the statutory defences of quotation and pastiche.

### III. Quotation

The quotation defence is provided by s30(1ZA) CDPA, under which copyright is not infringed by the use of a quotation from a work, provided the work has been made available to the public, the use of the quotation is fair dealing with the work, the extent of the quotation is no more than is required, and there is a sufficient acknowledgement of the quoted author. This is based on Article 5(3)(d) of the Information Society Directive (InfoSoc Directive),<sup>30</sup> which intended to implement Article 10(1) of the Berne Convention. To determine whether the quotation defence is applicable to sampling, the meaning of “quotation” needs to be ascertained.

#### (a) Type of work

We often speak of “quotation” as the excerpting of sentences or sections from another literary text and placing them in

---

<sup>30</sup> Council Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10 (Information Society Directive).

quotation marks in the quoter's work.<sup>31</sup> However, there is nothing in the language of the CDPA or the Berne Convention that imposes restrictions on the applicable type of work. The quotation defence should apply to all types of works, including musical works and recordings. A commentary by the World Intellectual Property Organisation (WIPO) also suggests that Berne Convention Article 10(1) can apply to the taking of a "musical passage ... from a piece of music".<sup>32</sup> In particular, music sampling has been referred to by musicians, composers and academics as "sonic quote", "audio quotation", "timbral quotation" and so on.<sup>33</sup> Music sampling would *prima facie* be considered as a form of "quotation".

### **(b) Requirements of "dialogue", "unaltered" and "distinguishable"**

However, this issue is complicated by *Pelham v Hütter*, where the Court of Justice of the European Union (CJEU) introduces additional requirements for the quotation defence. This case concerns the sampling of a two-second rhythm segment from "Metall auf Metall" by the German band Kraftwerk, which is looped throughout the song "Nur mir" by Sabrina Setlur. In analysing whether the quotation defence may apply, the Advocate General (AG) suggests that

---

<sup>31</sup> Tanya Aplin and Lionel Bently, *Global Mandatory Fair Use: The Nature and Scope of the Right to Quote Copyright Works* (Cambridge University Press 2020) 83.

<sup>32</sup> Sam Ricketson, 'WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment' (SCCR/9/7, Standing Committee on Copyright and Related Rights of the World Intellectual Property Organization, 5 April 2003) 12

<[https://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=16805](https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=16805)> accessed 27 August 2021.

<sup>33</sup> Aplin and Bently (n31) 91.

the quotation “must enter into some kind of dialogue with the work quoted”<sup>34</sup> and should be “unaltered and distinguishable”.<sup>35</sup>

For the “dialogue” requirement, the AG explains that possible ways of interaction between the quoting work and quoted work include paying tribute, confrontation and so on.<sup>36</sup> The judges also agree with the AG on the requirement of “entering into a dialogue”, and suggest that this includes “illustrating an assertion”, “defending an opinion” or “allowing an intellectual comparison”.<sup>37</sup> Subsequently, the German Federal Court applies this “dialogue” test to reject the quotation defence on the basis that the defendant did not intend to interact with the plaintiff’s work.<sup>38</sup>

However, such an understanding of “quotation” largely resembles that of literary quotations only, which are often used to express relatively concrete ideas, as opposed to musical quotations which involve relatively abstract musical relationships between the quoting and quoted pieces. An academic paper may quote the words by another scholar and comment on the argument raised; whereas a quoted musical segment may not contain any message or argument for subsequent musicians to comment on or compare with, but

---

<sup>34</sup> Case C-476/17 *Pelham GmbH v Hütter* EU:C:2018:1002, Opinion of AG Szpunar, para 64.

<sup>35</sup> *ibid*, para 65.

<sup>36</sup> *ibid*, para 64.

<sup>37</sup> Case C-476/17 *Pelham GmbH v Hütter* EU:C:2019:624, para 71.

<sup>38</sup> Lea Noemi Mackert, Christoph Hendel and Simon Hembt, ‘German Federal Supreme Court decides in spectacular music sampling case - for the fourth (and last?) time’ (*Lexology*, 1 May 2020)

<<https://www.lexology.com/library/detail.aspx?g=dfb1dd85-7237-44ac-a727-05a9bdaa7075>> accessed 27 August 2021.

is merely quoted to create a musical effect. As musicologist Ballantine describes, a musical quotation can communicate an attitude toward the original occasion and create a “dialectic between ... the fragment and ... the new musical context”.<sup>39</sup> Quotation involves implanting a musical segment into a new musical fabric or structure, through which the fragment and its associations are now to be understood.<sup>40</sup> For example, by quoting the “Westminster Chimes” in the piece “The Call of the Mountains”, composer Charles Ives has given the chimes a new role in the new musical fabric of an imaginary mountainous landscape.<sup>41</sup> Even if the music is not related to any concrete programmatic elements like chimes and mountains, Ballantine suggests that implanting a quote into a new fabric would imply an abstract musico-philosophical attitude towards the original piece.<sup>42</sup>

If we apply this understanding of musical quotations to *Pelham v Hütter*, we can see that the AG’s comments are unreasonably narrow and unsuitable for the arts. The AG suggests that the sampled extract being looped in the background is too short to allow any interaction, and that sampling is generally not used for comparative purposes, so it is not “a form of interaction but rather a form of appropriation”.<sup>43</sup> Nonetheless, despite the lack of concrete interaction or communication, the defendant can be considered to have interacted with the extract on a musico-philosophical level by implanting it into a new musical fabric — turning a segment that may originally evoke a fast-moving Trans-Europe Express train in “Metall auf Metall” into part of a strong rhythmic background that further

---

<sup>39</sup> Christopher Ballantine, *Music and Its Social Meanings* (Gordon and Breach 1984) 73.

