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Jigsaws and Curiosities: The Unintended Consequences of Misuse of Private Information Injunctions

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This article examines the unintended consequences of injunctions granted in misuse of private information (MPI) disputes. The MPI action enables successful claimants to obtain injunctions, often anonymised, to prevent publication of a story (or parts of it) that infringe upon their Article 8 privacy rights. This article considers cases such as *Giggs v News Group* and *PJS v News Group* which highlight the challenges of MPI injunctions; they may draw additional attention to disputed material, a phenomenon that has been colloquially termed the ‘*Streisand effect*’. It *affords specific attention to the phenomenon of ‘jigsaw identification’* which may result from MPI injunctions that only restrict the publication of *specific parts of a dispute, such as the claimant’s identity*. It *proceeds to discuss three primary reasons for unintended consequences in some MPI cases, including psychological reactance, social countering and the possibilities afforded by new online technologies*. The article concludes with a close analysis of the recent Supreme Court decision in *PJS* where the judicial response was to modify the problem that MPI injunctions seek to address. Changing the purpose of such injunctions, and therefore the outcomes by which their efficacy is to be gauged, enables the courts to justify their continuation in the face of widespread publication of private information. But this reasoning process relies on newly constructed, tenuous distinctions between press/Internet dissemination and secrecy/intrusion elements of privacy, and it necessarily entails some sacrifice of the wider credibility of law.

Jigsaws and Curiosities: The Unintended Consequences in Misuse of Private Information Injunctions

Introduction

As the claimant in the recent Supreme Court case of *PJS v News Group*¹ might ruefully agree, actions have consequences; some intended, some not. These latter unintended consequences are the concern of this article. Interest in unintended consequences can be traced to an influential article by Merton in the 1930s.² Here Merton made two claims with which judges in misuse of private information (MPI) cases are undoubtedly familiar. First, the rationality of a particular purposive action does not necessarily guarantee the success of its outcome.³ Second, correctly anticipating consequences of any given action will be hindered by inherent limitations in human knowledge, the limitations of prediction itself and the tendency to overlook remoter or less immediate consequences of a given act.⁴ Though Merton's observations did not apply to law specifically, they are highly pertinent to law as a rule-based form of 'purposive social action' used to regulate and effect social change. Recognition of the limits of laws to successfully fulfil this function, and its tendency to produce unintended results is by no means new. In *The Republic*, Plato said of legislators:

‘They make ... [*laws*] then try to improve them, and constantly expect the next breach of contract to be the last *one*, and likewise for ... crimes ..., because they are unaware that in fact *they're slashing away at a kind of Hydra* [a mythical beast who grows two heads when one is cut off]’.⁵

Such unintended consequences have arisen from misuse of private information (MPI) law. MPI is a common law tort⁶ that rapidly emerged in the decade or so following the enactment of the Human Rights Act 1998, constructed from a fusion of traditional breach of confidence and ECtHR jurisprudence.⁷ MPI disputes primarily involve high profile, 'celebrity' claimants seeking to protect their Article 8 ECHR privacy rights against media defendants relying on the Article 10 right to publish a story or expose about them. Using MPI judges apply a two-stage test, first asking whether the claimant had a reasonable expectation of

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¹ *PJS v News Group Newspapers Ltd* [2016] UKSC 26.

² Robert K. Merton, 'The Unanticipated Consequences of Purposive Social Action' *American Sociological Review*, Vol 1, No 6 (Dec 1936) 894-904.

³ *Ibid* 896.

⁴ *Ibid* 898-903. Merton also lists values as a factor.

⁵ Plato, *The Republic* (Oxford 1998) [426e].

⁶ Confirmed in *Vidal-Hall v Google* [2015] EWCA Civ 311.

⁷ Rebecca Moosavian, 'Charting the Journey from Confidence to the New Methodology' (2012) 34(5) *EIPR* 324-335.

privacy in relation to the disputed information, and if so, proceeding to undertake a balancing exercise⁸ between the competing privacy and free expression rights.⁹

This paper considers the unintended consequences of the development and enforcement of MPI law. It will focus on a specific species of unintended consequence; that of perverse incentives. According to Bouden, ‘there is a perverse effect when two (or more) individuals, in pursuing a given objective, generate an unintended state of affairs which may be undesirable from the point of view of both or one of them.’¹⁰

This article considers perverse incentives in MPI by analysing why injunctions to prohibit the dissemination of private information sometimes have the opposite effect, and how judges dealing with such cases have responded. It first considers select examples such as *Giggs v News Group* and the recent *PJS v News Group* where such unintended consequences played out. These cases highlight the challenges of MPI injunctions; they may draw more attention to the disputed material, a phenomenon that has been colloquially termed the ‘Streisand effect’ as per the US litigation in *Streisand v Adelman*. This article affords specific attention to the phenomenon of ‘jigsaw identification’ which may result from MPI injunctions that only restrict the publication of specific parts of a dispute, such as the claimant’s identity. It proceeds to discuss three primary reasons for unintended consequences in the cases discussed. It argues that the combination of psychological reactance, social countering and the possibilities afforded by new online technologies may cause unintended consequences that undermine the core purpose of privacy protecting injunctions. The article concludes with a close analysis of the recent Supreme Court decision in *PJS v News Group*¹¹ which encapsulates how the courts have responded to unintended consequences in MPI cases. The judicial response has been to modify the problem that MPI injunctions seek to address. Changing the purpose of such injunctions, and therefore the outcomes by which their efficacy is to be gauged, enables the courts to justify their continuation in the face of widespread publication of private information.

[1] The ‘Giggs Effect’

One feature of MPI law that raises unintended consequences in the form of perverse incentive is the granting of privacy-protecting injunctions, including interim injunctions. The proliferation of anonymised injunctions directly paralleled the emergence of MPI.¹² Such injunctions ‘*restrain*’ a person from publishing information which concerns the applicant and is said *to be confidential or private ... [and] the names of either or both of the parties to the proceedings are not stated.*¹³ In order to obtain an interim injunction – which preserves privacy pending trial – an applicant must show he is likely to establish that publication should

⁸ For an analysis of the metaphor of balancing in MPI case law see: ‘A Just Balance or Just Imbalance? The Role of Metaphor in Misuse of Private Information’ [2015] *Journal of Media Law*, Vol 7(2), 196-224.

⁹ *McKennitt v Ash* [2006] EWCA Civ 1714, [2008] QB 73; *Murray v Express Newspapers Plc* [2008] EWCA Civ 446.

¹⁰ Raymond Bouden, *The Unintended Consequences of Social Action* (Macmillan Press, 1982, London) 14.

¹¹ *PJS* Supreme Court (n 1).

¹² Lord Neuberger MR, ‘Report of the Committee on Super-Injunctions: Super-Injunctions, Anonymised Injunctions & Open Justice’ 2011. <<https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/super-injunction-report-20052011.pdf>> (accessed 16 Oct 2016) [1.8]-[1.13].

¹³ *Ibid* p iv.

not be allowed at trial.¹⁴ When deciding whether to grant an interim injunction one factor the court must consider is ‘the extent to which the material has, or is about to, become available to the public.’¹⁵

The Civil Procedure Rules 1998 state that though there is a general requirement that legal hearings are public, they can be made private, in whole or part, where publicity would defeat the object of the hearing, it involves confidential information or is necessary in the interests of justice.¹⁶ Furthermore, the CPR authorise the courts to protect the identity of any party where necessary to protect their interests.¹⁷ However, such orders derogate from the usual principles of open justice.¹⁸ Any MPI judgment given must provide a comprehensible account of the reasons for the decision (in line with principles of open justice), but must also be careful not to undermine the aims of any privacy-protecting injunction granted.

As Part 1.2 demonstrates, the ability of such orders to protect information in an online era has been called into question by certain cases, and this is partly due to a phenomenon that has been colloquially termed the ‘Streisand effect.’

[1.1] The ‘Streisand Effect’

This ‘effect’ emerged from a dispute between Hollywood star Barbara Streisand and Kenneth Adelman who runs a small organisation called the California Coastal Records (CCR) Project. The latter undertook a project to sequentially photograph and document the full stretch of California coastline. Amongst the 12,000 photographs on the CCR website were images of Streisand’s cliff-top Malibu estate, which the site labelled as such. Barbara Streisand brought an action alleging various privacy violations under Californian law, seeking the somewhat audacious sum of \$50 million damages and a permanent injunction. Yet, as news of the legal dispute spread, there was a substantial increase in the number of visitors to the CCR website to access the disputed photos of Streisand’s home. Goodman J rejected Streisand’s privacy arguments, claiming ‘Any intrusion on these facts is de minimus’.¹⁹

The ‘Streisand effect’ is explained in an article in *The Economist*,²⁰ and has been subsequently been afforded passing attention in certain US law journals.²¹ The article defines the ‘Streisand effect’ thus:

¹⁴ Section 12(3) Human Rights Act 1998. Further detailed guidance on the terms of such injunctions is set out in Practice Direction (Interim Non-Disclosure Orders) [2012] 1 WLR 1003. See also: *JIH v News Group Newspapers Ltd* [2011] EWCA Civ 42, [21].

¹⁵ Section 12(4)(a)(i) Human Rights Act 1998.

¹⁶ Rule 39.2(1) & (3), Civil Procedure Rules 1998.

¹⁷ Rule 39(2)(4), Civil Procedure Rules 1998, states: ‘The court may order that the identity of any party or witness must not be disclosed if it considers non-disclosure necessary in order to protect the interests of that party or witness.’. The test for anonymization is whether there is there a general public interest in identifying the claimant that justifies curtailing his Article 8 right: *Home Secretary of State for Home Department v AP (No 2)* [2010] UKSC 26, [7] (Lord Rodger). Applied in *Donald v Ntuli* [2010] EWCA Civ 1276 [52]; *XJA v News Group* [2010] EWHC 3174 [6].

