

The Marmite Election

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'What's food for one is poison for another'

Marmite: You either love it, or hate it

It's black. It's vegan. Its name is French,¹ and it was invented by a German.² As an icon for the British National Party, Marmite hardly seems to 'tick all the right boxes', least of all the far-right ones. Its attempted misappropriation by the BNP in that capacity in the course of the 2010 UK General Election would have been altogether incomprehensible but for two factors: for 10 years previously Marmite had been advertised under the slogan 'Marmite. You either love it or hate it'; and for the 2010 General Election campaign Marmite's advertising agents, DDB, had engaged in some harmless 'ambush marketing' by creating a parallel electoral campaign of their own, with an internet-based 'Marmite News Network' reporting on the televised campaigns of the two competing political parties.³

Not the real parties of the real election, of course, but fictional 'Love' and 'Hate' parties, a party of Marmite lovers pitted against a party of Marmite haters. The Love Party, led by the telegenic Fay Freely, was pledged to 'Spread the Love of Marmite', with policies including making Marmite available on the NHS, setting up anger management courses for Marmite haters, and providing Marmite-flavoured condoms for teenagers. Their opponents—the Hate Party—promised to 'Stop the Spread of Marmite' by creating designated Marmite-eating zones, a 'Spread Offenders List' of electronically tagged Marmite eaters, and special Marmite rehabilitation centres. But that was just the start. In one particularly hard-hitting scene from its second party election broadcast, the leader of the Hate Party, Steve Heaving, announced his party's intention to round up all the Marmite lovers in Britain, and deport them to Guernsey.

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- 1 Despite some equivocation by the brand owners, there is no reason to doubt that the name Marmite is derived from the French word 'marmite' for a round earthenware lidded casserole or cooking pot of the type still pictured on Marmite jars, and, by extension, a dish or recipe cooked in such a pot (eg *marmite dieppoise*). See <http://en.wikipedia.org/wiki/Marmite>; www.marmite.com/love/history/.
- 2 The inventor of 'Marmite' in the generic sense of an edible yeast extract was the eminent chemist Baron Justus von Liebig (1803–1873), who also

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This article

- Marmite (for those who do not know it) is a yeast-based condiment which, in the UK at least, is frequently used as a spread for toast or sandwiches. The advertising slogan, 'Marmite: You either love it or hate it' encapsulates the strongly differentiated responses which its unique taste provokes.
- For the 2010 UK general election, Marmite's proprietors, Unilever, ran a fictitious televised election campaign of their own, between imaginary 'Love' and 'Hate' parties. Perhaps in response to this, or perhaps in retaliation for being identified with the Hate Party, the British National Party apparently formed the intention of transmitting a party election broadcast in which the party leader, Nick Griffin, would have addressed his audience with a large image of a jar of Marmite floating above his right shoulder. Unilever objected, and an interim injunction was ordered to prevent the broadcast being transmitted in this form.
- This article comments upon the decision by which Arnold J banned the BNP from using the name and imagery of this popular, but controversial, food condiment; and its legal basis in terms of trade mark infringement, copyright infringement, and passing-off. It concludes by briefly comparing the legal protection accorded to a branded decoction of brewers' dregs to that claimed, with considerably less success, for other 'intellectual properties', living and dead, whose owners had cause to complain that their names, words, or images were appropriated for political purposes in the course of the 2010 General Election.

invented Oxo. Marmite as such was first marketed in 1902, on a wave of enthusiasm for novel branded food products, and especially those which were vegetarian, scientifically nutritious, and totally repulsive. Compare Saki (pseud. for H.H. Munro), 'Filboid Stodge, the story of a mouse that helped' in *The Chronicles of Clovis* (John Lane, The Bodley Head, London 1912).

- 3 www.marmitenetwork.com/; Daniel Farey-Jones, 'Marmite election ads make debut appearance' *Campaign* (online edition, 31 March 2010).

An entirely genuine party election broadcast on behalf of the BNP was slightly more restrained in terms of its actual content, if no less sensationalist in its tone.⁴ Sirens wailed and searchlights scanned the skies, Spitfires and Hurricanes scrambled, Winston Churchill rallied the nation, artillery pounded the enemy, and troops streamed ashore from landing craft. The Whitehall Cenotaph was the backdrop for two homilies delivered by the BNP's sole member of the London Assembly, and an unidentified war memorial served the same function for another of their candidates. The broadcast was held together by opening and closing scenes in which the BNP's leader, Nick Griffin, seated behind his desk in his study, office, or den, delivered a pair of straight-to-camera monologues extolling the virtues of a country he had never known, and an era before he was born, in the authentic manner of a party political broadcast of the 1950s.

