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The Boundaries of Property Rights in English Law

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Introduction

The World Congress questionnaire posed serious difficulties of definition, despite a strong Roman law influence on English law. The questionnaire asked about a vast range of property rights, from animals to electricity, from credit to intellectual property rights as well as questions concerning groups of assets and about public, private and collective groups of owners. This contemplated precise definitions of Roman law origins fitting into the civil law taxonomy. The structure of the English property is not based on such Roman law definitions, although they are generally understood. Sometimes basic definitions of property in England are hard to find, partly because there is a greater concern with remedies than with the nature of rights. There are other English property law structures, such as the law of equity, which do not fit this scheme of things.

The English title of the property group, “the boundaries of property rights” suggest a topological approach. The French title, “*la notion de bien*”, suggests an ontological approach. The general report took this essentialist approach, which included considering the philosophical basis of property law, for example in Locke and Rousseau. It would not have been possible to take this sort of ontological approach to the questionnaire with English law, which is not a natural law legal system, whereby philosophical concepts of property are embodied in the substantive law. As the Norwegian reporter said - property law is simply a system of rules. In England the rules are not directly connected to the great philosophical debates from the enlightenment, although they are influenced by them. The feudal origins of the English system predate these debates.

A topological approach is needed because it is necessary to explain large structural differences and the similarities before approaching the detailed questions. Even where there are similarities, the questions are of such breadth that there was no prospect of in depth exploration of ontology in the space available. In some questions concepts are similar to English law and these can be simply answered. A number of the concepts in the questions do not exist in English law, but with knowledge of the French law it is possible to take several steps backwards to find some similarity to civil law mechanisms within apparently different notions. Sometimes this means using a historical approach to different legal traditions (Glenn, 2004) to show origins concepts or their divergence from Roman ideas. Where there are concepts that do not exist in England, such as the *universatis rerum*, it may be possible to use a functionalist approach (Zweigert and Kötz, 1998), by tracing groups of assets with similar purposes. This means, for example, comparing the *universatis rerum* and trusts, and explaining important differences. Finally it is sometimes necessary to say that a device does not exist, and why this is so.

The concepts in the questionnaire correspond closely to French law, so that it is possible to illustrate differences for an English audience by a French comparison to assist understanding in places. This is often in the hope of finding parallel provisions or just an echo of the French law in the English law. English law is discussed but this is the same as the law of Wales, and, generally, Northern Ireland. Scottish law is closer to civil law systems and quite different, so that this must be omitted from this report. The order of the original questionnaire (in italics below the headings) has been changed to enable a general introduction to differences, particularly basic definitions, equity and trusts, and contracts. Corporeal property can then be dealt with, including groups of people and of property, such as trusts, companies, and matrimonial regimes. Next, incorporeal property is introduced followed by specific examples of intellectual property rights and the mechanisms for creation of new types of incorporeal property.

1. Some Essential System Differences

1.1 Categorising property

“Property” in a technical legal sense can mean rights of ownership, but in its everyday sense property refers to the thing owned in an extremely loose and wide way. Even when property means ownership, its use is not limited to ownership of real property. To distinguish between ownership (the rights to property) and asset (what is owned) it is sometimes necessary not to use those word property at all.

Unlike in England, the French Civil Code contains basic property definitions of things that can be owned,² even though, strictly speaking, in both French law and English law “property” describes the right to the thing rather than the thing itself, a common idea from Roman law. Terré and Simler (1998:13) say “*à proprement parler, ce sont ces droits qui ont une valeur, qui sont donc des biens, et non pas les choses elles-mêmes*”. French law is generally very precise in its definitions, making it relatively easy for a foreign lawyer to penetrate what is meant.

Codification, of itself, would not necessarily make a difference were it not for the fact that this took place immediately after the French revolution, sweeping complex and hierarchical forms of property including fragmentation of ownership. French feudal property tenures were replaced by the concept of absolute property³ supported by a strong right to property in article 17 of the Declaration of the Rights of Man and of the Citizen of 26th August 1789. This is a unitary concept of property and property conceived as attached to the person, as part of their *patrimoine*, or patrimony.

The English legal system has never been codified, although there are a number of very large statutes consolidating aspects of property law, such as the Law of Property Act 1925 and the Trustee Act 1925 which have been substantially amended. The subject continues to have an important basis in case law so that these statutes so not themselves essentially define property. The Law of Property Act 1925 s1(1) classifies types of

² CC, articles 517-528

³ CC, article 544

property in a way that departs from the Roman Law distinctions between real and personal property. Perhaps it is more important that land is involved here, rather than that these are real property rights. Freehold (ownership) and leasehold (tenancies) are not defined, but are both classified as “estates,” the most strongly protected form of land rights. It is slightly alien to most European lawyers that a tenant under a lease is in possession of a property right, even though in Germany tenants have been held by the *Bundesverfassungsgericht*, to have the benefit of the constitutional right to property.⁴ It is also ironic that short-term tenants in England are generally less secure than their French or German counterparts despite the fact that French tenants have no property right. For a full comparison of tenancies, see Ball (2003).

Property rights in England are ancient and complex. The Law of Property Act 1925 satisfies itself with classifying property rather than defining it, simplifying things in the process. The classifications that act govern the way property interests are protected in law by registration and the way they are transmitted, which are essentially procedural. The nature of property rights frequently has to be deduced from a piecemeal collection of *ad hoc* definitions, usually in case law, borrowing from a variety of sources.

The English concept of ownership has, however been referred to as “absolute” in the same way as the French concept, a common idea from Roman law (Sherman, 1937).⁵ The UK, in contrast continually reformed and modernised feudal property forms, rather than abolishing them. Scotland abolished the feudal system by the Abolition of Feudal Tenure Act 2000. English law retains the possibility of fragmentation of property rights with no concept of unity of property. This does not generally result in difficulty in management because any complexity in the legal relations of ownership tends to be controlled using a modernised trust (or other devices such as companies), part of the law of equity, so that a preliminary explanation of this area will be necessary. In France, for example, ownership on the model of real property ownership is a unitary concept so that lesser property rights are simply “*accessoire*”, something attaching to the irreducible core concept of property.

It may be that the English view of proprietary rights facilitates the creation of new personal property rights, despite conservative views by judges. The lack of a principle of unity of property in English law enables lawyers to manipulate the individual property rights, not necessarily hampered by limitative definitions of property. English law makes liberal use of the Hohfeldian notion that property is a bundle of rights,⁶ or a collection of different legal relationships. The idea of the bundle of rights goes back to Roman times when the *fasces* as a bundle of sticks carried in front of the Roman emperor to indicate a bundle of rights and thus the limitations of the emperor’s position by the law. The significance of the concept to English law is that public and private lawyers here are accustomed to fragmenting and manipulating property rights. Thus there is the notion that if you split the bundle of rights into its component parts, each component may be capable of being a property interest in its own right. The Law of Property Act 1925 by s.1(2)

⁴ Reported in Pressemitteilung des BvertG nr.46/2000 vom 13.4.2000, NJW-Informationen Heft 19/2000. Also see Beschluss des Ersten Senats vom 26.Mai 1993, - 1 BvR 208/93,- NJW 1993,2035

⁵ Par.a. 572

⁶ For an explanation of this in relation to English property law see Panesar (2001), from p.17

classifies particular legal land rights, such as easements and mortgages as “interests or charges in land” which attract some protection of the law of property. Thus a property interest is a way of referring to a component of the bundle of rights.

This does not mean that judges do not try to formulate ideas about what is and what is not property. In *National Westminster Bank v Ainsworth* the House of Lords explored the nature of property rights. Lord Wilberforce said:

Before a right or interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, capable in its assumption by third parties and have some degree of permanence or stability.⁷

The reference to third parties here concerns the traditional idea that property rights are good against the whole world.

There are competing technical bases for property rights, notably the idea of possession and control which is particularly dominant in UK law. As a matter of practicality cases on the nature of ownership rarely reach the courts, although there are disputes about the how far property rights extend. Many of our legal remedies, particularly nuisance and trespass are related to possession of land rather than to proof of title (Smith, 2006).⁸

1.2 Equity and Trusts

An additional major problem of definition and comparison is that, In England, the distinction between the law of real and personal property is blurred by a whole category of other rights, equitable rights, which are supported by the law of equity and trusts. It is difficult to classify equitable rights in terms of real or personal property. On of these rights, the right of a beneficiary under a trust is, for historical reasons, classed as a right *in personam*, because action is taken against people personally to restrain them by injunction or to impose any other sanction. Nonetheless the right of a beneficiary is clearly a proprietary right because it is effective against third parties in many circumstances.⁹ There is thus a whole class of proprietary rights which do not fit easily with the classic Roman law distinction between real and personal property, particularly since trusts are strongly associated with land. The law of equity is also instrumental in the creation of some intellectual property rights such as trade marks, also using equitable actions of breach of confidence and of “passing off”.

