Should Social Media Influence be Recognised as Property?

> '*There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe*.'[1]
>
> William Blackstone, *Commentaries on the Laws of England: Book II*

Introduction

It is trite to say that the question of whether 'things', or *res,* should be categorised as property in English law is one of great importance. Yet confusion still clouds this issue despite centuries of academic and judicial discourse. Should such a categorisation of property be found, proprietary rights in that thing may then be supported, which afford advantages far superior to those available to holders of mere personal interests. Conversely, the finding may prove highly detrimental to others who hold competing claims over the property, a policy factor to which courts have historically, and continue to be, sensitive.

Despite the serious ramifications that may flow from successful admittance into the category of property, a universal and binding definition of property has proved elusive. Instead, despite its somewhat problematic nature, the test for determining what may be considered an object of property continues to rest with that provided by the House of Lords via its seminal judgment in *National Provincial Bank v Ainsworth*[2]. For those who study this area of law or are required to apply it in practice, this understandably poses numerous issues.

A review of literature on the topic identifies three main themes: 1.) the use of land as a template for property; 2.) property defined not as a 'thing' but instead as a bundle of rights dictating a person's relationship with that thing; 3.) the categorisation of property as either choses in possession or choses in action. While imperfect, this situation has resisted change despite innovations, from social to technological, affecting the way property is viewed by both academics and the judiciary. The recent emergence of digital assets and similar resources, which defy traditional classifications of property, however, has further highlighted the limitations of such traditional analyses in English law.

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[1] William Blackstone and others, *Commentaries on the Laws of England* (The Oxford edition of Blackstone, First edition, Oxford University Press 2016).

[2] [1965] A.C. 1175

With respect to these new assets, social media influence is arguably the most extensive and yet it remains the least understood when viewed through a proprietary lens. Despite its relatively recent emergence over the past two decades, social media influence has proliferated rapidly and exponentially increased in importance. It is held and created by tens of millions within the UK alone, a prized resource for those able to acquire it and intensely coveted by many who do not. Beyond its actual and potential commercial value, social media influence is often a barometer of status within peer groups of all ages, leading many to seek it as an asset purely for its inherent social value. While the Law Commission and bodies such as the UK Jurisdictional Taskforce (UKJT) have released several comprehensive publications concerning digital assets, these have chosen to focus on more conventional objects such as cryptocurrency, non-fungible tokens (NFTs), digital files, and digital records. As a result, social media influence, despite its prolific status as a digital asset in the UK, has been largely ignored.

Examining the idea of property in law in England and Wales, it may be demonstrated that social media influence does indeed have the potential to be recognised as an object of property; should this be the case then it may also support powerful proprietary interests that may be vindicated by those who claim them. The proven flexibility of English law to adapt to new socio-economic circumstances further increases this prospect, a fact so recently demonstrated by developments on the proprietary status of more conventional digital assets[3].

Apart from any arguments as to why social media influence *could* be recognised as property, an altogether separate question arises as to whether it *should.* The motives for extending the analytical model of digital assets beyond its current boundaries, to embrace social media influence and bring it under the same aegis of property, are numerous and justifiable. The most basic imperative is moral: the satisfaction of a public good by protecting those things of greatest value to individuals through the recognition of their proprietary rights.

Whether social media influence is a good fit for classification as property is an issue that is yet to be determined judicially but it is one that will likely need to be addressed in the near future. For many, it has become their most valued asset, and one over which protection will inevitably be sought via the vindication of proprietary rights recognised by the courts.

The Enigma of Property

[3] Law Commission, 'Digital Assets: Final Report' <https://www.gov.uk/government/publications> at [8].

Despite an obsession with semantics and linguistic precision, it is curious that a term as important and frequently used as 'property' has resisted definition for so long in English common law[4]. For those unused to the intricacies and pleasures of property law, the word 'property' is often used very loosely, principally as a synonym for land. A person might say, for example, without thinking about the legal meaning of their words, that they are *'looking to buy a new property,'* when moving home. Similarly, reference is often made to the *'property ladder'* with respect to the sale and purchase of land[5]. It is axiomatic, however, to state that such terminology usage is legally inaccurate given that land is but one type of property. Such conflation is only one instance of the issues that can arise when an important legal term lacks an appropriate and accessible definition.

The colloquial treatment of property and land as synonymous terms is not limited to those unfamiliar with property law, however. Scholarship on the idea of property in English law continues this theme, reinforcing the virtual interchangeability of the terms and the notion that land can be used as an exemplar for all types of property, both real and personal. Not only is this analytical framework legally inaccurate, it is also highly detrimental when examining new assets such as social media influence, which often resist dissection and evaluation along such traditional lines.

Land as the Template for Property

In their 2022 Digital Assets Consultation Paper[6], the Law Commission explored both the definition and concept of property in English common law as a precursor to their analysis of emerging digital assets. In doing so, they cited the High Court of Australia case of *Western Australia v Ward*[7] and the judgment of the Court of Appeal in *Mayor of London v Hall*[8]. Despite the Law Commission's purported focus on the idea of property generally, both of these authorities dealt with issues that centred specifically on land. The language used and cases chosen by the Law Commission demonstrate a preoccupation with the specific example of real property, notwithstanding personal property or the distinct intangible nature of other less conventional assets. As a result, the Law Commission's analytical model is somewhat detrimental to the much more diverse and dynamic, yet

[4] This is not the case in statute, where property has been defined numerous times. This is purely in the context of the legislation, however, and is not intended to provide an objective definition. The Insolvency Act 1986, for example, states that: '*"property" includes money, goods, things in action, land and every description of property wherever situated and also obligations and every description of interest, whether present or future or vested or contingent, arising out of, or incidental to, property;'*

[5] For a typical example, see e.g., Ruby Hinchliffe, 'How to Help Your Children on the Property Ladder (without Giving Them a Penny)' *The Telegraph* (2 May 2023) <https://www.telegraph.co.uk/property/buy/help-children-buy-first-house/> accessed 16 June 2023.

[6] Law Commission, 'Digital Assets Consultation Paper' (2022), at [14-21].

[7] (2002) 213 CLR 1

[8] [2010] EWCA Civ 817

neglected, category of personal property that includes emerging assets such as social media influence. While it is not denied that the characteristics of property referenced by the Law Commission are important in certain contexts, the temptation to use land as the template for all property is inappropriate and an appealing trap into which it is far too easy to be drawn.

As a result, the construct of property offered up by the Law Commission, while intending to represent a more holistic appraisal in English law, instead focused far too heavily on land and its inherently unique characteristics. This decision led the Law Commission to subsequently identify the need for a degree of control to be exercised by an individual over an asset for it to be considered property, including the question of how a thing may be used by others and the ability of the possessor to exclude them from it[9]. With respect to this requirement, it is no coincidence that Lord Neuberger had stated in *Hall: 'As the majority of the Australian High Court put it, a person has possession of certain land if he can "control access to the [land] by others, and, in general, decide how the land will be used": Western Australia v Ward (2002) 213 CLR 1, para 52'*[10]. This preoccupation with land as the template for all property will, unfortunately, continue to conflate issues regarding what may be considered an object of property and whether a specific right in it is proprietary or personal in nature.