¹⁸ See discussion of the principle of open justice: Lord Neuberger (n 12) [1.17]-[1.35].

¹⁹ *Streisand v Adelman* (2003) Los Angeles Superior Court SC 077 257, p 37. <<http://www.californiacoastline.org/streisand/slapp-ruling.pdf>> (accessed 16 Oct 2016)

²⁰ *The Economist Online*, ‘What is the Streisand Effect?’ (16 April 2013) <<http://www.economist.com/blogs/economist-explains/2013/04/economist-explains-what-streisand-effect>> (last accessed 16 Oct 2016)

[It] describes how efforts to suppress a juicy piece of online information can backfire and end up making things worse for the would-be censor.’²²

For this reason the ‘Streisand effect’ is a textbook example of perverse incentive; attempts to contain or suppress information lead to its wider dissemination. Yet this dynamic is by no means a new phenomenon, as the Spycatcher affair demonstrates.

Spycatcher; Perverse Incentive in the Analogue Era

The 1980’s Spycatcher litigation concerned the controversial memoir of retired MI5 officer Peter Wright. The book included allegations that MI5 had ‘bugged and burgled’ their way across London, spied on Prime Minister Harold Wilson and it recounted other forms of intrigue and espionage such as assassination attempts. The book could not be published in the UK due to Official Secrets legislation and the terms of Wright’s employment contract. But he was based in Tasmania and sought to publish in Australia.

In September 1985 the UK government litigated in the Australian courts for an injunction to prevent publication of the book. This was initially obtained, though ultimately unsuccessful, and Wright’s publisher thus undertook arrangements to start publishing the book in the US, and later Australia and various other countries.²³ In June 1986 The Observer and Guardian newspapers reported on the Australian court proceedings and included an outline of the Spycatcher allegations. In response the Attorney-General applied to the English courts alleging breach of confidence and obtained interim injunctions against these papers to prevent further reporting. In April 1987 The Independent and other newspapers in the US and Australia published articles referring to the allegations. The Sunday Times obtained serialization rights to Spycatcher and published the first instalment on 12 July 1987, one day prior to the book’s US publication. The Attorney-General brought proceedings for contempt of court and The Times was prevented from further serialization. The Observer and Guardian promptly applied to discharge the interim injunction against them on the basis that the contents of the book were no longer confidential. Sir Nicholas Browne-Wilkinson V-C discharged the injunctions, acknowledging that modern technologies (rather quaintly, ‘electronics and jumbo jets’) allowed news to reach an international audience whilst the court’s powers were restricted to national borders. He continued:

²¹ See, e.g.: D Doherty, ‘Downloading Infringement: Patent Law as a Roadblock to the 3D Printing Revolution’ (2012) Harvard Journal of Law & Technology 26(1) 353-374, 363; S LoCasio, ‘Forcing Europe to Wear the Rose-Coloured Google Glass: The Right to Be Forgotten and the Struggle to Manage Compliance Post Google Spain’ (2015) Columbia Journal of Transnational Law 54(1) 296-331, 308-309; E Rosenblatt, ‘Fear & Loathing: Shame, Shaming and Intellectual Property’ (2013) De Paul Law Review, 63(1), 1-48, 26-27.

²² The Economist (n 20). A range of further examples of the ‘Streisand effect’ are set out in: BBC News, ‘The Perils of the Streisand Effect’ (31 July 2014) <<http://www.bbc.co.uk/news/magazine-28562156>> (accessed 16 October 2016). This article also indicates that the term was coined by Mike Masnick, founder of the Techdirt website in 2005.

²³ Attorney General v Observer Ltd & Others [1990] 1 A.C. 109.

‘Once the news is out by publication in the United States and the importation of the book into this country, the law could, I think be justifiably accused of being an ass and brought into disrepute if it closed its eyes to that reality and sought by injunction to prevent the press or anyone else from repeating information which is now freely available to all. ... *the court should not make orders which would be ineffective to achieve what they set out to do.*’²⁴

Though this decision was later reversed by the House of Lords, copies of Spycatcher started trickling into Britain in increasing quantities. Between August & November 1987 Spycatcher featured consistently on the New York Times best-seller list and was published in Canada, Ireland and various European countries. Throughout this time thousands of copies of the book filtered into Britain from abroad, at least partly due to the high profile of proceedings. Spycatcher allegations were also repeated in English-speaking Danish and Swedish radio broadcasts, accessible in the UK.²⁵

At the final trial in December 1987 Scott J discharged the injunctions against the papers on the basis the information was now public and no longer secret.²⁶ After various appeals Spycatcher reached the House of Lords where the majority Law Lords agreed the injunction should be discharged because the information was now public so no further damage could be done to the public interest.²⁷ Lord Keith explained that:

‘a very substantial number of copies have in fact been imported. So the contents of the book have been disseminated world-wide and anyone in this country who is interested can obtain a copy without undue difficulty.’²⁸

Similarly, Lord Goff set out the first of three limiting principles that remain an integral part of the doctrine of confidence from which MPI emerged:

‘the principle of confidentiality only applies to information to the extent that it is confidential. In particular, once it has entered what is usually called the public domain (which means no more than that the information in question is so generally accessible that, in all the circumstances, it cannot be regarded as confidential) then, as a general rule, the principle of *confidentiality can have no application to it.*’²⁹

As in *Streisand v Adelman* it seems that the attempt in Spycatcher to suppress the information fostered a curiosity and stimulated a demand for the book that otherwise may not have occurred. This case also raises the question of whether the act of censorship itself may create a demand for specific information rather than the nature and content of the information per se. These propositions are afforded further examination in Part 3.1.

²⁴ Attorney General v Guardian Ltd [1987] 1 WLR 1248, 1269H-1270A.

²⁵ For additional details of this factual background see: Spycatcher (n 23) 126-128 (Scott J)

²⁶ Ibid (Scott J) 117-174. Scott J did order the Sunday Times to account for profits due to publication.

²⁷ Ibid 258H-259H (Lord Keith); 267B-C (Lord Brightman); 282C, 283C (Lord Goff); 293E-F (Lord Jauncey). But see: 271B-C, 276A-G (Lord Griffith, dissenting). The Law Lords ordered the Sunday Times to account for profits accrued from its serialisation of Spycatcher.

²⁸ Ibid 254 D-F (Lord Keith)

²⁹ Ibid 282C-D.

[1.2] The ‘Giggs Effect’

A number of contemporary MPI cases have followed the broad Streisand-Spycatcher dynamic. The earliest high-profile example was the Giggs (formerly CTB) v News Group litigation which highlighted an unintended consequence of privacy-protecting injunctions that prohibit the dissemination of certain information; that they may draw more attention to the disputed material by piquing wider curiosity about it. As is well known, the dispute involved footballer Ryan Giggs who initially obtained an anonymised injunction to prevent publication of information relating to an extra-marital affair he had with the second defendant, Imogen Thomas. The sequence of events – and particularly their timeframe – provide a fascinating case study of perverse incentives in effect.

On 14 April 2011 Eady J granted a temporary anonymised injunction to prevent The Sun running a story about the applicant’s extra-marital affair.³⁰ On the same day The Sun ran a story revealing that an anonymous footballer had an affair with Imogen Thomas. On 8 May Giggs was named as ‘CTB’ on Twitter and some Twitter users started naming him. Speculation as to CTB’s identity continued on Twitter. Murray writes that it became apparent that ‘privacy injunctions were ... creating an informational vacuum which users of [social networking platforms] would quickly fill without care for accuracy or the well-being of the people they were naming.’³¹

On 16 May, in a published judgment outlining reasons to date, Eady J upheld the injunction on the basis that the claimant would be likely to obtain a permanent injunction at trial.³² Despite widespread online publication of Giggs’ identity, Eady J explained that in cases involving private information the public/private distinction is not ‘black and white’. Instead he proposed considering the specific facts of the case and deciding whether ‘there remains a reasonable expectation of **some** privacy’, even where some publication of information has occurred.³³ On 20 May Giggs’ lawyers applied for a Norwich Pharmacal order³⁴ requiring Twitter to disclose within 7 days the identities of users who had published his name on the site.³⁵ This led to a substantial increase in traffic to the Twitter site which saw a 22% spike in visitors, its busiest ever day in the UK.³⁶ Ryan Giggs became the top trending item on Twitter, with thousands of users naming Giggs alongside the prefix #IamSpartacus.³⁷ On 22

³⁰ The 14th April decision and reasons are outlined in *Giggs (formerly CTB) v News Group Newspapers Ltd & Another* [2011] EWHC 1232 [1].

³¹ A Murray, *Information Technology Law*, The Law & Society, 2nd ed (Oxford, OUP, 2013) 145.

³² *Giggs* 14 April (n 30) [37]

³³ Emphasis added. *Ibid* [28].

³⁴ *Norwich Pharmacal Company v Customs & Excise* [1974] AC 133

³⁵ BBC News Online, ‘Footballer Obtains Twitter Disclosure Order’ (21 May 2011) <<http://www.bbc.co.uk/news/technology-13477811>> (accessed 16 Oct 2016); The Guardian Online, ‘Twitter Faces Legal Action by Footballer over Privacy’ (20 May 2011) <<https://www.theguardian.com/media/2011/may/20/twitter-sued-by-footballer-over-privacy>> (accessed 16 Oct 2016).

³⁶ The Guardian online, ‘Twitter Traffic Sees 22% Spike in Rush to Find Identity of Injunction Footballer’ (23 May 2011) <<https://www.theguardian.com/technology/2011/may/23/twitter-traffic-injunction-footballer>> (accessed 16 Oct 2016).