Trusts are part of the answer to much of the questionnaire both as a form of ownership, concerning groups of assets and as a facilitator in the creation of new rights. Equity and trusts is treated as part of property law, partly because, as soon as there is more than one owner of land, there is always a trust. Europeans often associate the trust with financial services although it has much wider uses. Tony Honoré (undated: 4) has described the trust as the “universal ‘fix-it’” for common law systems because of its multiple uses,

⁷ [1965] AC 1175, 1247-1248, quoted by Panesar (2001), at p.57

⁸ Chapter 1

⁹ See Panesar (2001), from page 71 for an explanation, with other ways of classifying English property rights

rivaling the law of contract. It is possible the trust is in decline in England and the use of the contract increasing under European influence.

A trust is a flexible grouping of people and property in which one group of people (trustees), look after assets for another group (beneficiaries). In simple arrangements, the same people can be both trustees and beneficiaries. Trustees are referred to as “the legal owner”, because the property is in their name. Trustees are “legal owners”, but do not enjoy the benefit of the property. They simply administer it for the benefit of the real owners, the beneficiaries, who are considered owners of the equity, of the rights to enjoy property or its income. This arrangement always splits or dismembers the ownership into two parts, those of management and of enjoyment.

Beneficiaries; proprietary interests are equitable rights – the name coming from the Court of Equity, Chancery. This court was founded from the 12th century and managed by the Lord Chancellor, originally a churchman. This developed new and flexible rights and ways to protect people’s rights using the moral principles of equity. The Chancery courts were merged with the other courts for many purposes in 1873-74 and their procedures became available in all courts. The law of equity is important for property but it also invented new procedural remedies such as the injunction. Because of the merger, the procedural principles of equity are relevant across the whole legal system. In Scotland the law of equity and trusts developed within the ordinary law courts so that system does not have the duality of the English system.¹⁰

Trusts can be useful for effective and fair property management, although the law is complex. An example of a management device is that there cannot be more than 4 trustees of land, simplifying decision-making.¹¹ It provides management rules between trustees and beneficiaries, with trustees having strong powers of decision, and for managing property, together with (for land) obligations to consult beneficiaries and to allow them to occupy the property in certain circumstances.¹² This management of assets is supervised by the courts using the law of equity, if necessary. Any kind of asset may also be held in a trust.

Trusts often arise in English law without any requirement of agreement unlike the German *Treuhand* or the prospective French *fiducie*. Expressly created trusts do not depend on any expressed agreement by trustee or beneficiary although the rights can be repudiated. One statutory trust arises automatically as soon as there is more than one owner of land.¹³ There are not necessarily any management or registration costs. A couple who own their home will probably not be aware that in law they hold their property under a trust, both being trustees for themselves as beneficiaries. In addition, judges often impose a trust on people who had not planned to use such a thing to achieve some objective of justice. French judges use the *société de fait* in some similar circumstances to where an English judge uses a constructive trust.

¹⁰ For a history of the development of the system see Martin (2005), chapters 1 and 2

¹¹ Trustee Act 1925. s.34(2)

¹² S.12 of the Trusts of Land and Appointment of Trustees Act 1996

¹³ Instituted by s.34-36 of the Law of Property Act 1925

To make the arrangement work, trustees have heavy duties of good faith, not put themselves in a position where there is a conflict of interest nor make a profit from the trust except, for example for professional fees, or if the document setting up the trust provides otherwise. To assist the trustees they are not personally liable for the trust beyond its assets, provided they are not in breach of their duties. Another peculiarity is that the insolvency of the trustee does not mean that the beneficiaries lose their property because the trustee never owned the benefit of the trust (the equitable interest) in the first place.

1.3 Dealing with property - using contracts and remedies

Another important difference in English law concerns the law of contracts as a means of transmission of property. French contract law requires an *objet* which refers both to the obligation of the contract and its subject matter (such as goods or services). This (with the idea of *cause*) has a role in the classification of the contract. The questionnaire talks about objects in a number of places, but there is no requirement in English law that a contract should have an object in the French sense, although purpose and intention is important elsewhere. This lack of need for an object in English law has an effect of diminishing the requirement for definition in things contracted for.

The lack of definition of property types should not necessarily be regarded as a disadvantage. The UK financial services industry can produce new financial and property products without the necessity of legislation because the permitted forms of property are not limitatively defined. There is a strong English tendency to regard any right, or combination of rights, as property rights where this is possible. Consistent with this approach, the Financial Services Authority regulates the sale of financial products to consumers rather than the products themselves.

Another reason for a lower importance of definition is that English law does not always attach great importance to the precise words used. There is an awareness that particular words can be used to try to avoid the consequences of the law. For example, when someone tried to avoid the regulation of tenancies by calling their document something else which was not protected (a licence). Lord Templeman said:¹⁴

The manufacture of a five-pronged implement for manual digging results in a fork, even if the manufacturer, unfamiliar with the English language, insists that he has made and intends to make a spade.

A similar effect could be achieved in French law by the concept of abuse of law, but the English approach shows a much lower reliance on precise definitions than French law. There is an idea in English law that there is a truth or a concept behind the words used which is separate from the words themselves, which is at odds with the thoughts of modern structuralists such as Foucault (1976) or Derrida (1979), who suggest the primacy of words in defining thought

¹⁴ *In Street v Mountford* [1985] A.C. 809, at p.819

In English law, the legal question tends to be not necessarily based on the definition of the property but whether something can be protected by the law or handled by the law, perhaps on death, by a transfer or in the law of theft. This situation arises from a predominance of procedural law as means for the delivery of justice. In France, in contrast, codification from the early 1800s has meant the separation of procedural law within procedural codes from the legal principles of justice. If the French citizen can bring his or her case within the definitions, then justice should follow – *ubi ius, ubi remedium*. However in English law many of the justice principles are procedural. An example is the principles of equity which govern trusts and thus, in large measure, property law. The procedural principles of equity represent a substantial body of law developed in the Courts of Equity and they frequently govern how property claims are treated in the courts. In this sense equity is of much greater importance than *équité* in France and the two national principles should not be conflated, even though they have common Roman law origins.

Perhaps the best illustration of the English preference for procedural results over legal principle lies in national constructions of the word “right”. A French right can be purely programmatic, not permitting an individual to take legal action in the courts. An example of this is the French “right to housing” found, in several places but particularly in article 1 of the *Loi Besson*.¹⁵ This is an essential counter-weight to the right to property and permits positive discrimination in favour of those in need of housing, but does not permit any individual to insist on being provided with a home. There are, of course, also rights which permit successful legal action by individuals in France, but English lawyers only accept the latter as really constituting rights. A right, for English lawyers, is the same as a remedy – that is that you can issue proceedings and you should succeed, using *un recours opposable*. These different understandings may in part explain why France has signed the Revised European Social Charter in anticipation of action and the UK has not, expecting to have to deliver those rights immediately or suffer litigation (although labour rights also pose difficulties).

The basis of much UK law in remedies has facilitated the creation of new property rights, together with the mass of overlapping legal actions often using procedural devices invented by the law of equity. Ugo Mattei (2000: 171) puts it thus:

One must concentrate on the concrete set of remedies available in court, because markets are not affected by what is written in the law: What matters is the law as it is applied... Common law countries, particularly the United States, have developed a system of property law inspired by remedial creativity administered by courts of law concerned with policy issues.

The type of policy issues referred to by Mattei, include economic considerations for the functioning of markets and the public interest within that.¹⁶

¹⁵ Loi no.90-449 du 29^{mai} 1990 (although decisions of the Conseil Constitutionnel give its status as of “constitutional value”)

¹⁶ See, for example, Mattei (2000), chapter 3

2. Types of Corporeal Property

(Which corporeal things are the object of personal property, collective property (co-ownership), and public property?)

2.1 Public and private property

There is no distinction between public and private property law in England, but it is possible to consider the history and effects of this. The distinction has its origins in Roman Law (Sherman, 1937: 559-564). There were *res sacrae* (for example for temples), and *res religiosae* (for example for graveyards) which were not imported to France during the revolution, when church lands were confiscated and a secular state created. There were also *res sanctae* for city walls which needed special protection for their defence function. In addition when the Roman army conquered a city it took over a central area of land, known as the *ager publicus*, where necessary buildings were erected and other parts handed out for ownership originally by Romans

This concept of public property, described as *propriété collective*, was imported into France with the revolution. *Propriété collective* (collective public property) was promoted whilst *propriété commune* (common private property) was attacked. The individualistic concept of private property favoured the ideal of one man, one property. Thus, in the original Civil Code of 1804, private co-ownership was weakened so that, *indivision* (the default method of co-ownership), and *co-propriété* (for flats) were both governed by a single article each in the new code. Some private French communities holding their property in common, the *taisibles* communities, had their land confiscated (Gonnard, 1943: 26). Since then a sophisticated law of co-ownership has developed for property which is horizontally divided (most frequently for apartments), by a statute of 10th July 1965. Other developments facilitated the management of property, such as matrimonial property regimes, civil partnerships and companies generally.