Possession vs. Ownership

A further illustration of the unsuitability of land as a template for all property is a comparison of the ideas of 'ownership' and 'possession'. Indeed, they are frequently treated interchangeably, just as 'land' and 'property' typically are. For personal property, ownership is often less problematic and often follows the idea of patrimony that dominates in civil law jurisdictions[11]. This idea of absolute rights in personal property is typically synonymous with that of possession; the owner of an asset such as money, shares, or chattels is also the possessor of that property and necessarily can exclude others from it. While there is an added complication in English law between how an asset may be

[9] The characteristics of rivalrousness and excludability will also be addressed *supra*. It is argued that they are inappropriate as requirements for characterisation of a thing as an object of property and are more appropriate for deciding whether a particular right is proprietary in nature instead.

[10] Law Commission (n 4) at [17]; n5 at [21].

[11] For example, Art 544 of the French code civil states ownership as being *'La propriété est le droit de jouir et disposer des choses de la manière la plus absolue, pourvu qu'on n'en fasse pas un usage prohibé par les lois ou par les règlement'* (*'Property is the right to use and control things in the most absolute manner provided this use and control are not prohibited by the law'*).

owned at law and in equity[12], something that civil law patrimony would find abhorrent, it is much more typical to speak of absolute ownership and possession being enjoyed by the same person.

This is not true of land, however. Since ownership of land in England and Wales ultimately rests with the Crown[13], those sitting below them in the hierarchy of rights may only acquire one of the two legal estates that exist today under s1(1) of the Law of Property Act 1925: that of freehold or leasehold. Such estates subsequently provide the 'owner' with a bundle of rights in that land, referred to as tenure, for a specified period of time[14].

Freeholders, however, commonly lease their land or parts of their land to tenants or holidaymakers[15], resulting in a split between ownership and possession that often does not exist for other types of property. The freeholder owns the land, but it is the tenant who is in possession of it. Such a situation was typical historically for agricultural land, with landowners leasing to tenant farmers who took possession of it and were responsible for working it. Further, leasehold tenants may subsequently sub-lease the land to sub-tenants and so on, leading to greater division between ownership and possession. In this way, possession of land is often more significant than its actual ownership as it is the possessor who is making use of the land, occupying it, safeguarding it, and usually improving its value. Adverse possession provides a good example of this and is often cited to support the idea that possession is superior to estate ownership[16]. To an extent this is understandable since, under the old law governing unregistered land, it was entirely possible for a possessor, having satisfied the relevant statutory requirements, to extinguish the estate owner's legal title in land and replace it with their own[17]. It must be noted, however, that the regimes governing registered land since the Land Registration Act 2002 came into force must cast doubt over the

[12] Property held under a trust, for example, where ownership in law rests with the trustee but in equity ownership lies with the beneficiary.
[13] *Parker v British Airways Board* [1982] 1 QB 1004. This also explains why when there is nobody with a claim to property it will go *bona vacantia* to the Crown. In the context of trusts law, see e.g. *Hanchett-Stamford v AG* [2008] EWHC 330 (Ch).
[14] Kevin J Gray and Susan Francis Gray, *Elements of Land Law* (5th ed, Oxford University Press 2009).
[15] Indeed, the problem has become so severe in places that steps are being pursued by several government bodies to limit the use of short-term lets. See, e.g., https://www.theguardian.com/society/2023/apr/12/uk-government-proposes-law-requiring-planning-permission-for-holiday-lets accessed 21 February 2024.
[16] See e.g., Law Commission, 'Updating the Land Registration Act 2002' <https://s3-eu-west-2.amazonaws.com/cloud-platform-e218f50a4812967ba1215eaecede923f/uploads/sites/30/2018/07/Updating-Land-Registration-final_WEB_230718.pdf> accessed February 2024.
[17] All claimants must satisfy three basic requirements: 1.) dispossession or discontinuance; 2.) the claimant is in factual possession of the land; and 3.) the claimant exhibits the requisite intention to possess to the land. In unregistered land or registered land possessed prior to the LRA 2002 regime, the further statutory requirements are governed by the Limitation Act 1980.

supposed preference for possession over ownership given the advantages provided to the legal owner over the adverse possessor[18].

It may be seen, therefore, that land is not a panacea for all property and, given its inherent uniqueness, should not be treated as such. While the inability to 'own' land in English law is an historical product of the feudal system under which this valuable resource was originally consolidated by the conquering Normans, it is rather artificial to extend this paradigm to all other property types. The term ownership is to be preferred with respect to property as this terminology is much more in line with how individuals identify their relationships with their things. One may question how appropriate the distinction is when examining personal property or emerging digital assets given that they are not typically concerned with the distinction. Except for those who have studied the law, it would be uncommon for someone to speak of their 'possession' of a chattel such as a mobile phone; their relationship with such a piece of personal property would inevitably be perceived as one of ownership instead. It would be anachronistic for an influencer to speak of being in possession of the influence that they have accumulated; their attitude would very much be one of ownership. Unfortunately, the example of land and its distinction between ownership and possession has been unjustifiably extended not only to other choses in possession but to choses in action and a potential new third category of property also[19].

Novel Assets as Property

Whether traditional things such as land are categorised as property is ultimately taken for granted, as it was in the seminal House of Lords judgment in *National Provincial Bank v Ainsworth*[20] and the Court of Appeal case of *Mayor of London v Hall*[21]. Whether novel assets may be recognised as property, however, is a different and much more problematic issue. When faced with such a problem, three distinct questions can be identified. The first two must be addressed before conclusions may be reached on whether a particular asset may be classified as property; the third is necessary to subsequently determine the personal or proprietary nature of a claimant's rights in that property:

1.) What is property?

2.) Can the asset in question be classified as property?

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[18] E. Cooke, *The New Law of Land Registration* (Oxford: Hart, 2003), 139; and M. Dixon, 'The Reform of Property Law and the Land Registration Act 2002: A Risk Assessment' [2003] Conv 136, 150.

[19] Law Commission, 'Digital Assets Consultation Paper' (n 6); UK Jurisdiction Taskforce, 'Legal Statement on Cryptoassets and Smart Contracts' <https://technation.io/about-us/lawtech-panel>.

[20] *National Provincial Bank Ltd v Ainsworth* [1965] House of Lords [1965] A.C. 1175.

[21] n8

3.) What is the nature of the interest or right claimed in that property?

Only by proper separation and subsequent application of these questions can we effectively determine whether new assets, such as social media influence, are a good fit for classification as property and, therefore, able to support proprietary rights.

1.) What is Property?

At first sight this is a deceptively simple question and yet there is no definitive answer in English law. Over the past century, it has traditionally been addressed by reference to variations on the bundle of rights argument, differences appearing with respect to how they are enjoyed by one party and denied to another. Gray, for example, describes property as: *'…a socially approved power-relationship in respect of socially valued assets, things or resources.'*[22] In *The Law of Personal Property,* the authors endorse a view of property that includes both an individual's relationship to a thing and their relationships with others in relation to that thing[23].