<sup>40</sup> *ibid* 74.

<sup>41</sup> *ibid* 77.

<sup>42</sup> *ibid* 87.

<sup>43</sup> *Pelham* (AG Opinion) (n34), para 67.

energises Sabrina Setlur's brisk rap in "Nur Mir". The sampling artist has breathed new life into the sampled extract, and this act of implantation in all instances of music sampling would arguably constitute an interaction with the original piece, a communication of an abstract musico-philosophical attitude and an initiation of a musical dialogue, even though no concrete arguments or comments are being expressed. This broader interpretation of "dialogue" would suit musical quotations better, and music sampling thus understood would likely satisfy the "dialogue" requirement.

It is questionable whether this "dialogue" requirement is necessary in the first place though. The AG seems to have relied on the requirement in InfoSoc Directive Article 5(3)(d) that the quotation should be "for purposes such as criticism or review" and adopted this "dialogue" feature found in quotations for "criticism or review" as a unifying feature for all purposes of quotation.<sup>44</sup> However, Berne Convention Article 10(1), which the InfoSoc Directive intends to implement, has not given the examples of "criticism or review" as possible quotation purposes. Its language plainly has not indicated any additional "dialogue" requirement to be necessary. To add this requirement would be to unnecessarily restrict the scope of the quotation defence under the Berne Convention.<sup>45</sup> After Brexit, the UK is no longer bound by *Pelham v Hütter*, so the UK courts may adopt an interpretation of CDPA that suits the Berne Convention better and reject this "dialogue" requirement altogether, or at least interpret "dialogue" in a broader sense that fits musical quotations better.

The "unaltered" requirement is also unjustified, because "quotation" often refers to transformative reuses in

---

<sup>44</sup> *ibid*, para 64.

<sup>45</sup> James Parish, 'Sampling and Copyright -- Did the CJEU Make the Right Noises?' (2020) 79 *The Cambridge Law Journal* 31, 34.

non-literary fields like music, paintings and films.<sup>46</sup> In particular, musical quotation has been described as reproducing a stylistic or timbral excerpt of a pre-existing work,<sup>47</sup> and capturing the overall timbre does not entail an unaltered exact reproduction. Theorist Holm-Hudson describes John Oswald's sampling of Michael Jackson's "Bad" as a timbral quotation even though Oswald truncated and rearranged the bass line and magnified Jackson's whisper of "Who's bad".<sup>48</sup> What is being quoted is the sound quality or tone colour of Jackson's music but not the harmony or melody, so such a stylistic or timbral quotation still qualifies as a musical quotation despite involving alterations. This shows that the quotation defence should not be limited to unaltered quotations.

Finally, the "distinguishable" requirement is already covered by the condition of sufficient acknowledgement in s30(1ZA)(d) CDPA. The AG argues that the quotation must be easily distinguished as a foreign element so that the quoting and quoted work are dissociable from one another, like how a literary quotation is distinguishable by quotation marks.<sup>49</sup> However, as musical philosopher Bicknell concludes, there is no auditory equivalent to quotation marks.<sup>50</sup> The quoted extract can be stylistically similar to the quoting work and not highlighted by any particular musical device like pause or emphasis, but it does not cease to be an extract taken from elsewhere. Whether the quoted extract

---

<sup>46</sup> Aplin and Bently (n31) 115-121.

<sup>47</sup> Holm-Hudson (n17) 18.

<sup>48</sup> *ibid* 21.

<sup>49</sup> *Pelham* (AG Opinion) (n34), para 65.

<sup>50</sup> Jeanette Bicknell, 'The Problem of Reference in Musical Quotation: A Phenomenological Approach' (2001) 59 *The Journal of Aesthetics and Art Criticism* 185, 187-188.



can be identified by listeners as foreign also depends on the listeners' familiarity with the quoted work.<sup>51</sup>

As a solution, Bicknell proposes that a musical quotation is aesthetically effective as quotation only if the composer's intended audience recognises it.<sup>52</sup> Therefore, the lack of musical "quotation marks" or the failure of some people to recognise the quotation would not matter, so long as those familiar with the quoted work can recognise it. This approach fits the reality of musical quotations better than the search for auditory "quotation marks", but cannot be directly applied for legal purposes, as it is difficult to identify the composer's subjectively intended audience or define the degree of "familiarity" with the quoted work required. Instead, the existing requirement of sufficient acknowledgement already provides clear objective evidence of a quotation — so long as the quoted work is sufficiently acknowledged in the caption of the music video or description of the music album, listeners would know there is such a quote and those familiar with the quoted work would likely recognise it as a foreign quotation. If the quoted extract is unrecognisable, it has likely been so significantly altered that it has become something new, amounting to the sampling artist's own original intellectual creation,<sup>53</sup> or the unrecognisable quote may be too insubstantial to be caught by the infringement standard in the first place,<sup>54</sup> so neither case would need protection from the quotation defence. In conclusion, instead of adding a "distinguishable" requirement, the courts should just apply the sufficient

---

<sup>51</sup> *ibid* 186.

<sup>52</sup> *ibid* 188.

<sup>53</sup> *Interlego A.G. v Tyco Industries Inc. and Others* [1989] AC 217 (PC) 263C (Lord Oliver), Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* EU:C:2009:465, [2009] ECR I-6569, para 37.

<sup>54</sup> *Pelham* (ECJ Judgment) (n29), para 31.

acknowledgement criteria without wrestling with the difficult questions of whether there are musical quotation marks and whether the extract is dissociable from the rest of the piece.

The UK courts should therefore either reject the requirements of “dialogue”, “unaltered” and “distinguishable”, or apply an interpretation consistent with musical quotations, in which case these requirements would not be hurdles to sampling.