The law of public property is still distinct from the law of private property in France. This is partly because they are litigated in different courts, originally arising by a prohibition on the courts judging the administration in 1790.¹⁷ The modern division between public and private courts means deciding whether a property dispute concerns public or private property in order to know which court has jurisdiction and which rules apply. There are many special rules applying to public property, for example, public property rights are “*inaliénables, insaisissables et imprescriptibles*,” (Terré and Simler, 1998:388, Simonian-Ginest, 1989) as long as they are required for the public function of the State.

In England, legal action against both public bodies and private bodies proceed in the same set of courts. This of itself makes the public or private status of the land much less important. Specialist divisions within the courts, for example the Chancery Division of the High Court handle trusts and a range of property and commercial cases, but public and private property law is not distinguished. There are specialist diocesan courts, administering only the Church of England and its churches - a distant echo of the *res*

¹⁷ Lois des 16-24 août 1790 and décret du 16 fructidor an II. For a historical account see Dupuis, Guédon and Chrétien (2000) from p.29

sacrae and *res religiosae* of Roman law. These are of very low importance, although the law of church property has many peculiarities.

Although there is no distinction between public and private property within the law of property itself special rules of public law are likely to be applied to the public body owning the property rather than to the land itself. This has a similar effect in imposing duties on the public body concerning the land but by a different route. However, the common public and private property regime does mean that there is no obligation for public body to retain land which is required for public use. There is nothing, apart from the rules of public accountability, to stop a public body mortgaging its property and then having this seized by the lending company. This is useful for raising money against public assets. Today public services often involve a mix of public and private provision. Having a single law of property facilitates this in the raising of finance without the necessity of a guarantee being given by other public actors.

2.2 Groups of owners and the crown

As to collective rights in the sense of property owned by more than one person, France was not alone in promoting individual ownership at the expense of feudal private collective ownership. In England, the Enclosure Acts between 1760 and 1830 allowed the fencing or walling of much feudal land by individuals, a process beginning in the Middle Ages. However, some such rights, feudal-type "common" land rights still exist in English law. Rights to take soil, minerals, or natural produce from land usually by grazing or taking wood, fish, stone or turf were attached to medieval tenures and are now classified as "profits à prendre." The benefit of such rights does not have to be attached to a particular piece of land. The rights may be individual or enjoyed in common with others (Gray, 1993:1044-1047). Common rights still apply to some areas of moorland, beauty spots such as Cannock Chase and the New Forest, and town and village greens. The latter often have rather attractive ponds. Common rights will often make an area not capable of development, although the land subject to the rights is still nominally owned by the Lord of the Manor. Usually these rights benefit of local people, often landowners. Today, generally these rights must be registered under the Common Land and Commons Registration Act 1965 to survive. This may present problems in tracing the lord of the manor. This title brings little in the way of privileges so a current lord may well no longer exist. The 1965 Act covers common rights of profit à prendre held by more than one person (who are referred to as "commoners"). Common rights are still private law rights. They are probably best compared with servitudes in French law.

Since the Rights of Way and Access to the Countryside Act 2000, sections of countryside such as moorland, are now available for the walking public to wander freely across, known as "the right to roam".

It has already been said that English land owned by more than one person is held by a trust, both in public and in private law.¹⁸ This has already been dealt with in detail in the general introductory section. In this way, the answer to the question concerning what can

¹⁸ See *supra* page 2

be the subject of personal, public ownership or co-ownership, is that all things that are capable of being owned can be owned individually (by a person or a company) or by a trust. It is necessary, however to qualify this in the light of the above information. Common land, for example, may be of little use at all to the apparent owner, because of the rights to which it is subject. For the public who will go for country walks across land under the Rights of Way and Access to the Countryside Act 2000, it may seem as if they are walking across public land, which is not the case (Riddall, 2003).¹⁹ They simply have a statutory right, with restrictions such as in spring when lambs are born.

There is another qualification to the idea that all types of English property can be held in the same way. Quite apart from different regulation of different tenancies, a kind of property, the new commonhold ownership in England is generally, but not exclusively, intended for flats. It was created by the Leasehold and Commonhold Reform Act 2002. Any type of property which can be commonhold subject to exclusions, for example, agricultural land.²⁰ Commonhold is often described as a tenure, which is incorrect. The only two possible English tenures or estates in English law are freehold and leasehold property.²¹ Commonhold is a type of freehold where the ownership rights are limited by the rights of the commonhold association.²² The latter has legal personality, owns the common parts of the building and deals with the management of the property.

The commonhold was introduced into English law as a proposed simple form of ownership equivalent to the French *co-propriété* or the American condominium. However, an existing form of ownership is currently more popular. Flats may be held by long leases, equivalent to the Roman law *emphyteusis* or the French *bail emphytéotique*. The length of the lease in England may be for thousands of years, but more usually are 999 years or 99 years in London. These may be mortgaged and are purchased for a large capital sum and thereafter an extremely small rent is paid. Long leaseholders tend to regard themselves as owners. In modern flat developments it is common for the tenants (long leaseholders) to own the management company which is also the landlord. Commonholds are relatively new and may not have had all technical problems sorted out.

The fact that there is a single public and private property law must also be qualified by the fact that the Crown owns a quantity of assets, including those used for the benefit of the nation. An example of this is that the Crown owns all beaches between the high water mark and the low water mark, unless they have previously sold them or given away.²³ This does not necessarily ensure public access to the sea over private land, but there are public rights of fishing and navigation over the sea. Crown ownership frequently gives the public free enjoyment of beaches which may be managed by local authorities under the Public Health (Amendment) Act 1907 and Part VI of the Local Government Act 1972. Crown property also includes defence installations and numerous public monuments, managed by an agency, English Heritage, generally for public viewing. In

¹⁹ Chapter 19

²⁰ Commonhold and Leasehold Reform Act 2002, s.2 and Schedule 2

²¹ S.1(1) of the Law of Property Act 1925

²² S.1 of the Commonhold and Leasehold Reform Act 2002

²³ Settled in *A-G v Chambers* (1854) 4 De G M & G 206, [1843-60] All ER Rep. 94

England, Crown ownership of assets seems generally to fulfill a similar role to State ownership in France.

Crown ownership is not entirely the same as continental public collective ownership. Property law in England is a modified feudal pyramid with the Crown at the apex granting land to people lower down, although any intermediate lords are substantially omitted. All English owners of freeholds have a “tenure” because, rather confusingly, they are the Queen’s tenants in the sense that they hold (from the Latin “*tenere*”) property rights under her. Nonetheless property disputes are generally litigated by the Crown in the same courts as private citizens under the Crown Proceedings Act 1947. The Crown does not interfere with ownership rights any more than the State does in France, for example for the purpose of compulsory purchase by a public body.

2.3 Groups of assets and the *universitas rerum*

*(Are the so-called universitas rerum assimilated to corporeal things?
Have the universitas rerum a different legal regime from a single thing?
Are there examples of collections of corporeal things and of rights?
Is a collection of rights equivalent to a collection of things?)*

The *universitas rerum* is an interesting framework in which to consider special treatment of groups of assets, but the way in which assets connect to people is different in UK law, because many people who are legal owners of property hold the property for the benefit of other people within a trust, which the general reporter refers to as *titularity*.

Before it is possible to get close to an answer about *universatis rerum*, or universalities, it must be asked whether the universality (not a word with any legal meaning in English law) has any equivalent in English law. If looked at in a narrow sense (equivalent to the French patrimony) then it does not exist, but if considered in the wider sense of a group of assets treated together (equivalent to the French *fonds de commerce*, the matrimonial regimes and the company) then we can say that something comparable does exist in the form of the estate of a deceased person, in the trust, and in the administration of the company. This is essentially a functional analysis of assets treated as a group, which groups are a common and useful device for the purpose of managing assets and for their public control by statute or through the courts. However in England the *fonds de commerce* and the matrimonial regimes do not exist. Some explanation can be given for the alternative regulation of divorce.

2.3.1 The patrimony, death and trusts

The earliest and most important universality in French law is the *patrimoine* or patrimony. The concept worked on by Aubry and Rau is defined as: “*l’ensemble des rapports de droit appréciables en argent, qui ont pour sujet actif ou passif une même personne et qui sont envisagé comme formant une universalité juridique.*” (Terré and Simler, 1998. 4)

The property within the patrimony is designed to fulfill the needs of a person, but it should also have qualities such as unity, which together with the concept of unity of property should make for simplicity in law. It also makes it clear who owns what for

taxation purposes, for public control and for the purpose of the transmission of assets by inheritance, under which a significant proportion of assets passes compulsorily to blood relatives. (Raffenne, 2000). Another way in which the definition of patrimonial rights is useful is in opposition to extra-patrimonial rights which are not capable of sale, or transmission, such as Human Rights or the rights to the human body. Such rights in England tend not to be described as such, but rather as rights that are not property.