The classic studies by Hohfeld[24] on the legal conception of rights and duties and Honoré[25] on incidents of ownership[26] have been cited numerous times as the basis for further analyses on the nature of property in English law. The most notable and thorough of these were composed by James Penner in his landmark paper for the UCLA Law Review: *The 'Bundle of Rights' Picture of Property*[27] and subsequent book *The Idea of Property in Law*[28]. While the Hohfeld-Honoré model of property has long been upheld as the dominant paradigm, Penner's work builds upon it and provides a much more satisfactory and detailed analysis of property and its treatment in common law.

For Penner, the classic Hohfeld-Honoré framework ultimately proved deficient. Rather than providing an analytical framework for solving more practical problems of property, such as those affecting the novel asset of social media influence which this paper seeks to address, the schema instead resembled a collection of thoughts collated from the meditations of two legal philosophers. Penner's idea of property, therefore, differs from the traditional Hohfeld-Honoré model; at [742] he states:

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[22] K Gray, 'Equitable Property' (1994) 47 Current Legal Problems 157 at [160]. See also Kevin Gray, 'Property in Thin Air' (1991) 50 Cambridge Law Journal 252.
[23] MG Bridge and others, *The Law of Personal Property* (Third edition, Thomson Reuters/Sweet & Maxwell 2022).
[24] Wesley Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' 26 Yale Law Journal 710.
[25] AM Honoré, 'Ownership', *Oxford Essays in Jurisprudence (A.G. Guest ed.)* (Oxford University Press 1961).
[26] Ibid. For Honoré, '*Ownership comprises 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 or incidents of transmissibility and absence of term, the prohibition of harmful use, liability to execution, and the incident of residuarity ...'*
[27] James E Penner, 'The "Bundle of Rights" Picture of Property' UCLA Law Review.
[28] James Penner, *The Idea of Property in Law* (Oxford University Press 2000) <https://academic.oup.com/book/1609> accessed 20 September 2023.

> *'…property not only protects the exclusive use of the owner, but also permits him to transfer what he owns. Thus there are two sides to the coin of property - one inward-looking, the protection of the owner in his use of his own, and one outward-looking, his power to alienate his property to others-and so property must involve more than a right to the exclusive use of a thing.'*[29]

He then offers an alternative definition:

> *'The right to property is the right to determine the use or disposition of an alienable thing in so far as that can be achieved or aided by others excluding themselves from it, and includes the right to abandon it, to share it, to license it to others (either exclusively or not), and to give it to others in its entirety.'*[30]

While Penner's arguments are voluminous and comprehensive, the matter is by no means settled. His foundational works on the nature of property are now nearly three decades old. In the intervening years other commentators have expressed their own ideas on the meaning of property and how it should be defined.

Professor Roy Goode in a recent Law Quarterly Review article bluntly stated that property could be defined in a very basic manner: '*Subject to statute,'* he argues, *'property is anything of realisable commercial value.'*[31] To even a property law novice, this opinion is clearly at odds with the traditional bundle of rights picture or Penner's own more complete treatise on the subject. Nevertheless, it is highly attractive in its overt simplicity as well as the highly respected source from whence it came. That so venerable an academic as Goode can produce such a definition in 2023, in opposition to so much established literature, demonstrates just how little certainty is present in this area. Whatever criticisms may be levelled at his approach, Goode's contribution to the current melange of discourse on the nature of property in English law is certainly illustrative of its current state.

What may be distilled from this admittedly limited snapshot of scholarship on the meaning of property is the prolific range of subjective interpretations that exist, rather than the presence of any binding objective definition. While it is beyond the scope of this paper to extensively explore the idea of property or the various bundle of rights arguments, it is nevertheless apparent that the definition of property in common law is far more complex than it may first appear.

This is in stark contrast to the treatment of property in civil law systems, where evolution of the more absolute Roman concept of *dominium ex iure quirtium* continues to prevail. Unlike the subjectivity endemic in common law, civil law systems favour clear definitions, including exclusive

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[29] Penner (n 29).
[30] ibid.
[31] Roy Goode, 'What Is Property?' L.Q.R (2023) 139 (Jan) 1 at [3].

lists of what 'things' may be categorised as property. Examples are rife: the French Civil Code dedicates Book II[32] to the meaning of property and is prescriptive in its explanation of the various things that may be included. The Austrian Civil Code[33] is more *laissez-faire* in its approach, effectively allowing all things to generally be the subject of property rights. By contrast, German law prohibits the ownership of intangible things, such as choses in action under English law, or for them to be the subject of proprietary rights or interests[34]. While there are key differences in the treatment of property between these jurisdictions, what remains consistent is how its objects are defined. Whether the liberal interpretation under Austrian law or the prescriptive treatment under the French Civil Code, deciding whether a particular asset amounts to property remains a much simpler task than that which faces the common law academic or practitioner.

A Third Category of 'Things'

The problems inherent in defining property in English law do not end here, however, and these issues have posed significant barriers to the recognition of new emerging assets. In addition to the lack of a consistent or binding definition, there is also the precedential problem created by the judgment of the Court of Appeal in *Colonial Bank v Whinney*[35]. Fry LJ concluded that, based upon his own survey of English law at that time, '*…all personal things are either in possession or in action. The law knows no tertium quid between the two.*'[36] His opinion was undoubtedly influenced by the commentary of Blackstone on the issue, who had previously written:

> *'Property, in chattels personal, may be either in possession; which is where a man hath not only the right to enjoy, but hath the actual enjoyment of, the thing: or else it is in action; where a man hath only a bare right, without any occupation or enjoyment.'*[37]

Despite the subsequent importance attached to it, Fry LJ's statement on the two categories of property recognised in English law was not actually the basis for his dissenting judgment, which instead focused on whether the shares in question could be classified as choses in action. Given the subsequent approval of his opinion by the House of Lords when the case was appealed, however, and the lack of any correction to his binary categorisation of property, it may be inferred that they concurred with it[38]. As recently as 2014, the Court of Appeal added further weight to this view,

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[32] The full title being: *Book II: Of Property and of the Various Modifications of Ownership.*
[33] This is based upon the reading of Articles 285, 353, and 355 of the Austrian Civil Code.
[34] See Articles 90 and 903 of the German Civil Code.
[35] (1885) 30 Ch. D. 261
[36] Ibid at [285].
[37] Bl. Com. book 2, c. 25 at [389].
[38] *Colonial Bank v Whinney* (1886) 11 App. Cas. 426 (HL)

indicating that, while not impossible, recognising intangible property that fell outside the boundaries of choses in action would be extremely difficult[39].

The problem caused by Fry LJ's judgment in *Colonial Bank*[40] is not its statement on the categorisation of property as choses in possession or choses in action. Instead, it is the implication that these are the *only* two categories of property that may exist under English law, a consequence exemplified by the judgment in *Your Response v Datateam Business Media* [41]. While arguably true in 1885, this categorisation of property can no longer be considered accurate in the 21st Century. With the emergence of digital assets, which satisfy at least some of the recognised characteristics of property and yet are clearly not choses in possession and do not fit comfortably under the category of choses in action either, the traditional dualistic classification poses a significant problem. If one examines social media influence, it suffers from similar issues to other digital assets such as cryptocurrency. It is certainly not a chose in possession and would also not fit into the traditional classification of a chose in action either[42].

