this vein insofar as it extends the scope of protection of property law to bitcoins without reference to statute. Second, like in *Armstrong* and following the Taskforce's Opinion, Bryan J. recognises that the important legal question is an analytical one, namely, whether bitcoins are sufficiently excludable and transferable to form the basis of a property right; however, given that the real controversy surrounding recognising new forms of "intangible property" flow from defining the nature and scope of attendant remedies, it is hoped that in the event of a full hearing the normative justification for, and legal consequences of, classifying cryptoassets as property is developed. In other words, the Taskforce's laconic reference to reasonable expectations is not, it is submitted, a sufficient justification. Nevertheless, the important conceptual step taken should not be overlooked. Bryan J. did not attempt to fit bitcoins into a broad understanding of *choses* in action, which would have been a plausible interpretation of the Taskforce's Opinion and *Armstrong*. Instead, Bryan J. stated that dividing all personal property into *choses* in possession and *choses* in action is "fallacious". It is argued that Bryan J.'s recognition of a third and distinct category of intangible personal property, uncoupled from a background statutory framework, enables courts to think clearly about new forms of intangible assets and also avoid the pitfalls of "fiction piled upon fiction" (see *OBG v Allan* [2008] 1 A.C. 1, per Lord Nicholls). *AA v Persons Unknown* ultimately shows the remarkable flexibility of the common law in an age of virtual currencies and digital assets.

Rónán R. Condon

Address for Correspondence: School of Law and Government, Dublin City University, Dublin 9, Ireland. Email: ronan.condon@dcu.ie

THE DIGITAL EXHAUSTION OF COPYRIGHT

IN its Judgment of 19 December 2019 in *Tom Kabinet*, C-263/18, EU:C:2019:1111, the CJEU ruled that the supply to the public by downloading, for permanent use, of an e-book is not covered by the concept of "distribution to the public" (Art. 4(1), Directive 2001/29/EC, OJ 2001 L 167 p.1 ("InfoSoc Directive")), but by that of "communication to the public" (Art. 3(1), InfoSoc Directive). This is significant, as the Directive is explicit that, while the copyright owner's distribution right is exhausted with respect of a copy of the work by the first transfer of ownership of that copy with the right-holder's consent, so that the purchaser is free to resell it (Art. 4(2), InfoSoc Directive), the right of communication to the public is not subject to exhaustion (Art. 3(3), InfoSoc Directive). While the decision has been treated almost universally as portending an end to

trade in second-hand e-books, this note suggests there might be an opportunity for such trade if organised appropriately.

The case concerned Tom Kabinet, an online marketplace for used e-books. Tom Kabinet offered to its registered members, at a price lower than that charged by official retailers, copies of e-books that it had either purchased or which had been donated. The website's business model depended on encouraging members, after reading an e-book bought through the website, to sell it back or donate it to the operator, so that it could then offer it to other customers (see Opinion of Advocate General Szpunar, 10 September 2019, C-263/18, EU:C:2019:697, at [90]). After publishers sought an injunction prohibiting the operation of the website on the basis that it infringed copyright in the e-books it sold, Tom Kabinet argued that this had been exhausted when those copies were first put into circulation. The case was referred to the CJEU by the District Court of The Hague, which asked whether the act of offering e-books for download amounts to an act of distribution and, if so, whether exhaustion applies.

Following the lead of A.G. Szpunar (see his Opinion at [26]–[51]), the CJEU approached the question by juxtaposing the distribution right with the right of communication to the public. The Court concluded that the distribution right applies only to tangible copies of protected works, with digital copies covered by the right of communication to the public. The Court noted that the WIPO Copyright Treaty limits the right of distribution, and thus its exhaustion, to "tangible objects", thereby excluding intangible copies such as e-books (at [40]). Recitals 28 and 29 of the Directive likewise link the distribution right to "tangible articles" and clarify that the principle of exhaustion does not apply to the provision of online services (at [51]). Finally, Article 4(2) of the InfoSoc Directive describes the copies controlled by the distribution right as "objects" (at [52]).

The CJEU distinguished the facts of the case from those in *UsedSoft* (Judgment of 3 July 2012, C-128/11, EU:C:2012:407), in which it had found that the exhaustion of the distribution right in computer programs under Article 4(2) of the Computer Programs Directive (Directive 2009/24, OJ 2009 L 111 p.16) extends to digital copies. The Court observed that an e-book is not a computer program, that the text of the Computer Programs Directive explicitly encompasses "any form of a computer program", thus including digital copies, and that the Computer Programs Directive constitutes *lex specialis* in relation to the InfoSoc Directive (at [54]–[56]). The Court also noted that, while the online transmission of a computer program is the economic equivalent of its sale on a material medium, the same cannot be said of physical books and e-books. E-books do not deteriorate with use, making used copies perfect substitutes for new ones, while the resale of used e-books requires no effort or cost, thus affecting right-holders' ability to obtain an appropriate reward for their works (at [57]–[58]).

