Law Commission Call for Evidence on Digital Assets

Written evidence submitted by:

British and Irish Law, Education and Technology Association (BILETA)

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The British and Irish Law Education Technology Association (BILETA) was formed in April 1986 to promote, develop and communicate high-quality research and knowledge on technology law and policy to organisations, governments, professionals, students and the public. BILETA also promotes the use of and research into technology at all stages of education. The present inquiry raises technological and legal challenges that our membership explores in their research. As such, we believe that our contribution will add value to the inquiry on digital assets.

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1. **What would be the legal or practical implications for you if digital assets were possessable under the law of England and Wales? Please explain your answer and provide examples.**

1.1. We will start from the definition that UK Jurisdiction Taskforce in its 2019 statement on cryptoassets and smart contracts offers: 'Broadly speaking, the term "cryptoasset" is often used to describe something which is, or of which at least a component is, represented by certain data (often, although not necessarily, recorded on a distributed ledger) which, by virtue of the design of a broader system, can only be updated upon the satisfaction of specific conditions.'[1]

1.2. The Law Commission develops this and breaks down features of digital assets to: (a) intangibility; (b) cryptographic authentication; (c) use of a distributed transaction ledger; (d) decentralisation; and (e) rule by consensus. This definition implies that the main constituent elements of cryptoassets ae data, information and digital records, so our response will focus on these.

1.3. It is common knowledge in legal profession that in England, property rights are predominantly made by judges and have not yet been incorporated into statutes comprehensively (apart from, e.g. the Law of Property Act 1925), unlike in civil law countries where property law forms a significant part of civil codes or statutes. However, as per Lord Wilberforce in *National Provincial Bank Ltd v. Ainsworth*[2] there is a 'continuing

[1] UKJT, 'Legal statement on cryptoassets and smart contracts' November 2019, https://35z8e83m1ih83drye280o9d1-wpengine.netdna-ssl.com/wp-content/uploads/2019/11/6.6056_JO_Cryptocurrencies_Statement_FINAL_WEB_111119-1.pdf/

[2] [1965] A.C. 1175, 1247 – 1248.

creative ability of the courts', to recognise the right or interest in the category of property if it is 'definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability.'

1.4. These requirements were not identified in the case of information and data, and consequently, it would be difficult to include cryptoassets within this definition either, since they essentially comprise information, digital records on the ledger, as noted by the Taskforce in the Consultation paper and the Commission in this Consultation Paper, plus the rights purportedly represented by these records. These rights, arguably, already exist in law elsewhere, in the analogue world, so the real issue here is with digital records and data, such as private keys.

1.5. The law of England & Wales tends to recognise only two categories of personal property. It should be noted that these fall in to 2 categories: (i) things capable of physical possession (choses in possession) and (ii) things which embody a right or an obligation, and which are enforceable through the law (choses in action).[3]

1.6. This was the conclusion reached by the UK Jurisdiction Taskforce in its 2019 statement on cryptoassets and smart contracts.[4]

1.7. Choses in action are a different type of intangible (incorporeal) property, residual in character (i.e. debts, goodwill, rights under an insurance policy, shares, bills of exchange and intellectual property). The main characteristic of choses in action is that they can only be claimed by action, legal procedure, and not *in rem*, reclaiming possession.[5] Choses in action further divide into pure intangibles (e.g. debt, goodwill and copyright) and documentary intangibles (bill of lading, bill of exchange, promissory note, shares, insurance policy, etc). Notwithstanding the rigid 1885 (in *Colonial Bank v Whinney*) categorisation of personal property in English law, many authors would argue that, unlike in civil law, common law property is capable of expansion and inclusion of new categories.[6] Also, as Ball rightly notes, the lack of a principle of unity of property in English law, the lack of limitative definitions of property and the bundle of rights conception of property, make English law liberal and prone to fragmentation and the manipulation of property rights by lawyers.[7]

1.8. This theory, however, no longer appears to reflect the reality as the courts have refused to create new forms of property in the last century, with the exception of carbon emission.[8] Even legal recognition of full property rights for choses in action, which are recognised as property in English law, has been denied on the grounds that this property is not tangible. Thus, in *OBG Ltd v Allan*[9], the House of Lords by a 3:2 majority denied the application of the tort of conversion to anything other than chattels. We could confirm this difficulty in expanding the definition of property, by looking at some other examples of intangibles, such as emails and databases. Before embarking on that task, however, we will briefly set

[3] See: *Colonial Bank* v *Whinney* [1885] 7 WLUK 82.