Beginning with the emergence of cryptocurrency and crypto assets, however, the courts were challenged to decide the issue of their proprietary status, despite the precedent of *Colonial Bank*[43]. Both the Law Commission and UKJT advocated for a new third category of 'thing' to be admitted into the classification of property, with the former's final report on digital assets published in June 2023[44]. The UKJT Legal Statement specifically discussed the problems associated with *Colonial Bank*[45] and provided a basic précis of the historical ramifications of that judgment*:*

> *'The Colonial Bank case concerned a dispute about shares…there was no dispute that the shares were property. The relevant question was rather whether they were things in action…Fry LJ's statement that "personal things" are either in possession or in action, and that there is no third category, may carry the logical implication that an intangible thing is not property if it is not a thing in action…'*[46]

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[39] [2014] EWCA Civ 281, [2015] QB 41 at [26]
[40] n41
[41] n36
[42] See Amy Held, 'Cryptoassets as property under English Law: Surveying the Present Lie of the Land' B.J.I.B. & F.L. 2022, 37(8)
[43] n32
[44] Law Commission, 'Digital Assets: Final Report' <https://www.gov.uk/government/publications> accessed 4 October 2023.
[45] n32
[46] UK Jurisdiction Taskforce, 'Legal Statement on Cryptoassets and Smart Contracts' at [71] and [74] <https://technation.io/about-us/lawtech-panel> accessed 4 October 2023.

The Statement goes on to explain, however, that the case does not represent an insurmountable bar to the recognition of new assets simply because they do not fit comfortably within the categories of either choses in possession or choses in action:

> *'Our view is that Colonial Bank is not therefore to be treated as limiting the scope of what kinds of things can be property in law. If anything, it shows the ability of the common law to stretch traditional definitions and concepts to adapt to new business practices…We conclude that the fact that a crypto asset might not be a thing in action on the narrower definition of that term does not in itself mean that it cannot be treated as property."*[47]

Judicial recognition of this position was alacritous and the list of cases acknowledging cryptocurrency and crypto assets as property continues to grow[48]. In *AA v Persons Unknown*[49], for example, Bryan J specifically referenced the UKJT Legal Statement and its rejection of the binary categorisation of property inferred from *Colonial Bank*[50]:

> *'The conclusion that was expressed was that a crypto asset might not be a thing in action on a narrow definition of that term, but that does not mean that it cannot be treated as property. Essentially, and for the reasons identified in that legal statement, I consider that crypto assets such as Bitcoin are property.'* [51]

With the continuing proliferation of new and existing digital assets, it is only natural that the call for more of these to fall into this as-yet untitled third category of property will grow. Recognition by the UKJT of the law's flexibility with respect to recognising emerging assets, allowing it to move away from the traditional categorisation of property, is astute and one that is entirely justified given the history of English jurisprudence. As with Bitcoin prior to 2020[52], social media influence's lack of recognition as an object of property is not representative of any innate deficiency but, instead, the result of an absence in relevant cases for judicial consideration. Indeed, it is unfortunate that the judgment in *New Balance Athletics, Inc v The Liverpool Football Club and Athletic Grounds Limited*[53] was never appealed to either the Court of Appeal or Supreme Court, where the issue of social media influence and its relevance in English law would have likely been considered in much greater detail[54].

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[47] ibid at [77] and [84].
[48] See also *Tulip Trading Ltd v Bitcoin Association for BSV* [2022] EWHC 2 (Ch).
[49] [2020] 4 W.L.R. 35.
[50] n32
[51] n45 at [59].
[52] n49; see also *Tulip Trading Limited v Bitcoin Association for BSV* [2022] EWHC 2 (Ch)
[53] [2019] EWHC 2837 (Comm).
[54] For further detail, see an earlier article published by the author on how social media influence may be quantified as trust property or as an objective determinant for ascertaining the beneficiaries of a trust: Matthew Carn, 'Social Media Influence: A New Frontier in Proprietary Rights?' (2023) 29 Trusts and Trustees 126.

It seems clear, therefore, that the traditional classification of personal property as either choses in possession or choses in action would not be fatal to the recognition of social media influence as property. Despite it clearly not falling into either category, judicial and academic opinion on the existence of a new third category of personal property is compelling. Taken together with the proven flexibility inherent in English law to recognise novel assets, as demonstrated by recent judgments on cryptocurrency, there is no reason why the categorisation of social media influence as property cannot also be forthcoming. When individuals inevitably begin to assert their interests in this asset, in the same manner as those who wished to vindicate their proprietary rights in Bitcoin, then it may prove difficult for the courts to justify the classification of one as property and not the other.

Digital Assets: The Next Generation of Property

The emergence of valuable assets such as NFTs, which are now available to users and consumers in a wide array of commercial contexts, has continued to push the boundaries of property in English law. The increasing importance and complexity of digital files, for example, makes them particularly valuable to those purporting to own them. Indeed, they have become so prized that their appropriation by cybercriminals via ransomware attacks has become an all too familiar occurrence[55]. Nevertheless, difficult questions are raised when attempting to determining the precise legal status of digital files, either as a whole or with respect to their composite elements. While the *information* contained in digital files lacks the ability to be property[56], the files themselves comprise more than simple data and are definable using numerous quantifiable metrics[57]. Given the value of these assets to individuals and their desire to protect them, it is likely that further clarification will follow as relevant claims are heard by the courts.

Social media influence is, however, perceived of as an altogether different creature and one that has only recently been considered as a potential digital asset[58]. Its very nature feels, superficially, far too indistinct and imprecise for it to ever be seriously considered a viable object of property. This is most certainly the case with influence generally, which is neither measurable nor definable in any predictable or objective manner and justifiably remains far removed from consideration. But such limitations do not affect *social media* influence, however. The idea that it is inherently indefinable is affected by misconceptions as to both its nature and quantifiability. Presumptions as to its

[55] Ransomware attacks are not concerned with simple data and the publishing of confidential information. The theft of digital files from an organisation is just as damaging, with victims needing to rebuild their operating systems after their loss, often over a prolonged period of time.
[56] J Mummery, 'Property in the Digital Age', *Modern Studies in Property Law*, vol 8 (Oxford 2015).
[57] For an excellent in-depth analysis of this specific issue, see Johan David Michels and Christopher Millard, 'The New Things: Property Rights In Digital Files?' (2022) 81 The Cambridge Law Journal 323.
[58] For further detail, see n54.

supposedly vague and ill-defined nature are myopic and fail to reflect the true nature of this emergent digital resource, perhaps explaining why it has so far been excluded from studies examining new types of intangible assets and their suitability as property. Such an omission by the Law Commission and UKJT has undoubtedly had a detrimental impact upon its potential recognition as an object of property by the courts[59]. Nevertheless, the underlying metrics that underpin the quantification of social media influence have developed to such an extent that it is now used as the basis for increasingly lucrative commercial contracts[60]. The role of an 'influencer' has increased in prominence and popularity through the 21st century and competition between these individuals for recognition is fierce. At the highest level, many of the world's leading companies employ influencers as brand ambassadors, based upon the amount of social media influence that they possess; this calculation determines an influencer's ability to reach a target audience, spread positivity about a company's products, and convince their followers to become present or future consumers.[61]

2.) Can the Asset in Question be Classified as Property?