In this context it would be tempting to translate patrimony into English by “inheritance” or “estate”. The word “estate” is used here in a different legal sense than the one used earlier in this report. An estate in this sense refers to all of the assets of a deceased person, a group or pool of assets with generic rules to permit a special kind of trustee, to administer the estate. These people are referred to as personal representatives (executors when there is a will and administrators when there is not.) because they step into the shoes of the deceased, taking over their rights and obligations. They will be responsible for the funeral bills and any other debts, and if debts exceed the size of the estate they cannot be recovered. They can take action to obtain any money due to the deceased through legal action. They will ultimately distribute the assets of the estate to the beneficiaries. The assets of a deceased person in France can be together treated as a universality, but generally the difference between the English estate of a deceased person and the patrimony is that the patrimony attaches to a living person and the estate does not.

There are several reasons why a patrimony, as such, is not necessary in English law. The first reason is that there has never been any notion that unity of property or of the patrimony of a living person is necessary. Ownership is commonly fragmented for multiple ownership of different property rights or for better management, within a trust. Secondly, trusts do not necessarily make taxation difficult because trustees are personally responsible for the property in their care, and they are identifiable within public registers of property. Thirdly, inheritance by blood relatives is not compulsory, with needy dependants of any kind possibly able to recover support under the Inheritance (Provision for Family and Dependants) Act 1975. This removes the necessity of supervising lifetime property transfers to non family members.

Although the estate of a deceased person may not be the same as a patrimony, they may be a universality, which Terré and Simler describe as a group of assets the rights of which are connected and are treated differently than they would be if they were single rights (Terré and Simler, 1998: 5). However, what happens on death in France is quite different from in England. Personal representatives are extremely similar to trustees. In fact, they often become trustees with the passage of time, for example, if beneficiaries are children, there is a need to continue administering property for the beneficiaries. Personal representatives have the same heavy duties as trustees, very similar administrative rules, and are assisted by the slightly limited liability. Beneficiaries benefit from trust rules on insolvency²⁴. An advantage is that there is little gap in the management of assets between death and when beneficiaries finally receive their inheritance and individuals frequently handle much of the work for no profit for their family.

²⁴Supra p.10

Assets and rights that form part of an estate (or a trust) do not become incorporeal just because they are grouped together, in common with assets and rights within trusts. Prior to 1996 a beneficiary under a trust of land was the owner of a personal proprietary interest, not a real property interest. This was intended to encourage sale, a tendency also found in the French law of *indivision*. However, with the Trusts of Land and Appointment of Trustees Act 1996, beneficiaries are now owners of an “interest in land”. This, with other provisions in the act, is intended to make it easier for beneficiaries to insist on occupying land or to resist sale of land.²⁵ The vocabulary distinguishing between real and personal property is avoided.²⁶

In both England and France the purpose of property can be attached to assets within a collection of assets. Purpose is related to function, so that this is a useful way of recognising similarity to universalities. In French the purpose for which property is earmarked (*l'affection*) is used to bring property within a particular set of legal rules or regimes by a process of categorization, for example, if it is a commercial asset for a particular business, it may form part of a *fonds de commerce*. Categorization in general has lesser importance in England than in France. Judges, proceed by a process of analogy to existing cases rather than a process of categorization of the case. This can produce the same results, but if one situation is similar to another a judge can apply the same rules in the new area, expanding a category even if this means that there is a substantial overlap between the different areas of law. Successful and useful legal actions are allowed to expand whilst those that are less useful tend to fall into disuse. A litigant may have a real choice of several legal actions.

The purpose of a trust is important because the intentions of the people who set them up is important both in terms of what share people own and how they are administered. A trust is a universality in the sense that it is a group of assets that are managed together for a purpose, although the purpose is not necessarily paramount, for example, there are statutory considerations as to whether land in a trust should be sold (such as whether there are children in a home).²⁷ The purpose of a trust is whatever the person or people creating the trust intend, perhaps simply the use of a house for a home. There are presumptions about intention. When someone contributes money to a trust, it may be initially presumed that they intend to own a share of the property in the same proportion as their contribution.²⁸ This enables judges to bypass the formalism whereby only the names of the people whose names appear on the title documents have any rights. The law of equity allows people to have their rights considered within the principles of equity, in a structured and predictable way.

A trust may not be a universality or even necessarily a collection of property bound together because it can be used for the management of only one asset just as easily for a group of assets. It does have special rules in the way the property attaches to trustees, like

²⁵ S.12 created a limited right to occupy land for beneficiaries

²⁶ Also by the Law of Property Act s.1(1), supra p.1

²⁷ Ibid., s.15

²⁸ Within a resulting trust - See for example *Hodgson v Marks* [1971] Ch. 892 – this can be excluded or displaced

a universality. There is no need for third parties or outsiders are concerned to be adversely affected by the fact that the property is owned by trustees rather than sole owners, so long as they are prudent.

Trusts normally come to an end within a perpetuity period of around 100 years but trusts for a charitable purpose can last in perpetuity without any specified beneficiaries. This is because they are for good causes and are policed by the state in the form of the attorney general. Trusts in general and charitable trusts in particular are seen as a development of the Roman law of trusts, of the *fidei commissum* (Johnston, 1988).

There is an insistence within the French law relating that property should be attached to the person. There is perhaps a distant equivalent to this within the law of trusts. It is an established rule of trusts that there must be a beneficiary or beneficiaries who can enforce their rights against the trustees.²⁹ If this “beneficiary principle” is offended, then the trust is void. This means that assets cannot be held simply for a purpose without humans who can intervene in their administration. This is a common feature with the patrimony in the sense that the individuals have some connection to assets.

Probably the best way to classify the trust in European terms is as a form of grouping of people and property, without legal personality and with limited liability to the extent that trustees are not liable beyond the trust assets unless they are in breach of duty. The French *société* is also a grouping of people and property, which does not necessarily have a legal personality, for example, the *société en participation*. A *société* can also have a moral personality which is not fully detached from that of the owners of shares, for example in a *société civile*.

2.3.2 Business and companies

There are universalities associated with business in France. There is the patrimony of the *société* if it has moral personality, and the *fonds de commerce*, a group of personal rights used for *commerce*, which are regulated together and can provide security. England has no equivalent to the French *fonds de commerce*, although it is possible this would be useful. One reason for this is that in England, when there is no company involved, business is likely to be carried on in partnership, the default terms of which are contained in the Partnerships Act 1890. Generally speaking, unlike a *société*, a partnership is not required to have any assets. If there are partnership assets, these are in default owned by the partners within the terms of the partnership. Alternatively, if for example there are many partners, assets may be held by two or more of the partners as trustees for the partnership, or the property could be held by a company.

English and French companies may have a patrimony, but does a company necessarily have such a collection of assets? Are English and French companies the same? These companies are not similar in their nature, because the French company is based on a contract,³⁰ whilst the English company in the 19th century was based on the trust,

²⁹ Explained in *McPhail v Doulton* (also known as *Baden’s Deed Trusts (No. 1)*) [1971] A.C. 424; [1970] 2 W.L.R. 1110, HL

³⁰ CC, article 1832

particularly concerning director' duties of good faith. These include not making secret profits or acting if there is a conflict of interests, rules which based in the moral principles of equity. However company law is now a distinct area in its own right although directors' basic duties of good faith to the company still have the main features of trustees' duties. In France the principle of the unity of the patrimony is sometimes thought to be compromised by the existence of *sociétés*. The French company enables a person to earmark property into a separate collection of assets within the company, particularly if the company concerned is a one man company. In this way there is some debate about whether it should be possible to earmark assets for a purpose detached from the person in this way (Terré and Simler, 1998: 7-12) There is a fear of dishonesty, fraud and a lack of public control.

There are important differences of scope between the *société* in France and the company in England. The French word only describes private or semi-private law companies (such as the *société d'économie mixte* or *société anonyme* for public assets in process of *banalisation*). The English company forms are found in both the public and private sectors, although there are some very old forms of corporation in the public sector which have to some extent escaped modernisation. The English only consider bodies with legal personality to be companies. This put the partnership in a curious position in European terms – in UK terms it is only a contract, but in French terms it would probably be a *société*. The definition of a partnership in s.1 of the Partnership Act is remarkably similar to the definition of a company in the French Civil Code, article 1832.

England has relatively few forms of company. Company law is taught generically and modern company forms are very adaptable to public and private uses. France, in contrast has many more types of *société*, which clearly show their public/private status and many of which are specialist. Another difference is that an English company can be perpetual whilst a French company tends to offend the limitation period if its duration exceeds 99 years – because of its status as a contract. English commercial companies may not in fact be perpetual because if they cease to file accounts and notification of changes of officers in the national companies register, they can be struck off the register (Foster and Ball, 2006).