That was what the viewers saw and heard one night towards the end of April 2010, or at least it was what they would have seen had they not reached instinctively for the remote control, as Mr Griffin himself had foreseen in his opening words of a council election broadcast from 2009: 'Don't turn it off'.⁵

What viewers did not get to see, though, was an image of a jar of Marmite bizarrely floating at the top left hand corner of the screen during the sequences in which Mr Griffin spoke to the camera, in much the same way as the logo of a broadcasting company sometimes appears, though in this case rather larger and considerably more prominently than is normal in that capacity.⁶ Nor did they see, on that occasion at least, the closing shot in which a Marmite jar completely dominated the right hand side of the screen, with the BNP logo and the slogan 'Love Britain | Vote BNP' on the other.⁷

The version of the BNP electoral broadcast with the floating Marmite jar and the Marmite-themed closing shot was never transmitted. It was posted in this format on the BNP website on the evening of 21 April 2010,

apparently in anticipation of its being broadcast in the usual manner in the next few days. During the morning of 22 April, however, Marmite's proprietors, Unilever plc, were alerted to the danger, and their lawyers complained to the BNP. The BNP withdrew the clip from their website and offered assurances that it had never been their intention to broadcast the Marmite-branded version. Unilever considered these assurances inadequate, and successfully applied for an interim injunction.⁸ The application was technically without notice, and though the BNP were informed of it, they did not attend.

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What viewers never saw as part of the party political broadcast, however, they would have had ample opportunity to see on the late-night news for 22 April, or in the following morning's papers. Unilever's interim injunction against the BNP that afternoon was deemed a sufficiently newsworthy event in its own right to justify showing examples of the very material which had been enjoined.⁹ The result, somewhat bizarrely, was that though the BNP had been restrained from using Marmite imagery as part of a broadcast which would have been almost universally ignored, the self-same offending material was quite legitimately displayed to large and attentive audiences as part of the national news,¹⁰ and copies remain on YouTube to this day.¹¹ The dispute is reported as having settled in July.¹²

Whether Unilever should have been concerned by this turn of events is very much open to doubt, since the context in which the BNP material was shown or

4 www.youtube.com/watch?v=Yb9retGNn3s.

5 www.youtube.com/watch?v=QQLgFw_R2wY.

6 The 'Marmite News Network', above, n 3, displayed a logo in the top right of the screen consisting of the letters MNN, with a proportionately-sized Marmite jar slightly overlapping the letter M.

7 For stills, see <http://images.mirror.co.uk/upl/m4/apr2010/6/8/bnp-865848148.jpg> and <http://images.mirror.co.uk/upl/m4/apr2010/6/6/bnp-28981961.jpg>. (Both from 'Marmite sues BNP over political broadcast', mirror.co.uk, 22 April 2010) For the full video, see www.youtube.com/watch?v=xDpQR2-ItDM.

8 *Unilever Plc v Griffin* [2010] EWHC 899 (Ch); [2010] FSR 33 (Arnold J).

9 ITN: www.youtube.com/watch?v=OH3CaTtYyBU&feature=fvsr; BBC (online): news.bbc.co.uk/1/hi/uk_politics/election_2010/8637473.stm; Sky News Online: <http://news.sky.com/home/uk-news/article/15613050> (with embedded video); Fiona Hamilton, 'Owners of Marmite seek injunction against BNP after jar appears in video', *The Times* (23 April 2010).

10 Unilever's principal cause of action against the BNP had been copyright infringement, to which the BNP had no arguable defence, but media organizations could invoke the defences under the Copyright, Designs and Patents Act 1988, ss 30(2) (fair dealing for the purpose of reporting current events), and 45(2) (reporting judicial proceedings).

11 See, above, n 7. It is ironic that removing the objectionable version of the video from YouTube was one of the stated reasons for proceeding with the application for the injunction, after the BNP appeared to have thrown in the towel. *Unilever Plc v Griffin* [2010] EWHC 899 (Ch) at [25]; [2010] FSR 33.