³⁷ ‘By threatening Twitter users, Giggs’ legal team had inadvertently triggered Twitter’s autoimmune response known as #IamSpartacus. ... The idea is, as in the classic movie *Spartacus*, to form a single group meaning that an attack on one is an attack on all. ... by banding together the group defend the users under threat.’ Murray (n 31) 145.

May The Scottish Herald, not covered by English law, identified Giggs as CTB.³⁸ The following day, 23 May, saw two hearings in the case. First, the defendants applied to vary the terms of the order to allow publication of Giggs' name which was now in the public domain due to widespread publication. In a 2.30pm judgment Eady J refused this, explaining 'the modern law of privacy is **not concerned solely with secrets**: it is also concerned importantly with **intrusion**.'³⁹ Shortly after 3.30pm the same day, whilst debating injunctions in Parliament and thus protected by parliamentary privilege, MP John Hemming named Ryan Giggs as CTB⁴⁰ Immediately following this, the defendants again applied for anonymity to be removed. In a terse judgment Tugendhat J denied the application and reiterated Eady J's earlier point. He continued,

'The fact that tens of thousands of people have named the claimant on the internet confirms that the claimant and his family need protection from intrusion into their private and family life. The fact that a question has been asked in Parliament seems to me to increase, and not to diminish the strength of his case'⁴¹

The dispute lingered on and continued to an uneasy end when Giggs' action was struck out months later due failure to meet court deadlines and the injunction thus no longer had effect.⁴²

Giggs v News Group case is a fascinating example of unintended consequences, but other MPI cases also illustrate similar difficulties involved in privacy injunctions. For example, around the same time as the Giggs litigation Jeremy Clarkson was revealed as the claimant in *AMM v HXW*⁴³ in broadly similar circumstances, later claiming such injunctions are 'pointless' in an online era.⁴⁴ A further example is afforded by Sir Fred Goodwin's unsuccessful attempt to prevent publication of his adulterous affair with a work colleague. Goodwin (formerly MNB) was initially granted an anonymised injunction.⁴⁵ Some weeks later, Lord Stoneham on behalf of Lord Oakeshott identified Goodwin as the claimant in a parliamentary question.⁴⁶ The defendant applied to discharge the injunction that same day.

³⁸ The Herald Online, 'Internet Storm as Injunction Footballer Identified' (23 May 2011) <http://www.heraldscotland.com/news/13030446.Internet_storm_as_injunction_footballer_identified/> (accessed 16 Oct 2016).

³⁹ Emphasis added. *Giggs (formerly CTB) v News Group Newspapers Ltd* [2011] EWHC 1326 [23].

⁴⁰ Hemming started a question, stating: 'With about 75,000 people having named Ryan Giggs on Twitter, it is obviously impracticable to imprison them all, and with reports that Giles Coren also faces imprisonment' before being interrupted and admonished by the Speaker. A number of MPs who followed Hemming in the debate, including the Attorney General and Chuka Umunna, criticized his actions. HC Hansard, vol 528, col 638 (23 May 2011).

⁴¹ *Giggs (formerly CTB) v News Group Newspapers Ltd* [2011] EWHC 1334 [3].

⁴² Overview of ongoing events following this are set out at *Giggs (previously known as CTB) v News Group Newspapers Ltd* [2012] EWHC 431 [21]-[54]. Here the claimant's application for relief from strike out was refused.

⁴³ [2010] EWHC 2457

⁴⁴ The Guardian Online, 'Jeremy Clarkson Lifts 'pointless' Injunction Against Ex-wife' (27 October 2011) <<https://www.theguardian.com/media/2011/oct/27/jeremy-clarkson-lifts-injunction> > (accessed 16 Oct 2016). See also: U Smartt, 'Twitter Undermines Superinjunctions' (2011) Comms. L. 16(4), 135-139, 136-137.

⁴⁵ Outlined at *Goodwin (formerly MNB) v News Group* [2011] EWHC 528 [1]-[4]

⁴⁶ Lord Stoneham stated: 'Does [my noble friend] accept that every taxpayer has a direct public interest in the events leading up to the collapse of the Royal Bank of Scotland? So how can it be right for a super-injunction to hide the alleged relationship between Sir Fred Goodwin and a senior colleague? If true, it would be a serious breach of corporate governance and not even the Financial Services Authority would be allowed to know about it. Hansard HL vol 727, col 1490 (19 May 2011).

Tugendhat J did not discharge the injunction, but varied it so that Goodwin could be named and maintained anonymity for the female colleague (VBN) with whom he had an affair.⁴⁷

PJS; the Supreme Court deals with Unintended Consequences

PJS's attempts to restrain publication of his extra-marital encounters returned the issue of unintended consequences to the fore in April 2016. PJS had obtained an anonymous injunction on 22 January.⁴⁸ But on 6th April a popular US magazine published the story and identified PJS, promptly followed by further publications in America, Canada and Scotland. This led to online dissemination of the protected information, with Internet users naming PJS on websites and social networking sites. The claimant's solicitors monitored and removed the private information where possible. The respective judgments of the Court of Appeal and the Supreme Court provide subtly contrasting narratives of these facts, which correspond to their diverging findings.⁴⁹

On 11 April the House of Commons Speaker, John Bercow, banned MPs from naming PJS in parliamentary debate following reports that an MP reveal it.⁵⁰ The next day News Group applied to the Court of Appeal to discharge the injunction,⁵¹ arguing that PJS's identity had entered the public domain and the protective injunction thus no longer served a useful purpose.⁵² The defendants adduced supporting evidence, including numerous online articles identifying the claimant and 'Google trends' graphs indicating 'a massive increase' in online searches relating to PJS⁵³ (though these statistics are unfortunately not set out in the judgment). The Court of Appeal reiterated the distinction between public domain issues in breach of confidence and misuse of private information, confirming that widespread publication need not be fatal to an MPI claimant.⁵⁴ But it nonetheless found in News Group's favour, agreeing to discharge the injunction due to widespread publication. Amongst the reasons for this decision, Jackson LJ seemed to indicate that the injunction would make little difference to wider coverage of the story,⁵⁵ and that, crucially, 'the court should not make orders which are ineffective.'⁵⁶ The approach of the Supreme Court which reversed this decision is subjected to further analysis in Part 4.

Counter-examples

Streisand, Giggs and PJS are very specific (and illuminating) instances of the unintended consequences of suppressing material. But, it must be acknowledged that they are mere

⁴⁷ Goodwin (formerly MNB) v News Group Newspapers Ltd [2011] EWHC 1309 [29]. Goodwin did not oppose being named, but opposed discharge of injunction.

⁴⁸ PJS v News Group Ltd [2016] EWCA Civ 100, [2016] All ER (D) 248 Jan.

⁴⁹ Contrast the following: PJS v News Group Newspapers Ltd [2016] EWCA Civ 393, [15]-[17]; PJS Supreme Court (n 1) [7], [9] (Lord Mance).

⁵⁰ The Telegraph Online, 'Celebrity 'threesome' injunction: MP plans to name mystery couple in House of Commons' (11 April 2016) <<http://www.telegraph.co.uk/news/2016/04/10/celebrity-threesome-injunction-mp-plans-to-name-mystery-couple-i/>>; The Telegraph Online, 'Celebrity Injunction: John Bercow bans MPs from breaking high profile couple's gagging order' (11 April 2016) <<http://www.telegraph.co.uk/news/2016/04/11/john-bercow-bans-mps-from-naming-celebrity-couple-in-threesome-i/>> (accessed 16 Oct 2016).

⁵¹ PJS Court of Appeal (n 49) [20]

⁵² Ibid [20], [24]

⁵³ Ibid [21]-[22]. See also: PJS Supreme Court (n 1) [8].

⁵⁴ PJS Court of Appeal (n 49) [35]-[39].

⁵⁵ 'If the interim injunction stands, newspaper articles will continue to appear recycling the contents of the redacted judgment and calling upon PJS to identify himself. Websites discussing the story will continue to pop up. As one is taken down, another will appear. The process will continue up to the trial date.' Ibid [47](iv)

⁵⁶ Ibid [47](vii).

examples and there are many more cases where MPI injunctions appear to have been effective. The identities of most anonymised claimants remain hidden beneath a range of cryptic three-letter pseudonyms. *Contostavlos v Medhaun*⁵⁷ indicates that injunctions may work effectively in an online context. Here the claimant sought the continuation of an injunction to prevent online dissemination of intimate footage recorded by her former boyfriend via various websites, including that of the first defendant. Tugendat J continued the order prohibiting disclosure of the footage or stills. He also confirmed that it had been effective against many of the second defendants, internet users who shared the footage:

*‘The steps taken by [the claimant’s solicitors to serve the defendants] have been so successful that by the time I heard the application ... the evidence was that people were complaining that they could not find on the internet a copy of the video’.*⁵⁸

Additionally, *Mosley v News Group* shows that there may be substantial interest in a story irrespective of the presence of an injunction. Here, in the 5 days⁵⁹ between video footage of Mosley’s liaisons with sex workers being posted onto the defendant’s website and his application for an interim injunction to remove it, over 1 million people viewed it.⁶⁰ This led to the court’s refusal to grant an interim injunction on the basis that it would make little practical difference at this stage and would amount to a ‘vain gesture’.⁶¹

Nonetheless, these counter-examples do not detract from the fact that, in certain cases, privacy protecting injunctions are ineffective, or may even seem to have opposite effects to those intended.⁶² One feature of MPI cases that arguably exacerbates such unintended consequences is the partial nature of injunctions granted. Orders only partially restrict or censor⁶³ a story, meaning that select facts concerning disputes will be publicised via the judgment and/or injunction terms. But anonymising a claimant or restricting parts of a disputed story may lead to increased (and intrusive) speculation and ‘jigsaw identification’. It is to this phenomenon that discussion now turns.