Having thus excluded the applicability of the distribution right, the Court went on to consider whether Tom Kabinet's actions fell within the scope of the right of communication to the public. Notably, the referring court had concluded that neither of the two conditions set out in the CJEU's case law were met: (1) there was no "act of communication", as the content of the protected work was not included in the offer for download of the e-book and (2) there was no "public", as each e-book was transmitted only to a single member (at [60]).

The CJEU disagreed with both conclusions. First, with regard to the act of communication, the Court recalled that this includes the concept of "making available to the public" (Art. 3(1), InfoSoc Directive). The case law is clear that whether members of the public in fact access the work is irrelevant to this concept (see Judgment of 14 June 2017, *Stichting Brein*, C-610/15, EU:C:2017:456, at [31]). Instead, "the critical act" is the offering of a work in a public manner (at [63]–[64]). The Court observed that Tom Kabinet made its e-books available to all registered members. Consequently, there was an act of communication (at [65]).

Second, with regard to the existence of a public, the CJEU recalled that this refers to a group of people of indeterminate number whose size meets a *de minimis* threshold. In determining the group's size, not just simultaneous access, but the cumulative effect of access by different persons in succession should be taken into account (at [66]–[68]). The Court noted that anybody could register as a member of Tom Kabinet. It also emphasised that Tom Kabinet did not take technical measures to ensure that, "(i) only one copy of a work may be downloaded in the period during which the user of a work actually has access to the work and (ii) after that period has expired, the downloaded copy can no longer be used by that user" (at [69]). As a result, it made e-books available to a substantial number of persons, and thus a public. This public was also "new", as required by the case law, namely not already taken into account by the copyright holders when they authorised the initial communication of to the public. According to the CJEU, this follows from the fact that the terms accompanying the initial offer of an e-book for download will generally require that the user read it from their own equipment.

The decision is unsurprising, as it is clear that a literal interpretation of the InfoSoc Directive excludes digital exhaustion. At the same time, it is worth asking whether the functional differences between physical and digital copies of books justify different legal treatment. In *VOB*, the CJEU stated that, as concerns the public lending of books, digital copies have essentially similar characteristics to print ones (see Judgment of 10 November 2016, *Vereniging Openbare Bibliotheken*, C-174/15, EU:C:2016:856, at [51]). It is hard to see why second-hand sales should be different. The Court's analysis is unconvincing, as the exhaustion of the

distribution right in physical copies is not dependant on wear and tear or on expense and effort being put into resale.

In this regard, the introduction of a requirement of technical measures is particularly interesting. The Court does not explain their purpose. Moreover, the description of the first of the measures Tom Kabinet should have taken is difficult to parse. One interpretation might be that an e-book trader must ensure that each buyer can only download a single copy. It is unclear, however, how this would impact on the existence of a "public". A better reading would suggest that the platform is required to ensure that only one user can download each copy of each e-book each time it is made available on the website. Significantly, the CJEU cites *VOB*, which used the exact same wording. In that case, the questions submitted by the referring court make clear that the technical measures must ensure that other users are not able to download the e-book during the pertinent period (see *VOB*, at [26], [52]). That the CJEU would choose to introduce such a condition is striking, given that it could have rested on its "critical act" doctrine to state that provision of access to a public is sufficient to satisfy the making available right, regardless of whether access was immediately withdrawn for all other customers once one customer downloaded the work.

If this interpretation is correct, it becomes arguable that the CJEU is attempting to ensure the equal legal treatment of physical and digital copies, albeit via different rights. Certainly, once a second-hand physical book has been purchased by one customer, it may no longer be sold to others, unless it is first returned to the second-hand bookshop – at which point the first customer will have to give up their copy. The CJEU could be seeking to ensure that similar restrictions apply to e-books before a second-hand trader can dispense with authorisation. Viewed under this light, behind the strict literal interpretation in *Tom Kabinet* lurks a teleological equivalency – digital exhaustion in all but name.

Whether a business model that incorporates the technical measures required by the judgment would be profitable or whether it is technically possible to ensure that the seller of a second-hand book has not retained a copy are different matters. It is also worth considering whether the reproduction right would not step in to re-open the gap between digital and physical copies. The referring court had submitted a question on this issue, but in light of its answer on the distribution right, the CJEU declined to address it.

CHRISTINA ANGELOPOULOS

Address for Correspondence: Faculty of Law, University of Cambridge, Cambridge, CB3 9DZ, UK.
Email: cja58@cam.ac.uk