### (c) Length of quotation

There should also be no restrictions on the length of a quotation. Although a quotation is often described as a “partial extract”<sup>55</sup> or “melodic, stylistic or timbral excerpt” in the musical context,<sup>56</sup> it is not necessarily short and there are circumstances where quoting a work in full may be justified.<sup>57</sup> For example, AG Trstenjak suggested in the *Painer* case that a full quotation of a picture may be necessary to create the necessary material reference back to the work.<sup>58</sup> Similarly, some folk songs, popular jingles or simple tunes may be so short that full quotation is reasonably necessary to evoke the original work. The Berne Convention has also abandoned its original restrictive formulation “short quotations” and only requires that the extent of quotation “does not exceed that justified by the purpose” and is “compatible with fair practice”.<sup>59</sup> Therefore,

---

<sup>55</sup> Case C-145/10 *Painer v. Standard Verlags GmbH* EU:C:2011:239, Opinion of AG Trstenjak, para 212.

<sup>56</sup> Holm-Hudson (n17) 18.

<sup>57</sup> Sam Ricketson (n32) 12.

<sup>58</sup> *Painer* (AG Opinion) (n55), para 212.

<sup>59</sup> Case C-516/17 *Spiegel Online GmbH v. Volker Beck* EU:C:2019:16, Opinion of AG Szpunar, para 45.

a long or full quotation should still fall within the “quotation” defence, but whether such quotation is justified would be assessed under the fair dealing mechanism.

#### **(d) Purpose of quotation**

Since the quotation needs to be justified by its purpose, a relevant question is what quotation purposes are allowed. InfoSoc Directive Article 5(3)(d) refers to “quotations for purposes such as criticism or review” and CDPA s30(1ZA) uses the phrase “whether for criticism or review or otherwise”, which led some commentators to suggest that the purpose must be analogous to criticism or review.<sup>60</sup> However, the original Berne Convention article contains no reference to any particular purpose, not even mentioning the possible purposes of “criticism or review”. In the explanatory memorandum for introducing the quotation defence into CDPA, the drafters also clarified that the phrase “or otherwise” is intended to ensure that UK copyright law “offers as wide a quotation exception as is permitted by EU law and not one limited merely to criticism and review”.<sup>61</sup> This shows that the drafters’ intention was for s30(1ZA) to have broad applicability for various quotation purposes. The literal meaning of “or otherwise” has nothing to do with “analogous” either. The words “criticism and review” were

---

<sup>60</sup> Jane Parkin, ‘The copyright quotation exception: not fair use by another name’ (2019) 19 Oxford University Commonwealth Law Journal 55, 79.

<sup>61</sup> UK Intellectual Property Office, ‘Explanatory Memorandum to The Copyright and Rights in Performances (Personal Copies for Private Use) Regulations 2014 (2014 No. 2361) and The Copyright and Rights in Performances (Quotation and Parody) Regulations 2014 (2014 No.2356)’, para 3.4.3 <<https://www.legislation.gov.uk/uksi/2014/2356/memorandum/contents>> accessed 27 August 2021.

likely there to provide possible examples but not to limit the scope of the provision. Quotations for “entertainment purposes” under Berne Convention Article 10(1) have also been referred to in the 1965 Committee of Experts report for the Stockholm Conference,<sup>62</sup> so musical quotations for artistic, musical or entertainment purposes should be covered by the quotation defence as well.

The above analysis therefore shows that music sampling should fall within the quotation defence if the express requirements of s30(1ZA) are satisfied, including the requirements of sufficient acknowledgement and fair dealing.

#### IV. Pastiche

When *Pelham v Hütter* returned to the German Supreme Court in 2020, the court held that the defences of quotation, parody and caricature would all fail, but left open the possibility that sampling could be permissible under the pastiche defence,<sup>63</sup> which is an optional exception in the

---

<sup>62</sup> Sam Ricketson (n32) 13.

<sup>63</sup> German Federal Supreme Court, ‘Bundesgerichtshof entscheidet über Rechtswidrigkeit des Tonträger-Samplings’ (The Federal Court of Justice decides on the illegality of phonogram sampling) (2020, Press release No. 046/2020) <<https://www.bundesgerichtshof.de/SharedDocs/Pressemitteilungen/DE/2020/2020046.html?nn=10690868>> accessed 27 August 2021;

Julia Reda, ‘German Federal Supreme Court defends press freedom in two high-profile copyright cases, no resolution of sampling dispute’ (*Kluwer Copyright Blog*, 1 May 2020) <<http://copyrightblog.kluweriplaw.com/2020/05/01/german-federal-supreme-court-defends-press-freedom-in-two-high-profile-copyright-cases-no-resolution-of-sampling-dispute/>> accessed 27 August 2021.

InfoSoc Directive<sup>64</sup> previously not expressly adopted in Germany. The case might therefore have been decided differently in the UK, where there is a pastiche defence: s30A CDPA provides that fair dealing with a work for the purposes of “caricature, parody or pastiche” does not infringe copyright in the work.

Although put together in the same provision, the words “caricature”, “parody” and “pastiche” mean different things and should not be used interchangeably. Some European States treat the three concepts similarly, like Belgium which declared that the three concepts are too similar to be distinguished from each other.<sup>65</sup> However, they would likely be treated differently in the UK, as the Intellectual Property Office (IPO) provides separate descriptions for the three concepts respectively, stating that a parody “imitates a work for humorous or satirical effect”, a caricature “portrays its subject in a simplified or exaggerated way, which may be insulting or complimentary”, and a pastiche is “a musical or other composition made up of selections from various sources or one that imitates the style of another artist or period”.<sup>66</sup> IPO’s descriptions highlight at least two special features of “pastiche” that warrant its isolation from the other two concepts: Firstly, as opposed to

---

<sup>64</sup> Information Society Directive (n30), Article 5(3)(k).