The second question to be addressed when examining whether social media influence could be recognised as property is, unfortunately, no easier to answer than the first. As already discussed, this is in no way helped by the inconsistent way property has been defined and analysed, both academically and judicially. While unfortunate, it is understandable and rather predictable that confusion would arise given the somewhat nebulous and numerous definitions of property that currently exist. The courts have also, traditionally, failed to effectively separate questions 1.) to 3.), or deal with them appropriately as distinct and independent matters. Indeed, they have too often been conflated and treated almost interchangeably. When debating whether a particular *thing* is capable of being an object of property, focus often centres on whether a particular *interest* or *right* is capable of being proprietary in nature instead.

When examining the issue of whether an asset may or may not be considered as property, it is inevitable, therefore, that the leading judgment of the House of Lords in *National Provincial Bank v Ainsworth*[62], so often cited as definitive authority on the matter, provides the starting point.

National Provincial Bank v Ainsworth

[59] Bryan J, for example, placed a lot of significance on the UKJT Legal Statement in *AA v Persons Unknown.* Contrast this with the CA approach in *Your Response v Datateam Business Media,* which predated the Legal Statement's release and the consultation paper/final report of the Law Commission on digital assets.
[60] See *New Balance Athletics, Inc v The Liverpool Football Club and Athletic Grounds Limited* [2019] EWHC 2837 (Comm) (n 53).
[61] n54.
[62] [1965] A.C. 1175

While it is unnecessary to go into the details of the case here, given its notoriety and the frequency with which it has been examined by property law academics and the courts, a précis of the basic facts is still useful.

The dispute centred upon a piece of land in Hastings, 124 Milward Avenue, which had been bought and registered in the name of Mr Ainsworth in 1956. Following purchase, it operated as a family home for him, his wife, and their children. In 1957, however, Mr Ainsworth abandoned his family and moved out of Milward Avenue, leaving his estranged wife and children behind in residence. Judicial orders for maintenance of his estranged wife and children were granted after petition by Mrs Ainsworth in the immediate aftermath of these events.

Mr Ainsworth subsequently granted the National Provincial Bank (NPB) a charge on the house as security for a loan made to him; within a few years, however, Mr Ainsworth had defaulted upon this loan, together with the bulk of his other financial obligations. The NPB subsequently sought possession of 124 Milward Avenue to redeem its charge, an action which Mrs Ainsworth contested on the grounds that she held a superior right in the land. Her argument effectively stated that her common law right to reside with her husband and occupy the matrimonial home, once her husband had abandoned her (and, in the dated vernacular of 1965, failed to abide by his corresponding obligation to maintain her[63]), had become detached from him and become an interest in the land itself. As a proprietary right, this would have been enforceable against the NPB and taken precedence over their own.

The key question that fell to the House of Lords, therefore, was whether Mrs Ainsworth's right to occupy the former matrimonial home, which itself was not in doubt as between herself and her then-husband, was proprietary rather than personal and so binding upon the NPB. In finding that her interest was merely a personal one between husband and wife, Lord Wilberforce stated:

> *'On any division, then, which is to be made between property rights on the one hand, and personal rights on the other hand, however broad or penumbral the separating band between these two kinds of rights may be, there can be little doubt where the wife's rights fall. Before a right or an 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 nature of assumption by third parties, and have some degree of permanence or stability.'*[64]

It is important to note here that the specific focus of the House of Lords was not actually on the question of what 'things' may be considered 'property' in English law. What becomes clear from

[63] Although note that s198 Equality Act 2010 abolishing this common law obligation is still not yet in force.
[64] [1965] A.C. 1175 at [1247] - [1248].

analysis of the judgment is that the House of Lords' focus was instead (and quite rightly) on question 3.): whether the right of occupation claimed by Mrs Ainsworth was proprietary or personal in nature. Given that the property in question (124 Milward Avenue) was land, there was never any debate as to whether it was capable of being categorised as property or whether it was a 'thing' or *res* capable of supporting proprietary rights. As such, it was reasonable for the court to omit discussion of this point, notwithstanding its potential importance in future cases. Despite this fact, however, the test in *Ainsworth*[65] has repeatedly been cited as definitive with respect to identifying the *indicia* of property and the question of whether an asset may be categorised as such.

This discussion of the key characteristics of property has subsequently achieved the status of doctrine, despite criticisms of its circularity by Gray[66] and its focus on defining the proprietary status of rights rather than what may be classified as property itself. The UKJTF, for example, explicitly referred to and approved the *Ainsworth* test. At paragraph 39 it was stated:

> *'There is no general or comprehensive definition of property in statute or case law. Judges tend to approach the issue on a case-by-case basis, considering whether particular things are property for particular purposes. However, an important and authoritative description of the necessary characteristics of property can be found in National Provincial Bank v Ainsworth, where Lord Wilberforce said that, before a right or an interest could be admitted into the category of property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability. Certainty, exclusivity, control and assignability have also been identified in case law as characteristic of property rights.'* [67]

Similarly, in *AA v Persons Unknown*[68]*,* Bryan J cited and applied the *Ainsworth*[69] criteria when tasked with determining the proprietary status of Bitcoin, concluding that the cryptocurrency satisfied the test and so could be admitted into the category of property[70]. These are only two examples of the confusion caused by the decision in *Ainsworth*[71]*,* its focus on whether a right itself is proprietary in nature conflated with whether a particular asset may be considered property at all.

It is the latter issue that must be addressed, however, when examining whether new assets, such as social media influence, can and should be recognised as property. Only then can we move onto the

[65] n59
[66] See Gray and Gray (n 14).
[67] UK Jurisdiction Taskforce (n 21). [accessed 19 June 2023].
[68] [2020] 4 W.L.R. 35 (2020)
[69] n59
[70] *Ibid* at [59].
[71] *ibid*

question of whether this property is capable of supporting the proprietary rights referred to by the UKJTF and which was the subject of the House's attention in *Ainsworth*[72].

The Issue of Separability

The case that has best addressed the question of whether a particular thing may be considered an object of property is not *Ainsworth*[73] but rather the House's later decision in *OBG Ltd v Allan*[74]. Noted more for the celebrity nature of the parties involved than its relevance to property law, the judgment is extremely important because of the opinions expressed by Baroness Hale on the issue of choses in action. At [309] she states: *'The relevant question should be, not "is there a proprietary remedy?", but "is what has been usurped property?"'*[75]. This is a much more appropriate separation of questions 2.) and 3.) and strikes at the heart of the problem created by the judgment in *Ainsworth*[76]. In the same paragraph, Baroness Hale addressed the second question directly: '*The essential feature of property is that it has an existence independent of a particular person: it can be bought and sold, given and received, bequeathed and inherited, pledged or seized to secure debts*…' [77].