[2] Injunctions & Jigsaws

As outlined at Part 1, in order to uphold principles of open justice judges issue orders that restrict information about the parties and the specifics of disputes no more than necessary in order to preserve their Art 8 privacy right. Such ‘partial injunctions’ restrict only select features of a dispute, such as the parties’ names or certain details of a story. In some cases

⁵⁷ [2012] EWHC 850

⁵⁸ *Ibid* [27].

⁵⁹ The defendant published its story on 30th March and the claimant applied for an injunction on 4th April: *Mosley v News Group Newspapers Ltd* [2008] EWHC 687 [1], [3].

⁶⁰ Evidence indicated that the online article was accessed approximately 435,000 times and the footage was accessed over 1,420,000 times: *ibid* [7]-[8].

⁶¹ *Ibid* [34].

⁶² Smartt (n 44) 137.

⁶³ The use of the term ‘censorship’ in this article is not intended to imply condemnation of non-disclosure orders. It simply refers to injunctions as ‘a value-based attempt to control of interfere with the production and/or dissemination of verbal or pictorial information’: J Olson & V Esses, ‘The Social Psychology of Censorship’ in *Interpreting Censorship in Canada* (eds: Klaus Petersen & Allan C Hutchinson) (Toronto, University of Toronto Press, 1999) 268.

these partial restrictions have, paradoxically, led to intrusive speculation and mis-identification of the relevant claimant. Over the course of 2011, various high profile individuals were incorrectly named as being involved in MPI litigation, including: Jemima Khan, Ewan McGregor and Gaby Logan. This phenomenon is understood with reference to the metaphor of a jigsaw.⁶⁴ In *Donald v Ntuli* the Court of Appeal defined jigsaw identification as:

*'the risk that anonymization can give rise to, ... whereby anonymization may be undermined by correctly identifying someone as a result of relating separate snippets of information or, equally unfortunately, it may lead to the wrong person being identified by the media misaligning the snippets.'*⁶⁵

This statement acknowledges that jigsaw identification can be an unintended and unwelcome consequence of the anonymization process. As the court in *Goodwin* explained, the various separate 'snippets' of information may be publicly available and may not necessarily identify a claimant. But the alignment of these 'pieces' may undermine an injunction because 'The conjunction of publicly available information with the report of proceedings may well lead to *'two and two' being put together.'*⁶⁶ As Solove and Schwartz have noted (in a different context) the risk of non-personally identifiable information being pieced together to produce personally identifiable information increases with the existence of technologies like the internet and 'skilful Googlers'.⁶⁷ This risk requires the courts to carefully consider the content of their judgments which may provide information that could contribute to the 'jigsaw identification' of the party the court is trying to protect, as recently acknowledged by Laing J in *AMC v News Group*.⁶⁸ But the issue of jigsaw identification has also led the courts to experiment with the terms and scope of privacy-protecting injunctions when attempting to minimise such risks. First, they considered the so-called 'super'-injunction option. Second, they have assessed which specific parts of a story are best restricted to minimise the risk of jigsaw identification.

Avoiding the Jigsaw; Super-Injunctions

'Super'-injunctions have often been confused with anonymised injunctions but differ from that latter in one crucial respect; as well as preventing publication of private information about an applicant they also restrain publicising the very existence of the order and proceedings. In MPI cases they were rarely granted and then, only on a temporary basis.⁶⁹ But the cases of *DFT v TDF*⁷⁰ and *Donald v Ntuli*⁷¹ involved claimants arguing that a 'super'-injunction was necessary to prevent jigsaw identification and protect their identity (and thus their Art 8 privacy right). In the former case, the applicant argued that Sharp J should continue a previously granted super-injunction in order to prevent the 'drip drip'

⁶⁴ The term was used by Sir David Calcutt QC, Report of the Committee on Privacy & Related Matters (Cm 1102, HMSO, 1990), [7.49]; recommendation 8 (p 75).

⁶⁵ Emphasis added. *Donald v Ntuli* (n 17) [55]. Similar points regarding anonymization and jigsaw identification were reiterated in: *ZYT & BWE v Associated Newspapers Ltd* [2015] EWHC 1162, [15].

⁶⁶ *Goodwin* (n 45) [33].

⁶⁷ P Schwartz & D Solove, 'The PII Problem: Privacy & a New Concept of Personally Identifiable Information' (2011) 86 NYUL Rev 1814, 1842-1845.

⁶⁸ *AMC & KLJ v News Group Newspapers Ltd* [2015] EWHC 2361 [4]. See also: *Goodwin v News Group Newspapers Ltd* [2011] EWHC 1437 [148] (Tugendhat J).

⁶⁹ Lord Neuberger (n 12) iv.

⁷⁰ *DFT v TDF* [2010] EWHC 2335

⁷¹ *Donald v Ntuli* (n 17).

process⁷² of jigsaw identification which would defeat the purpose of the action. Pointing to recent incidents, he argued publication of the injunction

‘will, inevitably, lead to press and internet speculation as to the identity of the applicant. Such speculation will itself cause the applicant distress and will interfere with his Art 8 rights. Such **speculation risks breaches of the injunction** taking place in forums on the internet.’⁷³

Sharp J found that the ‘super injunction’ element of the order was not necessary,⁷⁴ though otherwise continued the anonymised order in its existing form. Similar arguments by the claimant in *Donald v Ntuli* were rejected by the Court of Appeal as ‘unpersuasive’ as an anonymity provision would provide adequate protection against such identification.⁷⁵

Avoiding the Jigsaw; Anonymise or Restrict Facts?

Another series of cases illustrates the courts trying to decide whether a claimant’s privacy is best served by protecting his identity or by restraining publication of the details of a dispute. It should be noted that, in any event, information such as intimate details of sexual activity and photographs are viewed as particularly intrusive and will invariably be restricted irrespective of the parties’ anonymisation.⁷⁶ But many MPI disputes involve splitting stories into ‘discrete parts’ and undertaking the balancing exercise in relation to each one to decide which parts are protectable. Some cases indicate that the publication of certain facts, such as marital status⁷⁷ or job description⁷⁸ may be disputed by claimants where such facts could potentially facilitate the process of jigsaw identification. However, the court may decide that an outline of dispute can be provided alongside naming the claimant if providing both will not compromise the specifically private information.⁷⁹

The potential approaches were considered in *JIH*. The claimant argued that the court could either allow the nature of the disputed information to be disclosed and anonymise the claimant or it could order the claimant to be named and restrict identification of the disputed information.⁸⁰ The Court of Appeal broadly accepted the binary choice discussed by the parties⁸¹ and concluded that *JIH* should retain anonymity and that general information about the disputed material should be published in the judgment.⁸² It therefore provided an outline of the dispute confirming (the now rather familiar narrative) that the claimant was a well-known sportsman who had a liaison with ‘ZZ’ whilst he was in another relationship and sought to prohibit publication of information that ‘ZZ’ had provided to *The Sun*. The court suggested that the public interest would be better served by outlining the facts of the dispute to help the public to better understand the reasons for such decisions and address concerns

⁷² DFT (n 70) [26]-[27].

⁷³ Emphasis added. *Ibid* [29].

⁷⁴ *Ibid* [33], [39].

⁷⁵ Though the anonymity feature of the order was also ultimately discharged here. *Donald v Ntuli* (n 17) [46], [1], [43]-[44].

⁷⁶ See, e.g.: *Theakston v MGN* [2002] EWHC 137; *Rocknroll v News Group Newspapers* [2013] EWHC 24.

⁷⁷ *NEJ v Helen Wood* [2011] All ER (D) 218 [11], [14], [23]-[24].

⁷⁸ *Goodwin* (n 45) [15]-[16], [3], [18]-[19], [37], [42]. See also: *Goodwin* (n 68) [146], [120]-[121], [112].

⁷⁹ *Donald v Ntuli* (n 17) [54]-[55]; *McKennitt v Ash* (n 9).

⁸⁰ *JIH v News Group Newspapers Ltd* [2010] EWHC 2818, [8], [9]; *JIH v News Group Newspapers Ltd* [2011] EWCA Civ 42 [24].

⁸¹ *JIH* Court of Appeal (n 80) [25].

⁸² *Ibid* [32].

about the rise of such orders.⁸³ It acknowledged that anonymization risked ‘**unintentionally** encouraging’ attention and rumour about third parties, but identifying the claimant was ‘more likely’ to result in speculation or deduction about what kind of information he was trying to suppress. It went on to say that ‘such speculation could be **even more damaging to JIH than if no injunction had been granted at all.**’⁸⁴ This indicates judicial acceptance that such injunctions risk unintended (‘unintentional’) effects. The Court of Appeal seemed to accept that there will be public speculation in any event; whether this is exacerbated by or primarily due to litigation is left open. But the implication is that people will be inclined to fill the ‘informational vacuum’ produced by an injunction, whether a name or the general facts of a dispute are restricted. The court thus saw its task as tailoring the injunction to try and manage or minimise the (inevitable?) speculation and related possibility that elements of the story might be pieced together, thus undermining the privacy-protecting purpose of the injunction.

So it seems that the partial information concerning MPI cases which must be published to meet the requirements of open justice may somehow contribute to speculation or curiosity about the restricted parts that remain protected. But, as noted at Part 1.2, most MPI injunctions remain effective, with the unintended consequences cases proving to be anomalies, albeit highly telling ones. What were the specific features of these anomalous cases that contributed to such unintended consequences? What distinguishes these cases from other successful attempts to restrict information?

[3] Why Unintended Consequences?