[4]. Supra note 1

[5] *Choses in action* are 'personal rights of property which can only be claimed or enforced by action and not by taking physical possession' *Torkington v Magee* [1902] 2 K.B. 427, at 430, or 'a thing which you cannot take, but must go to law to secure' T. Cyprian Williams, 'Property, Things in Action and Copyright' (1895) 11 L.Q.R. 223, 232.

[6] W G Friedmann, *Law in a Changing Society* (2nd edn. Penguin, 1972), 94: 'The common law is mercifully free of these distinctions [established by the codes] which artificially divide things that economically and sociologically belong together.', and K Moon 'The nature of computer programs: tangible? goods? personal property? intellectual property?' (2009) EIPR 396, 407.

[7] J Ball, 'The Boundaries of Property Rights in English Law', Report to the XVIIth International Congress of Comparative Law, (2006) (10)3 EJCL 1, p. 4.

[8] E.g. confidential information or electricity ('electricity … is not capable of ownership' in Low v Blease [1975] Crim. L.R. 513)

[9] [2007] UKHL 21.

out the common law's historical position on property in information, which diverges to what the Commission sets out in the Consultation Paper.

1.9. Traditionally, English common law has not been prepared to recognise information as property. For instance in *Boardman v Phipps*,[10] Lord Upjonh maintained 'it is not property in any normal sense, but equity will restrain its transmission to another if in breach of some confidential relationship'.[11] There are some earlier authorities in English common law that afford proprietary character to certain kinds of information: *Jeffrey v. Rolls Royce Ltd*[12] where Lord Redcliffe treated 'know-how' as an asset distinct from the physical records it was contained;[13] *Herbert Morris Ltd v. Saxelby*[14] where Lord Shaw of Dunfermline held that trade secrets are 'his master's property';[15] *Dean v. MacDowell*[16] where Judge Cotton held that information constitutes property of the partnership.[17] Nevertheless, Palmer and Kohler state that these authorities do not establish 'a universal characterisation of information as property.'[18] Rather, other rules of law, (like contract, tort and breach of confidence) have been preferred in theory and jurisprudence.[19]

1.10. The infamous case where an English court found property in information is *Exchange Telegraph Co. v. Gregory & Co.*[20] The Court of Appeal upheld injunction to restrain the defendant broker from publishing information, the quotations in stocks and shares from the Stock Exchange, on the grounds that the information was the plaintiff's property.[21] This stance has not been supported by most of the subsequent case law. For example, in *OBG v Allan*, Lord Walker stated: 'Information, even if it is confidential, cannot properly be regarded as a form of property.'[22]

1.11. Similarly, in *Moorgate Tobacco v Philip Morris*, Judge Deane, writing about breach of confidence, declared that confidence's 'rational basis does not lie in proprietary right.' Rather, 'it lies in the notion of an obligation of conscience arising from the circumstances in or through which the information was communicated or obtained.'[23] A recent Court of Appeal case tied breach of confidence to intellectual property, deciding that confidential information should be regarded as a type of intellectual property.[24] This is an unusual decision, and it does not follow the principles established in the previous and applied in the subsequent case law.

