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RESEARCH ARTICLE

Bailment of Intellectual Property in Nigeria: A Conceptual Possibility

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Abstract

This article interrogates the traditional limitations of the concept of bailment at common law. It argues that, although possession is a critical element, in modern commerce, a bailment relationship should be capable of being created without actual physical possession and control, but through constructive possession, which is as effective as physical possession and control. With this adjustment to the interpretation of the element of possession, bailment could then apply to intangible property, such as intellectual property. With the support of evidence from other progressive common law jurisdictions and inroads from the tort of conversion and criminal theft, the article argues that this new bailment jurisprudence is beginning to emerge. It then recommends that, in deserving circumstances, the courts should not hesitate to find that a bailment relationship exists, notwithstanding the absence of physical control and possession, at least pending legislative intervention.

Keywords: bailment; constructive possession; intellectual property; lien; physical possession and control; property rights

Introduction

The nature of bailment has remained very confusing and problematic for the legal community.[1] Bailment itself is an old common law property concept. Whether or not bailment is actually a contract or an implied obligation on property has generated significant debate over the years, and invariably turns to whether it deserves an *in rem* or *in personam* legal responsibility and obligation.[2] It is an old common law concept that has defied the ages.

However, things have changed. The world has moved on from the concept of bailment as it was originally conceived and the law continues to follow, albeit grudgingly, in the trail of development. The world has changed significantly since the original common law bailment was conceptualized and there is a need to align modern bailment with current commercial realities and ideas. Goods are beginning to take intangible forms in the nature of virtual property. Unfortunately, bailment has not evolved. The question is why bailment cannot be applied to intangible property and what the legal impediments are.

Actual possession is a vital aspect of bailment, especially in respect of the elements of delivery and redelivery. This article attempts to demonstrate that the possessory element of bailment can

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1 CM Newman "Bailment and the property / contract interface" (2015) (George Mason University Legal Studies Research Paper Series 15–12) 1; WK Laidlaw "Principles of bailment" (1931) 16/3 *Cornell Law Review* 286.

2 Newman, id at 16–25.

be met by constructive possession of intellectual property or other intangible property. Support for this proposition is drawn from other advanced common law jurisdictions to establish the legal possibility for bailment of intellectual property and other intangibles, pending clear legislative action.

The law of bailment in Nigeria

Bailment is the delivery of personal property by its owner or someone with a right of possession (bailor) to another (bailee), who accepts that property under an express or implied agreement to return it to the bailor or his designate. Generally, only personal property is capable of bailment.[3] Typically, bailment arises in contracts of carriage, auctioneering, repairs, safekeeping or custodial services, inn-keeping, hire agreements, storage services, oil and gas pipeline transportation,[4] for example. It could be for the benefit of the bailee, the bailor or for their joint interest. Even animals (as personal property) delivered for veterinary attention can be the subject of bailment.[5] In *Keepler v Ofosia*, the court defined bailment as:

> "[A] delivery of goods or personal property by one person called the bailor to another known as the bailee in trust for the execution of a special object upon or in relation to such goods beneficial either to the bailor or bailee or both and upon a contract express or implied to perform the trust and carry out such object and thereupon either to redeliver the goods to the bailor or otherwise dispose of the same in conformity with the purpose of the trust. The bailee is responsible for exercising due care towards the goods."[6]

Bailment has been part of the Nigerian law of property as a legacy of the English common law and many decisions on the concept have been embedded in Nigerian property law jurisprudence. The court restated the common law position on bailment and also the common law classifications of bailment in *Ike v Mangrove Eng (Nigeria) Ltd and Another*.[7] On the duties and liability of the bailee, the court noted that the bailee owes a duty of care in the tort of negligence as well as in contract to the bailor and that, if the bailee entrusts that duty of care to a servant or an agent, he is vicariously liable for their actions. Also, a bailee's liability for breach of a bailment is founded on the principle of *restitutio in integrum* [restitution to the original position].[8] In other words, the bailor will be entitled to a sum of money that would put him in as good a position as if the goods had not been lost or damaged, but not to generate a profit from the breach.[9] A bailee may exclude or limit liability by express provisions in the bailment, although the onus will still be on him to prove that the loss or damage to the goods occurred without any fault, neglect or misconduct on his part or on the part of his agent or servant, or that liability had been expressly excluded.[10]

One of the fundamental features of bailment is redelivery. The bailee is under an obligation to return the bailed chattel to the bailor at the end of the bailment unless there is a good reason for not

3 JP Mallor et al *Business Law: The Ethical Global, and E-Commerce Environment* (12th ed, 2004, McGraw-Hill Companies / Irwin) at 513.

4 In *Public Service Electric & Gas Co v Federal Power Commission* 371 F2d 1 (3rd cir 1967), the Federal Court of Appeal of the Third Circuit agreed that bailment was possible even though the natural gas being transported in the pipeline for different owners, from Texas to New Jersey, naturally commingled in the process.

5 KJL Scott "Bailment and veterinary malpractice: Doctrinal exclusivity, or not?" (2004) 55/4 *Hastings Law Journal* 1009.

6 [1991] 3 NWLR (pt 384) 415, per Onalaja JCA at 430. See also *Broadline Enterprises Ltd v Monterey Maritime Corporation* [1995] 9 NWLR (pt 417) 1 at 49; *Hill Station Hotel Ltd v Adeyi* [1996] 4 NWLR (pt 442) 294.

7 [1986] 5 NWLR (pt 41) 350.

8 The court relied on an earlier decision in *West African Examinations Council v Koroye* [1977] 2 SC 45. See also *Broadline v Monterey*, above at note 6 at 50.

9 *Ike v Mangrove*, above at note 7.

10 *Co-operative Supply Association Ltd v Intercotra Ltd* [1969] 1 All NLR 112; *Ogugua v Annels Transport Ltd* [1974] 3 SC 139.

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returning it. The tort of conversion or an action in detinue [the wrongful withholding, retention or detention of goods] may be pursued by the bailor depending on the circumstances. In *Leventis Motors Ltd v Cyrus Nunieh*,[11] sometime in 1981, the plaintiff delivered his Mercedes Benz car to the defendant for repairs and paid a deposit of NGN 5,200, being one half of the repair cost. In 1983 when he eventually collected the car, it had to be returned because it broke down again. While he was still waiting for the repair works, in 1987, he heard the car had been sold in 1984 at an auction for scrap for NGN 1,200. The trial court found for conversion and awarded NGN 5,200, being the deposit he had paid. The Court of Appeal awarded NGN 50,000, taking into account the change in the economy and the depreciation of the Naira. The court reiterated that the damages ensured *restitutio in integrum* [restoration of the plaintiff to his original position].[12] An action in detinue[13] on the other hand is an action *in rem*, in which the plaintiff seeks to establish that his property has been held over by the defendant, who is in possession of the property, and the onus of establishing detinue lies with the plaintiff.[14] An action in detinue can be maintained on the bailee's wrongful detention of property belonging to the bailor after the bailee refuses to comply with a demand to deliver up the chattel. It can also be maintained by a person who has an immediate right to possess the chattel against the person who is in actual possession.[15] However, where the goods are lost or destroyed before the demand for return of the chattel in the bailee's custody, the bailee will not be found liable in detinue since detinue is about wrongful detention.[16] Apart from the need to prove ownership or immediate possession, an action in detinue requires adverse possession by the bailee and a refusal without lawful excuse to comply with a demand.[17]

Bailment as a modern statutory security interest

The law relating to secured credits has been codified in many common law jurisdictions. Bailment is a form of secured credit transaction, as the lien guarantees payment. In modern secured credit, the effectiveness and suitability of bailment appears not to have received due attention, specifically in respect of the registrability of bailment as a security interest under the Personal Property Security Act (PPSA) in Canada and Australia, Uniform Commercial Code (UCC), article 9 in the USA and Nigeria's Secured Transactions in Movable Assets Act (STMA) 2017.[18] The absence of the registration of bailment as a security interest reduces it to a mere common law security interest that does not benefit from the statutory regimes for secured credits. The issue is how the courts will construe bailment and whether it meets the statutory requirements for registration under the functional security interest regimes of the PPSA and its equivalents. This issue arose in Australia, where the court had to consider whether bailment is a PPSA lease, and therefore registrable. In *Bredenkamp v Gas Sensing Technology Corporation* (*Bredenkamp*),[19] the court considered the provisions of the PPSA for the registration of leases and concluded that a lease must include the elements of: duration; the bailee giving value for the bailment; and the bailor being regularly engaged

11 [1999] 13 NWLR (pt 634) 235 at 250. See also *Halliburton (Nigeria) Ltd v Chapele* [1996] 8 NWLR (pt 468) 554.