As to whether the assets within a UK company are treated as corporeal or incorporeal property, it is clear that shares may be treated as personal rather than real property, and that both in the UK and France the shares are or can be dematerialised so as to be incorporeal.

2.3.3 Matrimonial regimes and divorce

Another French universality is the matrimonial regime which is chosen and contracted for at the time of the civil marriage ceremony, before any church marriage or other religious observance. There is a default form of régime if another form of agreement has not already been chosen.³¹ This will be an important determining factor in general of the way assets are divided on a divorce and gives rights on death. The existence of the regime

³¹ CC, article 1394

changes the rules of property, for example because the consent of a non-owning spouse is required for a matrimonial home to be sold.

In England, on the other hand, marriage in itself is not taken to change the underlying property regime of the couple's property, except that the marriage ceremony revokes the wills of both parties.³² This means that the rules of intestacy (where there is no will) will have effect usually to the benefit of the spouse. Thus people should quickly make wills as soon as they are married if their wishes are in any way unusual or they have complex needs. There is also an English presumption on divorce, that a gift in a will in favour of a spouse is intended to be revoked.³³

In England marriage is not a contract in the normal legal sense and there are generally more rules concerning what happens to private property on the termination of marriage than governing this during the course of the marriage. An English spouse is likely to receive welfare benefits by virtue of their status, or a dependant spouse and children to receive payments from their ex-spouse for their maintenance but this is not regarded as part of the law of property. Divorce, when it arises, does give the courts one important opportunity to transfer capital between spouses, in a way that is uncommon in France because of compulsory inheritance law. In England, if a spouse with children is in need of a home then a property may be either transferred to the wife absolutely or that the property may not be allowed to be sold until the children grow up. The factors in deciding this do not relate to any marriage contract, but to a whole series of statutory factors, such as, for example, contributions to the marriage (financial or not) and the needs of the parties and the children.³⁴

Homosexual couples (only) can now sign up to a civil partnership under the Civil Partnership Act 2004 in England, although a judge at first instance has recently found that this discriminates against heterosexual couples under the Human Rights Act 1998³⁵. This provides some of the benefits of marriage and divorce law, but is again not regarded as a property regime.

2.4 Animals and the *res extra commercium*

(1. Are animals considered as things?

Which corporeal things cannot be the object of personal property [*res extra commercium*]?)

It has always been possible to own domestic animals but for wild animals English law has used the Roman law concept of *res nullius*, - something which does not belong to anyone. Riddall (2003: 64) says:

a landowner has a right to catch and kill wild animals on his land. Once wild animals are caught or killed (whether by the owner of anyone including a trespasser) they become the property of the owner of the land.

³² S.18 of the Wills Act 1837

³³ S.18A, *ibid.*

³⁴ Regulated by Part II of the Matrimonial Causes Act 1973

³⁵ *Wilkinson v The Attorney-General and Lord Chancellor* [2006] EWHC 2022 (Fam.)

Gray describes the landowner's rights as "qualified property" and that if you start to hunt a property on your own land and chase it into neighbouring land it will still belong to you even though you are now a trespasser (Gray, 1993: 28). A trespasser is someone who is on someone else's land unlawfully.

The question of whether animals are property is also defined for the purposes of the crime of theft by s.4(4) of the Theft Act 1968:

Wild creatures, tamed or untamed shall be regarded as property, but a person cannot steal a wild creature not tamed nor ordinarily kept in captivity, or the carcass of any such creature, unless either it has been reduced into possession by or on behalf of another person and possession of it has not since been lost or abandoned, or another person is in course of reducing it into possession.

This definition avoids the need to specify which creatures are wild or not. It also uses a preferred English notion of property as something which is possessed or controlled. This idea clearly has its roots in the Roman law idea of *dominium* (*maîtrise* in French).

Animals are chattels (tangible personal property). The question of the possession and control of chattels is thoroughly reviewed and explored in *Parker v British Airways Board* and casts light on the basis of ownership in possession.³⁶ Donaldson LJ recognised the inadequacy of the existing rules: He said:

We therefore have both the right and the duty to extend and adapt the common law in the light of established principles and the current needs of the community.

In England, someone who finds a chattel has rights to keep such lost objects, but this is inferior to the entitlement of the original owner, and may also be inferior to other people's rights. The person whose claim can establish the greatest priority owns the chattel absolutely. Lord Donaldson, whilst recognising the finders' rights to lost objects in some circumstances, commented about the owner of the land on which the property was found:

An occupier of a building has rights superior to those of a finder over chattels upon or in, but not attached to, that building if, but only if, before the chattel is found, he has manifested an intention to exercise control over the building and the things which may be upon it or in it.

The concept of the *res extra commercium*, (that something can be outside commerce and cannot be traded) is not obviously in use in England. It has been seen that the Crown owns a good deal of things are unlikely to be traded or which in practical terms are available to citizens. There are a number of things which will be explored which are not capable of being owned although the expression *res extra commercium* is rarely used, but the idea had an influence on English Roman law scholars. Air is sometimes thought to be *extra commercium*. In theory a land owner owns everything down to the centre of the

³⁶ [1982] QB 1004

earth and up to the stars. However there is no danger of civil action against aircraft at a height where the higher air is of no possible use to the land owner.³⁷

2.5 The ownership and legal treatment of gas electricity and water

(Are the incorporeal things (water, gas, energy) assimilated to corporeal things?

Can the incorporeal things be the object of a contract?

If the answer to the above question is yes: Is there a specific or nominate form required for them?

If the answer to the above question is no: what kind of legal relationship can be referred to them?)

This question of the property status of gas water and electricity must be answered in terms of whether the incorporeal things referred are capable of being owned, and dealt with again concerning incorporeal rights generally. I am not sure an English lawyer would regard gas and water as incorporeal as they do have a physical existence.

Water is not similar to corporeal things because non-tidal parts of rivers and inland waters are generally regarded as land covered with water. If the land adjacent to a non-tidal river is transferred, this also transfers the bed of the river to the mid-point of the river, and any water rights going with it, such as rights of fishing, navigation, mooring and water extraction. It follows from this that water forming part of a river cannot be owned as such. If someone attempts simply to transfer the water, this will take effect as fishing rights (Gray, 1993: 24-29). There is nothing to prevent the various rights relating to the river being sold off separately, so far as practical. The view that a river is land with water on it is really an expression of the importance of the underlying land in English law. Water flowing freely cannot be stolen or owned (Jefferson, 2003: p.567). Bottled water, for example, is capable of ownership.

The sea is not capable of ownership, although new land created by wind-borne or water borne deposits belong to whoever owns the coast or for that matter whoever owns the riverbank owns the new land with corresponding loss to the owner of the other river bank (Gray, 1993: 26-27)

There is no problem with the ownership of gas, but it is rather difficult to find a case on the point. There are a number of cases where there is an underlying assumption that gas can be traded as such or as gas futures - *Mahonia Limited v JP Morgan Chase Bank and another*.³⁸ Gas could be probably be assimilated to goods by itself, but supply of gas necessarily involves service often avoiding the requirement for property definition. Under s.62 of the Law of Property Act 1925, things within the soil of land form part of that land, as a default position. Thus, gas, along with coal and other mineral resources belong to the land owner, except that when land is sold it is quite common to exclude mining and other rights from the sale. The seller then retains these rights. The question of the nature of ownership tends not to arise because the supply of gas for fuel was nationalised after the Second World War so that many aspects of the supply were regulated by statute. Coal

³⁷ *Bernstein of Leigh (Baron) v Skyviews & General Ltd* [1978] QB 479. Also the Civil Aviation Act 1982, s.76(1) excludes liability for nuisance or trespass for aircraft lawfully flying at a reasonable height

³⁸ [2004] EWHC 1938 (Comm), 2001/1400,

mining rights were nationalised, part of then statutory control of energy sources. Since privatisation of utilities, supply is regulated, amongst other things, by the Gas Act 1995, the Utilities Act 2000 and the Energy Act 2004. Thus recently the supply of gas and electricity is regulated together particularly by the Office of Gas and Electricity Markets (“OFGEM”).

Electricity, on the other hand is not capable of ownership. It is not capable of theft because it is not a substance.³⁹ This was held to be the case in *Law v Blease*⁴⁰ when a person using a telephone was not guilty of theft. For this reason the Theft Act 1968 was amended to add a specific offence of abstracting electricity by s.13. Electricity supply is now a privatised industry and hedged about with regulations and safety requirements.