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[10] [1967] 2 AC 46 (HL).
[11] Ibid 128.
[12] [1962] 1 AER 801.
[13] Ibid 805.
[14] [1916] 1 AC 688 (HL).
[15] Ibid 714.
[16] (1878) 8 Ch D 345.
[17] Ibid 354.
[18] P Kohler and N Palmer, 'Information as Property' in N Palmer and E McKendrick eds. *Interests in Goods* (2d ed. Lloyd's of London Press Ltd, 1993), p. 7.
[19] Ibid 4–5.
[20] [1896] 1 QB 147.
[21] Ibid 152–153 (Lord Esher M.R.) ('This information . . . is something which can be sold. It is property, and being sold to the plaintiffs it was their property. The defendant has, with intention, invaded their right of property in it, and he has done so surreptitiously and meanly.').
[22] *OBG Ltd. v. Allan* [2007] UKHL 21 at 275.
[23] *Moorgate Tobacco Co. Ltd. v. Philip Morris Ltd.* (No.2) [1984] 156 C.L.R. 414, 438. See also *Boardman v. Phipps* [1967] 2 A.C. 46, 89–90, 102, 127–128; *Breen v. Williams* [1996] 186 C.L.R. 71, 81, 91, 111–112, 129; *Cadbury Schweppes Inc. v. FBI Foods Ltd*. [1999] 167 D.L.R. (4th) 577 [48]; *Douglas v. Hello! Ltd.* (No.3) [2005] EWCA (Civ) 595 (Eng.); [2006] Q.B. 125 [119, 126].
[24] *Coogan v. News Group Newspapers Ltd*. [2012] EWCA (Civ) 48.

1.12. Recent examples of decisions on whether databases or emails can be property confirm the long-standing principles of common law. In *Fairstar Heavy Transport NV v Adkins*,[25] Justice Edwards – Stuart he found that emails are not to be considered property.[26] The Court of Appeal has recognised the same conceptual difficulties that property in information would encounter, as those that Justice Edwards-Stuart identified.[27] However, the Court further asserted that this does not mean that there can never be property in any kind of information, as the inquiry depends on the quality of the information in question.[28] This would mean that information such as 'know-how' might be susceptible to property, as opposed to personal data.[29]

1.13. Despite this long-held position, the case of *AA* v *Persons Unknown*[30] found that cryptocurrencies are capable of being regarded as a form of property. The judgment in this case indicated that while the narrow conception of categories of property recognised by English law, it does not mean that cryptoassets cannot be considered as a form of property.

1.14. While the court in *AA* v *Persons Unknown* reached the conclusion that cryptocurrencies can be a form of property, no further clarity has been offered on whether this introduces a new or additional category of property in English law.

1.15. The judgment in *AA* v *Persons Unknown* may be novel, and regarded as ground-breaking for its treatment of cryptocurrencies, but it also contains serious flaws, and is based around rather straightforward reasoning.[31]

1.16. *AA* v *Persons Unknown* is a judgment which is based on other decisions which are controversial,[32] and much less reasoned[33] so is in itself a spurious decision. It is therefore less than convincing in terms of the conclusion that cryptocurrencies can be property. The judgment in *AA* v *Persons Unknown* suggests that it is property, and as such, can be owned. While this may be the straightforward conclusion, and one shared by the UKJT,[34] it is a position which we do not share given the numerous difficulties in equating cryptoassets with property.

1.17. These difficulties include establishing the property norms which are well-established for the legally recognised two categories of property in English law. Other forms of property – including intellectual property – has become justifiable through addressing these challenges. The same cannot (yet) be said for cryptoassets.

1.18. It is, however, possible to create new rights by the courts (choses in action in particular), or the Parliament, as indicated above. Before doing so, it is wise to consider other vehicles that could be used to protect investments in crypotassets, which we refer

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[25] [2012] EWHC 2952 (TCC).

[26] Ibid 69.

[27] 'The claim to property in intangible information presents obvious definitional difficulties, having regard to the criteria of certainty, exclusivity, control and assignability that normally characterise property rights and distinguish them from personal rights.' *Fairstar Heavy Transport N.V. v. Adkins* [2013] EWCA (Civ) 886, [47].

[28] Ibid 48.