<sup>65</sup> Frédéric Döhl, ‘The Concept of “Pastiche” in Directive 2001/29/EC in the Light of the German Case *Metall auf Metall*’ (2017) 2 Media in Action 37, 49-50.

<sup>66</sup> UK Intellectual Property Office, ‘Exceptions to Copyright: Guidance for creators and copyright owners’ (2014) p.6 <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/448274/Exceptions\\_to\\_copyright\\_-\\_Guidance\\_for\\_creators\\_and\\_copyright\\_owners.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/448274/Exceptions_to_copyright_-_Guidance_for_creators_and_copyright_owners.pdf)> accessed 27 August 2021.

“parody” being an expression of “humour or mockery”<sup>67</sup> or “caricature” being “insulting or complimentary”,<sup>68</sup> “pastiche” can have a complimentary or neutral connotation. Secondly, “pastiche” may include a compilation or mixture of different source materials. These two features of “pastiche” make it more suitable for describing sampling pieces which are musical mixtures not necessarily having any humorous intention.

There is currently no settled legal definition of “pastiche”. CJEU has held in *Deckmyn v Vandersteen* that, since “parody” is not explicitly defined in the directives, its meaning and scope should be determined by considering its “usual meaning in everyday language”, taking into account the context of the provision and the objectives of the rules of which it is part.<sup>69</sup> This approach can similarly be applied to “pastiche”,<sup>70</sup> which has so far neither been considered by courts nor defined in statutes on both the national and European levels.

The word “pastiche” derived from the Italian word “pasticcio”, meaning a pie of various ingredients, and was referred to during the Renaissance as works where the author drew upon diverse techniques and styles.<sup>71</sup> Today “pastiche” is mainly used in two senses, either referring to a

---

<sup>67</sup> Case C-201/13 *Deckmyn v Vandersteen* EU:C:2014:2132, [2014] ECDR 21, para 20.

<sup>68</sup> IPO Guidance (n66) p.6.

<sup>69</sup> *Deckmyn* (n67), para 19.

<sup>70</sup> European Commission, ‘Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market’ (Brussels, 4 June 2021) 19 <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021DC0288&from=EN>> accessed 27 August 2021.

<sup>71</sup> Ingeborg Hoesterey, *Pastiche — Cultural Memory in Art, Film and Literature* (Indiana University Press 2001) 1-4.

combination of aesthetic elements or to a kind of aesthetic imitation, which align with UK IPO's description.<sup>72</sup> The first sense is more relevant to music sampling. However, commentators are divided as to the precise definition of "pastiche", and a clear-cut binding definition has long been absent from the history of the arts.<sup>73</sup> For example, Hoesterey found nearly twenty different terms used by arts scholars to describe "pastiche", from "adaptation" and "montage" to "plagiarism" and "travesty", indicating how complex and inconsistent the discourse on the concept is in the arts.<sup>74</sup> In the context of sampling, commentators are also divided as to the prerequisites for applying the concept of "pastiche", disagreeing on issues like whether an intentional intertextuality recognisable by the audience or a "juxtaposition of disparate aesthetic systems" are required.<sup>75</sup> This led to some commentators like Döhl and Hui doubting whether the "underdeveloped" and "widely disputed" concept of "pastiche" could develop into a broad defence without compromising legal certainty and predictability.<sup>76</sup>

Nonetheless, the "pastiche" defence arguably still has great potential. Despite scholars' fine disagreements on the precise boundaries of "pastiche", it seems generally true that

---

<sup>72</sup> Richard Dyer, *Pastiche* (Routledge 2007) 1.

<sup>73</sup> Döhl (2017) (n65) 55; Frédéric Döhl, 'On the New Significance of the Pastiche in Copyright Law' in Berthold Over and Gesa zur Nieden (eds), *Operatic Pasticcios in 18th-Century Europe – Contexts, Materials and Aesthetics* (transcript Verlag 2021) 217-218.

<sup>74</sup> Döhl (2017) (n65) 55; Hoesterey (n71) 10-15.

<sup>75</sup> Döhl (2017) (n65) 56-57.

<sup>76</sup> Döhl (2017) (n65); Döhl (2021) (n73); Alan Hui and Frédéric Döhl, 'Collateral Damage: Reuse in the Arts and the New Role of Quotation Provisions in Countries with Free Use Provisions After the ECJ's *Pelham*, *Funke Medien* and *Spiegel Online* Judgments' (2021) 52 International Review of Intellectual Property and Competition Law 852, 860 and 882.

the term is different from “parody” as it may accommodate neutral or non-mockery imitation and assemblage uses. Together with the fact that the statute specifically includes all three words instead of merely using the word “parody”, it is reasonably arguable that the statutory intention is for “pastiche” to cover its own type of exempted conduct. Therefore, despite its disputed meaning, it should still operate as a proper defence. The IPO can issue a clarificatory guidance document (discussed in Section VI below) explaining how “pastiche” is to be understood. IPO should just generally define “pastiche” to have its meaning in either the “imitation” or “medley” sense, without any fine musicological or philosophical restrictions. Borderline cases, like cases failing to meet certain fine artistic criteria, can be considered as “pastiche” first and filtered by the more flexible fair dealing mechanism, instead of rigidly excluding them from the meaning of “pastiche” and depriving them of legal protection altogether. Such a broad interpretation of “pastiche” has gained momentum in European legal literature,<sup>77</sup> and has also been advocated by Professor Hudson in the UK.<sup>78</sup> In its guidance document, the IPO can also provide examples of “pastiche” to illustrate its possible coverage, similar to how a new “pastiche” provision introduced in Germany in 2021 is expressly stated to cover “remix, meme, GIF, mashup, fan art, fan fiction, cover and sampling”.<sup>79</sup> Sampling should also be included as an example of “pastiche” in the UK. If this broad interpretation leads to an overshoot in permitted conduct, the flexible fair dealing mechanism would maintain the balance between upstream rights and downstream creativity.