There is no problem in contracting for a supply of water, electricity and gas, as well as for telephony. Possibly these could be regarded as services, but the statutory nature of the regulation of the industry make this less necessary to define. OFGEM requires a licence with lengthy detailed conditions before electricity can be supplied. There are similar water and telephone regulators. Because of their heavy regulation it is tempting to answer the question concerning their legal regime, by saying that this is a statutory regime, but not exclusively so. The law of contract which is applicable to both public and private spheres has no problem in handling all three types of thing, which enables private suppliers to sell their services. Possibly the single law of contract in public and private law may assist, together with the fact that there is no English requirement for an object in a contract.⁴¹

Under s.4 of the Utilities Act, there is a Gas and Electricity Consumers Council. That terminology does not mean that treatment of consumer problems are limited to any particular area of law, nor that the consumers necessarily have the normal type of consumer claim in relation to their supply. This Consumers Council is simply a consultative body.

3. Types of Incorporeal Property

(Can incorporeal things be the object of ownership or other property rights?)

In all European countries there is pressure to recognise new types of property rights, particularly intangible property. Baumol, the American economist, found by looking at data in 16 countries over a period from 1870 to 1879, a median increase in trade of 6,000 percent. Continuing exchange and production means that there now is a much greater volume of personal wealth other than land than in the 19th century.

This section illustrates ways in which English law has extended the benefits of property status to the various types of incorporeal property to be explored - intellectual property, credit, rights to the personal image and human data. Today, there are many international

³⁹ The Criminal Law Revision Committee’s Eighth Report, Theft and Related Offences, Cmnd. 2977, 1966, 39

⁴⁰ [1975] Crim LR 513

⁴¹ Supra p.2

influences but saleable rights are not limited to the categories to be described. The financial services industry in England, particularly London is continually unbundling property rights and reconfiguring these with detailed contractual relationships to form new financial products. Futures markets, for example, depend on the selling of contractual rights to assets contracted to be sold in the future.

3.1 Rights to a person's image

(Does your legal system provide a right to a persons own image?)

England, unlike France, does not have a well developed law of privacy, except insofar as this has developed using article 8 or the European Convention on Human Rights (“the ECHR”). However, the Human Rights Act 1998, incorporated much of this into UK law. Thus, a simple breach of that convention, including article 8, can give rise to legal action. However, while the duty of respect for private and family life is clear for public bodies, the direct effect of the Act in creating a “privacy” right between private individuals is far from clear.

There have been attempts to protect the right of privacy using aspects of property law. In *Victoria Park Racing and Recreation Grounds v Taylor*,⁴² a home owner adjacent to a racecourse built a tower from which races could be seen and he hired this to a broadcasting company to comment on the races. The racecourse owners took legal action for breach of copyright and nuisance, concerning incorporeal property and in respect of disturbance of possession respectively. They were not successful in their action. In general a view is difficult to protect in English law.

There was a recent more successful attempt to protect the right to privacy and the right to an image in the case of *Douglas and others v Hello! Ltd and others (No 3)*.⁴³ The film stars Michael Douglas and Catherine Zeta Jones sold the rights to their wedding photos to OK! Magazine, whilst using tight security and asking guests not to carry cameras. One guest clandestinely took unflattering photos and sought to publish them in a rival magazine. An immediate injunction was sought and refused, so that the photos were published, although an injunction was granted later. The case raised issues concerning the English law of breach of confidence. This equitable right of action is evolving which might lead to it in the future being able to deal with issues of privacy raised by article 8 of the ECHR. This has to be balanced with the right to freedom of expression in article 10. The films stars recovered a fairly small amount of damages not reflecting their distress, whilst OK! magazine received nothing.

The law of confidentiality is thus developing to cover rights to privacy. These rights arise either in contract as a matter of duty, often by employees or various professional advisors but there is also the non-contractual equitable right which is a matter of moral duty, used for trade secrets considered below. It will also be seen that the law of copyright can protect the use of authorised photographs.

⁴² (1937) 58 C.L.R.479

⁴³ [2005] EWCA Civ 595, [2006] QB 125

When the “image” of another individual is interpreted as the photographic representation of the individual, it is then protected as personal data under the Data Protection Act 1998. The meaning of “personal data” is wide enough to cover photographs of individuals, and there fore to protect this aspect of their image, being:

- data which relate to a living individual who can be identified –
 - (a) from those data, or
 - (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller ...⁴⁴

However, the interpretation of “relate to” has been given a narrow interpretation in *Durant v. Financial Services Authority*.⁴⁵ The implications of the judgment on the scope of the protection offered under English law now remain to be tested.

There has been another approach to the protection of the individual’s “image” in the commercial context. The question of whether an individual’s image can be the subject of a trade mark registration or protected generally in a passing is considered below (Bentley and Sherman, 2004: 773). However, the difficulties are both conceptual – for example, is it appropriate to extend such protection to images of individuals? – and practical – for example, if a picture is registered as a trade mark, is that the extent of the legal protection, or is any image of the individual protected? And, how far is the individual engaged in business through their image and what is the extent of the “image” of an individual in the broadest sense in this commercial area?

3.2 Rights to personal data

(Does there exist a right to dispose of your own personal data?)

In the face of a relatively weak UK provision for privacy generally, the specific protection of personal data is substantially covered by the Data Protection Act 1998, and enforced and promoted by the Information Commissioner.⁴⁶ UK protection of personal data has its primary origins in European Union (EU) law, particularly Directive 95/46/EC, but also has protection in the law of confidentiality. Although there was a slow take-up of registration by people holding data, the criminal provisions of that Act are a common reason given by companies and public authorities for not disclosing information. There are also strong ethical requirements for research within most institutions, necessary to comply with that Act. However, the Data Protection Act does not give rise to property rights for personal information.

When personal data is controlled by the individual subject of the data, then they obviously have the ability to dispose of their data as they see fit. When this is in the hands of another person, this is more difficult. Within the Data Protection Act 1998, on the face of it, the data subject retains broad rights to the protection of his or her personal data in the hands of a third party.⁴⁷ In particular the data subject has rights to “access,”⁴⁸ to

⁴⁴ The Data Protection Act 1998, s. 1

⁴⁵ [2003] EWCA Civ 1746

⁴⁶ Appointed under s.6 of the Data Protection Act 1998, as amended by the Freedom of Information Act 2000, s. 18

⁴⁷ The Data Protection Act 1998, Part II

“rectify, block, erase or destroy”⁴⁹ his or her personal data, and to prevent the processing of such data in cases of potential damage or for direct marketing.⁵⁰ There are certain legal and practical caveats on that general position. First, there are situations when the rights of the data subject are limited, for example concerning data held by a third party for the purposes of research,⁵¹ or in relation to crime or national security.⁵² These limitations vary according to the nature of the exemption.⁵³

Second, there are practical constraints that the 1998 Act seeks to address in realising the rights of a data subject over their personal data in the hands of a third party. The keystone of data protection is that the data subject gains knowledge about the processing of his or her data. That is, the data subject must know that his or her data is being processed and by whom. Schedule 1 of the 1998 Act gives these information rights to the data subject. However, it also recognises that in certain situations it may not be possible or realistic to expect the data controller to notify the data subject about the processing. The law must reflect this reality, but the 1998 Act is framed so that the information must be given “so far as practicable”⁵⁴ There is an argument that, when compared with the rights as set out in the Directive 95/46/EC, the UK law has gone too far in allowing this exemption when the data is gathered directly from the data subject by the data controller (Beyleveld, Grubb, Townend, Morgan, and Wright, 2004). Thus, it is possible that data subjects will not be told about processing, in practice removing their ability to protect their data.

3.3 Intellectual property

English law has been much more successful in creating proprietary rights in the area of intellectual property than in the area of privacy. Intellectual property law is created using ideas from English property law and equity, by statute or from abroad, taken from France in the case of moral rights. This section is cannot explored at any meaningful length because it is a complex area, overlaid with rules from European and global treaties, such as the Berne Copyright Convention from 1886 and provisions within the Treaty of Rome 1957. This reflects the international nature of the information society – a new film can be quickly copied in the Far East and thousands of such copies distributed. Computer networks are even more difficult to police.

Since the creation of patents, the oldest kind of intellectual property right (below), there has been a steady enlargement in the types and scope of intellectual property. In addition to copyright, patent and trade marks, there are also protection of unregistered trade marks and business goodwill and reputation through the tort of “passing off,” the law of registered designs (by the Registered Designs Act 1949), the protection of plant varieties (originating in the EU)⁵⁵, and the law of breach of confidence, (concerning, amongst

⁴⁸ *Ibid.*, s. 7

⁴⁹ *Ibid.*, s. 14(1)

⁵⁰ *Ibid.*, s. 10 and 11 respectively.

⁵¹ *Ibid.*, s. 33.

⁵² *Ibid.*, s. 28 and 29.

⁵³ See generally *ibid.*, Part IV.

⁵⁴ *Ibid.*, Schedule 1, paragraph 2(1)(a)

⁵⁵ Most recently by the Plant Varieties Act 1997

other things, trade secrets). There are also pseudo-copyright rights such as public lending rights (payments by lending libraries to authors), and royalty rights (payments for performance of works). Then there are newer concepts working within these traditional rights and responding to modern developments, such as character merchandising, franchising and sponsorship. In this respect, both copyright law, and to a very limited extent patent law, have been extended to cover software and related computer rights.