From the survey of caselaw in Parts 1-2 it seems that three crucial factors are at play when information-protecting injunctions result in unintended consequences. These three factors - psychological reactance, social-political countering and technological developments - can overlap, and may have a cumulative effect in certain cases.

[3.1] The Allure of the Banned

MPI injunctions aimed at protecting privacy may, paradoxically, undermine privacy by producing perverse incentives in two ways. First, reporting of the existence of legal proceedings will draw public attention to the fact that someone is going to great length and expense to suppress some form of private information. Second, providing the bare outline of the facts of a dispute whilst restricting certain ‘items’ of information (including a claimant’s identity) may fuel curiosity and speculation, leading people to attempt to fill the informational ‘gaps’.

What this article terms ‘the allure of the banned’ is arguably a long-standing strand of folk psychology and its roots can be traced back to the biblical tale of Adam and Eve’s tasting of the forbidden fruit in the Garden of Eden. Yet this folk psychology is supported by historical

⁸³ Ibid [33]-[35]

⁸⁴ Emphasis added. Ibid [38]. The Court of Appeal also noted that because the claimant had previously been subject to a kiss-and-tell it would be ‘relatively easy for the media and members of the public to deduce the nature of that info: it would be a classic, if not very difficult, jigsaw exercise.’ [40].

examples⁸⁵ and select empirical studies that have analysed the effects of censorship on audience attitudes. The findings of such studies have significant implications for MPI injunctions. They confirm that the act of censorship tends to instigate two responses in individuals who are subjected to it. First, it may lead to the subject to change their attitude towards greater agreement with the censored communication.⁸⁶ But second, and more significantly, it is likely to lead to an increased desire to hear the communication,⁸⁷ termed ‘the boomerang’ effect by Olson and Esses.⁸⁸ These observed responses to censorship support ‘reactance theory’ which proposes that:

‘when a person’s freedom to perform a particular behaviour is threatened or eliminated, he experiences a motivational state which is directed toward safeguarding or restoring the freedom in question.’⁸⁹

Worchell et al found that censorship can arouse reactance in an audience, and, crucially, this occurred irrespective of the reasons why material was censored⁹⁰ or the ‘attractiveness’ of the censor.

These studies confirm that censorship can produce the opposite consequences to those intended by the censor,⁹¹ and provide likely explanations as to why is. Their findings are especially significant to MPI because they confirm that the very act of censorship can foster a desire to know, irrespective of the content of the suppressed material or the congruency of reasons justifying the prohibition. This, in turn, casts (further) doubt on recurring judicial depictions of tabloid consumers as prurient, prying or a ‘particular’ readership,⁹² and upon whether such voyeurism is always their sole, dominant – or even conscious - motivation. It also raises the possibility that injunctions may exacerbate or contribute to this very culture that judges implicitly denigrate. Despite judicial scepticism towards the voyeurism of the tabloid-consuming (and online) public, curiosity should perhaps also be acknowledged as a widespread human response to MPI cases. This was given fleeting acknowledgment when the Court of Appeal in PJS quoted the following passage from The Observer:

⁸⁵ N Miller, *Banned in Boston, The Watch & Ward Society’s Crusade against Books, Burlesque, and the Social Evil* (Boston, Beacon Press, 2010).

⁸⁶ R Ashmore, V Ramchandra, R Jones. ‘Censorship as an Attitude Change Induction’ Paper presented at Eastern Psychological Association meeting, New York, April 1971, pp 2, 5. <<http://files.eric.ed.gov/fulltext/ED053411.pdf>> (accessed 16 Oct 2016). It should be noted that many of the censorship studies discussed here involve tests using political communications rather than private information.

⁸⁷ S Worchell, S Arnold & M Baker, ‘The Effects of Censorship on Attitude Change: The Influence of Censor & Communication Characteristics’ *Journal of Applied Social Psychology* (1975) 5, 3, pp 227-239, 237. See also: S Worchell & S Arnold, ‘The Effects of Censorship & Attractiveness of the Censor on Attitude Change’ *Journal of Experimental Social Psychology* 9, (1973) 365-377, 374.

⁸⁸ Olson & Esses (n 63) 280.

⁸⁹ Ashmore et al (n 86) 2; Worchell et al, 1975 (n 87) 228, 233-234, 237.

⁹⁰ Worchell et al, 1975 (n 87) 238; Worchell et al, 1973 (n 87) 375-376.

⁹¹ S Worchell et al, 1975 (n 87) 239. See also: Olson & Esses (n 63) 281.

⁹² I have elsewhere analysed judicial depictions of such material and the public that consumes it: Rebecca Moosavian, ‘Deconstructing “Public Interest” in the Article 8 vs Article 10 Balancing Exercise’ (2014) 6 *Journal of Media Law* 234-268. See also: J Balkin, ‘The Future of Free Expression in a Digital age (2009) *Pepperdine Law Review*, Vol 36, 437.

‘Human inquisitiveness is such that thousands more people have probably searched for this story ... than would have paid to read it in the Sun on Sunday.’⁹³

This highlights one particularly interesting feature of MPI judgments: the gaps or absences therein; what they tell, what they do not, and the effects this generates. Any reader of MPI cases who has found themselves casually mentally ‘jigsawing’ possible gaps, including claimants’ identities, illustrates this active, human curiosity at play. Of course, the claim that curiosity (about identities or missing facts) is a human and, it seems, not uncommon response to MPI cases, is not to assert that everyone necessarily has a ‘right to know’ private information or, indeed, to engage in moral witch-hunts. But this response to censored information, especially partially censored stories, does pose an innate challenge to the effective enforcement of MPI law that should be acknowledged. And this enduring human quality of curiosity – the desire to know, which is lauded in other contexts - may be one reason why MPI injunctions can never be infallible, or at least not in every case.

[3.2] Countering

‘Countering’ is a second significant factor that arguably led to unintended consequences in MPI cases. It seems that more than curiosity was at play in the disputes outlined in Part 1. There is also evidence of a rebellion, a kick-back or defiance of sorts. Fine identifies ‘countering’ as one of four ways in which solutions to issues may generate further (unintended) problems. Countering occurs where ‘social problems generate a pitched battle between opponents who hold dramatically different values and beliefs’, and Fine cites abortion as an example.⁹⁴ This counter-movement between opposing interests was arguably at play in the cases discussed, acting to polarise the disputes. In particular, the actions of three groups in defiance of injunctions represent vital instances of countering.

First, countering is arguably at play when media organisations based outside of the English courts’ jurisdiction publish the very information that injunctions seek to prohibit. For example, in *Spycatcher* and *PJS*, there was widespread international publication across North America and beyond. But even closer to home, the Scottish press has published the identities of Giggs and *PJS* north of the border raising logistical problems and acutely highlighting the concrete geographical limitations of the reach of English injunctions. It thus seems that in these cases the international media may have played a ‘countering’ role. The institutional ethos of the press strongly favours free expression values which it sees itself as upholding.⁹⁵ The notion that wealthy, powerful individuals should be able to conceal ‘wrongdoing’ by censoring what the media can publish is an anathema to this position. This is particularly the case in the US where, as the courts in *Spycatcher* acknowledged, the constitution places prime emphasis on free expression by virtue of the First Amendment,⁹⁶ and where privacy-

⁹³ *PJS* Court of Appeal (n 49) [17]. It should be noted that this was not quoted with approval or disapproval, but as an example of press complaints about the ban.

⁹⁴ GA Fine, ‘The Chaining of Social Problems: Solutions and Unintended Consequences in the Age of Betrayal’ 53 *Social Problems* 3 (2006) 6

⁹⁵ Though, this is not necessarily to claim that the press always lives up to the lofty ideals to which it advocates: P Wragg, ‘Time to End Tyranny: Leveson and the Failure of the Fourth Estate’ *Comms. L.* (2013), 18(1), 11-20; E Herman & N Chomsky, *Manufacturing Consent, The Political Economy of the Mass Media* (London: Vintage, 1994).

⁹⁶ *Spycatcher* (n 23) p123 (Scott J); p254 (Lord Keith).

protecting injunctions of the MPI variety are culturally alien. US media groups arguably publish for these reasons and, of course, because they can.

A second group that arguably demonstrates the effects of countering in action is the Members of Parliament who have intervened in certain cases. MPs in parliamentary debates named parties in direct breach of injunctions in Giggs and Goodwin, and would have done so in PJS but for the intervention of the Speaker. The direct defiance of these MPs is also said to be motivated by concerns about free expression,⁹⁷ arguably further demonstrating a basic clash or conflict of values.⁹⁸ Finally, the largest group – the community of Internet users – also demonstrates countering in action, particularly in Streisand, PJS and especially Giggs. The rapid proliferation of the #Iamspartacus handle in the latter case indicates a showdown between members of the web community, where a free expression, ‘information wants to be free’ ethos prevails, and the concerns of an individual seeking to exert control over what others know about him.

The actions of these three groups do suggest forms of countering or defiance at play. They hold political values and outlooks that directly oppose the censorship implemented by injunctions, and their reactions contribute to the unintended problems such injunctions generate. Though such defiance has been condemned for its blatant disregard of privacy values or the rule of law more generally,⁹⁹ cases such as Spycatcher and Trafigura¹⁰⁰ demonstrate that countering can also be sign of a healthy arena of public discussion, which, according to Mill, entailed conflict, collision and resistance of opposing views.¹⁰¹

[3.3] The Liquidity of Online Information

The third and final factor contributing to the unintended consequences of privacy injunctions is the Internet and associated information technologies. The specific characteristics of the Internet as a medium act to exacerbate the issues. Elsewhere I have drawn upon the work of Lash¹⁰² and Castells,¹⁰³ both of whom offer insights into the nature of information in the Internet era. They suggest that internet technologies have resulted in information becoming intangible in nature and detached from physical copies such as individual books or newspapers. Information is now highly mobile, moving rapidly and unpredictably in ‘flows’, resulting in spatial and temporal compression.¹⁰⁴ These three related characteristics of temporal compression, spatial compression and fluidity were particularly influential in MPI unintended consequences cases, and are now discussed in turn.