12 A further irony is that media coverage was renewed (and the same images posted) when the BNP settled the case, reportedly paying Unilever between £70,000 and £170,000 in costs (though this cannot be verified). See, eg Gary Anderson, 'BNP face ruin over joke Marmite ad', *The Mirror* (online edition, 18 July 2010).

referred to in the news media, whether broadcast, online, or printed, made it clear beyond peradventure that Unilever were neither the hirelings nor the paymasters of the BNP, while Marmite itself enjoyed a few minutes of publicity which no amount of money could have bought. Short of issuing a 'super-injunction' to prevent the existence of the principal injunction being disclosed or discussed by anyone, it is hard to see how this chain of developments could have been avoided. As for the BNP, their Leader had been knocked out in the first round by an opponent his own children might have eaten for breakfast—and now the whole world knew it.

Victory has a thousand fathers, but defeat is an orphan. We may never know for certain whose idea it was to brand the BNP as the Marmite party, though once the election was over, and it was clear that the BNP was toast, the knives would be out for Mr Griffin,¹³ as they had been for Mr Heaving before him.¹⁴ Perhaps the BNP would have done better to have returned to their East End roots and the (unofficial) slogan of Millwall Football Club—'No one likes us, . . . we don't care'. But then again, perhaps that particular association would have savoured too much of the street-fighting days of Mr Griffin's predecessor at the BNP, John Tyndall, or Oswald Moseley and the British Union of Fascists before him. Or perhaps the hard men of the BNP simply lost their bottle at the thought of taking a rise out of the even harder men of the Den.

Mr Griffin addresses the nation

Talking of dens, what about the room from which Mr Griffin delivered his televised address to the British Nation? It may not be entirely irrelevant to what follows to describe it in some detail, based on its appearance in broadcasts for the BNP recorded on two separate occasions, one for the European Elections in 2009,¹⁵ and the other for the General Election of 2010.¹⁶ Call it a study, home office, studio, den, or what you will, there is a contrived and almost stagey quality to it. Not 'stagey', though, in the sense of a few props hurriedly thrown together to create a particular setting—we shall come to such an example later—nor in the sense of a set lovingly and ingeniously devised for a film or television production company with money to burn and a reputation for production values to uphold. Rather, the room displays the half self-

conscious staginess of an old-fashioned suburban parlour; the kind of room which has been furnished to demonstrate one's taste and social status, rather than for pleasure, use, or occupation. It is the office of a man who has no business to keep him busy, the study of a man who is not in the least bit studious, and the library of a man who has no place in his life for books.

In the 2011 embodiment of this *mise-en-scène*, Mr Griffin is sitting behind a large, polished, wooden desk. The desktop is empty, except for a blotter, an unidentified hard-back book on a small lectern, and a miniature Union Jack on a little pole. Behind Mr Griffin are ranged, from right to left as we view them, a tall wooden bookcase filled with old, unidentifiable, books, a console table (which is directly behind him), and a smaller wooden bookcase, which is largely hidden from sight. The seated Mr Griffin is flanked by two objects conspicuously placed on either side of the console table behind him: a framed set of six medals or decorations on the left, of which the leftmost appears to be the Military Cross, and a photograph of Sir Winston Churchill on the right. The wall behind him is painted or papered in pale blue, with a slight rag-rolled effect.

The 2009 version of the room was almost exactly the same, with very few exceptions. The desk was slightly more cluttered then, with a fussy inkstand directly in front of the sitter, and other paraphernalia. The larger bookcase to the right of the picture appears to be identical, even to the arrangement of individual volumes, but that to the left appears different. The most conspicuous difference, though, is that in 2009 Mr Griffin was framed by what appear to have been a pair of family photographs on the console table behind him, with the case of medals occupying the top of the larger bookcase, and the Churchill portrait nowhere to be seen.

Viewers of Mr Griffin's 2009 broadcast might therefore have experienced a sense of *déjà vu* on seeing him in virtually the self-same setting a year later, assuming that their memories were that long, and that precise. But many more viewers of his 2010 broadcast might have had a sense of *déjà vu* for a very different reason, since the room from which Mr Griffin spoke on behalf of the British National Party on that day in April 2010 was quite remarkably similar to that used by the fictitious Mr Heaving to deliver his messages of Hate, in advertisements which were widely broadcast (though only on commercial channels, of course) in the 3 or 4 weeks previously.