3.3.1 Copyright

(Can copyrights be the object of ownership or another property right?

Can you describe the content and essence of copyrights?)

Abstract objects in intellectual property law take the form of a convenient legal fiction.⁵⁶ The benefits of this are commercial and economic. Obviously individuals cannot control the product in the same way that someone can control land, but they can take the commercial benefits of the invention. This should also be for the wider good. Phillips and Firth (2007: 7) said:

[I]t is an important function of intellectual property law that it encourages (if such is possible) the creation of ideas and inventions, their disclosure for the benefit of all, not to mention their commercial exploitation so as to facilitate the greatest potential exploitation of their practical and concrete embodiments.

In England copyright law was the one of the earliest kinds of intellectual property right. Drahos describes the origins of copyrights as “a complex system of prerogative, privilege and monopoly.”(Drahos, 1996: 14). After the invention of the printing press, Henry VIII, by an Act of 1529, sought to restrict the printing of political and religious books, by a system of privileges in printing under the control of the Stationers’ Company, originally a guild of craftsmen. In this sense “copyright” is the right to take copies. In 1709 the Statute of Anne generally gave exclusive for a fixed period (Bainbridge, 1999: 32). This set the strong prevailing commercial ethos of UK copyright law.

A the major reform in the Copyright, Designs and Patents Act 1988, which remains the basis of today’s copyright law, included “moral rights” for the first time. The scope of copyright is defined in s. 1. as:

- 1) Copyright is a property right⁵⁷ which subsists in accordance with this Part in the following descriptions of work
 - (a) original literary, dramatic, musical or artistic works,
 - (b) sound recordings, films [or broadcasts], and
 - (c) the typographical arrangement of published editions.

⁵⁶ (Drahos, 1996: 4)

⁵⁷ There are some technical items on this in s.90

The amount of protection of moral rights within English law is limited, as the law tends to be more concerned with economic exploitation than with control by the original author (Phillips and Firth, 2007: 257). Thus the 1988 Act rather late in the day complies with the Berne Convention with a limited number of rights attaching permanently to the author – the right to be identified as author or director,⁵⁸ and the right to object to derogatory treatment of the work.⁵⁹ These rights do not relate to all types of copyright.

Further definitions of things protected by copyright law are found in sections 2-8, much of which relates to international definitions. There is still a large body of existing case law concerning the nature of these rights, so far as not inconsistent with the Act.⁶⁰ S.3(1) of the 1988 Act applies copyright to computers, and includes a table or compilation, a computer program, the preparatory design for a computer programme and a database. The EC Council Directive 91/250/EEC on the Legal Protection of Computer Programmes contained an inclusionary definition of the term “computer programme”. There is no doubt that copyright covers such things.

For “artistic works” in s.4(2) of the 1988 Act, copyright provides greater protection once they are “recorded in writing”. The idea of artistic works also protects photographs but does not protect the privacy of people against unwanted photographs. The right in s.85(1) concerns commissioned photographs, which are protected as artistic works rather than an aspect of privacy. Chapter II of the 1988 Act lists 16 types of rights which are protected by copyright, whilst chapter III contains a list of permitted acts with copyright material, including those which allow individuals to make one copy for their own study or research,⁶¹ rights for educational establishments and libraries,⁶² and certain public administration rights.⁶³ There are some practical concessions for lawful users of computer programmes, such as making back-up copies, study, observation, testing and use of databases.⁶⁴

Chapter VI of the 1988 Act contains remedies available to people whose rights are infringed, including injunctions preventing use of the material,⁶⁵ damages for infringement⁶⁶ and the right to seize and deliver up infringing material.⁶⁷ Other provisions relate to the administration of the rights including licensing and the duration (which may be from 25 to 70 years depending on the type of work). Under separate legislation local Trading Standards Offices are active in the prosecution of people dealing in counterfeit goods.

⁵⁸ S.77 of the 1988 Act

⁵⁹ S80, *ibid.*

⁶⁰ See, for example, Bentley and Sherman (2004)

⁶¹ S.19 Copyright, Designs and Patents Act 1988

⁶² S.34-s.44A *ibid.*

⁶³ S.45-s.50 *ibid.*

⁶⁴ S.50A-s.50D

⁶⁵ S.97A *ibid.*

⁶⁶ S.97 *ibid.*

⁶⁷ S.99-s.100 *ibid.*

3.3.2 Patents

***(Is the “patent” the object of any property right?
What is the extent of the patent ? In other words can you describe which
inventions can be registered?)***

The Patents Act 1977, section 30 establishes that a patent and a patent application are both personal property in English law. The scope of a patent is found in s.1 of the 1977 act, which is similar to s.52(1) of the European Patent Convention. Bainbridge (1999: 357) describes the criteria for patentability:

Because of the strength of this form of property right, high standards are required – the invention must be new and it must involve an inventive step that is, it must be more than merely an obvious application of technology. Furthermore, the invention must be capable of industrial application and must not fall within certain stated exclusions.

Clearly “an invention” is a very wide definition, relating to a mental process and the application of this in industry. It is fairly typically English in that it does not name specifically the sort of things it covers. This is perhaps understandable here as it is difficult to predict what will be novel and involving an inventive step in advance of its creation. There is a substantial case law on these elements (Bentley and Sherman, 2004): An invention must also not be statutorily unpatentable. These restrictions prevent the granting of a patent for:

- a) a discovery, scientific theory or mathematical method;
- b) [issues covered generally by copyright]
- c) a scheme, rule or method for performing a mental act, playing a game or doing business, or a program for a computer;
- d) the presentation of information.⁶⁸

Other inventions are not patentable where “the exploitation ... would be generally expected to encourage offensive, immoral or anti-social behaviour”⁶⁹ or for “any variety of animal or plant or any essentially biological process for the production of animals or plants, not being a micro-biological process or the product of such a process.”⁷⁰

New technologies strain traditional interpretations of the law. Computer programmes, discussed under copyrights, are disputed as a possible subject for patent, because there may be a problem with the requirement for novelty and an inventive step (Carr and Arnold, 1992). Also programmes themselves are not a kind of manufacture, although, some programmes have exceptionally been patented because they are part of a piece of machinery or an industrial process (Bainbridge, 1999: 370). Likewise, modern biotechnology challenges the definitions of patentability. Innovation in its nature requires a pushing the boundaries of the predictable. Perhaps a certain responsiveness in the law made patent law so important in England for so long. The first “letters patent” were recorded to have been granted in 1311 to John Kemps, a Flemish weaver. This system

⁶⁸ Patents Act 1977, s.(2)

⁶⁹ *Ibid.*, s. 1(3)(a)

⁷⁰ *Ibid.*, s. 1(3)(b)

was useful for encouraging industry whilst giving some control to the crown, still important today.

A patent grants exclusive rights to exploit an invention for 20 years, a kind of monopoly, but requires full and clear definition and disclosure of the invention for the purpose of registration, so that the invention can be exploited by others after expiry of the patent⁷¹ and so that competitors can produce different solutions from those in the patent. Today applications can be made either to the Patent Office in London or the European Patent Office, a complex procedure so that people seek the assistance of patent agents.

3.3.3 Trade secrets

(Are trade secrets considered as the rights deriving from a patent?)

In England, trade secrets can be protected by the law of confidence already described, by an equitable duty, which is a moral duty arising from the circumstances. It is separate from patent law although some parallel claims could be made. A duty of confidence does not require any contract as it can be implied into a relationship. It is not purely confined to relations between employers and employees. However many employers do provide in an employment contract that they will own the intellectual property rights arising from the work of their employees.

An early modern revival of the law of breach of confidence arose in *Saltman Engineering Co. Ltd. v Campbell Engineering Co. Ltd.*⁷² Design drawings were given to the defendant to manufacture tools. After the order was complete they retained the drawings and carried on using them for their own profit. There was an implied term that the drawings were confidential. Lord Greene said:

The information, to be confidential, must...apart from contract, have the necessary quality of confidence about it, namely, it must not be something which is public property and public knowledge.⁷³

The law of confidentiality does protect trade secrets in an industrial and commercial context but Bainbridge (1999: 292) suggests there is “no satisfactory legal definition of the term.” Some case law refers to the detailed nature of protected information which is subject to confidentiality, as opposed to trivial information which, once learned, forms part of an employees skill and experience. Very confidential information can be protected after termination of employment.⁷⁴

Equitable duties of confidentiality apply to both the public and private domain. For government work, the Official Secrets Act 1989 is widely drafted and contains offences concerning the disclosure of confidential information.

⁷¹ S.14(5) of the Patents Act 1977

⁷² (1948) 65 RPC 203 and [1963] 3 All ER 413.