The words of Baroness Hale echo similar sentiments from Honoré on the ability to alienate property as an incident of property ownership. He states that this ability amounts to, '…*the power to alienate during life or on death, by way of sale, mortgage, gift or other mode, to alienate a part of the thing and partially to alienate it,*'[78].

Penner explored this theme with his theory of separability, one of the key characteristics shared by objects of property. In contrast to Goode's definition of property discussed earlier, the theory of separability rejects the notion that anything of value, by extension including realisable commercial value, may be considered property. Information, such as the details contained in intimate personal correspondence, for example, may be of high realisable commercial value to a seller with blackmail

[72] *ibid*
[73] *ibid*
[74] [2008] 1 A.C. 1.
[75] *Ibid* at [309]
[76] n59
[77] *Ibid*
[78] Honoré (n 5) at 118.

on their mind, but it is not itself capable of being property[79]. Instead, for a particular asset to be recognised as an object of property, not only must the owner be able to claim title to it, but it must also be capable of being owned by another; while it is unnecessary for the asset to be capable of transfer, it must be capable of maintaining its integrity, together with its owner, upon alienation [80].

It is this ability for property to be separated from its owner that presents perhaps the clearest danger to the recognition of social media influence as property. There is little doubt that it is generated by its creator, through any number of non-exhaustive methods. The question then becomes whether, once created, it can in fact be separated from its owner without normative consequence to either the influencer or the influence. At first glance it may appear that this is not possible, but influence can already form the subject matter of a commercial transfer in social media marketing[81]. Unlike information, which lacks the recognisable boundaries necessary for categorisation as property[82], social media influence may be quantified as a whole and then broken down into constituent parts[83]; once this has occurred these may then be the subject of transactions.

While somewhat abstract, it is not too difficult to imagine that an influencer, having created a dynamic but objectively determinable amount of social media influence, could choose to alienate it either wholly or in part to another. While the loss of their influence may affect them personally, this does not normatively change them as a person any more than the alienation of money or land might. Having been detached from its creator, it is true that the value and integrity of the alienated influence may deteriorate. Followers of a particular influencer may not have the same reverence for the new owner of the transferred influence, but this is largely irrelevant to considerations of whether said asset is property. A majority shareholding may be transferred to a new owner, for example, whose administration of the company is disliked by other shareholders or those prospective buyers considering the purchase of shares themselves[84]. This may, in turn, drive the value of the transferred shares down and even cause them to become entirely worthless but it does not alter the fact that

[79] *Your Response Ltd. v Business Media* [2014] EWCA Civ 281
[80] For details, see James Penner, *The Idea of Property in Law* (Oxford University Press 2000)
[81] Chandler and Munday, 'A Dictionary of Social Media': A social network of producers and consumers of online content (as well as of offline commodities and services), in which likes, shares, mentions, and recommendations are a significant currency. It is a mixed economy in which likes can be bought, which features gift-giving as well as buying and selling, in which the roles of producers and consumers can blur and blend, and in which the role of influencers is crucial.
[82] Mummery (n 56). There is no method of determining, for example, where the information purported to be property ends and that which is free for anyone to use begins.
[83] Carn (n 57).
[84] Adam Gabbatt, 'Value of X Has Fallen 71% since Purchase by Musk and Name Change from Twitter' *The Guardian* (2 January 2024) <https://www.theguardian.com/technology/2024/jan/02/x-twitter-stock-falls-elon-musk> accessed 15 February 2024.

the shares are still objects of property. Similarly, a leasehold once transferred will inevitably continue to deteriorate in value as the estate's duration continues to dwindle, making its acquisition less attractive to prospective buyers. It is argued that this is not, therefore, a persuasive bar to the recognition of social media influence as property. Simply because an asset loses value once detached from its creator, this does not affect its ability to form an object of property.

Social Media Influence, Intellectual Property, and Goodwill

Further analogies may also be drawn between social media influence and intellectual property, which has itself struggled with its categorisation as property[85]. There are certainly comparisons to be made between the concept of an influencer generating influence via social media and that of ideas generated by an individual which are capable of valuable application. In addition to the superficial similarities, in both cases the owner seeks to subsequently protect the usage of the asset that they have created. The argument that social media influence cannot be property because of its inherently intangible and uncertain nature is to misunderstand the issue entirely. To talk of a creator's ideas, trademarks or patents as property is also wide of the mark and has led to numerous arguments about what exactly forms the object of property in such cases[86]. Whichever argument is more attractive to an individual, it is recognised that intellectual property rights can be treated as property with respect to controlling the particular uses of a specified type of intangible asset[87] attributable to an identifiable individual or group of creators[88]. If social media influence is arguably too intangible to be treated as property itself, an argument that this author disagrees with, then there is no reason why, in the alternative, *rights* in it may not exist as property in the same manner as they can in intellectual property.

A final comparison may also be made to a recognised object of property that is far more amorphous and poorly defined than social media influence. In *The Commissioners of Inland Revenue v Muller & Co.'s Margarine,* the House of Lords examined the proprietary nature of goodwill. Lord Macnaghten stated:

> *'It is very difficult, as it seems to me, to say that goodwill is not property. Goodwill is bought and sold every day. It may be acquired, I think, in any of the different ways in which property is usually acquired. When a man has got it he may keep it as his own. He may vindicate his*

[85] Recognition as personal property is now recognised in statute: Copyright, Designs and Patents Act 1988, s90; Patents Act 1977, s30; Trade Marks Act 1994, ss 22 and 27.
[86] See, e.g., Michael Spence, *Intellectual Property* (1. publ, Oxford Univ Press 2007) who argues that the legal rights in intellectual property are the objects of property themselves; Penner (n 39) argues that the object is the user's monopoly over the usage of their rights in intellectual property instead.
[87] Spence (n 89).
[88] *Ibid.*

exclusive right to it if necessary by process of law. He may dispose of it if he will - of course under the conditions attaching to property of that nature.'[89]

The proprietary nature of goodwill includes, therefore, its separability and, by extension, its ability to be alienated to a new owner. Lord Davey added: '*It is not disputed that property in its wider sense may include whatever rights or benefits pass under the term "goodwill"*[90]*.* Lords James, Brampton, Lindley and the Earl of Halsbury V-C all offered support for this contention, albeit in different ways.

These passages leave us in little doubt that the House of Lords considered the goodwill of a business to be property, including the rights that flow from it, despite the difficulty of identifying or defining it. As the Vice-Chancellor said at [238]: *'"The goodwill thereof" is a thing which can be assumed to exist separately. Like every other thing which suggests one simple idea, it is difficult, if not impossible, to define it*[91]*.'* Lord Macnaghten's definition of goodwill is itself incredibly vague and does little to establish its boundaries:

'What is goodwill? It is a thing very easy to describe, very difficult to define. It is the benefit and advantage of the good name, reputation, and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old-established business from a new business at its first start…Goodwill is composed of a variety of elements. It differs in its composition in different trades and in different businesses in the same trade. One element may preponderate here and another element there.'[92]

Nevertheless, the lack of precision surrounding goodwill did little to deter the highest court in England and Wales from finding goodwill to be property. While arguments persist about the true proprietary nature of goodwill[93] and whether it can truly be separated from the business to which it is attached, the fact remains that despite the apparent obstacles to its recognition the courts have been willing to at least entertain its categorisation as an object of property.