---

<sup>77</sup> Hui and Döhl (n76) 881.

<sup>78</sup> Emily Hudson, ‘The pastiche exception in copyright law: a case of mashed-up drafting?’ (2017) 4 IPQ 346, 363.

<sup>79</sup> Hui and Döhl (n76) 881.



## V. Fair Dealing

One may object that a broad interpretation of the defences would disproportionately favour downstream authors by exempting them from infringement liability. However, this would be balanced by the courts' consideration of fair dealing factors. For the two defences to apply respectively, s30(1ZA)(b) CDPA requires the use of the quotation to be "fair dealing with the work" and s30A(1) CDPA also requires "fair dealing" for the purposes of caricature, parody or pastiche. This allows the courts to balance between the copyright owners' exclusive economic rights and the alleged infringers' rights to freedom of expression<sup>80</sup> and freedom of the arts.<sup>81</sup> The copyright owner's interest in restricting artistic reuses would also be balanced against the public interest in having a diversity of creative artistic products.

In the UK, fair dealing is traditionally based on factors set out by the courts but not the statute. In *Ashdown v Telegraph Group Ltd*, the Court of Appeal cited with approval an academic summary describing fair dealing as a "matter of fact, degree and impression" for which it is "impossible to lay down any hard-and-fast definition".<sup>82</sup> The most important factor to consider is whether the alleged fair

---

<sup>80</sup> Charter of Fundamental Rights of the European Union [2012] OJ C326/391, Article 11; given effect in UK Human Rights Act 1998.

After Brexit, the right to freedom of expression will continue to be protected under Human Rights Act 1998 and the devolution statutes, see UK Government, 'Charter of Fundamental Rights of the EU Right by Right Analysis' (5 December 2017) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/664891/05122017\\_Charter\\_Analysis\\_FINAL\\_VERSION.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/664891/05122017_Charter_Analysis_FINAL_VERSION.pdf)> accessed 27 August 2021.

<sup>81</sup> Charter of Fundamental Human Rights of the European Union, Article 13, given effect in UK Human Rights Act 1998.

<sup>82</sup> *Ashdown v Telegraph Group Ltd* [2001] EWCA Civ 1142, [2001] 3 WLR 1368 [70] (Lord Phillips).

dealing is commercially competing with the copyright owner's exploitation of the copyright work and is a market substitute for the original work.<sup>83</sup> The next important factor is whether the original work has already been published,<sup>84</sup> followed by the third most important factor being the amount and importance of the work that has been taken<sup>85</sup> and whether the extent was necessary and justified with respect to the purpose of the dealing.<sup>86</sup> These factors still represent the current UK position, as they have been followed by the High Court recently.<sup>87</sup>

There are currently no cases illuminating on how fair dealing would apply to s30(1ZA) and s30A CDPA, so it is difficult to predict how the courts would actually approach the issue. Instead, this essay would propose how the courts should apply the fair dealing evaluation to music sampling. The factor of prior publication can be dealt with quickly as virtually all sampled pieces have been published before. In the rare case that a quoted sample is unpublished, such sampling would unlikely be "fair". The remaining two factors, commercial competition and proportionality of the extent of work taken, would be discussed in detail below.

### **(a) Commercial competition and market effect**

The UK fair dealing factor of commercial competition is similar to the requirement that the reproduction does not

---

<sup>83</sup> *ibid.*

<sup>84</sup> *ibid*, *Hyde Park v Yelland* [2000] 3 WLR 215 (EWCA) [37] (Aldous LJ).

<sup>85</sup> *Ashdown* (n82) [70] (Lord Phillips).

<sup>86</sup> *Hyde Park* (n84) [37] (Aldous LJ); *Hubbard v Vosper* [1972] 2 QB 84 (EWCA) 94B-C (Lord Denning).

<sup>87</sup> *Duchess of Sussex v Associated Newspapers Ltd* [2021] EWHC 273 (Ch), [2021] 4 WLR 35 [154] (Warby J).

conflict with a normal exploitation of the work in Berne Convention Article 9(2) and the US fair use factor of market effect,<sup>88</sup> so the US approach may shed some light on this issue. In relation to sampling, the US courts have held that the enquiry must take account not only of harm to the original market (primary market) but also of harm to the market for derivative works (secondary market).<sup>89</sup> The primary market consists of the sales of the musical work or copies of the album, while the secondary market consists of collecting royalties and licensing the work for subsequent uses of the work by other artists. The analysis below would show that this fair dealing factor would unlikely pose difficulties to sampling artists.

### *(i) Primary market*

In terms of the primary market, sampling works are unlikely to harm the sales of the sampled music. The sampling work and the sampled work are two different pieces. In the sampling work, the sample is accompanied by other musical segments resulting in a new overall flavour. The sampling work is not a market substitute of the sampled work but a different product possibly with a different consumer base: Those who love the original work may not buy the sampling piece only to listen to the sampled portion, whereas those interested in sampling music may have no interest in the original work anyways. This is especially true when the two pieces belong to different genres. For example, where a rap song sampled an easy-listening pop ballad, a US court noted that “The two songs were utterly unlike and reached completely different markets. Certainly, nobody would have confused the songs. Few would have bought the

---

<sup>88</sup> Copyright Act 1976 (US), s 107(4).