12 *Leventis v Cyrus*, id at 256.

13 In England, the tort of detinue was abolished by the Torts (Interference with Goods) Act 1977, sec 2(1) and replaced with different classifications, such as trespass or conversion of goods and negligence. See *Florence Labode v Godfrey Otubu* [2001] 7 NWLR (pt 712) 256 per Ayoola JSC at 290. By virtue of inherited English common law, detinue remains a tort in Nigeria, in addition to the tort of conversion.

14 *MF Kent WA Ltd v Martchem Industries Nigeria Ltd* [2000] 8 NWLR (pt 669) 459 at 474. See also *Umoru v Ijumu Local Government Council* [2010] 7 NWLR (pt 1192) 1.

15 *Kent v Martchem*, ibid. See also *Iheanacho v Uzochukwu* [1997] 2 NWLR (pt 487) 257; *Umoru v Ijumu*, ibid.

16 *West African Oilfields Serv Ltd v UAC Nigeria Ltd* [2000] 13 NWLR 68 at 75.

17 *Kent v Martchem*, above at note 14 at 480; *Sodimu* v *Nigerian Ports Authority* [1975] 4 SC 15; *Umoru v Ijumu*, above at note 14.

18 (31 May 2017) *Federal Republic of Nigeria Official Gazette (Government Notice No 50)* No 58, vol 104, A37–60.

19 *In the matter of Welldog Pty Ltd (in liquidation) (Receivers and Managers Appointed)* [2017] FCA 1065.

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in the business of bailing goods. In that case, Gas Sensing Technology Corporation (GSTC) was based in the USA and engaged in designing and manufacturing chemical sensing systems that analyse underground conditions; Welldog was an Australian subsidiary of GSTC. The latter had, in about 2016, been prospecting opportunities in Australia and China, which eventually fell through. However, in anticipation, GSTC had sent tools to Welldog in Australia and thereafter decided to leave them in Australia in case an opportunity arose. Thus, the tools were stored with Welldog. No contract was signed and no fees were paid. Welldog created a security interest over its property in favour of ProX Pty Ltd, which was registered in the registry. Subsequently ProX appointed receivers. The main issue was whether GSTC's interest in the tools was a security interest and whether it was registrable as required by the PPSA.[20] The court examined the circumstances and held that the interest was bailment for an indefinite period and not a lease interest. It also held that GSTC was not regularly engaged in the business of bailing goods and Welldog did not give value as well. Bailment is therefore not a registrable security interest. It remains a common law concept.

It is submitted that the decision in *Bredenkamp* also represents the position under the Nigerian STMA, as that enactment has no express mention of a bailment transaction except in the very narrow sense of an equipment lease, which it is not. It is also not within the definition of a purchase money security interest and therefore is not a registrable security interest in the context of the STMA. However, there are some provisions of the STMA that protect and preserve the common law position of a lessor as a bailor. The STMA provisions on purchase money security interest however protect lease transactions as a species of bailment transaction, when they define purchase money security interest to include "the right of a financial lessor".[21] A finance lease on the other hand is defined in the common law context as a lease that transfers ownership of the asset to the lessee at the end of the lease term.[22] Consequently, a finance lease, or rather money payable under a finance lease, is a registrable security interest under the STMA as a purchase money security interest, not as bailment.[23] The STMA also preserves the lessor's rights in an operating lease, by providing that the enforcement and realization of a security interest shall not prejudice the interest in an operating lease.[24] An operating lease creates a bailment at common law similar to a hire and is similarly defined in the STMA.[25] Restricting the recognition and registration of bailment to the lease species is practically and functionally understandable under article 9 of the UCC, the PPSA and the STMA. It is only in the context of leases and hires that a security interest in modern bailment may be practically registrable and protectable. It is not generally practicable to register other variants (such as an innkeeper's bailment, carriage of goods, or a repairer's or workman's bailment) as a security interest, especially in the context of an intervening third party interest.

Possession as a critical element of bailment

One of the elements of bailment is delivery (of possession). Possession itself is an individual's relationship to property, which is defeated only by ownership and could be likened to custody or control. At law, there are two elements of possession that must come together to establish possession: the *animus possidendi* [intention to possess] and the *corpus possessionis* [the body of possession],

20 O Mccoy and G Burkett "Bredenkamp: Further analysis of when a bailment will be a PPS lease" (1 March 2018), available at: <https://www.claytonutz.com/knowledge/2018/march/bredenkamp-further-analysis-of-when-a-bailment-will-be-a-pps-lease> (last accessed 9 December 2022).

21 STMA, sec 63(1).

22 Id, sec 63(1).

23 Ibid.

24 Id, sec 39(2) provides that an operating lessor may enforce its rights under the lease agreement or any other law governing the operating lease where the security interest is sought to be realized.

25 Id, sec 63(1) defines an operating lease as an agreement between two parties under which the lessor allows the lessee to use its asset for a specific period of time in exchange for periodic fees.

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which is actual (physical) possession. Possession is very strongly regarded in property law and, as often said, possession is nine-tenths of the law. Lawful possession is what gives rise to a lien[26] or customary pledge[27] at common law. Even when possession is adverse, it can give rise to ownership where there is no better claim or title to the property.[28] In the era of functional secured credit, some chattels are perfected by mere (lawful) possession.[29] In *Buraimoh v Bamgbose* the Nigerian apex court described possession in these terms:

> "[A] word of wide and sometimes vague and ambiguous import. It may mean effective, physical, or manual control or occupation … - *de facto* possession - as well as possession *animus possidendi* together with that amount of occupation or control … which is sufficient to exclude other persons from interfering - the *de jure* possession. It follows from this that although legal possession is ordinarily associated with *de facto* possession but is not limited to it, legal possession may exist without *de facto* possession and the latter may not always amount to possession in law. Legal possession includes constructive possession … A person who is in possession … includes a user of it and one who is in physical control thereof as well as one who is in receipt of rents and profits from tenants installed thereat by him."[30]

Possession is the fulcrum and the defining ingredient of the bailment relationship, as noted above. Without delivery therefore, nothing is bailed, as the property bailed, usually a chattel, must come within the control and custody of the bailee to establish bailment. In *Zuppa v Hertz*, a widely quoted US case on bailment, the court defined it in possessory terms as "the rightful possession of goods by one who is not the owner. It is the element of lawful possession, however created, and the duty to account for the thing as the property of another, that creates the bailment, regardless of whether such possession is based upon contract in the ordinary sense or not".[31] The possession has to be effective. Possession (delivery) is what places the duty of care for the bailed chattel on the bailee as well as the obligation to redeliver the chattel at the end of the bailment. Possession is also what founds an action in negligence for loss, damage or detinue. The bailee retains possession of the property while title remains with the bailor and the former cannot validly pass title.

Bailment of intellectual property

Bailment and lien generally apply to chattels and tangible goods due to the requirement for delivery and possession; indeed bailment and lien are a legal relationship related to physical possession of property.[32] The applicability of bailment to intangible property, such as electronic money, Bitcoin and intellectual property, which does not have a physical form, is becoming an area of interest in contemporary property jurisprudence, and will become more relevant as electronic commerce and electronic goods and intangibles increase.

One pertinent question that may be asked is how intellectual property, being intangible property, can be the subject of bailment. It has been suggested that the reason software companies choose to license their software to users rather than sell it lies in the characteristic distinction between a sale

26 *Barbedos Ventures Ltd v FBN Plc* [2018] 4 NWLR (pt 1609) 241; *FBN v Songonuga* [2007] 3 NWLR (pt 1021) 230 at 266–67.