13 Nemesis, 'Marmitegate' *Griffinwatch* <http://griffinwatch-nwn.blogspot.com/> (11 May 2010). This appears to be a blog by an anonymous, anti-Griffin, BNP insider.

14 http://wn.com/Marmite_Online_Content_Heaving_Gets_The_Knives.

15 www.youtube.com/watch?v=vhP61pqvkJ4.

16 Above, n 4.

For completeness, it will be worth describing the setting for these Hate Party broadcasts, of which there were two.¹⁷ In this case, it is beyond doubt that what we are seeing is indeed a studio set. Mr Heaving sits behind a desk, on which there is a large book, propped up as if on a lectern, and a little Union Jack on a stand. Behind him are visible two bookcases, a taller one on the right and a shorter one on the left. On the top of the latter (as well as some books) is a picture of a bulldog sitting on a Union Jack. On the wall behind, which is painted pale blue, there hangs a case of medals. The two settings are by no means identical, however. Apart from differences in details, such as the individual pieces of furniture, or in the precise placement of items which correspond, there are a couple of items which have no counterpart in the BNP set, namely a model sailing ship on top of the larger bookcase, and a brass banker's lamp on the desk. The overall impression is that a few stock studio properties had been selected and arranged to create a similar look to that of the 2009 BNP setting, but not so as to reproduce it precisely. The room is also much smaller and less cluttered, as we are able to see when the camera follows Mr Heaving when he rises from behind his desk, which Mr Griffin does not do.

Up to that point in the first Hate Party broadcast, however, there are plenty of other similarities to notice. Mr Heaving's posture, address, and body language are remarkably similar to those of Mr Griffin (who does not vary much in these respects between the 2009 and 2010 broadcasts). Much of the verbal material is obviously and necessarily different, since Mr Griffin had not at that point in time favoured us with the official BNP position on Marmite, whereas Mr Heaving was interested in nothing else. However, it may be noted that both Mr Heaving and Mr Griffin attached great importance to protecting 'our' vulnerable children from the insidious menaces to which they were increasingly exposed—Marmite, or multiculturalism, as the case may be—and to differentiating themselves and their parties from corrupt and untrustworthy opponents.

The gratuitous similarity between the BNP and the Hate Party was not lost on commentators, even if they

did not necessarily notice, or allude to, the similarities with the 2009 BNP electoral broadcast.¹⁸

Marmite as icon, symbol, metaphor, and snowclone

If Marmite is an icon, then what might it iconically denote? Obviously not the British National Party, though Marmite might credibly stand as an icon for Britishness at its most bloody-minded. No other country loves Marmite, or even gives it shelf space. New Zealand 'Marmite' is something different, and even the Australians prefer Vegemite. Bill Bryson compared Marmite to an industrial lubricant.¹⁹ Marmite is famously one of those products which British ex-pats crave, and the locals everywhere despise. France has many three-star recipes for *marmite dieppoise*, but only Britain has Marmite.

In strictly Peircean terms,²⁰ however, Marmite, though undoubtedly a sign, is neither an icon nor even an index. It is a symbol, an arbitrary signifier which is connected to its object neither by visual resemblance, nor by any of its inherent characteristics. Though Marmite's taste might be said to be an inherent consequence of its composition, those who like it tend to do so on account of attachments formed in infancy and early childhood, and it is therefore more accurate to say that though the taste may be inherent, the Love it/Hate it characteristic is socially constructed. It is in the nature of symbols that they can be symbolic of more than one semiotic object, as with Barthes' Eiffel Tower,²¹ though with 'icons' in the popular sense one symbolism tends to predominate. Though Marmite might conceivably have stood for British insularity, by social convention it stands primarily for something else. Marmite, as a symbol, is socially constructed twice over. We follow the example of our parents in deciding whether its taste is pleasant or unpleasant, but we all accept its suitability as a metaphor for something which evokes extremes of opinion. No one who has ever tasted it is merely indifferent or apathetic to Marmite. There is no middle ground.

17 www.youtube.com/watch?v=BE5GW8uByLc and <http://www.youtube.com/watch?v=Ay8D39ojQsg>. The setting is the same in both cases.

