the Berne Convention for the Protection of Literary and Artistic Works (as amended 28 September 1979)).

Professor Drassinower has previously offered an alternative, more expansive definition of "dialogue", which ensures that users' rights are not unduly restricted. Drassinower argues that the concept of authorship (which underpins copyright) should be understood as an ongoing "dialogue" between past, present and future authors (*What's Wrong with Copying?* (2015)). Insofar as a sampler is creating a new work of authorship – namely a new musical work itself protected by copyright – the sampler is deemed to have engaged with an intention of entering into "dialogue". Therefore a national court can immediately proceed to consider whether: (1) the source material had already been lawfully made available to the public; (2) the source of the sampled sound recording is indicated; (3) the use of the sample accords with fair practice; and (4) the sample lasts no longer than is required by the purpose of creating a new recording (Art. 5(3)(d)).

Lastly, an unwelcome quirk in the CJEU's reasoning casts further doubts on whether one can sample from sound recordings that do not contain authorial works. The CJEU interpreted sampling solely as a means by which one quotes a "protected musical work" (at [68]). But what if sampler reproduces non-authorial sounds, such as the aforementioned waves and traffic sounds? With no author to speak to, how is the sampler supposed to engage in "dialogue"?

While the CJEU has thus opened up some space for unauthorised sampling of sound recordings containing musical works, its judgment has generated a cacophony of questions that will now need to be resolved.

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DECONSTRUCTING PARENTHOOD: WHAT MAKES A "MOTHER"?

FIFTY years ago, before the development of artificial reproductive technology, and when same-sex relationships and transgender individuals were unrecognised by the law, the question of who was a child's mother was so obvious as not to warrant judicial or legislative attention. However, the social shape and legal understanding of the family has dramatically changed over the last half-century, giving rise to difficult questions concerning parenthood and filiation. For this reason, when the court was called upon for the first time to define the term "mother" under English law in *TT and YY v The Registrar General for England and Wales* ([2019] EWHC 2384 (Fam)), it required no fewer than 58 pages to provide an answer.

The facts of this case are straightforward: TT was registered female at birth, but later transitioned to live in the male gender, and in April 2017

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obtained a Gender Recognition Certificate confirming this. The same month, he underwent fertility treatment and subsequently gave birth to a son, YY. When registering the birth, he was informed that he could not be listed on the birth certificate as "father" or "parent" as he wished, but would instead be recorded as the child's "mother" – a conclusion that he challenged before the High Court.

The starting point for the court – and indeed the sole authority under common law – was an obiter dicta passage from the 1977 Committee for Privileges: The Ampthill Peerage: "[m]otherhood, although a legal relationship, is based on a fact, being proved demonstrably by parturition" ([1978] A.C. 547, 577, per Lord Simon). While McFarlane P. cautioned that this was merely a statement of what was at the time seen as the obvious, the fact that it was considered so self-evident showed that there was no legal doubt as to the mother's legal identity. The very absence of other authorities only further emphasised the indisputable nature of motherhood: the law reflected "the basic facts of life", and the role of "mother" was ascribed to the person who undertook the carrying of the pregnancy and gave birth to the child. At common law, therefore, being a "mother" was held to describe a person's role in the biological process, regardless of sex or gender.

The court then turned to the question of whether the Gender Recognition Act 2004 ("GRA") displaced the common law position in circumstances where the person who carried and gave birth to the child was male. Section 9(1) of the GRA requires that a person who obtains a Gender Recognition Certificate be regarded as having the acquired gender "for all purposes", a provision that TT argued would be contravened if he were registered as the child's "mother". Although section 12 of the GRA provides that "the fact that a person's gender has become the acquired gender under this Act does not affect the status of the person as the father or mother of a child", he argued that this provision should be interpreted to apply exclusively retrospectively: that is, to parenthood already acquired before the issue of the certificate. If applied prospectively, he argued, rendering a certificate effective in determining gender for all purposes other than parenthood, it would leave individuals in limbo between two genders, defeating the purpose of the Act. However, as McFarlane P. pointed out, this argument only has force if the attribution of the status of "mother" or "father" is seen as being gender specific. Going back to the common law definition, he rejected that being female was an essential or determining attribute of motherhood – indeed, although TT is the first legal male to have given birth in England (at least that we are aware of), other individuals who have obtained Gender Recognition Certificates may already have existing children, thus creating male "mothers" and female "fathers" (see e.g. *R. (JK) v The Registrar General* [2015] EWHC 990 (Admin)).