27 *Okoro v Nwachukwu* [2007] 4 NWLR (pt 1024) 285 at 298; *Agada Okoiko v Esedalue* [1974] 3 SC 15.

28 See *Nwosu v Udeaja* [1990] 1 NWLR (pt 125) 188.

29 UCC, sec 9-305. See also DA Ebroon "Perfection by possession in article 9: Challenging the arcane but honored rule" (1994) 69/4 *Indiana Law Journal* 1193.

30 [1989] 3 NWLR (pt 109) 354 at 366 per Nnaemeka-Agu JSC.

31 268 A2d 364 (NJ 1970) at 419.

32 N Medniuk "Rights and duties arising from bailment and liens" (26 February 2014), available at: <https://www.lexology.com/library/detail.aspx?g=4b0aed7b-647f-413a-baed-4cec871bb0b5> (last accessed 9 December 2022).

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and bailment transaction, with the latter coterminous, though different from a sale.[33] Such a licence will be a renting out of the software and that way the company ensures that the first sale doctrine in the USA, which excuses the buyer from infringement for public distribution by way of sale or gifting of the copyright, does not apply.[34] Again, the effect of such licensing will be to restrict significantly the user's ability to transfer the software and also to impose certain significant use restrictions on users.[35] In such a licensing regime, title will never pass but remains with the owner; the transaction only permits possession and use for specific purposes. If this scenario occurs in a compact disk (CD) transaction, the CD is sold as a chattel and the intellectual property in it is simply licensed. It has been argued that the challenge with this scenario is that, in the absence of a return requirement in the use of the software licences, it may create only a right *in personam* in the contract and may not prevent passing of title.[36] Again, in circumstances where possession is not limited by time, such a contract risks a possible recharacterization as a sale.[37]

In Nigeria, a most apt decision on bailment of intellectual property (the Court of Appeal decision in *Learn Africa Plc v Moses Oko* (*Learn Africa*))[38] did not even tangentially mention bailment. Unfortunately, the issues canvassed before the court did not include bailment at all, and the case was decided without any mention of bailment. The facts of *Learn Africa* are very important in eliciting bailment. Sometime in 1994, Moses Oko, the respondent, sent the typescript of his proposed novel titled *They Died for You* to Learn Africa Plc,[39] the appellant, for publishing. The appellant unfortunately misplaced the typescript and then informed the respondent of the loss, and asked him to send another copy. The respondent refused to send another copy, affirming that the typescript sent was the only available copy. He instituted an action at Cross River State High Court asking for the following reliefs: the sum of NGN 17 million annually as damages for the proceeds that would have accrued to him from the publication of his book; and the sum of NGN 50 million as general damages for negligence.

In a judgment of 28 July 2016, Ogar J awarded the sum of NGN 20 million as general damages to the respondent for negligence. The first relief sought, for damages of NGN 17 million annually, was dismissed. Dissatisfied with the judgment of the High Court, the appellant appealed to the Court of Appeal. One of the issues for determination was "whether having found the appellant negligent and in breach of the duty of care owed to the respondent to safeguard his manuscript the learned trial Court rightly in law awarded general damages as it did, in favour of the respondent".[40] At the Court of Appeal, the court narrowed down the issues to the quantum of the liability of the appellant, who admitted the loss of the typescript delivered for consideration towards publication. It was not in contention that what was lost by the appellant was the property of the respondent. The issue of the distinction between manuscript and typescript was a moot point, as the court admitted the appellant was entitled to claim for the loss of his property. Surprisingly, on the propriety of the NGN 20 million general damages awarded, the court held that the respondent ought to have retained a copy of his work in case of any eventuality. Consequently, he was considered contributorily negligent in the loss of his intellectual property. On that premise, the court reduced the general damages to NGN 10 million.

This is a very curious decision in the sense that bailment was not considered at all. It was an action based squarely on the tort of negligence and the duty of care, so the court was entitled to

33 Newman "Bailment and the property", above at note 1 at 27.

34 Ibid. See also US Copyright Code (cap 17), sec 109(a) (Limitations on exclusive rights: Effect of transfer of particular copy or phonorecord).

35 Newman, ibid.

36 BW Carver "Why license agreements do not control copy ownership: First sales and essential copies" (2010) 25 *Berkeley Technology Law Journal* 1887.

37 See for example, *Softman Products Co LLC v Adobe Systems Inc* 171 F sup 2d 1075 at 1086 (CD Cal 2001).

38 [2018] LPELR-45181 (CA).

39 Then, Longman Nigeria Plc.

40 *Learn Africa*, above at note 38 at 3.

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apply its discretion in deciding what quantum of damages would be sufficient. The court did not rely on a formula to determine the amount payable. Meanwhile, there was incontrovertible evidence that the appellant had misplaced the typescript of the literary work, being the property of the respondent, while in the appellant's custody. All the ingredients of bailment were present: delivery, acceptance, property and the intention that the same be returned as a published novel or exactly as it had been bailed.

If the question of bailment had been raised, it is submitted that there would have been no question of contributory negligence, as the respondent did not either by an act or omission cause the appellant to misplace the chattel bailed to him for publication as contracted, even if not as intellectual property, at least as a chattel. The expectation in bailment is that the same chattel or a modified and acceptable version of it be redelivered to the bailor. Damages would not have been downgraded if the action had been founded on bailment of property, ie the manuscript. At common law, a bailor is entitled to recover full damages for his loss save for any statutory or contractual limitations and the intervention of the tort of negligence.[41] If bailment is upheld, or if the plaintiff canvasses bailment instead of negligence, there is no reason at law he should not be allowed to recover full damages. The English Court of Appeal in *The Winkfield*[42] emphatically decided in favour of the view that the bailor is entitled to sue for full damages and receive back a complete equivalent for the whole loss or deterioration of the asset.[43] This is known as the Winkfield rule and is still good law, save for the exceptions earlier noted.[44] Typically though, commercial bailees have in modern times found a way to limit their liability with an express agreement and disclaimer, and legislation has also intervened in some cases of commercial bailment.[45] In *Learn Africa*, there was no question of agreement, disclaimer or statutory limitation of liability, thus the Winkfield doctrine should have applied to enable the respondent to recover full damages if an action regarding breach of (intellectual) property bailment had been canvassed and established. Unfortunately, the question of bailment was neither raised by counsel to the respondent nor considered by the court. This is understandable because bailment is generally neglected by lawyers, probably because of its antiquity and the overlap with other areas of the law, such as contract, tort and property.[46]

Another question is what informed the court in determining the quantum of damages awarded in that case for loss of the writing. It is submitted that the court recognized that what was delivered to the appellant was no ordinary paper, rather it was intellectual property that was technically delivered to the appellant and the quantum of damages by the trial court reflected that. If true, would that not amount to an admission, or at least recognition, that intellectual property (in that case copyright) can be bailed (delivered) to another? Otherwise what would have been recompensed or restituted would have been the manual labour and paper costs of his manuscript. In fact, it was admitted that the bailed manuscript was a product of five years of diligent research by the appellant.[47] Recently, in *Multichoice Nigeria Ltd v Musical Copyright Society Nigeria Ltd / Gte*, in perhaps an inadvertent leaning on the labour and economic theories of intellectual property (copyright in that case), the court stated, "[i]t is unconscionable to deny a musician the fruits of his

41 See "The bailee's right to recover full damages: Historically and critically" (1950) 25/1 *St John's Law Review* 51 at 54–55; and "A re-examination of the *Winkfield* case" (1940) 9/2 *Fordham Law Review* 247 (both providing justifications for the *Winkfield* rule).

42 [1902] P 42, 1900–03 All ER 346 (1901).

43 Id at 42, thus overruling the decision in *Claridge v South Staffordshire Tramway Co* [1892] 1 QB 422, where the court decided (at 422–23) that "if a man is in possession of a chattel and his possession is interfered with, he may maintain an action but only for the injury sustained by himself. The right to bring an action against a wrongdoer is one thing; the measure of damages recoverable in such action is another."