18 For example, Simon Jeffery (blog), 'Marmite and the BNP: love them or hate them, they've added a new taste to the election', *The Guardian* (22 August 2011). If the comments cited by the judge at para 20 were relevant and admissible, then why not those appended to this article, such as Akula971 at 2:47pm?

19 Bill Bryson, *Notes from a Small Island* (William Morrow & Co, New York 1995): 'There are certain things that you have to be British . . . to appreciate: skiffle music, salt-cellars with a single hole and Marmite (an edible yeast extract with the visual properties of an industrial lubricant).'

20 For the semiotic theories of Charles Sanders Peirce (1839–1914) see Albert Atkin, 'Peirce's Theory of Signs' in Edward N. Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Winter 2010 online edition), <http://plato.stanford.edu/archives/win2010/entries/peirce-semiotics/>. For an avowedly Peircean account of (American) trade mark law, see Barton Beebe, 'The semiotic analysis of trademark law', (2004) 51 *UCLA Law Rev* 621.

21 Roland Barthes, 'The Eiffel Tower' in *Image, music, text: essays*, trans. Stephen Heath (Collins, London 1977). 'This pure—virtually empty—sign, is ineluctable, *because it means everything*.' (Original italics).

In one recent month alone,²² the Marmite analogy or metaphor has been employed in respect of sports personalities (Geoff Boycott,²³ Graeme Souness,²⁴ and Robbie Savage²⁵), popular entertainers (teen idol Justin Bieber,²⁶ cult vocalist Florence and the Machine,²⁷ X-Factor hopeful Janet Devlin,²⁸ and X-Factor failures Jedward²⁹), short selling on the stock exchange³⁰ (and not just of shares in Autonomy,³¹ which is a 'Marmite stock' in its own right), *The Big Lebowski*³² (though not the *Harry Potter* film series³³), wind turbines,³⁴ and vuvuzelas.³⁵ Marmite-as-metaphor seems to have antedated the earliest of Unilever's 'Love it, or hate it' advertising campaigns by quite some margin, and may well have originated as a spontaneous popular phenomenon.³⁶ If so, it has very successfully been re-appropriated and re-energized, as well as re-engineered, by Unilever.³⁷ 'I hate Marmite' and 'You either love it or hate it' are both registered trade marks.³⁸

If Marmite is a sign, as it is, then might it be registrable as a trade mark in its own right? Probably not, if only because of the impossibility of providing a graphical representation of the sticky tar-like substance which would sufficiently identify it.³⁹ Nothing else

tastes (or smells) like Marmite, but a distinct visual identity has never been its strongest point, as Mr Bryson noted. Besides, although I accept that 'Marmite' (the word) denotes the product of Unilever to the exclusion of all others (or rather that it does so when used in an appropriate context), Marmite (the substance) has other connotations entirely. Marmite has transcended the status of the humble icon, and become a 'snowclone'.⁴⁰ Marmite is the new minimalism, on steroids.

'Now hatred is by far the longest pleasure'

It is time to examine *Unilever v Griffin* in more detail.⁴¹ In a necessarily short, but otherwise entirely characteristic judgment, Arnold J dealt briefly but lucidly with the likelihood of success of the three alleged causes of action, the normal *American Cyanamid* criteria,⁴² the impact of the Human Rights Act 1998, section 12, and the House of Lords decision in *Cream v Bannerjee*.⁴³ So far as the causes of action were con-

22 August 2011. All references below were available online at the time of writing, but URLs have been suppressed to save space, and because of the ephemeral character of most of them. The absence of politicians is surprising, and untypical, but perhaps results from the choice of a month when most of them were on holiday.

23 Rob Smyth and Alan Gardner, 'England v India—as it happened (Fourth Test, day five, The Oval)' *The Guardian* (22 August 2011) (comment from Guy Hornsby at over No 52).

24 Merlin, 'Someone is worried', *Vital Chelsea* at vitalfootball.co.uk (14 August 2011).

25 Mr Savage has a regular Friday column in the *Daily Mirror* for which he is billed as 'Football's Mr. Marmite'.

26 Carl3232, 'Evan Rachel Wood loves Justin Bieber this much', *SugarScope* (29 August 2011).

27 Michael Cragg, 'New Music: Florence and the Machine—What the Water Gave Me' *The Guardian* (24 August 2011). See also Chiino, 'Track of the Day—What the Water Gave Me by Florence + The Machine', *musicovered* (29 August 2011).

