



The Open
University

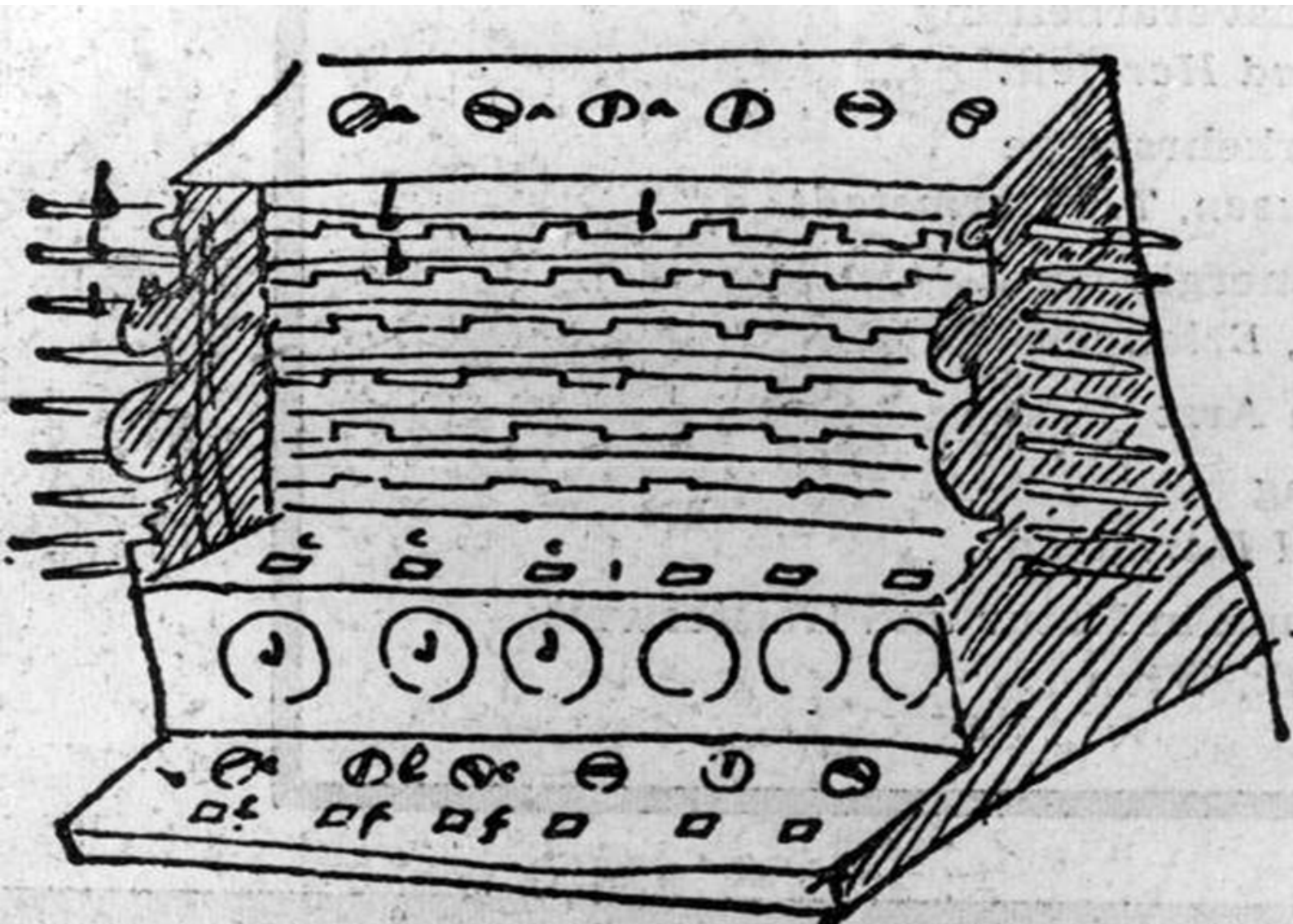
LAW SCHOOL

Equity and New Technological Horizons

8th April 2021
1pm – 6pm (GMT)

A webinar hosted by the [Equity and Trusts Research Network](#) (ETRN), and the [Law, Information, Future, Technology](#) (LIFT) research group of The Open University Law School.

[Register at Eventbrite](#)



Programme

(All timings are GMT)

1:00pm – 1:10pm Introductions

1:10pm – 3:10pm **Panel 1**

3:10pm – 3:40pm Break

3:40pm – 5:20pm **Panel 2**

5:20pm – 5:50pm Open discussion

5:50pm – 6:00pm Closing remarks

This exciting and ground-breaking interdisciplinary seminar explores interpretations, intersections, and tensions between the law of equity and new technologies. Combining equitable doctrine and principles, speculative theories, critical fields of thought, and futurological perspectives the seminar will offer radical insights into a techno-equitable future.