3.) What is the nature of the interest or right claimed in that property?

Turning to the third question, the property pioneer begins to emerge from the murky waters through which they had been wading. It is this question that the judgment in *Ainsworth*[94] begins to assist in answering, with the test laid down by Lord Wilberforce applied to a particular right that is being claimed. Applying the test, Mrs Ainsworth's right seemed to satisfy only one of the four criteria, or *indicia,* of a proprietary right. While it was definable, the ability of third parties to identify it would

[89] [1901] A.C. 217 at [223].
[90] Ibid at [226].
[91] Ibid at [238]
[92] Ibid at [223-224].
[93] See, e.g., Penner (n 30).
[94] n59

have placed far too high a burden upon prospective purchasers of land or mortgagors. The idea of detailed investigations needing to take place into the rights owed to potentially interested parties in a sale of land was difficult to justify as a matter of public policy[95]. Similarly, the right was not stable given the inherently personal nature of an interest between spouses and the recognised dynamic of such a potentially turbulent relationship[96]. The need for it to be capable of assumption by third parties would have also been an absurdity. The idea of Mrs Ainsworth transferring her right to be maintained by her husband and occupy the matrimonial home to another or Mr Ainsworth's successor in title to 124 Milward Avenue inheriting the same matrimonial duties owed to Mrs Ainsworth was a nonsense. As such, the right claimed by Mrs Ainsworth was inevitably going to be found to be personal rather than proprietary in nature and, therefore, not binding against the NPB.

Rivalrous and Exclusive

Further requirements for assets to exist as objects of property were identified in the Law Commission's digital assets consultation paper, with the need for them to be both rivalrous and exclusive highlighted[97]. The former is a reference to the requirement that, should someone own a piece of property then, by definition, another does not; the latter that the owner of property has sufficient control over the asset that they may exclude all others from it should they so choose[98]. These are, after all, the key issues that prevent mere information from being categorised as property, since information may be used simultaneously by many people and those who have received it cannot then be magically excluded from it. Having learned that the earth is round, for example, it is not possible for the purported owner of this information to simply exclude another from it and have them return to the genuine belief that the earth is flat.

Such requirements, however, may be questioned with respect to their universal application to all types of property. Indeed, the wisdom in searching for a panacea for all property must be questioned again, just as it was when analysing the unsatisfactory selection of land as its prototype. Ironically, land itself provides a useful counterargument to the requirements of both exclusivity and rivalrousness, since land is the patriarch of all property and yet resists both. Indeed, one of land's most useful characteristics is its ability to support concurrent interests, both personal and

[95] This would clash with the Mirror and Curtain principles of registered land. It could, however, potentially form an overriding interest in actual occupation under Schedule 3 Paragraph 2 of the Land Registration Act 2002. This category of overriding interest is arguably the most problematic and still retains difficult aspects of the doctrine of notice. A proprietary right must still exist, however, for such an interest to bind a purchaser.

[96] For further examples, see the law surrounding common intention constructive trusts of land, e.g., *Stack v Dowden*

[97] Law Commission (n 4) at [28 - 31].

[98] This is similar to the concept of exclusive possession in land law, a requirement for the finding of a leasehold rather than a licence; see *Street v Mountford* [1985] AC 809.

proprietary[99]. A legal estate in land such as the freehold might be burdened by an easement, for example. This easement is a proprietary interest that may also be legal[100] and therefore binding upon the whole world[101]. The owner of the freehold is, therefore, legally bound *not* to exclude the holder of the easement from their land[102]. Likewise, land may be co-owned by multiple individuals and, if the nature of this co-ownership is a joint tenancy[103], then both effectively own the entirety of the property together and no joint tenant may exclude any of the others from any part of it. It is inaccurate to say, therefore, that *'this land is mine and so, by definition, it is not yours,'* in the case of such co-ownership. As Lord Coke famously said, after all: *'[E]ach joint tenant holds the whole and holds nothing, that is, he holds the whole jointly and nothing separately.'*[104] Land, therefore, is often neither exclusive nor rivalrous[105]; the owners often do not have the right to exclude others from the land and it may also be owned by any number of individuals at the same time. While it may be accurate to state that exclusivity and rivalrousness are requirements for *many* objects of property, it is incorrect to state that they are necessary for *all* property.

For these reasons, it is perhaps better to view rivalrousness and exclusivity as conditions for *rights* to exist in property rather than for an asset to be recognised as an object of property capable of supporting proprietary interests. This is, arguably, evidence of further conflation between the issues of whether a particular asset may be an object of property and whether a right or interest may be proprietary in nature. Indeed, this may be seen as another example of the detrimental effect that the judgment in *Ainsworth*[106] has caused. Consideration of exclusivity and rivalrousness is appropriate, therefore, with respect to our third question concerning property rather than the second. While important with respect to categorising rights in property, just as that claimed by Mrs Ainsworth against the NPB, this is not a question directly relevant to the categorisation of an asset as property and, by extension, to the recognition of social media influence as property. Given the nature of many new and emerging assets, it is perhaps time to abandon the quest for a single, all-encompassing

[99] Gray and Gray (n 14).
[100] Subject to statutory and common law formalities being satisfied.
[101] s1(2)(a) Law of Property Act 1925
[102] Macpherson argues that the essence of rights in property is the right to not be excluded rather than the right to exclude others. This interpretation sits far more comfortably with rights in land such as easements. Macpherson, C. B. (1962), From Hobbes to Locke: The Theory of Possessive Individualism (Oxford University Press, Oxford, 1962).
[103] At law, co-ownership can only exist under a joint tenancy, s1(6) LPA 1925; at equity it may be held under either a joint tenancy or tenancy in common.
[104] Coke Upon Littleton, 19th edn (London: Hargrave and Butler, 1832), 186a.
[105] The idea of exclusivity as a requirement of property is not new. See, e.g. Thomas W Merrill, 'Property and the Right to Exclude' (1998) 77 Nebraska Law Review 730. Indeed, Merrill refers to exclusivity as the *sine qua non* of property and the single greatest characteristic of it.
[106] n59

model of property and move towards a nimbler and more flexible paradigm instead. Failure to do so would be to commit the same mistake that bound English law to the two-category restrictions of *Colonial Bank*[107] for so long.

Despite the issues surrounding the requirements of exclusivity and rivalry for the classification of property, it may still be argued that social media influence satisfies both. If one accepts that it is not the abstract concept that it is incorrectly perceived to be and may, instead, be defined through numerous objective methods focusing on quantifiable metrics, there is no reason why it should fail to be both exclusive and rivalrous. The fact that it is an asset owned by some and not by others is demonstrated by the vigour with which influencers are identified and sought out by major companies and even states, to convey specific messages to particular groups[108]. While numerous influencers may own social media influence and use it to affect the same individual consuming their content, it would be artificial to suggest that all were using the same property simultaneously and, therefore, that it lacked rivalrousness. The influence generated and owned by Influencer X is entirely different from that of Influencer Y and is unique in its attributes. Recognition of this was, after all, central to the judgment of Teare J in *New Balance Athletics Inc v Liverpool Football Club and Athletic Grounds Ltd*[109] where the influence exerted by athletes and celebrities was found to be sufficiently unique to allow for an objective comparison in the context of a contractual marketing clause[110]. The exclusive nature of this influence is often the root of litigation by influencers against those purporting to act or speak for them, an issue that has grown increasingly problematic thanks to AI and deepfake technology. Looking at the matter from a different perspective, influencers using AI to generate revenue often find themselves adversely affected should this become public knowledge[111]. It is clear, therefore, that even an AI clone of an influencer cannot generate the same influence as the influencer themselves, further demonstrating the exclusive nature of social media influence.