<sup>89</sup> *Harper & Row v Nation Enterprises* 471 US 539, 568 (1985).

rap song because it contained a portion of the original song.”<sup>90</sup>

Not only are sampling works unlikely to harm the primary market, but they may even bring economic benefits to the sampled artists, as evident in an empirical study<sup>91</sup> about the effect of music sampling on the market for copyright-protected music. The study looks at the album “All Day” from the musician Girl Talk, which is a collage of around 400 interwoven samples of copyright-protected music,<sup>92</sup> and compares the sales of the sampled songs a year before and after the release of “All Day”. This album is particularly suitable for an empirical study because it was highly popular but was created without licensing any of the copyright works being sampled.<sup>93</sup> The study found that the average sampled song sold over 1300 more copies in the year after the release of “All Day” than the year before. This accounted for an aggregate sales increase of 3.2% and this increase is statistically significant to a 92.5% confidence interval.<sup>94</sup> This shows that the sampling of a copyright work may not harm the sales of the original copyright work, and may even boost their sales by reviving the listeners’ interest in the original work.

Moreover, even sampling for commercial purposes can satisfy fair dealing pursuant to this factor. As explained later in Section VI, a well-known sampler (who likely uses

---

<sup>90</sup> Melissa Eckhause, ‘Digital Sampling v Appropriation Art: Why is One Stealing and the Other Fair Use? A Proposal for a Code of Best Practices in Fair Use for Digital Music Sampling’ p.31, <<https://ssrn.com/abstract=3224724>> accessed 27 August 2021; citing *Jarvis v A&M Records* 827 F Supp 282, 295.

<sup>91</sup> Schuster (n16).

<sup>92</sup> *ibid* 446.

<sup>93</sup> *ibid* 463-464.

<sup>94</sup> *ibid* 474.

sampling commercially) may even be more likely to revive interest in a sampled work and bring economic benefits to the original author than a lay person who uses sampling non-commercially.

Meanwhile, if a sampling artist incorporates an excessively long quote that is unaltered, or if the sampling song taints the original song with a derogatory message that leads the audience to associate it with the original author, then the primary market may still be harmed. Where there is evidence of actual or likely harm to the primary market, it may point against fair dealing.

### *(ii) Secondary market*

Even if sampling may bring benefits or no harm to the primary market, copyright owners may be concerned about the reduction of income from the secondary market. Nonetheless, this essay argues that effects on the secondary market should be left out from the fair dealing analysis.

Firstly, copyright owners may argue that the lost licensing fees from the defendant would constitute market harm.<sup>95</sup> However, this would involve circular reasoning in the form of “you should not be exempted from paying licensing fees to legally use my work (by relying on the statutory defences) because if you do I cannot receive licensing fees from you”. This would presume that the defendant is obligated to pay licensing fees, without explaining why that should be the case.<sup>96</sup> Moreover, if lost licensing fees would constitute market harm, then the more

---

<sup>95</sup> Sam Claflin, ‘How to Get Away with Copyright Infringement: Music Sampling as Fair Use’ (2020) 26(1) BUJ Sci & Tech L 102, 124.

<sup>96</sup> *ibid* 125.

expensive the licensing fee of a piece is, the greater the amount of lost licensing revenue and market harm would be, and the more unlikely it constitutes fair dealing. This would mean that copying pieces with lower licensing fees would more easily qualify as fair dealing, but large record companies and famous artists that charge high licensing fees would more likely win against sampling artists and keep tight control over uses of their work. Famous and expensive pieces would be kept off from musical borrowing. Not only does this exacerbate inequality in the music industry, but it also hampers the flourishing of a sampling culture where both expensive and cheap pieces can be sampled.

Secondly, some academics argue that allowing unauthorised sampling once may lead to a chain of other derivative works which diminishes the commercial value of the original piece. Under this view, when one sampler renews public interest in a particular sample, other samplers would also want to use the same popular sample. The market would become “flooded” with the same popular samples, and their commercial value would dissipate quickly.<sup>97</sup> As it is once put, “no matter how catchy a particular original song is, a proliferation of derivative works may render it so common that it loses its commercial appeal.”<sup>98</sup>

However, there are several objections to this argument. One main objection is the difficulty in making a speculative assessment of whether one instance of unauthorised sampling would repopularise the sample to the

---

<sup>97</sup> Robert M Szymanski, ‘Audio Pastiche: Digital Sampling, Intermediate Copying, Fair Use’ (1996) 3 UCLA Ent L Rev 271, 321-322.

<sup>98</sup> Harvard Law Review Association, ‘A New Spin on Music Sampling: A Case for Fair Play’ (1992) 105(3) Harvard Law Review 726, 738.

extent that the market would become “flooded” with the same sample. The particular sample may not necessarily be requoted in a short while. Unless there is actual evidence that the sample is requoted excessively after the first instance of quoting it, the court is not equipped to predict the popularity of this sample in the future.

Even if this instance of unauthorised sampling has indeed led to a “flood” of derivative works of the same sample, this should not be a reason for denying fair dealing. If this phenomenon occurs, it means that the defendant’s sampling song has successfully renewed public interest in the plaintiff’s sampled song, benefitting the latter’s primary market. Moreover, the legacy of the sampled song would be more likely preserved among the listeners. To cite this “economic harm to the secondary market” to deny fair dealing would be to penalise such positive effects that the sampling culture can bring to the sampled song, as sampling artists are better off if they fail to revive interest in that sampled song. Therefore, this damage to the derivative market should not be counted in the market harm assessment of the fair dealing analysis. The factor of commercial competition thus understood should generally pose no difficulty to sampling artists.