28 Andrei Harmsworth, 'X Factor frontrunner Janet Devlin is secret YouTube sensation' *Metro* (18 August 2011). Other X Factors contenders compared to Marmite include Kitty Brucknell (Baggers, '9 things we learnt at the X Factor launch . . .', *celebrity.aol.co.uk*, 18 August 2011) and an 'anonymous diva' (Genevieve Hassan, 'X Factor returns without Simon Cowell', *BBC News* (online edition, 19 August 2011)).

29 Maureen Coleman, 'Love them or hate them, they are born entertainers' *The Belfast Telegraph* (16 August 2011). X-Factor judge Cheryl Cole, who championed Jedward in 2009, has herself been compared to Marmite (Rob Grainge, 'Does Cheryl Cole leave you cold' *The Sun* (4 November 2010)).

30 James Mackintosh, 'Love it or hate it: the short sell', *The Financial Times* (25 August 2011).

31 Mary Watkins and Tim Bradshaw, 'Takeover is loss for UK software sector' *The Financial Times* (18 August 2011).

32 Simon Gallagher, 'THE BIG LEBOWSKI Limited Edition is the perfect treatment for a modern classic', *WhatCulture!* (23 August 2011).

33 David Mitchell, 'JK Rowling should remember that less means more in the Potterverse' *The Guardian* (21 August 2011).

34 David Black, 'Has Northumberland more than Its fair share of wind turbines?', *UtilityProducts.com* (8 August 2011).

35 Helen, 'Shrek's Vuvuzelas', *femalefirst.co.uk* (dated 15 August 2011 by Google, but more probably posted on 17 June 2010).

36 Amelia Hodgson, 'How Marmite spread its way through journalism', *The Guardian* (22 April 2010). This article was posted at 11:05, so shortly before the BNP injunction story broke. The first citation of the Love/Hate Marmite trope in *The Guardian* is dated to 7 April 1995, a year or so before the Love it, Hate it advertising campaign started. (The article should not be read as suggesting that the latter began in 2006, with the launch of the squeezezy Marmite bottle.)

37 Prime Minister Gordon Brown even took time off from governing the country to tweet: 'Sarah loves marmite I love marmalade'. (Noted, Amelia Hodgson, above, n 36.)

38 TM No 2,126,560 of 1997 ('I Hate Marmite') in classes 29, 30, and 35; TM No 2,346,071 of 2003 ('You Either Love It or Hate it') in classes 29 and 30. Note, in the latter case, the very limited categories of goods ('vegetable extract paste' and 'yeast extract'), and the absence from the mark of the word 'Marmite'.

39 Trade Marks Act 1994, s 1(1).

40 Amelia Hodgson, 'How Marmite spread its way through journalism' *The Guardian* (22 April 2010). A 'snowclone' (the concept is attributed to Professor Geoffrey Pullum, the word to Glen Whitman) is 'a multi-use, customizable, instantly recognizable, time-worn, quoted or misquoted phrase or sentence that can be used in an entirely open array of different variants'. The paradigmatic example (from which the snowclone takes its name) is 'If the Eskimos have n_1 words for snow, then the XX must have n_2 words for YY'. In the present case, the snowclone is 'X is the Marmite of Y' (or 'X is like Marmite, you either love it or you hate it'). See also Nicola Twilley, 'Marmite Linguistics', www.ediblegeography.com/marmite-linguistics/ (25 April 1990).

41 *Unilever Plc v Griffin* [2010] EWHC 899 (Ch); [2010] FSR 33.

42 *American Cyanamid Co v Ethicon Ltd* [1975] AC 396; [1975] FSR 101; [1975] RPC 513 (HL).

43 *Cream Holdings Ltd v Banerjee* [2004] UKHL 44; [2005] 1 AC 253 (HL).

cerned, he held that there was no arguable case of trade mark infringement, but that the allegation of copyright infringement was strong, and the case for passing-off more than tenable. Two of the three causes of action therefore exceeded the higher of the two *Cream v Banerjee* thresholds, the balance of justice strongly favoured the claimants, and an interim injunction, effective for 7 days, would be granted.