The Part 1 cases aptly illustrate that, though the challenges of restricting information are by no means new, they are intensified by the Internet’s capacity to enable information to be

⁹⁷ See, e.g. The Telegraph Online (n 50).

⁹⁸ It is also arguable that perceived conflicts regarding legislative-judicial separation of powers and sexual mores are arguably also influence M.P.s’ motivations.

⁹⁹ The Guardian Online, ‘Superinjunctions: Modern Technology is out of Control, says Lord Chief Justice’ (20 May 2011) <<https://www.theguardian.com/law/2011/may/20/superinjunction-modern-technology-lord-judge>> (accessed 16 Oct 2016)

¹⁰⁰ RJW & SJW v Guardian News & Media & Others [2009] EWHC 2540.

¹⁰¹ JS Mill, *On Liberty & Other Essays*, (Oxford: Oxford, 1998) Ch II

¹⁰² S Lash, *Critique of Information* (London: Sage 2002).

¹⁰³ Manuel Castells, *The Rise of the Network Society* (London: Wiley-Blackwell 2010).

¹⁰⁴ R Moosavian, ‘Keep Calm and Carry On’: Informing the Public under the Civil Contingencies Act 2004’ [2014] *International Journal of Human Rights*, Vol 18, No 2, 178.

widely communicated instantaneously via decentralised networks. For example, in Spycatcher the analogue process of dissemination unfurled over a period of weeks and months, with physical copies filtering into the country. Yet with digital technologies such time-frames are significantly compressed into days or even hours. For example, Max Mosley's application for an interim injunction within 4 days of the defendant's publication was unsuccessful because of the sheer scale of online dissemination in that short period.¹⁰⁵ The Giggs affair provides a further salient example of the speed with which information can be spread in a matter of hours. The Internet's temporal compression is particularly relevant to MPI because of its interaction with the psychological reactance response outlined above. Olson and Esses note other potential responses to censorship which entail the compliance of individuals.¹⁰⁶ But they suggest that reactance might be an immediate response to the act of censorship, with compliance responses coming later:

'Reactance theory applies when people perceive strong external forces restricting their freedom. **Such perceptions may be particularly likely when censorship is initially imposed.**'¹⁰⁷

If this hypothesis is proved correct, it has implications for audience reactance in an online world where technology enables the instantaneous sharing of restricted information. It suggests that by the time the reactance response passes, the censored information will have been widely shared and accessed.

Linked to temporal compression, Internet technologies enable information to move immense distances and traverse boundaries, including those of the nation state, with great ease. The impact of this on legal issues was acknowledged in *Martinez* where the CJEU cited *Castells* in its consideration of jurisdiction issues.¹⁰⁸ The contrast between the global physical reach of the Internet and the geographically-limited jurisdiction of English courts is acutely highlighted, and sometimes acknowledged, in MPI case law. As *Spycatcher* and *PJS* illustrate, the English courts have no jurisdiction over what American or other international media groups print, broadcast or disseminate online. But, crucially, the law's physical dominion also reaches its limits over protected territories closer to home, with Scotland and Parliament representing physical locations where restricted information can be publicised with impunity. Irrespective of the cogency of reasons justifying privacy-protecting injunctions, such absurdity inevitably impacts upon their credibility (and that of the law more generally).

Finally, the fluid, flowing and unpredictable nature of information on the Internet contributes to the unintended consequences of MPI injunctions because it makes information more difficult to manage. Occasional use of the liquidity metaphor is apparent in MPI judgments, for example in references to 'burst dams'¹⁰⁹ or the common judicial mis-reading of the ancient tale of King Canute.¹¹⁰ In *Mosley Eady J* warned that:

¹⁰⁵ The defendant had published its story on 30th March and the claimant applied for an injunction on 4th April: *Mosley* (n 59) [1], [3].

¹⁰⁶ Specifically dissonance and self-perception: Olson & Esses (n 63) 283.

¹⁰⁷ Emphasis added. *Ibid* 283-4.

¹⁰⁸ *Martinez and another v MGN Limited* c-161/10 [2011] ECR I – 10269, [2012] QB 654 [43]

¹⁰⁹ *Mosley* (n 59) [36]; *Giggs* (n 39) [24].

¹¹⁰ The 12th Century tale of King Canute by Henry of Huntingdon depicted Canute's act of sitting at the sea shore edge as an act of humility to show the limits of his powers, rather than a futile gesture to hold back the tide. Lord Mance recently demonstrated a better grasp of the subtleties of the tale, claiming 'The Court is well aware of the lesson which King Canute gave his courtiers': *PJS* Supreme Court (n 1) [3].

‘The court should guard against slipping into playing the role of **King Canute**. Even though an order may be desirable for the protection of *privacy ... there may come some point where it would simply serve no useful purpose and would merely be ... a brutum fulmen [an empty threat]*. It is inappropriate for the court to make vain gestures.’¹¹¹

The implicit casting of digital era information as a tide that cannot be held back or controlled reflects fundamental characteristics identified by Castells and Lash. In short, and as MPI case law aptly demonstrates, ‘*Because ‘Information wants to be free’ it poses major challenges for those who wish to tightly control or monopolise it in the Information Age.*’¹¹²

The three factors discussed in this part – audience reactance, social countering and the liquidity of online information - provide reasons why privacy injunctions sometimes create perverse incentives in certain cases. Judicial responses to such unintended consequences in MPI should thus be viewed in light of these factors.

[4] Unintended Consequences: The Supreme Court Responds

Judicial responses to the unintended consequences of MPI injunctions are epitomised in the Supreme Court’s PJS judgment. Here the Law Lords employed two crucial distinctions, analysed in this section, that the Court of Appeal and the dissenting Lord Toulson did not accept. First, they constructed a distinction between newspaper and online publication of private information. Second, they distinguished between two aspects of privacy; secrecy and intrusion. Drawing these distinctions enabled the Law Lords to marginalise the clear, widespread dissemination of the claimant’s identity despite the injunction. Doing so justified the continuation of that injunction and, not insignificantly, arguably allowed the law to claim success.

[4.1] Press v Online Distinction

Lord Mance’s leading judgment in PJS¹¹³ indicated that assessing disclosure should not be a narrow quantitative issue, and instead placed repeated emphasis on the ‘qualitatively different’ nature of Internet and press dissemination of private information.¹¹⁴ Though these differences were not afforded specific, sustained examination, three broad distinctions seemed to be influential. First, Lord Mance made certain passing claims about the nature of press coverage, depicting it as a ‘media storm’.¹¹⁵ Judges repeatedly employ this common metaphor in relation to press coverage but not the Internet, suggesting violent, turbulent, ominous, even dangerous characteristics in the former that are not present in the latter. Lord Neuberger also touched upon a related characteristic of press coverage; its tendency to record private information ‘in eye-catching headlines and sensational terms’.¹¹⁶ Yet it is not clear

¹¹¹ Mosley (n 59) [34].

¹¹² Moosavian (n 104) 182.

¹¹³ Lord Neuberger, Lady Hale & Lord Reed concurring.

¹¹⁴ PJS Supreme Court (n 1) [1], [35], [37]. See also [82] (Lord Toulson)

¹¹⁵ Ibid [35], [45],

¹¹⁶ Ibid [68]

why online coverage might not also possess volatile, ‘storm’-like qualities and/or use sensational forms of presentation. The Law Lords may have been alluding to the general hounding by groups of journalists and photographers that can accompany press coverage of a story. But, if so, this dimension was not clearly outlined or articulated, though it is discussed further below.

Second, there are subtle indications that the Law Lords viewed press coverage as somehow more concrete and lasting compared to online coverage. Lord Mance claimed that allowing press publication of PJS’s identity would add an ‘**in some respects more enduring dimension** to the existing invasions of privacy being perpetrated on the internet’.¹¹⁷ Lord Mance did not articulate why press exposure would entail more permanent or enduring coverage and, by implication, the net more ephemeral. It is unclear whether this is an allusion to press hounding or the nature of the press medium itself. If a reference to the latter, such a proposition is by no means uncontested. Contrast this claim, for example, with the comments of MacDonald J in *H v A*, who cast the respective longevities of press and Internet publication in opposite terms, referring to:

*‘the age of the Internet, where today’s news story no longer becomes tomorrow’s discarded fish and chip wrapper, but rather remains accessible in electronic form to those with the requisite search terms’*¹¹⁸

This view contradicts Lord Mance’s claims, depicting the Internet as the more permanent, concrete medium, and press coverage as more transient.

Third, Lord Mance briefly pointed to specific features of the Internet that qualitatively distinguish online from press dissemination. For example, with the Internet ‘those interested in a prurient story can, **if they try, probably** read about the identities of those involved and in some cases about the detail of the conduct, according to where they may find it on the internet.’¹¹⁹ So an important distinction between press and online publication is that online material must be actively sought. This claim is prima facie justifiable in that, unlike press publication, the Internet does not involve prominently displayed front-page headlines for passers-by to see. Yet this should arguably be viewed in light of the ease with which online material can be accessed (even with the PJS injunction in place) and the immense quantitative reach of the Internet, discussed below. A further, and highly significant feature of the Internet that Lord Mance identified is ‘the parallel – and **in probability significantly uncontrollable** – world of the internet and social media’.¹²⁰ This, he conceded, was ‘the **only** consideration militating in favour of discharging the injunction’. This telling statement represents an acknowledgment of the limits of law in an online context, suggesting that ‘storm’-like conditions may extend into online media coverage. Ultimately, this brief but highly revealing acknowledgement perhaps highlights the most significant difference between the press and internet as far as the law is concerned; the former, being fixed in a physical space within the court’s jurisdiction, can readily be made subject to an order, whereas Internet communications, for the reasons outlined in Part 3.3, will prove far harder to police. This is arguably the most persuasive of the various examples set out by the Law Lords in support of their press-Internet distinction. Yet this reason relates to the practical efficacy and enforceability of law rather than core privacy concerns per se.