44 See above at note 41.

45 D Dickerson "Bailor beware: Limitations and exclusions of liability in commercial bailments" (1988) 41/1 *Vanderbilt Law Review* 129 at 138–49.

46 Id at 129–30.

47 *Learn Africa*, above at note 38 at 22.

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intellectual efforts. Such kills ingenuity in the music artistic firmament to the detriment of all. This is because, music is a money spinner for an artiste, his dependents, and successors. Its gains permeate all segments of the global society".[48]

The jurisprudence of intellectual property is that the property in it does not exist until it is fixed in a reproducible form.[49] The legal corollary of that is that intellectual property can only find expression in a chattel or other tangible form of property. A patent formula remains an intellectual exercise until that formula is expressed in a pharmaceutical or other product. While the formula is registrable and protectable, what is actually protected by law is the replication of that formula into a pharmaceutical product (or other product as the case may be). This is also the case in respect of industrial designs and trademarks. A mark is just what it is until it is associated with a particular product and goodwill. In many jurisdictions, including the USA, it is probably for this reason that the bare assignment of trademarks is prohibited so that a trademark can only be assigned in conjunction with the goodwill that attaches to it. Similarly, from a copyright perspective, protection can only be afforded to a work when it has been *fixed* in a medium.[50] Such medium can take the form of physical papers (manuscript or typesetting), or a computer file, floppy disk, flash drive, CD-ROM and so on. These media of expression of the copyright are certainly chattels but their value is not in their being a chattel but in the intellectual property that they hold or convey. The chattel itself may be worth say USD 2.50 but the intellectual property it conveys may be worth millions or billions of US dollars in fact or potentially. Similarly, a manuscript of a novel has the same value whether it is saved in a computer's memory, a memory stick or printed on paper. A bailment of such a medium (the chattel), such as a manuscript for instance, is technically, it is submitted, not a bailment of a chattel but bailment of the intellectual property conveyed by that chattel. It can therefore be said that, even as a statutory requirement, intellectual property must be "chattelized" to be protectable. The English court in *St Alban's City & District Council v International Computers Ltd*[51] clearly recognized the distinction between a disk or other medium of storage on which data is held (which is a tangible) and the data itself, which is not. This distinction is even clearer with copyright. Bailment of intellectual property is an area of property jurisprudence that became popularized by e-commerce and electronic goods, advanced by a technologically-driven millennium. By analogy though, the English court in *Thunder Air Ltd v Hilmarsson*,[52] refused to find for the tort of unlawful interference, where the documents in issue were in the possession and control of the defendants; this was on the grounds that the documents stored in electronic form were not "goods" within the meaning of the relevant tort legislation.

Another issue that should have been relevant in *Learn Africa* was the appropriate valuation of the intellectual property in issue, to ascertain the approximate monetary value that should have been placed on it. Unfortunately, this was not considered by the court. It is submitted that the damages awarded did not reflect the value of the intellectual property.

One may also consider the facts of *Learn Africa* in a role reversal situation. If the appellant had published the novels for the respondent and the respondent had failed to pay for them, would the appellant not be entitled, even in the absence of a clear contract to that effect, to a right to detain the typescript and the published novels? If the answer is in the affirmative, would that not have resulted in a lien on intellectual property or would it just have amounted to a lien on the manuscript as a mere chattel? In *Learn Africa*, an opportunity was lost to advance the crusade of bailment in intellectual property in Nigeria.

48 [2020] 13 NWLR (pt 1742) 415 at 535 per Ogbuinya JCA.
49 Copyright Act, sec 1(2)(b).
50 Ibid.
51 [1996] 4 All ER 481.
52 [2008] EWHC 355 (Ch).

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The Court of Appeal in England in *Your Response Limited v Datateam Business Media Limited* (*Datateam*)[53] had the opportunity to consider whether a lien can be applied to an electronic database, being intangible property. The facts of this case were relevant to bailment and lien. It was an action for sums allegedly due under a contract for the management of an electronic database and damages for breach of contract. Datateam publishes magazines with numerous subscribers, while Your Response Ltd carries on business as a database manager. Around March 2010, Datateam engaged Your Response Ltd to manage, maintain and update the database of its subscribers. Sometimes hundreds of amendments were made per day on the database. The contract was contained in a written agreement by an exchange of emails and also partly orally. Parties disagreed on the provision of the services and, on 17 October 2011, Datateam gave one month's notice to terminate the contract. Your Response invoiced Datateam for outstanding fees and then refused to provide its data management services during the notice period or even allow Datateam to access its database, pending discharge of all outstanding fees and charges. Your Response sued Datateam for the outstanding fees and charges. Datateam counterclaimed for damages resulting from the costs incurred in engaging a third party to rebuild its database.

The court of first instance decided that Your Response was entitled to retain Datateam's database in order to secure payment of the outstanding charges, apparently in the exercise of a possessory lien over the database as a reflection of common commercial practice. Datateam appealed to the Court of Appeal. The latter reasoned that common law lien, being a possessory security, can only be exercised over tangible goods or property and does not extend to intangibles.[54] In arriving at that decision, the appellate court sought reliance on the House of Lords decision in *OBG Ltd v Allan*.[55] In *OBG Ltd v Allan*, the issue before the Lords was whether wrongful interference with contractual rights, over a chose in action and, even more so, property, could constitute the tort of conversion in English law. The House of Lords held that it could not. According to its reasoning, the English tort of conversion only applies to chattels and not to choses in action. Lord Hoffmann noted that conversion was historically a tort against a person's interest in a chattel and that the statutory modifications of the tort of conversion were based on the solid assumption that it applies only to chattels.[56] Subsequently, in *Environment Agency v Churngold Recycling Ltd*,[57] the English Court of Appeal held that the tort of conversion did not apply to electronic copies of documents for the purposes of the extant English law of tort.

53 [2014] 4 All ER 928; [2015] QB 41, available at: <https://www.casemine.com/judgement/uk/5b46f1ed2-c94e0775e7ee3bb> (last accessed 18 January 2023).

54 For critique, see: M Lewis "Virtual possession: Electronic data is not tangible property" (21 May 2014) *Solicitors Journal*, available at: <https://www.solicitorsjournal.com/sjarticle/Virtual%20possession:%20electronic%20data%20is%20not%20tangible%20property> (last accessed 9 December 2022); PM Cooper "Lien out: Electronic data is not tangible property so no lien arises" (25 June 2014), available at: <https://www.penningtonslaw.com/news-publications/latest-news/lien-out-electronic-data-is-not-tangible-property-so-no-lien-arises> (last accessed 9 December 2022); "Tangible vs intangible: Can a lien exist over electronic data?" (24 April 2014, Olswang LLP), available at: <https://www.cms-law-now.com/ealerts/2014/04/tangible-vs-intangible-can-a-lien-exist-over-electronic-data?sc_lang=en> (last accessed 9 December 2022); P Friedman, N Jamieson and S Garg "Intangible property, such as electronic databases, may not be subject to liens" (8 December 2014), available at: <https://www.lexology.com/library/detail.aspx?g=da2d3590-b344-4f9c-bd34-e333fab7500d> (last accessed 9 December 2022); M Dunster and S Florance "Holding data hostage" (24 April 2014), available at: <https://www.lexology.com/library/detail.aspx?g=64cc21dc-6b8a-4199-8b0b-a4cfd7d6f453> (last accessed 9 December 2022); and "Do service providers have a lien over data?" (7 August 2014, Mason Hayes & Curran LLP), available at: <https://www.lexology.com/library/detail.aspx?g=2f02e233-f731-4195-89c7-a4cc08138f9a> (last accessed 9 December 2022).

55 [2007] UKHL 21.

56 Id, para 97. See for example, the English Torts (Interference with Goods) Act 1977, sec 1, which defines wrongful interference with goods to include "conversion of goods". "Goods" on the other hand is defined as "… all chattels personal other than things in action and money".

57 [2014] EWCA Civ 909.