The Public Good of Recognition

One of the most overlooked aspects with respect to the consideration of social media influence's recognition as property is, perhaps, the most relevant with respect to why it is more likely than not to occur. English law has consistently worked to protect what is most important to its subjects, its

[107] n32
[108] Matthew Dathan, 'TikTok Stars to Be Paid to Warn Migrants Not to Cross Channel' (15 February 2024) <https://www.thetimes.co.uk/article/tiktok-influencers-persuade-migrants-not-cross-channel-albania-pvdj7t0qz> accessed 15 February 2024.
[109] [2019] EWHC 2837 (Comm).
[110] The author examines this case in much more detail in the previous paper on a related topic: n51.
[111] Amy Hawkins, 'How Chinese Influencers Use AI Digital Clones of Themselves to Pump out Content' *The Guardian* (6 November 2023) <https://www.theguardian.com/world/2023/nov/06/chinese-influencers-using-ai-digital-clones-of-themselves-to-pump-out-content> accessed 15 February 2024.

inherent flexibility providing the means by which this may be accomplished. To those involved in the world of social media, it is no surprise that influence is such a highly prized asset by those who seek to accumulate it. In 2023, the value of the social media influence market was estimated at an astounding 21.1 billion US dollars[112]. In the United Kingdom alone, there were 57.1 million active social media users as of January 2023; this translates to a social media penetration rate of 84.4 percent, which currently sits at number 22 in a worldwide table, well above the global average of 45 percent[113]. Because of this, the accumulation of social media influence has the potential to provide the most successful influencers with a lucrative and glamorous lifestyle; in turn, these factors often only increase their status as influencers and lead to greater rewards. This appeal, however unrealistic it may be for most, is one of the main drivers behind the rise in the number of individuals, particularly those aged under 24, who view being an influencer as an aspirational career choice[114].

Even to those outside the scope of this profitable commercial setting, the acquisition of social media influence remains an attractive proposition because of its inherent social value. Whether on the playground, in school, between friends and acquaintances, family members or co-workers, social media influence is often a status symbol that signifies one's popularity and perceived importance in relation to others. In a similar manner to cryptocurrency, social media influence is a rare asset in English law in that it may be acquired in a classic Lockean manner: freely and with no expenditure of capital[115]. In a time of deepening economic woes, where the dream of land ownership is slipping further and further away for younger generations, social media influence has become a commodity realistically capable of acquisition and of inestimable value.

As has already been discussed, goodwill, intellectual property, and emerging digital assets including cryptocurrency and NFTs have overcome inherent problems caused by potentially rigid application of specific legal requirements dictated by common law or statute. This fundamentally comes down to the idea that the question of whether an asset *should* be recognised as property is a genuine consideration, not just whether it *could.* While this may be somewhat anathema to the idea of

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[112] 'Global Influencer Market Size 2023' (*Statista*) <https://www.statista.com/statistics/1092819/global-influencer-market-size/> accessed 20 September 2023.
[113] 'Social Media Penetration UK 2023' (*Statista*) <https://www.statista.com/statistics/507405/uk-active-social-media-and-mobile-social-media-users/> accessed 20 September 2023.
[114] See Nina Willment, '"Influencer" Is Now a Popular Career Choice for Young People – Here's What You Should Know about the Creator Economy's Dark Side' (*The Conversation*, 28 June 2022) <http://theconversation.com/influencer-is-now-a-popular-career-choice-for-young-people-heres-what-you-should-know-about-the-creator-economys-dark-side-185806> accessed 20 September 2023.
[115] JE Penner and Henry E Smith (eds), *Philosophical Foundations of Property Law* (First edition, Oxford University Press 2013).

property and proprietary rights being definitive and not subject to discretion[116], the reality is that such a consideration has consistently been taken into account in English law when questions of property arise. Indeed, when even a definition of property is absent, it is inevitable that the certainty sought will also prove elusive. By way of example, one need look no further than developments in the context of disputes involving cohabitees of land, with proprietary rights granted under a remedial rather than institutive model of the constructive trust[117], despite the remedial model being consistently rejected by the courts[118]. In addition to overcoming obstacles relevant to whether it can be recognised as property, social media influence also benefits from the fact that it should be recognised as property. To do so would satisfy the social good of protecting an asset that is often the most valuable that a person may own and also one that is not predicated on ownership of capital that is often beyond the reach of individuals in the 21st Century.

Conclusion

The proliferation of social media influence has accelerated in the United Kingdom ever since its first appearance at the start of the 21st Century. It represents a conundrum to the conservative treatment of property in English law, defying classification under traditional categories and victim to numerous misconceptions based upon inaccurate presumptions. Nevertheless, it represents a highly sought after commodity of extreme value, a rare asset that may be created without the need for capital or application of it. As a result of the worth attached to social media influence, together with its numerous valuable applications, it is increasingly the most valuable asset that an individual possesses.

Examining whether a particular asset may be recognised as property under English law is a complicated matter and one that rightly resists a one size fits all model. The matter is far too nuanced for such an approach, and it is quixotic to pursue such a panacea. Instead, the key questions that must be addressed before a conclusion on practical problems such as this are reached must to be identified and applied. Unfortunately, such questions have often been conflated, malformed, and misapplied and this has led to a great deal of confusion with respect to assessing objects of property.

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[116] See, e.g. the comments of Lord Millett in *Foskett v McKeown* [2001] 1 A.C. 102 at [127].

[117] The possibility of a proprietary interest in land arising via an inferred common intention constructive trust in the absence of any direct financial contribution to its acquisition was first raised *obiter* in the landmark House of Lords case of *Stack v Dowden* [2007] UKHL 17. This was subsequently followed in *Graham-York v York* [2015] EWCA Civ 72 where the principle was applied and formed part of the judgment's *ratio.*

[118] *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at [714-715]; *Metall und Rohstoff A.G. v Donaldson Lufkin & Jenrette Inc.* [1990] 1 Q.B. 391 at [478-480]; *Re Polly Peck International plc (No 2)* EWCA Civ 789.

It is not impossible, however, to remedy this historic problem and distil considerations relevant to an asset's categorisation of property.

After identification and application of these requirements, it may be concluded that none pose an insurmountable barrier to the recognition of social media influence as an object of property. In addition, the demonstrated flexibility of English law reinforces this possibility. Indeed, it is in pursuit of the public good that protection should be extended to social media influence given its inherent value and paramount importance to so many who possess it.