⁷³ [1963] 3 All ER 413, at 415

⁷⁴ *Herbert Morris Ltd. v Saxelby* [1916] 1 AC 688, and *Faccenda Chicken Ltd. v Fowler* [1985] 1 All ER 724

The law of confidentiality can be used with other intellectual property rights, which often provide more extensive protection. Confidentiality protects confidence, which is not itself a property right in the same sense of a copyright or a patent. It is linked to property law through the law of equity, and procedural justice developing old forms of legal action.

3.3.4 Trade marks and passing off

(Can the trade mark be the object of any property right? - Trade marks and passing off)

The trade mark belongs in yet another area of intellectual property law, protecting business goodwill and reputation. Goodwill can be sold with a business, performing a similar function to the *clientèle* within a *fonds de commerce*, but it is of less importance. Part of the reason for protecting trade marks is that, if someone provides inferior goods and services using someone else's trademark, then the reputation of that business is damaged. Trade marks are protected as personal property and protected by statute since the 19th century. The Trade Marks Act 1938 gave rise to case law which is still used, and the old definition in s.68(1) is still useful concerning the scope of the word "mark":

A device, brand, heading, label, ticket, names, signature, word, letter, numeral or any combination thereof.⁷⁵

The current provisions in the Trade Marks Act 1994 are better drafted and comply with EU and international law, a major change in thinking. S.22 makes it clear that a trade mark is property:

A registered trade mark is personal property (in Scotland, incorporeal moveable property).

There is a wider definition of a trade mark in s.1(1) of the 1994 Act:

In this Act a "trade mark" means any sign capable of being represented graphically which is capable of distinguishing goods or services of one undertaking from those of other undertakings. A trade mark may, in particular, consist of words (including personal names), designs, letters, numerals or the shape of goods or their packaging.

Musical jingles, computer images sounds and smells could all now be registered, because they can be recorded "graphically". In 1999, Bainbridge found 34 classes of goods and 8 classes of services which could be protected in this way.⁷⁶

Trade marks obtain protection by registration in the course of which they are examined and the results published.⁷⁷ Registration may be refused for various reasons including that they are "contrary to public policy or to accepted principles of morality, or of such a nature as to deceive the public."⁷⁸ Refusal may also arise from similarity to a royal symbol or to other trade marks. Infringement of trade mark rights is essentially by use of

⁷⁵ Quoted in Bainbridge (1999: 526)

⁷⁶ *Ibid.*, p.523 and Appendix I

⁷⁷ *Ibid.*, p. 513

⁷⁸ S.2, Trade Marks Act 1994

the trade mark by someone else without consent.⁷⁹ Remedies include erasure of the offending sign, seizing goods which bear the mark and disposing of those goods.⁸⁰

Business reputations are also protected by a court action for “passing off,” which has common origins with the trade mark legislation. When the latter became statutory, “passing-off” continued to exist in case law. An advantage of “passing off” actions is that there is no requirement to register anything. It would be possible to issue proceedings in both passing off and trademarks. This illustrates very well the way in which English law is based in different procedures which can overlap strongly, because it is not necessary to categorize a right as belonging to just one legal domain by definition.

Passing off was originally an equitable action to restrain the use of a person’s name, which might cause that person to be sued,⁸¹ but it is also related to the tort (delictual action) of deceit. Passing off means that someone passes off their business, their goods or their services as being provided by another. Phillips and Firth (2007: 278) said:

In principle passing off takes place wherever one person so emulates the appearance, name, get-up or identificatory features of another’s business or trade products as to confuse the public and to lead the public to believe that his goods or business are those of the other person.

There has been a certain amount of activity in this area, for example where a supermarket produces biscuits in packets of a very similar colour and size as a well known product, in the hope that the customer will not distinguish between them. Like the law of confidentiality, this action protects property, rather than being property in itself.

3.4 Credit and other incorporeal property

(Can credit be considered as property?)

Can incorporeal things be the object of ownership or other property rights?)

Can credit be the object of a property right? So far as legal mortgages are concerned, yes, but these are referred to by s.1(2) of the Law of Property Act 1925 as “charges”, a kind of property right in land. They are not defined as “estates” which covers freeholds and leaseholds in s.1(1) of the 1925 Act, and are thus of less importance. Nonetheless, a person lending money by legal mortgage has much of the same kind of protection afforded to a purchaser of land.⁸² Mortgages are strongly affected by the law of equity, with a substantial case law directed to ensuring fairness between borrowers and lenders.

As to other forms of credit, this is not so much a question of defining them as property, but rather a question of transmissibility, exclusivity, control and protection against third parties for such credit. This concerns practical uses of property rather than its essence, so that it is not necessarily fundamental to describe something as property or not property. The lack of importance of the distinction can be illustrated by the fact that on death personal representatives are responsible for both property matters and possibly legal

⁷⁹ S.10, *ibid.*

⁸⁰ S.15, 16 and 19, *ibid.*

⁸¹ *Matthew Gloag & Son Ltd. v Welsh Distillers Ltd* [1998] ETMR 504

⁸² S.205(1)(xxi) of the Law of Property Act 1925

actions formerly available to the deceased. A legal action may produce money damages, a type of property, so that there is a certain amount of circularity in the distinction between what is property and what is not.

There are legal actions which underpin protection and transmissibility of contractual rights, leading them to be thought of as something that can be owned. There is a delictual action (tort) in the UK which attacks interference in someone else's contract. This, of itself, gives an element of effectiveness of contracts concerning third parties. Most contracts can be transmitted in English law provided there is a term in that contract which says this can be done. Some types of can be transmitted even if there is not such a term. Going against this is a principle in English law "privity of contract" which indicates that only the original parties to a contract can take legal action. This principle is now considerably mitigated by the provisions of the Contracts (Rights of Third Parties) Act 1999, allowing people who are not parties to a contract to take legal action under the contract in certain conditions.

A debt is a thing in action, a type of property. This and other rights in contracts and can generally be sold. The transfer of things in action is provided for by s. 136 of the Law of Property Act 1925, providing a set of formalities. The assignment (transfer) should be in writing and notice of this should be given to the debtor, who is a third party to the transfer. In France, for rights to be effective against third parties, generally publicity is required.

In England the notice procedure, in contrast to publicity, limits the number of people who know what is happening. Notice essentially requires that steps should be taken to notify a person involved of something. There are statutorily defined ways to do this, which are not necessarily very formal,⁸³ often simply by letter. Occasionally if a person cannot be found then publicity will be used. One of the consequences of the notice procedure is that when a lender intends to take possession of a property because of default on a mortgage, only the debtor and other mortgage lenders easily find out about the sale of land. This reduces the number of unsecured lenders who can claim money on the sale of the property. It also makes the procedure quicker and considerably less traumatic for the debtor because credit difficulties are not published.

Conclusion

The questionnaire was drafted in such a way that it does not cope well with a legal system that diverges from the Roman law model. The questions would have been better directed to functions such as the purpose of a small number of property rights or perhaps addressing a common problem. The World Congress had been meeting regularly since 1932, so that there should be time to deal with property law a bit at a time. The broad range of questions meant making generalities which are difficult in English law without some measure of inaccuracy. An example of a small area that would reward study is that trusts and custodial statutes are both directed to protecting investors from the insolvency

⁸³ S.196(3) of the Law of Property Act 1925

of financial institutions, and both use fiduciary duties. Functional equivalences or devices sharing similar characteristics can be found provided it is accepted that like is not being compared like. An example of this is the concept of the *universitas rerum*, which does not exist in England on a first glance, although similar collections of assets that are treated together can be found in estates of deceased persons, in trusts, and in companies. The economic similarities between UK and France are striking.

Preparing the report has been an interesting and useful process but the questions assumed readily available definitions, that these definitions correspond to Roman law taxonomy, and that such definitions reflect an “essence” of property defined in philosophical terms, appropriate to a natural law legal system. Much of this report has been devoted to explaining why English definitions do not describe the essence of property, but the law is rather a system of rules for handling proprietary rights. It is also clear that a whole series of factors make this kind of categorization typical of French law less necessary in England. These are firstly a unified court system, a single public and private treatment of property, and the use of trusts or companies to manage property. Secondly contract law does not require an *objet* in the French sense which leads to categorization of the contract. Thirdly, multiple overlapping court remedies assist in the creation of extra categories of proprietary rights, particularly by the law of equity and property rights can be enlarged by a process of analogy rather than categorization. If a right is well protected by remedies and if it is freely transferable, it starts to assume a proprietary character.

The law of equity is an important feature of the system causing widespread differences in every area. This has some continental equivalences, for example in the use of good faith. The different status of French judges rather excludes the active creation of judge-made law as in England over centuries, particularly the extent to which English judges intervene in the property rights of individuals. Thus *équité* in France is not a single major body of law which is important for property, procedure and many other things in quite the same way as in England.

Property is a much larger and more heterogeneous concept in England this report has attempted to explain the way the creation of new property rights are facilitated. Whether this is regarded as creativity or excessive commodification is very much a matter of taste.

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