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Incidentally and unfortunately, the *Datateam* court passed the buck of progressing the *lex virtualis* [virtual property] to Parliament when it reasoned that information and argument on the issue:

> "[M]ake a powerful case for recognising that the essential elements of possession can be exercised over digitised materials, of which a database is a prime example, which should therefore be amenable to the tort of conversion … Inevitably they are critical of the decision in *OBG v Allan*, which they regard as a wasted opportunity to set the law on a modern footing. In my view there is much force in their analysis, which, if accepted, would have the beneficial effect of extending the protection of property rights in a way that would take account of recent technological developments … That course is not open to us - indeed, it may now have to await the intervention of Parliament - and I do not think that any purpose would therefore be served by embarking on a fuller discussion of their suggestions here."[58]

Those statements are suggestive of the fact that the circumstances of the case and the progressive development of the law on lien deserved a deeper inquiry against modern realities, which the *Datateam* court was unwilling to undertake. Lord Justice Floyd, in agreeing with the lead judgment, also hinged his auxiliary reasoning on the fact that information is not property in English law and allowing the possessory lien argument would be tantamount to treating information as property.[59] From the decision of the House of Lords in *Boardman v Phipps*,[60] to the decision in *Oxford v Moss*[61] and down to *Douglas v Hello*,[62] it is clear that information is not treated as property in English law. Even recently, the UK Supreme Court reiterated this in *Phillips v News Group Newspapers Ltd*.[63] However, the subject matter of the lien in *Datateam* was a database, not just information per se. A database is protectible property in English law, just as copyright is, by virtue of the Copyright and Rights in Databases Regulations 1997, which modified the Copyright, Designs and Patents Act 1988 and were designed to implement European Council Directive No 96/9/EC.[64] Lord Justice Davies flatly rejected progressive and commercially minded arguments on the grounds of what he feared would be the unintended consequences of such an interpretation.[65] This reasoning, with due respect, is not one of which the modernist or realist school of law will be proud and smacks of a predilection to continue to shackle common law concepts with legal formalism, which is unhelpful in modern realities.

As an indispensable ingredient of bailment, possession may also be constructive, not only characterized by the physical delivery of chattel. There can be constructive possession as well, such as the handing of a key to a warehouse to the bailee. The bailee is deemed to be in constructive possession of the goods in the warehouse. This creates rights and obligations in bailment between the parties.

58 *Datateam*, above at note 53 (online), para 27, per Lord Justice Moore-Bick.

59 Id at 41–42, per Lord Justice Floyd. See generally, TF Aplin "Confidential information as property?" (2013) 24/2 *King's Law Journal* 172; AA Pam and JI Mantu "An appraisal of the legal framework on confidential information and trade secrets in Nigeria" (20 May 2019), available at: <http://dx.doi.org/10.2139/ssrn.3422302> (last accessed 9 December 2022).

60 [1967] 2 AC 46. Here, the House of Lords, per Lord Upjohn, categorically held that information cannot be regarded as property, but a person may be restrained in equity from disclosing confidential information that contains secret processes or know-how.

61 [1978] Cr App R 183. This case held that information is not property under English law and thus cannot be stolen.

62 [2008] 1 AC 1. Lord Walker observed in this case that confidential information, whether personal or commercial, cannot be regarded as a form of property.

63 [2012] UKSC 28, [2013] 1 AC 1. The court observed that, although confidential information is not strictly property, it is not unusual to include it as an aspect of intellectual property.

64 Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31996L0009> (last accessed 9 December 2022).

65 *Datateam*, above at note 53 (online), paras 38–39.

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In the proposed bailment of intellectual property such as software, a database (as intellectual property) or an electronic or physical manuscript, the bailee would be deemed to be in possession of the property when the password, pin, source code, electronic or physical manuscript (as the case may be) is delivered or revealed to him by the bailor. Consequently, in the context of intellectual property bailment, the bailee has a duty to "redeliver" the intellectual property in the manner agreed by the parties (maybe after upgrade, repair or maintenance etc) without corrupting the same, exposing it to a virus, destroying, copying, losing, selling or otherwise compromising the owner-bailor's economic monopoly right. Redelivery would mean providing the owner-bailor with sole (electronic) access to the intellectual property, to the exclusion of everyone, including the bailee, with the agreed service(s) performed. This is what would amount to a successful redelivery and the bailor would have a duty to pay for services rendered. Conversely, and as seen in *Datateam*, the bailee's right of lien in the intellectual property by withholding the password, pin or electronic or physical access, would have been better served just as in traditional bailment, until the bailor-owner fulfils his bailment obligations too.

The proposal for bailment of intellectual property is not without some practical difficulties and challenges. One of these is the non-rivalrous nature of intellectual property, for instance a patent. What the law actually protects is the economic and commercial monopoly attached to the ownership of the intellectual property: more or less the excludability right of the owner. In the context of a "bailed" patent, this becomes difficult to establish, when the knowledge of the process has been revealed to the bailee. Patents as a species of intellectual property present a strong challenge to the bailment thesis, considering that they can hardly be lost or destroyed in such a way that an action for infringement cannot cover, since it is the registration that confers property status. Notwithstanding the challenges, there are ideal circumstances where bailment (maybe not for all intellectual property), would be apposite to protect the property rights of the bailor-owner. Again, by their nature, patents or other intellectual property all need a carrier to be considered property, and any wrongful interference with that carrier should found a right actionable in bailment, especially where the intellectual property cannot be easily extricated from its carrier.[66]

Tort example: A case for constructive possession

Bailment and lien thrive in possession and control. Indeed the doctrine of constructive possession is a well-known legal concept. In other areas of the law where *dominium* [possession] is a critical element, there appears to have been some measure of progress towards the recognition of virtual possession or constructive possession in place of actual physical possession, especially from the judicial decisions and jurisprudence emanating from the USA. That is not to say there is unanimity even in the USA, as some decisions have remained faithfully traditional in the dichotomy between tangible and intangible property.[67] Contemporary works and thinking about the tort of conversion and trespass to goods, where possession and control are critical elements, demonstrate a shift in the rigidity of the thinking from physical to virtual, especially with the emergence of virtual goods and products recognized and protected as property and other intangibles.[68] The preponderance

66 SV Erp "Ownership of data: The numerus clausus of legal objects" (2017) 6 *Property Rights Conference Journal* 235 at 250–52.

67 See for example, *Express One International v Steinbeck* 53 SW 3d 895 at 901 (2001); *Montecalvo v Mandarelli* 682 A.2d 918 at 929 (RI 1996); and *Allied Investment Corp v Jasen* 354 Md 547 at 562, and 731 A.2d 957 at 965 (1999). In the latter, the court declined to apply conversion to an interest in corporation and partnership.

68 See S Green and J Randall QC *The Tort of Conversion* (2009, Hart Publishing Ltd) at 109–11 and 118–34; and TJ Hall and JA Archer "The slow expansion of conversion claims to cover intangible property" (20 February 2020) *New York Law Journal* (online), available at: <https://www.law.com/newyorklawjournal/2020/02/20/the-slow-expansion-of-conversion-claims-to-cover-intangible-property/?slreturn=20200923042308> (last accessed 9 December 2022). The writers note that, notwithstanding the traditional view on conversion, recent case law has provided some exceptions to the tort

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of academic opinion is that the law should gradually recognize virtual property[69] and rights attaching to such property should adapt accordingly, with or without parliamentary intervention. For instance, much virtual copyright and other intellectual property is protected and it is often stolen or infringed virtually. A progressive judiciary should be able to protect that property even in the absence of clear legislation, even if temporarily. In the US case of *Thrifty-Tel Inc v Bezenek*, without delving into the issue of internet trespass, the Supreme Court of California noted that electronic signals were "sufficiently tangible to support a trespass cause action".[70] This reasoning was immediately applied in *CompuServe Inc v Cyber Promotions Inc*,[71] where an application for an injunction to prevent the defendant advertising company sending spam to the plaintiff's customer over the network was based on trespass to a chattel.[72] The cyber trespass action for an injunction failed in *Intel Corp v Hamidi*, albeit because of Intel Corporation's inability to prove actual damage or impairment.[73] However in *Sotelo v DirectRevenue LLC*,[74] a case of trespass for allegedly installing spyware surreptitiously on the plaintiff's computer, which spyware delivered pop-up adverts to the plaintiff's frequented sites, was sustained based on the modern reality of the internet age and computer use. A good number of commentators also favour the emergence and recognition of the new constructive trespass.[75]

Again the US courts have blazed the trail in recognizing virtual conversion and particularly virtual bailment. In *Kremen v Cohen*[76] the court held that there was conversion of an internet domain name and that the cause of action can embrace intangible property. *Thyroff v Nationwide Mutual Insurance Co*[77] decided that information had value notwithstanding the format in which it was stored, whether tangible or intangible. In that case, the New York court held that there was a cause of action for conversion of electronic records and data stored on a computer just as much as for the printed copies. The facts, circumstances and decision in *Shmueli v Corcoran Group*[78] were even more compelling. The plaintiff, a real estate broker retained by the defendant, brought

of conversion so that it can protect intangible property where it is manifested in some physical form. See also CJ Akins "Conversion of digital property: Protecting consumers in the age of technology" (2010) 23/2 *Loyola Consumer Law Review* 215.