¹¹⁷ Emphasis added. Ibid [45]

¹¹⁸ *H v A* (No 2) [2015] EWHC 2630 (Fam).

¹¹⁹ Emphasis added. PJS Supreme Court (n 1) [44]. See also [61] (Neuberger).

¹²⁰ Ibid [45]. See also: PJS Court of Appeal (n 49) [44].

In light of the tenuousness of the main reasons underlying the press-Internet qualitative distinction, one must question whether it is necessary or appropriate. Lord Toulson rejected the distinction drawn by the majority,¹²¹ arguing that s.12(4) HRA requires the court to have regard to the extent to which information is available to the public irrespective of the medium:

‘If the information is in wide, general circulation from whatever source or combination of sources, I do not see that it should make a significant difference whether the medium of the intended publication is the internet, print journalism or broadcast journalism. The world of public information is interactive and indivisible.’¹²²

Quantitative distinctions

In emphasising qualitative distinctions between the Internet and press, the Law Lords disregarded the traditional quantitative view of dissemination, a strategy intrinsically linked to their marginalisation of secrecy discussed at Part 4.2. However, despite indicating that the number of people aware of PJS’s identity was immaterial, some brief quantitative distinctions between the respective reaches of the press and Internet did also feature in the Law Lords’ reasoning. For example, Lord Mance claimed that newspaper publication of the PJS story would be accompanied by photographs of the appellant and his family, quoting with approval a passage from the Leveson Report which stated that ‘mass circulation’ of photos:

‘multiplies and magnifies the intrusion, not simply because **more people will be viewing** the images, but also because **more people will be talking about them**. Thus the fact of publication inflates the apparent *newsworthiness* ... *by placing them more firmly within the public domain* and at the top of the news agenda.’¹²³

Lord Mance’s use of this passage seemed to suggest that the press enjoys an extended reach because more people will see (presumably generic rather than intimate) photos of the parties, and this will somehow prompt more ‘water-cooler’ gossip than the basic story in isolation. This proposition is highly speculative. Alternatively, Lord Mance could have been alluding to the paparazzi photography that sometimes accompanies press coverage of stories. This practice has been condemned by the European Court of Human Rights¹²⁴ and forms a more convincing basis for distinguishing press and Internet coverage. However the passage does not explicitly refer to paparazzi photography, and furthermore it does not articulate why such accompanying photos lead more people to discuss the story, or why they place it ‘more firmly’ in the public domain.

Lord Neuberger also afforded passing attention to the quantitative aspects of dissemination. He dealt with claims that that 20-25% of the population already knew the identity of PJS by optimistically focussing on the counter-point that 75% thus remained unaware of it.¹²⁵ At

¹²¹ PJS Supreme Court (n 1) [82].

¹²² Ibid [89]

¹²³ Emphasis added. The Leveson Report quoted *ibid* [31].

¹²⁴ Von Hannover v Germany (No 1) [2004] EMLR 21 ECtHR,

¹²⁵ PJS Supreme Court (n 1) [57]. It should be noted that these claims are based on survey evidence held by the defendant’s Mail Online: [8]. But a poll by Yougov (18 April 2016) confirmed that 1 in 4 British people knew

one level he was correct to point out that this represents a minority of the populace, albeit a significant one. But nevertheless, Lord Neuberger significantly underplayed the statistics here. Even 20-25% of the British population (approximately 12.5 to 15.7 million people)¹²⁶ is a figure around 10 times higher than the sales figures for even the highest-circulation newspapers in England. For example, May 2015 figures indicated that the highest-selling newspapers were the Daily Mail (average circulation of 1,650,00) and The Mail on Sunday (average circulation of around 1,500,000).¹²⁷

Summary

The reasons informing the Law Lords' qualitative distinction between press and Internet dissemination were mostly tenuous and contestable, a proposition supported by Lord Toulson's alternative finding that public information is indivisible. Furthermore, the quantitative approach to confidentiality was marginalised and dismissed. Yet even when it was briefly addressed, there was a tendency to underplay the extent of Internet dissemination and amplify the quantity of press dissemination in the face of clear evidence to the contrary. Yet despite such weaknesses, the press-online divide formed a necessary part of the Law Lords' strategy of modifying the problem they were faced with solving.

[4.2] From Secrecy to Intrusion: Changing the Problem

Fine identifies latent failures in solutions to problems as an example of unintended consequences.¹²⁸ Each MPI injunction is an attempted solution to a problem. But in order to determine its success or failure we must identify and articulate the precise problem that such an injunction is attempting to solve. In basic terms, the injunction's purpose is to protect a claimant from the problem of a loss of privacy. It would therefore seem that an injunction prohibiting defendants and others from disseminating private information that later becomes widely disseminated in any event represents a failed solution to the problem of protecting privacy. Yet the MPI courts have responded to this apparent solution failure in a highly interesting way.

The approach was first adopted in *Giggs* where the injunction as a solution to a problem seemed to have failed; dissemination of *Giggs*' identity and his affair arguably increased as a result of the litigation. This failure was indirectly acknowledged by Tugendhat J, who claimed:

‘It is obvious that **if** the purpose of this injunction were to preserve a secret, it would have **failed** in its purpose. But in so far as its purpose is to prevent intrusion or harassment, **it has not failed**.’¹²⁹

the identity of PJS: <<https://yougov.co.uk/news/2016/04/19/1-4-british-people-know-celebrity-threesome-couple/>> (accessed 16 Oct 2016).

¹²⁶ Rough calculations based upon 2014 population figures for England, Wales and Scotland (where the Yougov poll was held). Figures accessible via <http://webarchive.nationalarchives.gov.uk/20160105160709/http://www.ons.gov.uk/ons/dcp171778_406922.pdf> (accessed 16 October 2016) p 3.

¹²⁷ The Press Gazette Online, ‘National Newspaper Circulations, May 2015: Mail on Sunday Overtakes Sun on Sunday, Times Remains Only Growing Title’ (5 June 2015) <<http://www.pressgazette.co.uk/national-newspaper-circulations-may-2015-mail-sunday-overtakes-sun-sunday-times-remains-biggest-growing/>> (accessed 16 October 2016).

¹²⁸ Fine (n 95).

¹²⁹ Emphasis added. *Giggs* (n 41) [3].

Two points of interest emerge from this statement. First Tugendhat J implies that ‘keeping a secret’ was not necessarily the injunction’s aim (‘if’). Yet a secret, understood as something that is kept hidden or concealed¹³⁰ was surely a key aim of the Giggs injunctions, and indeed all MPI injunctions. Selective concealment and exposure, a degree of control over the information we reveal about ourselves to others, is viewed as a crucial aspect of modern liberal understandings of privacy.¹³¹ Second, Tugendhat J indicated that the purposes of keeping a secret and preventing intrusion are two distinct, separable aims, and that one can fail whilst the other succeeds. This distinction informed the Supreme Court’s recent approach in the PJS dispute.

The distinction in PJS v News Group

In PJS the majority Law Lords also drew a crucial distinction in the very core of the Article 8 privacy right itself, which enabled them to justify continuing the PJS injunction despite widespread dissemination. Lords Mance and Neuberger drew upon the comments of Tugendhat and Eady Js in Giggs¹³² and maintained a distinction between two core components of Article 8: confidentiality and intrusion.¹³³

The first confidentiality aspect of privacy entails maintaining a secret, seeking to protect against ‘unwanted access to private information’,¹³⁴ and this is arguably associated with MPI’s breach of confidence origins. Lord Neuberger conceded that due to widespread dissemination, this first aspect of the claimant’s case was weak, though (interestingly) not futile:

*‘If PJS’s case was simply based on confidentiality (or secrecy), then, while I would not characterise his claim for a permanent injunction as hopeless, it would have substantial difficulties.’*¹³⁵

A second component of privacy, intrusion, was distinguished from confidentiality. This entails ‘*unwanted access to [or intrusion into] one’s ... personal space*’,¹³⁶ and is also the concern of privacy.¹³⁷ This element was said to be concerned with preventing ‘invasiveness and distress’ to individuals.¹³⁸ Though the Supreme Court judgment did not elaborate upon this further, it indirectly referenced passages of leading text Tugendhat & Christie that indicate this second aspect of Article 8 is concerned with physical privacy. Tugendhat &

¹³⁰ Chambers defines secret thus: ‘(noun) a fact ... that is kept undivulged; ... anything unrevealed or unknown’. The Chambers Dictionary, (10th ed, 2006, Edinburgh).

¹³¹ See e.g.: J Rachels, ‘Why Privacy is Important’ (1975) *Philosophy & Public Affairs* 4(4) 323-333; C Fried, ‘Privacy’ (1968) *Yale LJ* 77, 475-493; A Westin, ‘The Origins of Modern Claims to Privacy’ in *Philosophical Dimensions of Privacy: An Anthology* (ed: F Schoeman) Cambridge, 1984, Ch 3; R Murphy, ‘Social Distance and the Veil’ in *Philosophical Dimensions of Privacy: An Anthology* (ed: F Schoeman) Cambridge, 1984, 51; H Nissenbaum, ‘Protecting Privacy in an Information Age: The Problem of Privacy in Public’ (1998) *Law & Philosophy* 17, 559-596, 583-4; T Nagel, *Concealment & Exposure* (1998) *Philosophy & Public Affairs* 27(1), 3-30, 4, 17.