[29] Ibid. Similarly, see *Veolia ES Nottinghamshire Ltd v Nottinghamshire County Council* [2010] EWCA Civ 1214, per Lord Justice Rix [111] and [120]. Aplin has convincingly criticised this decision, noting *inter alia*,' a stark divide between the 'public law' or human rights notion of property in A1-P1 and the private law notion that has been explored in various cases and by numerous scholars'. Tanya Aplin, 'Confidential Information as Property?', *King's Law Journal*, (2013)24:2, 172-201, DOI: 10.5235/09615768.24.2.172, p 201. For more on the legal nature of confidential information see Tanya Aplin, Lionel Bently, Phillip Johnson, Simon Malynicz, *Gurry on breach of confidence : the protection of confidential information*, 2nd ed. (Oxford: Oxford University Press, 2012).

[30] *AA* v *Persons Unknown* [2019] EWHC 3556 (Comm).

[31] Kelvin F K Low, 'Bitcoins as property: welcome clarity?' *Law Quarterly Review* 2020, 136(Jul), 345-349; 345.

[32] *B2C2 Ltd* v *Quoine Pte Ltd* [2019] SGHC (I) 3.

[33] Vorotnytseva v Money-4 Ltd (t/a Nebeus.com) [2018] EWHC 2598 (Ch).

[34] Ibid, n2.

to in this response (including potentially, contracts). Recognising something as property, as demonstrated above, implies serious consequences and some of them could be unintended (as judges clearly state in Fairstar and Your Response), especially for the uncertain and developing technology such as DLT.

Conceptual problems around property and possession

1.19. At a more abstract level, it is useful to refer to the widely-accepted Honoré's theory of property. This theory introduces incidents of property that 'are not individually necessary, though they may be together sufficient, conditions for the person of inherence to be designated as 'owner' of a particular thing in a given system'.[35] These incidents are: the right to possess, the right to use, the right to manage, the right to the income of the thing, the right to the capital, the right to security, the rights of transmissibility and absence of term, the prohibition of harmful use, liability of execution, and the incident of residuarity.[36]

1.20. We argue that cryptoassets lack at least a few of these, such as the right to possess (in the legal sense, to the exclusion of others, given the distributed nature of the technology, the rule by consensus, the problems with permanence and stability) , the right to use and manage (similar consideration of control and actors involved in the DLT).[37] DLT and cryptoassets are composed of various actors that crucially participate in its operation; these are participants, developers, administrators, and gateways. The Taskforce notes some of these difficulties too.[38]

1.21. In addition, one needs to consider the economic features, which qualify various objects as property. The list presented here is not exhaustive, but only the most crucial features will be referred to for the purpose of brevity. These are the following: rivalrousness (the fact that the object cannot be physically possessed by multiple individuals at the same time); excludability (possession of one individual excludes the possession of another); permanence (temporality, certain stability in time); and interconnectivity (objects in the real world, means that they can affect each other, 'by the laws of physics',[39] they are connected and can be perceived as such by senses).

1.22. Here, we can again see the lack of rivalrousness, excludability, permanence for cryptoassets, due to the inherent nature of the DLT technology, referred to in your Consultation paper. Interconnectivity as a quality is, arguably, more easily detectable in the case of cryptoassets. The Taskforce notes that control and excludability might be easier to achieve with private and permissioned DLT applications.[40] These networks have, however, been criticised due to the lack of security achieved through distributed networks and peer-

[35] A M Honoré 'Ownership' in A G Guest, ed, Oxford essays in jurisprudence, a collabourative work (Oxford University Press, 1961), pp. 112-113

[36] Ibid 113-128.

[37] The Tasks Force notes these issues too, referring to *Your Response v Datateam Business Media* [2014] EWCA Civ 281, [2015] QB 41, [32]

[38] 'Electronic data which does not appear in a physical format is more or less (depending on the way in which it is held) susceptible of being copied. Without an infrastructure designed to protect against this, this is likely to destroy the possibility of a given electronic record having unique qualities, i.e. the scarcity of that digital record. It is also likely to mean that an individual cannot credibly claim to have exclusive control of that electronic record.', The UK Jurisdiction Taskforce (the "UKJT") of the LawTech Delivery Panel, Consultation on the status of cryptoassets, distributed ledger technology and smart contracts under English private law, p. 17.

[39] Fairfield 'Virtual Property' (2005) 85 B.U.L. Rev. 1047.