69 See Green and Randall, ibid; B Pratama "Legal prescription on virtual property and its rights" (2017) *International Conference on Computing and Applied Informatics Journal of Physics Conference Series 801*, available at: <https://iopscience.iop.org/article/10.1088/1742-6596/801/1/012090/pdf> (last accessed 9 December 2022); W Erlank "Introduction to virtual property: Lex virtualis ipsa loquitur" (2015) 18/7 *Potchefstroom Electronic Law Journal* 2525; JT Fairfield "Virtual property" (2005) 85 *Boston University Law Review* 1047; P Palka "Virtual property: Towards a general theory" (PhD thesis presented to the Department of Law, European University Institute, 2017), available at: <https://cadmus.eui.eu/handle/1814/49664> (last accessed 9 December 2022); C Blazer "The five indicia of virtual property" (2006) 5/1 *Pierce Law Review* 137.

70 (1996) 46 Cal App 4th 1559, 54 Cal Rptr 2d 468 at 1567. See J Macdonald "Electronic trespass in Canada: The protection of private property on the internet" (2006) 5/3 *Canadian Journal of Law and Technology* 163 at 163–64 and 167.

71 962 F Supp 1015 (SD Ohio 1997).

72 Macdonald "Electronic trespass", above at note 70.

73 71 P 3d 296 (Cal 2003) at 308. This case was criticized as a setback to the advancement of the law on cyber trespass because trespass is actionable per se.

74 384 F Supp 2d 1219 at 1230 (ND Ill 2005). For an analysis also from an unmentioned nuisance viewpoint, see J Anderson and D Fish "*Sotelo v DirectRevenue, LLC*: Paving the way for spyware-free internet" (2005) 22/5 *Santa Clara Computer and High Tech Law Journal* 841.

75 See PA Winn "The guilty eye: Unauthorized access, trespass and privacy" (2007) 62/4 *The Business Lawyer* 1395; MJ O'Connor "The common law of cyber trespass" (2020) 85/2 *Brooklyn Law Review* 421; C Sharkey "Trespass torts and self-help for an electronic age" (2009) 45 *Tulsa Law Review* 101; S Balganesh "Common law property metaphors on the internet: The real problem with the doctrine of cybertrespass" (2006) 12/2 *Michigan Telecommunications & Technology Law Review* 265.

76 337 F3d 1024 at 1033–34 (9th cir 2003).

77 (2007) NY Slip Op 2442, 8 NY 3d 283.

78 (2006) NY Slip Op 30664 (NY Sup Ct 2006). See LN Jacobs "Is what's yours really mine? *Shmueli v Corcoran Group and Penumbral Property Rights*" (2006) 14/2 *Journal of Law and Policy* 837.

an action for conversion, breach of bailment, misappropriation of proprietary information and interference with prospective business relations against the defendant for failing to return the plaintiff's computerized virtual client list upon termination, thereby occasioning intentional emotional distress, inter alia, on the plaintiff. The court found for conversion of the plaintiff's virtual property and also found for breach of bailment of the plaintiff's computerized client list. Similarly, the appellate court found for the plaintiff in an action for conversion of the product, system and formula, which contained methodologies, strategies and information.[79] These cases therefore recognize the paradigm shift in the conception of the actual possession requirement of common law in tort and property law.[80]

Criminal law analogy

From a criminal law perspective, the English courts also reneged in providing a progressive and expansive interpretation of possession and control. However, fortunately, legislative intervention has been faster to respond to the criminal jurisprudence of theft, from its original larceny, by recognizing constructive possession and control. In *R v Preddy*,[81] the House of Lords set a precedent that payments by electronic funds transfer did not meet the equivalent criteria under section 15 of the UK Theft Act 1968. This led to urgent law reform with the hasty insertion by the Theft (Amendment) Act 1996 of section 15A into the 1968 act.[82] Unsurprisingly, interpretation of property offences struggled with the advancement in technology, especially with the dichotomy of the treatment of tangible and intangible property.[83] The work of the English Criminal Law Revision Committee[84] that led to the 1968 Theft Act, reconceptualized stealing (larceny) as theft, with a definition that eschewed the requirement for physical intervention and was expanded to accommodate intangible property.[85]

The USA, as early as 1984, passed the Counterfeit Access Device and Computer Fraud and Abuse Act 1984[86] as a federal enactment designed to be the principal legal weapon in the battle to protect computer systems and other electronically stored information from thieves and vandals, by punishing any person who intentionally accesses a computer or other electronic device without the authorization of the owner, or who exceeds the access authorized by the owner.[87] The Copyright Act 1976,[88] Digital Millennium Copyright Act 1998,[89] Computer Fraud and Abuse Act 1986[90] (for

79 *MP Innovations v Atlantic Horizon International* No 604133/2007 (2008) WL 7729118 (NY Sup Ct NY Cnty 2008).

80 See KG Faley and AM Alonso "Conversion in electronic age" (21 January 2014) *New York Law Journal*, available at: <https://mdafny.com/index.aspx?TypeContent=CUSTOMPAGEARTICLE&custom_pages_articlesID=14846> (last accessed 9 December 2022).

81 [1996] AC 81.

82 P Binning and B Henriques "A thief is not necessarily a fraudster. A fraudster is not necessarily a thief" (6 July 2018), available at: <https://www.corkerbinning.com/a-thief-is-not-necessarily-a-fraudster-a-fraudster-is-not-necessarily-a-thief/> (last accessed 9 December 2022).

83 J Lipton "Property offences into the 21st century" (1999) 1 *The Journal of Information, Law and Technology*, available at: <https://warwick.ac.uk/fac/soc/law/elj/jilt/1999_1/lipton/#a4> (last accessed 9 December 2022).

84 *Eighth Report: Theft and Related Offences* (Cmnd 2977, 1966, Criminal Law Revision Committee, House of Commons).

85 See Theft Act 1968, sec 1, which uses the word "appropriate" instead of "steal" and which defines "appropriate" in detail in sec 3. See also sec 4, which defines property to include "money and all other property, real or personal, including things in action and other intangible property". See A Steel "Taking possession: The defining element of theft?" (2008) 32/3 *Melbourne University Law Review* 1030.

86 Pub L No 98-473, § 2102(a), 98 Stat 2190 at 2190–92.

87 US Code, title 18, secs 1030(a)(2) and 1030 generally. Authorization was not defined in the Computer Fraud and Abuse Act 1986, but see *International Airport Centers LLC v Citrin* 440 F3d 418 at 419–20 (7th Cir, 2006), where the court hinged authorization on agency of employment relationship. In *EF Cultural Travel BV v Explorica Inc* 274 F 3d 577 at 582–84 (1st Cir 2001), the contract approach was adopted as suitable to prove or disprove authorization.