The trade mark case: classic infringement

The trade mark principally relied on was No 2,333,143, for the Marmite label, dating from 2003, and registered in classes 29 and 30 for various condiments and food-stuff items. The Trade Marks Act 1994, which implements harmonized European law, creates three routes to liability, under sections 10(2)(a) and (b), and 10(3). Only the latter was relied on by Unilever, but it is worth examining the two aspects of section 10(2) liability as a preliminary exercise.

All three subsections require the making of two comparisons. First, the ‘mark’ (ie the trade mark as registered) is compared to what is conventionally referred to as the ‘sign’, which is the corresponding image (or whatever) used by the defendant. In the present case, the ‘mark’ was a simplified version of the Marmite label circa 2003, which is what was registered under No 2,333,143, and the ‘sign’ (in the case of the broadcast) was the Marmite image as actually used by the BNP, so we may confidently say that mark and sign were very similar, but not quite identical. The second comparison one obliged to draw is between the goods (or services) for which the mark is registered, and the goods or services in respect of which the sign is actually used by the defendants. The first set of goods is ascertained from the entry on the Trade Marks Register. In the present case, the goods specified for No 2,333,143 were ‘Vegetable extracts; potato crisps; spreads and pastes containing vegetable extracts’ (class 29) and ‘Flour and preparations made from cereals, bread, pastry and confectionery, yeast, baking-powder’ (class 30). The other aspect of this comparison looks at the goods or services provided by the defendant under the sign, which in the present case proved to be a significant problem in its own right. Clearly, the BNP were not selling spreads, pastes, crisps, or condiments themselves, nor were they using the Marmite trade mark in relation to any of these.

With these two comparisons in mind, one can work one’s way quickly through sections 10(1)(a) and (b). Liability under section 10(1)(a) arises only if the sign is identical to the mark, and the goods or services in

respect of which the sign is used are identical to those for which the mark is registered. Obviously neither test is met here, so we pass immediately on to section 10(2)(b). Under this subsection, there is liability if the mark and the sign are identical or similar, if the two sets of goods or services are identical or similar, and if, as a result of the combined similarities, there is what is called a likelihood of confusion. The relevant kind of confusion is not between the mark and sign per se (since this would address only one of two equally important criteria for comparison), but between the enterprises, respectively, designated by the mark and the sign.

Applying section 10(2)(b) to the present set of facts gives rise to three separate but interrelated problems. We may pass quickly over the correspondence between the mark and the sign. They are clearly very similar indeed, and if this were the only relevant criterion then a likelihood of confusion would easily be established, and liability would be complete. But what about similarity between goods and services? On the terms of the Act, we can go on to consider the likelihood of confusion only if there is sufficient similarity between the kinds of goods for which the mark was registered, and whatever activity the BNP intended by way of use of the sign. Could it properly be said that the BNP were using the sign in relation to goods or services at all? If not, then section 10(2)(b) could never be satisfied, and we would never get as far as considering whether ‘confusion’ was likely or not.

Dilution and trade mark use

This takes us to the only ground of trade mark liability which was argued, and on which Arnold J decided that there was no reasonably tenable case. The 1994 Act does not confine liability for infringement to cases in which the parties’ goods or services are sufficiently close for confusion to arise. There is also section 10(3), which provides for what is conveniently, if unofficially, called protection against dilution.

In the present case, the ‘mark’ which was the simplified Marmite label registered as TM No 2,333,143, undoubtedly ‘had a reputation’ in the UK, at least in relation to yeast extract for use as a spread or condiment, though not necessarily for the full range of goods registered. But was the corresponding sign used by the BNP in relation to goods or services *at all*? And if not, do we ever get as far as considering whether the use was ‘without due cause’, and whether it was such as to take unfair advantage of the mark, or cause it detriment?

Arnold J decided that in the present case, at least, the BNP were not using the sign in relation to goods or services at all:⁴⁴

[15] A further difficulty is caused by the requirement that the use be ‘in relation to’ goods or services. For the purposes of a claim under art. 5(2), it does not particularly matter what the goods or services are, but nevertheless they have to be identifiable goods or services. Rightly, counsel for Unilever disclaimed any suggestion that there was use in relation to goods, but nevertheless one still has to ask what services is there use in relation to? Counsel suggested that there was use in relation to informational services and a service of soliciting donations. I have some difficulty in regarding either of those as services at all within the meaning of the Trade Marks Directive. In any event, I have grave doubts that the use that is complained of is in relation to any services at all.