Equity traditionally encompasses fiduciary law, contractual remedies, injunctions, and trusts, operating in and around common law jurisdictions to mitigate the harshness of bright-line rules and legislative encumbrances. Equity also finds form and substance in civil law jurisdictions, and critical, sociological, spiritual, and philosophical analyses of legal thought and practice. Several features of equity's jurisdiction are undergoing re-evaluation in light of new technologies, notably smart contracts, and specific performance, cryptoassets and property definitions, and blockchains and trusts. Yet equity's explicit contribution to the shaping of new technological horizons remains under-theorized.

Technologies have long amplified the reach and transformed the character of rules and laws by exposing them to algorithms and intermingling them with code to create alternative systems and networks of governance and regulation. This meshwork of legal and computer code, jurisdictional and networked practices, human and machinic interfaces exposes new questions and problems for equity. But equity also offers an important lens through which we can analyse and better understand technologies. New technological horizons promise a greater and far more sophisticated optimization of human life and systems than classical computing has achieved. Quantum computers and advanced artificial intelligence will be capable of reasoning, rationalization, simulation, and justification that is truly alien to human understanding. As a last vestige of human discretionary advantage, equity may be subsumed by new machinic intelligences or destroyed by them, or it may emerge anew and tell us inescapable truths about humanity's relationship with its machines.

Panel 1

Chair: Robert Herian

Searching for effective equitable remedies in the age of AI creativity

- Ignas Kalpokas, Associate Professor, Department of Public Communication, Vytautas Magnus University
- Julija Kalpokiene, PhD Candidate, Faculty of Law, Vytautas Magnus University

Today's world is characterised by the trends of datafication and algorithmisation that enable the automation of almost every domain of human life providing greater efficiency and more effective extraction of surplus value (see e.g., Greenfield 2018; Berardi 2021). One domain often thought to be immune to such automation is artistic creativity, as asserted in the seminal accounts by Hofstadter (1979) and Boden (1990). However, advances in machine learning, particularly neural networks, challenge this orthodoxy by creating paintings that mimic existing styles or trailblaze entirely new ones, composing music that ranges from being 'more Bach than Bach' to completely new synthetic sounds, and even writing literary works. Hence, more recent interventions by du Sautoy (2019) and Miller (2020) challenge the orthodoxy of exclusively human creativity while companies such as Alphabet and Spotify are exploring options for AI-generated content potentially leaving human creators behind.

Inevitably, copyright infringements in the process of creating AI-generated output might occur. Whilst there already are ongoing academic discussions as to the subjectivity of AI, instead of taking sides in this debate, this article aims to suggest that new ways to protect (human) authors' equitable interests shall be sought. In this context, it will be examined whether equitable remedies will remain an effective way to protect authors' equitable interests in the age of AI creativity.

It will be suggested that current equitable remedies might not suit to effectively deal with copyright infringements perpetrated by AI. The paper will, therefore, raise questions and prompt a discussion as to what should and could be an adequate, fair, and universal mechanism of ensuring adequate protection or monetary compensation for exploitation of copyrighted works by AI.

What the Dickens is an Algorithmic Fiduciary?

Joseph Savirimuthu, School of Law and Social Justice, University of Liverpool

"...our point of view, once valid in its singularity, has been broken up into an infinite diversity of perspectives. The unexpected constellations of these perspectives, their chance interplay which gives rise to temporary ideas and images, require a new art of perception." Wolfgang Schirmacher, "Art(ificial) Perception: Nietzsche and Culture After Nihilism," *Poesis* (1999):4.

Understanding the legal and policy implications arising from the inclusion of algorithms in a fiduciary relationship is going to be a challenging endeavour. At the risk of oversimplifying the debate, the answer to the question would seem to depend on how the role of the algorithm is viewed within the context of the fiduciary relationship. For doctrinal fundamentalists, fairness, transparency, agency and accountability are likely to be seen as non-negotiable criteria. Legal pragmatists however may take more realist stance. Speed, accuracy and the invisible hand of the market may ultimately be powerful determinants. At the core of these apparent diverging perspectives is the pressing concern of the status and boundaries of human agency within a dynamic environment of automated decision making processes. As the boundaries of human and machine agency become fluid, it is unlikely that existing conceptions and understandings of a fiduciary will remain unchanged. The issues raised and implications for legal doctrine must be treated as a work in progress. A more pressing concern for us now is to articulate what we actually mean when we say that we trust algorithms? The paper attempts to answer this question and proposes an analytical framework that could be used to help clarify the nature of agency as well as the processes that need to be put in place when algorithms mediate relations of a fiduciary nature.