[40] 'As Private and Permissioned networks provide participants with greater levels of control over who participates, how cryptoassets come into existence and how they are transferred, Private and Permissioned DLT implementations are often seen as being more suitable for the development of a "security token" structure.' The UKJT of the LawTech Delivery Panel, Consultation on the status of cryptoassets, distributed ledger technology and smart contracts under English private law, p. 22, fn 47.

to-peer structures,[41] going so far as proclaiming these "nothing more than cumbersome databases."[42]

2. Do you consider a transfer of a digital asset to be more analogous to a transfer of a thing in possession, such as cash, or a transfer of a thing in action, such as bank money? Does a different analysis apply for different types of digital assets (including different sub-sets of cryptoassets) or different methods of transfer? Please explain your answer and provide examples.

2.1. No. A digital asset cannot be analogous to a transfer of a thing in possession because of the difficulties in establishing possession.
2.2. It is more conceivable that a digital asset can be analogous to a transfer of a thing in action given the digital composition of the thing. That said, such an analogy still presents obstacles given the narrow conception of categories of property under English law.
2.3. A different analysis is required given that we remain unconvinced that cryptoassets can fall within the categories of property. It is perhaps easier to conceive of a cryptoasset as similar to a bank note or a cheque in that it represents a 'promise', rather than property.

5. In what circumstances (if any) are digital assets analogous to "goods", as currently defined under the Sale of Goods Act 1979? In what circumstances are digital assets not analogous to "goods"? What would be the practical consequences of characterising digital assets as "goods" for these purposes? Please explain your answer and provide examples. We would also be interested in respondents' views on these issues in the context of the Supply of Goods and Services Act 1982 and the Consumer Rights Act 2015.

5.1. There are differing definitions of 'goods' under each of these pieces of legislation.
5.2. The Sale of Goods Act (SGA) defines, goods under s61 as including "all personal chattels other than things in action and money, and in Scotland all corporeal moveables except money; and in particular "goods" includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale."
5.3. The definition under the Consumer Rights Act (CRA) 2015 differs somewhat in that it is not as comprehensive, but should be read alongside the SGA 1979.
5.4. The CRA defines 'goods' as "any tangible moveable items, but that includes water, gas and electricity if and only if they are put up for supply in a limited volume or set quantity." (s2(8)). It goes further in offering a definition of what is meant by digital content, taken under this Act to be "data which are produced and supplied in digital form."
5.5. These definitions support the analysis above that digital assets are not property, therefore are not goods under the SGA 1979, nor the CRA 2015 and as a result, are not analogous.

[41] Hampton, Nikolai (5 September 2016). "Understanding the blockchain hype: Why much of it is nothing more than snake oil and spin". Computerworld. Archived from the original on 6 September 2016, at https://www.computerworld.com.au/article/606253/understanding-blockchain-hype-why-much-it-nothing-more-than-snake-oil-spin/; Barry, Levine (11 June 2018). "A new report bursts the blockchain bubble". MarTech, at https://martechtoday.com/a-new-report-bursts-the-blockchain-bubble-216959.
[42] Ibid.

11. We welcome comments on the aspects of the Liechtenstein Blockchain Act and the Wyoming Blockchain Laws relevant to the questions in this call for evidence. What other jurisdictions, if any, should we consider and why?

11.1. Japan has been required to consider whether bitcoin / cryptoassets can be considered to be property.[43] The Tokyo District Court concluded in the MtGox case answered this in the negative

11.2. Japan would be one jurisdiction worth exploring given the significance of the MtGox judgment, but also the centrality of the property question as the precursor to the bankruptcy proceedings.

[43] Lousie Gullider, Megumi Hara & Charles W Mooney Jr, 'English translation of the Mt Gox judgment on the legal status of bitcoin prepared by the Digital Assets Project' (11 February 2019) https://www.law.ox.ac.uk/business-law-blog/blog/2019/02/english-translation-mt-gox-judgment-legal-status-bitcoin-prepared. See: https://www.law.ox.ac.uk/sites/files/oxlaw/mtgox_judgment_final.pdf for translation.