### **(b) Proportionality of the extent of work taken**

The next factor to consider is the extent of copying and its proportionality to the purpose of use. In general it is more likely to be fair if the extracted sample is short and relatively unimportant, but a long extract or full quote may also be fair depending on the circumstances.

For quotation, the court may consider whether the quotations are altogether too many and too long to be fair,<sup>99</sup> as well as the qualitative importance of the quotations.<sup>100</sup> The courts should not set a rigid limit on the number of seconds of a sample but should adopt a flexible assessment considering the general length and frequency of other similar samples and the overall context. For example, it may be fair for a sampling artist to quote the entirety of a long musical phrase to ensure musical coherence in one case, but unfair for another artist to quote the entire signature section of the sampled song given its importance to the quoted work. It would be a fact-sensitive question.

Applying this factor to *Pelham v Hütter*, the fact that only 2 seconds of music had been taken from the plaintiff's piece (albeit repeated in the defendant's piece) may point to a finding of fair dealing. The importance of the part copied is generally assessed in terms of its importance to the plaintiff's work but not the defendant's work,<sup>101</sup> so the short 2-second sample is relatively unimportant to the plaintiff's work even though its repeated use may indicate its importance in the defendant's work. The short length of the sample should therefore outweigh its repeated use in the defendant's piece.

As for full quotations, as explained above in Section III, some folk songs, popular jingles or simple tunes may be so short that full quotation is reasonably necessary to allow listeners to recognise the work and appreciate the quotation. However, the explanatory memorandum to the 2014 UK copyright reform cautioned that, although there may be circumstances where quotation in full is permissible, in

---

<sup>99</sup> *Hubbard v Vosper* (n86) 94B-C (Lord Denning).

<sup>100</sup> *Ashdown* (n82) [70] (Lord Phillips).

<sup>101</sup> *Designers Guild Ltd v Russell Williams (Textiles) Ltd* [2000] 1 WLR 2416 (HL) 2426 (Lord Millett).



practice such a full quotation is much more difficult to constitute “fair dealing” than a shorter quotation.<sup>102</sup>

For pastiche, the general principle of considering the length, frequency and qualitative importance of the extracts should also apply, but it can arguably accommodate long or full quotations better due to its emphasis on “mixture” or “medley” instead of “excerpt” as in the case of quotation. “Quotation” and “excerpt” usually refer to a partial extract of the original work, and according to the UK explanatory memorandum a full quotation is unlikely to be fair in most circumstances. On the contrary, a “mixture” or “medley” has no implications on whether their ingredients are partial extracts or entire works, so the inclusion of a full work as an ingredient of a mixture can still be fair for the purpose of pastiche. Whether including a long or full work is fair is still a fact-sensitive question, but it may more likely be fair under “pastiche” than under “quotation”. For example, if the new work is entirely made up of two full quotations horizontally placed to each other, there is little sense of a “mixture” involved and the long length of the quotations would render them unfair under the general rule. However, if several extracts are vertically superimposed onto a full quotation, the full quotation may be considered justified for its role in the mixture as an overarching backbone to mix with the superimposed extracts and create varied musical textures. Therefore, in addition to considering the length, frequency and qualitative importance of the sampled extract, the court should give some leeway to long or full quotations that are justified for the purpose of “pastiche”.

This difference between the two defences also shows that pastiche is different and separate from quotation but not, as Professors Aplin and Bently suggest, a mere sub-

---

<sup>102</sup> UK IPO Explanatory Memorandum (n61), para 3.5.7.

group of quotation.<sup>103</sup> The two professors have suggested broadly interpreting “quotation” under Berne Convention Article 10(1) as covering most reuses of recognisable expressive material for expressive purposes,<sup>104</sup> so pastiche as a type of reuse would fall within the quotation defence as its subgroup. However, this understanding does not suit the UK CDPA regime and is unlikely to be adopted by the UK courts. Given that s30(1ZA) CDPA was introduced in 2014 as a separate subsection but not as an overarching umbrella provision, the legislative intention was likely for the quotation defence to be distinct from the pastiche defence. The former would focus on the excerpting of materials from other sources, and the latter would focus on aesthetic imitation or aesthetic combination, so their functions and emphases are different. Although there are overlaps between quotation and pastiche in relation to sampling, one difference may lie in the application of fair dealing — long or full samples may be unfair for the purpose of quotation but fair for the purpose of pastiche.

### **(c) Implications**

The implications of the analysis above are that most sampling cases should qualify as fair dealing. The factor of prior publication is largely irrelevant as most sampled pieces have been published previously. The factor of commercial exploitation would unlikely pose difficulties to music sampling, because sampling works are unlikely to cause economic harm to the primary market and may even bring economic benefits by reviving interest in the sampled music. Reduction of licensing income from the secondary market should not be considered by the courts. The third factor, the proportionality of the extent of work taken, is a fact-sensitive question. It is generally more likely to be fair if the

---

<sup>103</sup> Aplin and Bently (n31) 124.

<sup>104</sup> *ibid* 138.

sampled extracts are short, infrequent and qualitatively unimportant. Longer or full quotations may also sometimes be considered as justified for the purpose of pastiche. Overall speaking however, an unfavourable finding under one factor is not conclusive, as the courts would weigh all factors to obtain an overall impression.

Under this liberal interpretation of fair dealing, it would be easier for sampling artists to use sampling fairly, upon which the quotation and pastiche defences would have permitted them to incorporate samples for free instead of having to pay expensive licensing fees every time. The existing CDPA regime therefore has great potential in accommodating a vibrant sampling culture so long as “quotation”, “pastiche” and “fair dealing” are interpreted more broadly.