In light of these conclusions, the court had to consider whether the legislative framework for the registration of children born within transgender

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families was compatible with TT and YY's rights under the Human Rights Act 1998. TT argued that his registration as "mother" would not only mean that his transition would no longer be confidential, but would also be deeply distressing for him, contrary to his right to respect for private life. The terms "mother" and "father" go to the very heart of the nature of gender dysphoria, and would therefore place such individuals in an impossible dilemma – forced to choose either to have a family, and be "outed" as transgender, or to abandon the prospect of parenthood in order to retain their acquired gender for all purposes. While acknowledging the significant adverse impact on TT, the court held that this interference was "very substantially outweighed" by the interests of society as a whole in maintaining an administratively coherent and certain scheme for the registration of births, which consistently records the person who gives birth as "mother". Such certainty was also in the best interests of children, whose welfare must be a primary consideration, securing their right to establish the substance of their identity, and to know details concerning their origins.

This was a very carefully crafted judgment from the President of the Family Division, characterised by detailed reasoning and a thorough consideration of all possible aspects of the case. However, it lays bare the gendered, heteronormative, conception of the family currently in operation under English law. As McFarlane P. correctly identifies, the law conceives a fundamental difference between the parental status of a "mother" and "father", assuming that such people fulfil two different, yet complementary, legal roles. This "parental dimorphism", as described by McCandless and Sheldon, can be further seen in the status provisions of the Human Fertilisation and Embryology Act 2008 ("HFEA 2008") which recognise the female partners of the woman giving birth: not as mothers – a status that is reserved exclusively for the woman who has given birth – but as a "second female parent" (J. McCandless and S. Sheldon, "The Human Fertilisation and Embryology Act (2008) and the Tenacity of the Sexual Family Form" (2008) 73(2) M.L.R. 175).

The binary conception of the parental role privileges a certain form of "family life" rooted in the sexual family ideal, consisting of one (cisgendered) man and one (cisgendered) woman in a monogamous, heterosexual, relationship, who raise their own genetic children (see M. Fineman, *The Neutered Mother, the Sexual Family and Other Twentieth Century Tragedies* (London 1995)). While the HFEA 2008 has expanded the boundaries of parenthood for non-traditional families, it has done so using an assimilationist approach – taking the traditional family model as the starting point and working outwards to encompass emerging relationship forms. New forms of parenthood are not recognised in their own right, but in terms of how they fit with conventional understandings of family relationships (see J. McCandless, "Transgender parenting and the law", 6 January 2012, available at < https://blogs.lse.ac.uk/politicsandpolicy/parenthood-laws-family/>).

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Where this judgment represents a missed opportunity is in the failure to recognise that this gendered legal framework violates the right of TT to respect for private life. The attribution of "motherhood" to a legal male creates a discord between law and identity, and an inconsistency between the legal meaning of the term "mother", and its common understanding. As McGuinness and Alghrani foresaw over a decade ago, "[b]y forcing definitions to stretch, so that males are acting as 'mothers' and females as 'fathers' we are tacitly accepting that enforced definitions of gender roles are more important than an acknowledgement of the reality of these situations" ("Gender and Parenthood: The Case for Realignment" (2008) 16 Med.L. Rev. 261, 279). There is no doubt that the terms "mother" and "father" remain inextricably gendered in social use, and by requiring their application to legally describe the person who gave birth to the child, the law prioritises the conventional family, and marginalises those who fall outside this. As Liam Davis points out, "a child can only have a mother and father (correctly identified) by being born to a cisgendered, heterosexual woman, and her male partner" ("Re TT and YY: When a 'Father' is a 'Mother'", 7 October 2019, available at < https://www.bionews.org.uk/page_145481>).

Neither of the justifications given by the Government for the undoubted interference with TT's rights – the need for a coherent scheme of birth registration and for the person who gave birth to be recorded in a consistent way – require the use of the particular term "mother". Nor does the right of the child to have access to information about their origins provide such a mandate. The objection of TT was not to the registration of his role in the child's birth, but to the use of a highly (socially) gendered term to do so. An administratively coherent system of birth registration can be easily achieved whilst still protecting the right of transgender individuals to a consistent and authentic gender identity, through the simple mechanism of altering the legal nomenclature to reflect the individual's biological role without the connotations of gender – "parent" – as was suggested by TT. Indeed, this neutral term has in fact already been adopted in other jurisdictions – for example, Malta and Ontario.

In its failure to challenge the status quo, the judgment further entrenches the traditional assumptions underpinning English family law. A declaration of incompatibility would have been one small step towards addressing a much wider issue, and may have provided the impetus needed for Parliament to re-evaluate our understanding of legal parenthood to better reflect the complexities of modern family forms. We need to break down the barriers of our conservative approach to the legal family and re-imagine a model of parenthood fit for the twenty-first century.

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