Consumers as Subscribers: time for a new consumer-beneficiary class?

Sally Zhu, Leverhulme Early Career Fellow, University of Glasgow

From the landmark *Donoghue v Stevenson* to the recent European Digital Services and Digital Markets Act, law has been forced to acknowledge the changing relationship between corporations which provide goods and services, and their customers. The creation of a consumer class defined by their vulnerability and need for protection has exempted them from free-market contracting and instituted status-based obligations between businesses and consumers. But they have not yet reached the fiduciary status of relationships such as between agents and principals, or professionals and clients.

One technological development may precipitate changing consumers into beneficiaries; the advent of the Internet of Things and the transformation of consumption goods into streams of services. Conventional businesses exercise power predominantly at the point of sale, and once the goods are delivered or services rendered the relationship ends. IOT goods which require frequent updates and maintenance by the producer challenge these assumptions. The consumer is locked into an ongoing relationship with the corporation characterised by reliance and dependency. They do not 'own' assets, but 'subscribe' to services, effectively depriving them of the autonomy guaranteed by private property and access to resources.

I propose that consumers' ongoing dependency on corporations to provide them with continued service at fair price and quality, justifies establishing an equitable relationship between them. The corporation may be seen as a 'trustee' who retains the legal property, with the consumer as 'beneficiary' of the limited license to use the technology. This exhibits characteristics typical of fiduciary relationships as the corporation has control over the 'property' and data of the consumer, and must exercise extensive discretion over their management in order to fulfil their service. Such discretion cannot be prescribed by legal obligations, but proscribed by equitable doctrines of loyalty, confidentiality, and good faith.

Oil and data: on the problem of possession

Nathan Moore, School of Law, Birkbeck College

This paper considers the problem of possession in light of the distinction between tangible and intangible property. It will explore how technology impacts upon our thinking of possession, and how it serves to redraw the distinction between the tangible and the intangible. What is soon apparent is that the physical nature of a 'thing' is, of course, subject to the ideas that we have about it, and vice versa. Two cases will form the focus of the presentation: *Bocardo SA v Star Energy UK* [2010] UKSC 35, and *Your Response Ltd v Datateam* [2014] EWCA Civ 28. The former considers the status of a subterranean oil field and the means of accessing it. Beyond this, the case goes onto question just what the 'thing' land is, when viewed through the form of an estate. The latter case addresses whether or not data can be possessed, drawing a common sensical (but, perhaps, too common sensical) distinction between hardware and software.

More broadly, the paper will branch out to consider how these cases reflect the perennial philosophical problem of distinguishing between person and object. In so doing, it will not seek to arrive at a 'new' or 'final' method for defining 'personhood' or 'thing-ness', nor will it attempt to 'return' to some sort of 'original' conceptualisation of their difference. Perhaps counter-intuitively, it will argue that subject and object are best left confused. Through harbouring such confusion, or conceptual instability, the paper aims to gesture towards short circuiting that politico-theological holding known, variously, as the 'anthropological machine' (Agamben), the 'paradigm of immunisation' (Haraway/Esposito), the 'apparatus of capture' (Deleuze & Guattari), 'necropolitics' (Mbembe), and so on.

Panel 2

Chair: Nick Piska

- The Immortal Donor
- John Picton, University of Liverpool

Simulations of human decision-making (e.g. chatbots) are now commonplace. In the light of the large amount of personal data recorded on line (e.g. WhatsApp), it is now possible to create algorithmic simulations of people that have died¹. In combination with the charitable trust form, this holds out the possibility of an 'algorithmic trust' – i.e. a charitable fund controlled forever by a simulation of a deceased philanthropist.

At the practical level, this is legally straightforward. In order for the trust to valid, the algorithm needs only to be confined within the law of England and Wales as it changes over time. It must not create private profits, accumulate funds, or stray past baseline public benefit requirements. From the perspective of a donor, the algorithm has the potential to keep a trust practically workable in perpetuity. The algorithm would update the terms of the trust according to the simulated preferences of the dead donor.