## VI. Rejecting the Compulsory Licensing Scheme

Alternatively, some academics have suggested implementing a compulsory licensing system with implied licences issued to the public for all musical pieces, so that record companies have no discretion to deny clearance and samplers can use any pre-existing musical piece so long as they pay.<sup>105</sup> The licensing fees would be based on a statutory rate,<sup>106</sup> which can be made more affordable than current fees. However, this is still insufficient in accommodating and facilitating a vibrant sampling culture. Amateurs who sample as a hobby may still fail to afford the licensing fees, especially if they want to create sample-heavy pieces that are common in hip-hop music, in which case the accumulated statutory licensing fees for the numerous samples can be high. Such creations by amateurs would unlikely harm the commercial interests of copyright owners, but could be prevented from emerging due to the requirement of licensing fees.

---

<sup>105</sup> Keyes (n12) 439.

<sup>106</sup> *ibid.*

Other academics therefore argue that non-commercial uses should be exempted from payment of licensing fees altogether, and a compulsory licensing system should only apply to commercial uses.<sup>107</sup> However, the line between commercial and non-commercial uses may be hard to draw. For example, Girl Talk's aforementioned album "All Day" was released online for free and he encouraged free downloads and optional contributions,<sup>108</sup> but this album may have also helped to boost his fame and allowed him to earn more during his live performances. His use of sampling is not "commercial" in the conventional sense of selling one's works for profit, but is not entirely "non-commercial" either, as it does bring him economic benefits. Therefore, there may be difficulties in drawing a clear line of commerciality.

Moreover, this would in effect exclude commercial uses from the fair dealing mechanism, in turn unreasonably discouraging those commercial sampling practices which are fair and beneficial. The more well-known a sampler, the higher the number of listeners and the greater the positive market effects the sampler can bring to the sampled works. When a famous artist and an unknown person sample the same song, it is reasonable to expect that the famous artist would more likely renew public interest in the sample than the unknown person. These well-known artists would usually use the samples for commercial purposes, but they

---

<sup>107</sup> Bernd Justin Jütte, 'The EU's Trouble with Mashups: From Disabling to Enabling a Digital Art Form', (2014) 5 JIPITEC 172, Section 4 <[www.jipitec.eu/issues/jipitec-5-3-2014/4094](http://www.jipitec.eu/issues/jipitec-5-3-2014/4094)> accessed 27 August 2021.

<sup>108</sup> Elina Lae, 'Mashups – A Protected Form of Appropriation Art or a Blatant Copyright Infringement?' (15 February 2012), 3 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2003854](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2003854)> accessed 27 August 2021.

may potentially bring more benefits to the sampled author than non-commercial uses. The fair dealing mechanism should encourage such fair and beneficial uses even if they are commercial. Therefore, it is undesirable to require commercial uses to follow a compulsory licensing scheme and limit the fair dealing mechanism to non-commercial uses only.

Instead of establishing a new compulsory licensing system, a liberal application of the existing CDPA regime would already help to promote a vibrant sampling culture. Because it may be rare for cases of sampling to reach the courts, one way to effect a change is for IPO to publish a formal opinion to clarify the legal position of sampling. As suggested in the Hargreaves report, such opinion can be non-binding but courts should have a duty to take the report into account when adjudicating relevant cases.<sup>109</sup> IPO can therefore explain how “quotation”, “pastiche” and “fair dealing” should be interpreted, and clarify how licence-free music sampling practices can be fair and permitted under these existing copyright defences, so as to provide assurance to musicians to engage in sampling activities more boldly, and encourage copyright owners to be more accepting towards such sampling practices.

## VII. Conclusion

Music sampling serves important artistic and cultural purposes, including paying tribute and homage to other musicians, bringing back forgotten tunes and breathing new life into the sampled music. Unfortunately, its development in the UK has been hampered by the high licensing fees and the lack of legal certainty. This essay therefore makes a case

---

<sup>109</sup> Ian Hargreaves, ‘Digital Opportunity: A Review of Intellectual Property and Growth’ (May 2011), paras 10.22-10.23 <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/32563/ipreview-finalreport.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/32563/ipreview-finalreport.pdf)> accessed 27 August 2021.

for a liberal interpretation of the quotation and pastiche defences to exempt fair sampling practices from copyright infringement and allow this art form to properly develop in the UK.

The quotation defence should apply to musical quotations and there should be no restriction on their length or purpose. Requirements that the quotation should be unaltered, distinguishable or involve a dialogue are also unjustified. As for pastiche, it is different from parody as it can have a commendatory or neutral connotation. Generally understood as an assemblage of works or a mixture of artistic ingredients, pastiche has the potential of covering the practice of music sampling. Therefore, sampling may fall within both quotation and pastiche defences.

Given the lack of cases discussing how fair dealing should apply to quotation and pastiche, the actual approach of the courts cannot be predicted, but the essay argues that the fair dealing mechanism should be interpreted liberally to enable sampling artists to adopt a fair sampling practice more easily. Most sampled pieces have already been published previously, and empirical evidence shows that music samples rarely compete with the commercial exploitation of the original pieces. If the sampled extracts are short, infrequent and qualitatively unimportant, they would likely be considered proportionate and fair. Meanwhile, commercial sampling uses should not be automatically excluded from fair dealing as they may bring economic benefits by reviving interest in the sampled work. Finally, clarifications on the legal position of sampling can be made in the form of an IPO opinion which the courts are bound to consider. It is hoped that a more liberal interpretation of “quotation”, “pastiche” and “fair dealing” as applied to sampling would encourage sampling artists to engage in sampling activities more boldly, and allow a vibrant sampling culture to develop.