88 US Code, title 17, sec 101 (West 2012).

89 Id, secs 101, 104, 104A, 108, 132, 114, 117 and 701.

90 US Code, title 18, sec 1030.

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digital copyright) and the Economic Espionage Act 1996[91] were the results of the US federal government's resolve to combat the theft of digital copyright on the one hand and the international theft of digital technological knowhow, confidential business information and trade secrets, respectively.[92] There has also been a call for criminal prosecution for theft of blockchain property and cryptocurrency.[93]

In defining property capable of being stolen, the Criminal Code laws of various Nigerian states provide that, "[e]very inanimate thing whatever which is the property of any person, *and which is movable*, (*and which is capable of being made movable, is capable of being stolen as soon as it becomes movable, although it is made movable in order to steal it*), is capable of being stolen".[94] In any other public or private law where the term "larceny" is used, it shall be taken that it is intended to refer to the offence of theft.[95] Unfortunately, the law that is adopted and used by most states in Nigeria, still considers property capable of being stolen in the traditional common law movability concept (possession and control), which clearly excludes choses in action and other intangible property. However, Lagos State has, in its criminal law,[96] been able to redefine property capable of being stolen to include "money and all other properties, real or personal, *including things in action and other intangible properties* which is the property of another".[97] At the federal level, the Cybercrime (Prohibition, Prevention, Etc) Act 2015 was passed, inter alia, to promote cyber security and the protection of computer systems and networks, electronic communications, data and computer programmes, intellectual property and privacy rights.[98] It provides for what can be termed criminal trespass by punishing unlawful interference in non-public computer data, content or traffic data, including electromagnetic emissions or signals from a computer, computer system or network carrying or emitting signals, to or from a computer, computer system or connected system or network.[99] In other jurisdictions, there has also been considerable progress in redefining theft of property to eschew old fashioned requirements for tangibility and actual physical movement.[100]

91 Id, secs 1831–39 (West 2012).

92 See TG Field "Crimes involving intangible property" (2013) 11/2 *The University of New Hampshire Law Review* 171; GS Moohr "Federal criminal fraud and the development of intangible property rights in information" (2000) *University of Illinois Law Review* 683; M Song and C Leonetti "The protection of digital information and prevention of its unauthorized access and use in criminal law" (2011) 28/4 *The John Marshall Journal of Information Technology & Privacy Law* 523; AF Popper "More than the sum of all parts: Taking on IP and IT theft through a global partnership" (2014) 12/4 *Northwestern Journal of Technology and Intellectual Property* 253.

93 HS Zaytoun "Cyber pickpockets: Blockchain, cryptocurrency, and the law of theft" (2019) 97/2 *North Carolina Law Review* 395.

94 Emphasis added. See Criminal Code Act (cap 77, Laws of the Federation of Nigeria 1990), sec 382 and (cap C39, Laws of the Federation of Nigeria 2004).

95 Id, sec 3(2).

96 Crimes, subject to covering the field, are within the residual list for states to legislate on. See *Ontario Oil and Gas Ltd v FRN* [2018] 13 NWLR (pt 1636) 197.

97 Criminal Law of Lagos State 2011 (cap C17), sec 281(2) (emphasis added).

98 Cybercrime (Prohibition, Prevention, Etc) Act 2015, sec 1(c).

99 Id, sec 12(1). See also generally, secs 14 and 15, the latter providing against unauthorized modification of computer systems, network data and system interference.

100 See for example, *R v Wilkinson* [1999] 1 NZLR 403 (CA), where it was held that electronically transferred bank credit could not be stolen within the meaning of extant criminal law; and subsequently *R v Misic* [2001] NZCA 128, [2001] 3 NZLR 1 (CA) where, for the offence of theft, it was held that "document … in any form" covers documents in electronic or digital files. In *Dixon v R* [2016] 1 NZLR 678, the accused was convicted for obtaining property by accessing a computer system for a dishonest purpose, thereby holding that digital files are property. For a critique of the latter decision, see D Harvey "Case note: Digital property - *Dixon v R* [2015] NZSC 147, [2016] 1 NZLR 678" (2017) *New Zealand Criminal Law Review*, available at: <https://ojs.aut.ac.nz/new-zealand-criminal-law-review/index.php/tewharenga/article/view/54/46> (last accessed 9 December 2022). For the general position in New Zealand, see W Rumbles "Theft in the digital: Can you steal virtual property?" (2011) 17/2 *Canterbury Law Review* 354; A Steel "Problematic and unnecessary? Issues with the use of the theft offence to protect intangible property" (2008) 30 *Sydney Law*

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Treatment of virtual property in a digital age as an analogy

Bailment, as a property concept, can be employed to ensure citizens' right of privacy over their electronic communications and that private data[101] are not violated by service providers and the government. It can be used to protect a citizen's right to privacy against search and seizure where property is in the hands of a third person.[102] This is founded on the bailment relationship where the service provider is the bailee or mere intermediary of such data, which he cannot treat as he pleases. This proposition was canvassed in *Carpenter v United States*.[103] In this landmark decision, the Supreme Court held, in a very close 5:4 decision, that the government violated the Fourth Amendment to the US Constitution by accessing historical cell site location information records covering the physical locations of mobile phones without a search warrant. This was despite the rejection of the property theory by the court, which based its decision on the reasonable expectation of privacy test established in *Katz v United States*.[104] The court noted that, "just because you entrust your data - in some cases, your modern-day papers and effects - to a third party may not mean you lose any Fourth Amendment (privacy) interest in its contents".[105] It has also been strongly argued, through the bailment perspective, that personal digital data acquirers owe their clients a duty of care to prevent and safeguard their clients' personally identifiable information until its return or safe disposal in a customary manner.[106]

Progress in this area has been sluggish and reluctant, resulting in lost opportunities.[107] There is no reason this advancement in the law of tort and property cannot be initiated by the judiciary. Other than the futile struggle to cling to the traditional elements at common law, there appears to be no real reason these developments in the law should not be extended to bailment and lien, as has been seen in criminal law. Surprisingly, the court clearly understands the need to protect these rights, yet passes the buck to Parliament.[108] There is a case for virtual trespass and conversion as well as theft of virtual property. The emergence of virtual lien and bailment is inevitably a matter of time. A password has been recognized as a means of exercising possession and control and should be interpreted as evidence of constructive possession in lien and bailment of virtual property.

Virtual property is emerging and unstoppable. The role of the judiciary in evolving global commerce is certainly not one where comfort is guaranteed. In the rampaging world of virtual property, there is no legal or commercial reason why choses in action and other intangible property should not enjoy the same levels of legal protection because of their nature, just because of a common law conceptualization of lien and bailment that cannot stand the test of contemporary commercial realities. E-commerce and technological developments are modern factors, and formal concepts and interpretations of the law must inescapably adapt to them. The trial court in *Datateam* was more futuristic to hold that a possessory lien can be placed on virtual property,[109] only to be overruled by the English Court of Appeal. Even in overruling the decision, the latter admitted that there was a powerful argument for recognizing that an element of possession can be exercised over a

Review 575. For South Africa, see MN Njotin "Re-positioning the law of theft in view of recent developments in ICTS: The case of South Africa" (2016) 19 *Potchefstroom Electronic Law Journal* 1.

101 For example, GPS information, cloud storage services and all forms of custodial digital storage services and hosting, email servers and services, telephone calls and historical cell-site location information for mobile phone operators.

102 S Gallant "The old bailment doctrine: The answer to Fourth Amendment jurisprudence in the digital age" (2020) 25/1 *Roger Williams University Law Review* 116.

103 138 S Ct 2206 (2018).

104 389 US 347 (1967).

105 *Carpenter*, above at note 103 at 2269.

106 MC Skedvold "A duty to safeguard: Data breach litigation through a quasi-bailment lens" (2018) 25/2 *Journal of Intellectual Property Law* 201.

107 For example, *Datateam*, above at note 53 and *Learn Africa*, above at note 38.

108 *Datateam*, id (online), para 27, per Lord Justice Moore-Bick.

109 Brighton County Court, per District Judge Bell.

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database.[110] It was a case of a lack of judicial activism and a refusal to apply and adapt the law of lien and bailment creatively. While reliance on *OBG Ltd v Allan* is understandable because of the overriding statutory meaning of goods or chattels, there is no statutorily overriding reason for holding that there cannot be a lien on electronic databases in deserving circumstances such as in *Datateam*.