¹³² PJS Supreme Court (n 1) [27]-[29] (Mance); [61]-[62] (Neuberger).

¹³³ *Ibid* [58] (Neuberger, quoting Moreham); [29] (Mance quoting Eady J). See also: Tugendhat & Christie, *The Law of Privacy and the Media* (Oxford: Oxford, 2nd ed, 2011) 2.07-2.08, 2.16, 12.71; N Moreham, ‘Privacy in the Common Law: A Doctrinal & Theoretical Analysis’ *LQR* (2005) 121(Oct), 628-656, 648-652

¹³⁴ PJS Supreme Court (n 1) [58] (Neuberger).

¹³⁵ Emphasis added. *Ibid* [57]; [65].

¹³⁶ Quoting Tugendhat & Christie. *Ibid* [58];

¹³⁷ *Ibid* [29].

¹³⁸ *Ibid* [26].

Christie lists various activities that violate physical privacy, including: telephoto lens photography; filming someone against their wishes; following a person or pursuing them for an interview.¹³⁹ The passage thus directly covers press hounding and paparazzi activity, yet this physical understanding of intrusion was merely afforded fleeting mention by the Law Lords,¹⁴⁰ only becoming apparent as a background influence upon further examination. In any event the Law Lords' treatment of 'intrusion' was ambiguous because there seemed to be a second understanding of 'intrusion' at play; new individual intrusions would result from additional repetition of personal information,¹⁴¹ each reiteration causing another harm to the claimant. This form of intrusion indicates that it is not merely understood with reference to physical space, but also in a more personal 'non-physical' sense. Support for this latter meaning can be found in Tugendhat & Christie¹⁴² and in Solove's account of intrusion.¹⁴³

The proposition that each repetition of private information creates another intrusion is a crucial development because it directly inverts the legal effect of the traditional public domain proviso as set out by Lord Goff in *Spycatcher*. Thus as information becomes disseminated more widely, harmful intrusion actually increases in quantity as a result. The quantitative approach dismissed as too limited in the context of secrecy is re-deployed in relation to intrusion. The process of disseminating private information thus shifts from being a factor that undermines the claimant's case into a factor that actively favours a claimant's case. It is this second intrusional component of privacy that the Law Lords privileged throughout *PJS* whilst marginalising the first confidence-based element. This enabled Lord Neuberger to claim that while the secrecy aspect of *PJS*'s claim had been 'undoubtedly severely undermined (and probably, but not necessarily demolished)', he doubted that the intrusion-based claim had been 'substantially reduced [in] strength'.¹⁴⁴ So under this approach, as the 'secrecy' claim dissipates with the spread of private information, the 'intrusion' claim undergoes an inversely proportionate strengthening. This means that in future similar cases, the claimant's Article 8 claim will be unaffected by how widely known his private information is. Eady J's comments in *Giggs* that widespread publication strengthened rather than diminished the claimant's case for an injunction¹⁴⁵ supports this reading.

The crucial inversion of wide dissemination from an anti-claimant factor into a pro-claimant factor in *MPI* claims has significant consequences for the viability of injunctions. The change of emphasis from maintaining secrecy to restricting instances of intrusion entails a subtle but profound shift in the purpose and justification of privacy-protecting injunctions, and thus – in turn – the standard by which their success is gauged. So when privacy is understood as the need to keep private information secret, widespread online publication of

¹³⁹ Tugendhat & Christie (n 133) 2.16.

¹⁴⁰ Explicit references to press hounding can be found in *PJS* Supreme Court (n 1) at: [29] (quoting a 'cruel and destructive media frenzy'); [35] (reference to 'media storm' along with 'increased media attention'); [37] (reference to 'harassment').

¹⁴¹ *Ibid* [29], [32] (Mance). Note that no distinction is made between the original source of the information in each repetition. There is no explicit claim that only repetition of private information obtained via press hounding amounts to an intrusion.

¹⁴² Tugendhat & Christie (n 133) 2.06, 2.17-2.23.

¹⁴³ "Intrusion" involves invasions or incursions into one's life. It disturbs its victim's daily activities, alters her routines, destroys her solitude, and often makes her feel uncomfortable and uneasy. ... Intrusion need not involve spatial incursions.' Daniel Solove, *Understanding Privacy* (Cambridge MA, Harvard University Press, 2008) 162-163, and 161-165.

¹⁴⁴ *PJS* Supreme Court (n 1) [65]. See also: *H v A* (n 118) [46]-[48] for a summary of the impact of this on understandings of 'public domain'.

¹⁴⁵ This point was approved in *PJS* Supreme Court (n 1) [30] (Mance); [62] (Neuberger).

that information inevitably entails a loss of control over it; the injunction as a solution to this problem has not successfully achieved its purpose. Tugendhat J's claim (outlined above) that if the injunction was intended to keep a secret it had failed acknowledges this, and was quoted with approval by both Lords Mance and Neuberger in PJS.¹⁴⁶ But in PJS and Giggs, the courts marginalised this aspect and instead shifted to emphasise privacy understood as restricting the intrusive repetition of private information; the injunction was thus able to achieve this more modest aim simply by acting to limit its repetition more effectively than if no injunction was in place. Lord Neuberger made this very point, claiming that PJS and his family would be subject to greater intrusion if the injunction was not continued. As well as limiting press intrusion, he argued that the injunction would have some effect on Internet dissemination because it would make the story more difficult to find,¹⁴⁷ thus indicating a potential concern for both physical paparazzi-based intrusion and 'repetition of information' intrusion.

By claiming that the claimant would be subject to more intrusion without an injunction, courts can maintain that it has not failed and remains worthwhile (or 'serves a useful purpose').¹⁴⁸ The problem is changed, the injunction successfully solves this new problem and, perhaps, the law saves face. Yet, as discussed, the extent to which MPI injunctions are able to limit 'repetition of information' intrusion is questionable. Part 1.2 established that private information was nonetheless widely repeated despite the PJS injunction. Additionally, MPI injunctions are not the only means to restrict physical press intrusion; for example, the Harassment Act 1997 was employed effectively to restrain aggressive and deplorable press hounding in *Hong v XYZ*.¹⁴⁹

Ultimately, one must question the extent to which the two aspects of privacy – secrecy and intrusion - are neatly and conveniently separable as the Law Lords suggested. This is particularly in light of the apparent dual meaning of intrusion itself; it seems to encompass press hounding and intrusive repetition, the latter of which bears a remarkable resemblance (in form but not favour) to the 'secrecy' that it displaced. As with the Supreme Court majority's distinction between online and press dissemination, Lord Toulson implicitly dissented on the majority's splitting of privacy. He did not distinguish between confidence and intrusion, but viewed privacy as a unified whole. Thus a degree of confidentiality was central if a privacy-protecting injunction was to continue:

*'the story's confidentiality has become so porous that the idea of it still remaining a secret in a meaningful sense is illusory. Once it has become readily available to anyone who wants to know it, it has lost the essence of confidentiality.'*¹⁵⁰

¹⁴⁶ Ibid.

¹⁴⁷ Ibid [61]-[63].

¹⁴⁸ Ibid [26], [28].

¹⁴⁹ *Hong & Another v XYZ & Another* [2011] EWHC 2995

¹⁵⁰ Ibid [86]; [87].

Conclusion

Though in most cases MPI injunctions remain effective, they have on occasion led to unintended consequences. In these cases injunctions created perverse incentives by increasing the desire of audiences to know the restricted information and/or instigating counter-responses from groups whose values strongly oppose such censorship. Though such dynamics are by no means a new phenomenon, they have been exacerbated by Internet technologies that make communication of information quicker, easier, more widespread and fluid.

The specific effects of MPI injunction censorship in an online context do not appear to have been subject to empirical study and could arguably benefit from further inter-disciplinary research. Building on the Worchel censorship studies, such research could provide a greater understanding of the factors that increase the likelihood of injunctions creating perverse incentives. Its findings could provide a basis for more effective use of injunctions, e.g. providing guidance on the appropriate conditions in which to issue them and their precise terms. But Merton also cautions us to be attuned of the limits of purposive human action and to the possibility that, in any event, legal edicts may fail or backfire in a world over which lawmakers and other actors have limited control.

Because judges are unable to address the root causes of unintended consequences of MPI injunctions it is likely that similar episodes could occur in the future. Instead, the judicial response to unintended consequences has been to modify the problem that MPI injunctions seek to address, and thus their intended purpose and outcome. Hence a crucial shift from restricting the dissemination of private information (maintaining secrecy) to the more modest objective of serving a useful purpose by limiting both press hounding and the dissemination of private information more than if no injunction was in place (limiting intrusion). But even the achievement of this modest aim relies on a recently-constructed and tenuous distinction between press and Internet dissemination. This distinction entails the courts marginalising the widespread online dissemination of private information, and ignoring its inevitable ‘off-line’ cross-over. This underplaying of the immense quantitative reach of Internet media glosses over the essential failures of MPI orders, at least in relation to their ‘maintaining secrecy’ function, but arguably, their ‘limiting intrusive repetition’ function also. This approach enables the courts to justify the continuation of MPI injunctions in the face of widespread defiance. Where an injunction faces unintended consequences such reactions now act to strengthen the arguments favouring the injunction, meaning they can remain in force even where private information is widely publicised. But, as *Browne-Wilkinson V-C*, Lord Toulson¹⁵¹ and the Court of Appeal in *PJS* have warned, this arguably does risk sacrificing some of the law’s wider credibility in the process.

¹⁵¹ Ibid [88].