This should not be thought far-fetched. In *Protecting Donor Intent: How to Define and Safeguard Your Philanthropic Principles*,² a practical guide for wealthy donors, Jeffrey Cain details one existing foundation with interactive foyer kiosks explaining the life, values and beliefs of the founder to staff.³ Such a donor might be thought to be an enthusiastic adopter of an algorithmic trust if it were possible. Courts acknowledge the drive to immortality. For example, in *Re Woodhams*, Vinelott J referred to donor intention as a, 'will o' the wisp,'⁴ linking the donor's perpetual wishes to an ephemeral and atmospheric ghost.

It is necessary to question critically the desirability of permitting this type of electronic immortality. The less a donor attempts to impress the nature of their personality on funds (e.g. a gift for general humanity, a gift for the relief of poverty) the more altruistic that gift is.⁵ Equally, altruism is economically efficient as funds can be distributed on the basis of need. By contrast, the algorithmically perpetual donor will be broadly egoistic – i.e. a product of the living donor's social identity.

¹M Rothblatt, *Virtually Human: The Promise and Peril of Digital Immortality* (St Martin's, London, 2014).

²J. Cain, *Protecting Donor Intent: How to Define and Safeguard Your Philanthropic Principles* (The Philanthropy Roundtable, 2012).

³Ibid 20.

⁴*Re Woodhams* [1981] 1 WLR 493 (Ch), 502.

⁵P. Singer, 'Famine, Affluence, Morality' (1972) 1 *Philosophy & Public Affairs* 229.

Conscience as emergence

Bernard Keenan, School of Law, Birkbeck College

We are now accustomed to the warning that technology is coming for law. But do we know how? Natural language processing may be one area of focus. Such systems are currently reading and writing, by some descriptions, with a success rate comparable to a three-year-old child. As systems predicated on processing and interpreting human readable text mature to generate with more reliable human readable responses, more and more interpretative labour can be delegated or at least supplemented by such systems.

But what would really be the effect of this? The digitisation of decision-making means the implementation of decision-making cognitive routines. This is indeed within the scope of possibility. But does that mean that the centuries-old need for human adjudication – human conscience, we might say – will be superseded? In a classical-rationalist view of organisational structure this might be the case. But if we shift to a theory of autopoiesis, then we must shift from seeing such institutional decision-making systems, like the courts, as centrally planned and rational. What we may instead expect to see is that automated decisions made by AI systems would lead to a proliferation or at least intensification (in time, and attention) in microdiversity throughout the legal system, particularly if costs of consulting the law fall, as promised. In that scenario, self-organisation – an emergent property generated from microdecisions, rather than an imposed rationality that authorises them – would have more material to refer to, not less.⁶ And judges would not become any less busy.

It is striking that scholars and, to a lesser extent, judges have been concerned about the demise of equity, or what equity represents, for quite some time. Perhaps law as technology generates as much uncertainty as it solves. Perhaps this is where conscience – as a symbolically generalised medium for communicating a deviation from the rule – finds its continuously emerging function.

⁶Niklas Luhmann, *Organization and Decision*, trans. Rhodes Barrett (Cambridge: Cambridge University Press, 2018), 181–207.

Tokens of Equity

Robert Herian, School of Law, The Open University

Equity is having a moment of judgment (or perhaps arbitration, to follow Aristotle's distinction) in the tempestuous world of crypto. I refer in particular to the back-to-back decisions in *AA v Persons Unknown* [2019] EWHC 3556 (Comm), and *Ruscoe v Cryptopia* [2020] NZHC 728, where equitable definitions of property, trusts, and injunctions are central to judicial reasoning and conclusions. How should we interpret this, and what might the ramifications be?

Dealing with the discombobulating uncertainties that crypto insists on unleashing upon commercial actors (investors, exchange operators, account holders), regulators, liquidators, etc., led judges in both cases to equity as the best or, perhaps, only means of getting to grips with the subject. On the one hand, we may choose to view this as a reasonable judicial use of the tools of procedure and resolution available to align crypto with the easy familiarity of known contexts, such as fraud. Alternatively, we can explain Equity's "moment" through the frame it places around settled human desires to, as Sarah Worthington (2006) says, manipulate traditionally accepted concepts of property. In the imaginary of our techno-social age this makes equity not only a solution but also a problem. Equity has long provided for those wishing to stake a claim, 'take actual delivery', possess and control, push onwards to ownership, and define interests in objects of value that lie indistinguishably hidden in a bulk or fund, constructively imagined, or intangible. In the expansive loci of desire of today's global markets, crypto commodities are the new face of usable and tradable wealth, a stubbornly uncertain and contestable situs supported, perhaps even created, by equity. Conjured from computational labour and cold, logical operations, equity is, once again, on hand to chaperone these things into action.