The remedy of constructive trust and its limitations

At common law, the constructive trust is a tool of equity available in circumstances where one party has taken advantage of another, in situations of unjust enrichment arising out of a breach of a fiduciary relationship and in a number of circumstances that are generally difficult to categorize.[111] In relation to property, it is an equitable remedy that subjects the person who holds title to property to an equitable obligation to transfer it to another because the holder's acquisition or retention of the property would constitute unjust enrichment. From US common law jurisprudence, *In Re Real Estate Associates Ltd Partnership Litigation* described it as "an involuntary equitable trust created as a remedy to compel the transfer of property from the person wrongfully holding it to the rightful owner".[112] In *Beatty v Guggenheim Exploration Co*, the court similarly explained that, "where property has been acquired in such circumstances that the holder of legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee".[113] Even as amorphous as the doctrine is, it can be summarized as an equitable remedy imposed to prevent unjust enrichment.[114] In the context of this article and the bailment relationship discussed, a remedial constructive trust is an equitable judicial remedy and operates retroactively to the prejudice of third parties and at the discretion of the court.[115]

The Nigerian Supreme Court and lower courts are unanimous that a constructive trust is neither granted nor accepted, but is foisted upon the parties by the operation of law; it is imposed by equity regardless of the intention of the owner of the property, where it will be unconscionable for the beneficial owner or trustee to hold the property for his benefit, being the formula through which the conscience of equity finds expression.[116] It has been used in a variety of cases in Nigeria covering fraud, unjust enrichment and breach of fiduciary duties. It is an equitable remedy, with which common law jurisdictions are familiar.[117]

In the context of applicability of bailment to intellectual property, it appears that the constructive trust would be another mechanism through which the law can protect the bailor-owner from unjust and improper dealings with the intellectual property so that the bailee may be declared a constructive trustee for the benefit of the bailor-owner. However, the constructive trust remedy at common law has its limitations, in particular its inability to supplant the interest of a bona fide purchaser for value without notice.[118] In a constructive trust situation, legal title may be passed to a bona fide

110 *Datateam*, above at note 53 (online), para 27, per Lord Justice Moore-Bick.

111 T Etherton "Constructive trusts: A new model for equity and unjust enrichment" (2008) 67/2 *The Cambridge Law Journal* 265. See also *In Re Alpert* 9 Misc 3d 1102 [A].

112 223 F Supp 2d 1109 (CD Cal 2002) at 1139.

113 225 NY 380 [1919] at 386.

114 *Simonds v Simonds* 45 NY2d 233 at 242 [1978].

115 See *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] UKHL 12; [1996] AC 669 at 671G–715A.

116 *Huebner v AIEPM Co Ltd* [2017] 14 NWLR 397 at 419, 420 and 442; *Ibekwe v Nwosu* [2011] 9 NWLR (pt 1251) 1 at 14–16; *Kotoye v Saraki* [1994] 7 NWLR (pt 357) 414; *Anyaegbunam v Osaka* [1993] 5 NWLR (pt 294) 449 at 461.

117 See *Moore v Sweet* [2018] SCC 52; *DBDC Spadina Ltd v Walton* [2018] ONCA 60 and *Muschinski v Dodds* [1985] 160 CLR 583 as applied by courts in Canada and Australia, respectively. Also for Australia, see YK Liew "Constructive trusts and discretion in Australia: Taking stock" (2021) 44/3 *Melbourne University Law Review* 1.

118 See *Westdeutsche Landesbank v Islington*, above at note 115 at 705; *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22; J Dietrich and P Ridge "The receipt of what? Questions concerning third party recipient liability in equity and unjust enrichment" (2007) 31 *Melbourne University Law Review* 47 at 53, 55–56 and 63; BJ Saunders "Imperfect property: Defective protection for bona fide purchasers of copyrights" (1988) 5/1 *University of Miami*

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purchaser, while in a bailment the bailor never cedes title to the bailee and, with the *nemo dat* principle,[119] the bailee will never be able to transfer valid title to a third party, hence the support for bailment. Also, in a situation like that in *Datateam* where the service provider attempted to exercise its right of lien emanating from the bailment of the company's intellectual property, a constructive trust will not achieve the desired intention. Ditto for the scenario in *Learn Africa* where there was a loss in a bailment situation that warranted full restitution. A constructive trust may not be suitable in these situations. However, a constructive trust can be invoked to prevent a fraudulent sale of intellectual property or a situation of unjust enrichment or in other situations requiring equitable interventions. These limitations strengthen the proposal for bailment of intellectual property (or some intellectual property). In addition to a constructive trust, a constructive bailment may also protect an intellectual property bailor. A constructive bailment arises where the person having possession of property holds it under certain circumstances where the law imposes upon him the obligation of redelivering it to the owner.[120] For instance, in *Hadfield v Gilchrist*[121] a towing company was held to be a constructive bailee of the car it towed.[122]

Conclusion

Nigerian courts are traditionally persuaded by English decisions.[123] It is however hoped that, at the earliest opportunity, the Nigerian judiciary will be able to express itself differently and independently in the emerging law of virtual property and establish bailment in intellectual property. The legislature has become the last bastion for the progress of technological advancement in commerce and in addressing the changes in the modern law of property. Historically, its intervention has been able to address certain anomalies in the law. The present situation, where intangible property is not capable of possession, even constructive possession, reflects parliamentary indifference and judicial procrastination, rather than the absence of a legal right or factual impossibility. Using *Datateam* as an example, a situation where a data manager is able to log-out a user or owner, change passwords and refuse access to the database or intellectual property is a clear indication of the control and possession required in a lien or bailment. Until such a time as there is parliamentary intervention, from a practical perspective the obvious injustice in *Datateam* will remain. Contractual provisions will be employed to circumvent the effect of *Datateam* by providing clearly in the contract for a right of lien over (or right to withhold) access to the database until fees are fully paid.[124] Media, entertainment and information technology companies should learn to pay adequate attention to their contracts and provide for all their rights contractually, instead of relying on traditional concepts.[125]

Entertainment & Sports Law Review 13 at 13–14; S Wheeldon "Reflections on the concept of 'property' with particular reference to breach of confidence" (1997) 8/2 *Auckland University Law Review* 353 at 369 and 383; DG Carlson "Constructive trusts and fraudulent transfers: When worlds collide" (2019) 103/2 *Marquette Law Review* 366 at 377.

119 *Nemo dat quod non habet*: one cannot give what one does not have.

120 See *Wentworth v Riggs* 143 NYS 955 (Sup Ct NY 1913).

121 538 SE2d 268 (Ct App SC 2000).

122 CM Newman "Bailment and the property / contract interface" (George Mason University Legal Studies Research Paper Series LS 15-12) at 17.

123 English decisions, even with the highest authority of the House of Lords, are only persuasive in Nigerian courts. See *In Re Abdullahi* [2018] 14 NWLR (pt 1639) 272; *Yahaya v State* [2002] 3 NWLR (pt 754) 289; *Lijadu v Lijadu* [1991] 1 NWLR (pt 169) 627 at 648.

124 See P Nolan et al "Do service providers have a lien over data?" (12 August 2014) *Mondaq*, available at: <https://www.mondaq.com/ireland/data-protection/334150/do-service-providers-have-a-lien-over-data> (last accessed 9 December 2022).

125 See *Datateam*, per Lord Justice Davis, id (online), para 40. See also P Susman QC and N Dilworth "Possessory lien does not apply to database" (20 March 2014) *Henderson Chambers Alerter* at 4. The writers of this article successfully represented Datateam in *Datateam*.

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The judiciary is constrained from making changes to traditional legal concepts to suit the overwhelming considerations of technological advancement. The last resort for any hope for reform is apparently the legislature. A law that recognizes bailment and lien in general intangible or intellectual property should be accorded urgent attention. Not only will this achieve justice, it will also expand the frontiers of the secured financing of intangible property in Nigeria; the indirect effect will be access to financing for the development of intellectual property products.

Competing interests. None

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