That being the case, liability under section 10(3) could not arise. Moreover, trade mark liability was also contradicted by a factor which cut across all three statutory routes to liability. As Arnold J had already noted, it was settled law that use ‘in the course of trade’ meant use ‘in the context of commercial activity with a view to economic advantage and not as a private matter.’⁴⁵ Even allowing for the fact that the BNP also used other portions of its website to solicit for donations, the purpose of the clip as such was exclusively political. This was not use ‘in the course of trade’.

For either or both of these reasons, the case for alleged trade mark infringement was more likely than not to fail at trial, and it was very doubtful that it cleared even the lower *Cream v Banerjee* threshold.

Copyright

The case for copyright infringement was necessarily incomplete in view of the short notice, but Arnold J accepted that Unilever would almost certainly be able to prove subsistence and ownership of copyright in the (current) Marmite label as an artistic work. There was a strong *prima facie* case of infringement by copying and making available to the public, and it was by no means obvious that the BNP had any defence at all. It was unduly speculative to ask how any public interest defence might have been argued, and perhaps further developed, in the absence of the defendants.

44 *Unilever Plc v Griffin* [2010] EWHC 899 (Ch) at [15]; [2010] FSR 33.

45 Applying Case C-236/08, *Google France SARL v Louis Vuitton Malletier SA* [2010] ETMR 30; [2010] RPC 19 at [50].

46 See Christopher Wadlow, ‘Trade mark torture: some musings on *Associated Newspapers v Persons Unknown*’ [2011] JIPLP 177.

Passing-off

The decision of Arnold J, in so far as it dealt with passing-off, is so brief, and so non-committal in its reasoning, that detailed consideration can be postponed to the section criticizing the judgment.

‘Men love in haste, but they detest at leisure’

Trade marks

I have very few criticisms of the judgment in so far as it relates to trade mark infringement. The conclusion that the BNP were not using the mark in the course of trade is surely correct, and would not have been affected if Unilever had selected any one of a dozen other Marmite trade marks to sue on. Indeed, the point would seem to be almost too obvious to notice, except that the opposite result has been reached, apparently *per incuriam*, in another case on not dissimilar facts.⁴⁶

Of rather more interest is Arnold J’s conclusion that the BNP were not using the ‘sign’ in relation to goods or services at all. There is a possible counter-argument that ‘goods or services’ is simply a figure of speech, akin to a hendiadys, in which a single idea is conveyed by two conjoined words, so that ‘goods or services’ simply means ‘anything and everything’. On balance, however, I think that Arnold J is right. Modern trade mark law is the legacy of a compromise under which trade marks (for goods) were protected under one legal regime, and service marks (for services) were protected under another regime, or not at all. It is not clear that the effects of this legacy have been entirely eliminated, nor that they ought to be.

Though Arnold J does not mention it (and I do not think the omission affects any of his analysis, either for trade mark infringement or passing-off), the BNP does have an online shop,⁴⁷ trading as Excalibur.

Copyright

I also have very little to say about the copyright aspects of the decision, and though I agree with the judge that the residual common law public interest defence preserved by the Copyright, Designs and Patents Act, 1988, section 171(3) has scope for further development, it is hard for developments of this kind to take place at such

47 www.buyexcalibur.co.uk. I pondered over whether to buy a T-shirt reading ‘My Job Was Outsourced to India—And All I Got Was This Lousy T-Shirt’ as a seasonal present for the Editor, but in the end decided that my £12.50 could be better spent elsewhere. By the way, did you spot the snowclone?

short notice and when only one party is represented. Unfortunately, it is precisely in those circumstances that the public interest may most need protecting.

Passing-off

It is on passing-off that I have the most substantial reservations about Arnold J's judgment. Passing-off is an uncodified common law tort, where the parameters of liability depend on previous decided cases. In this instance, there are three sets of authorities to consider: the general law of passing-off, its specific application to political parties, and its treatment of supposed cases of endorsement.

So far as general statements of the law are concerned, these are almost always taken either from the speech of Lord Diplock in *Warnink v Townend*,⁴⁸ or from that of Lord Oliver in *Reckitt & Colman v Borden*.⁴⁹ Lord Diplock's *Advocaat* speech immediately flags up the problem: of the five criteria which are necessary (though perhaps not sufficient) for liability, the second and third are particularly relevant. According to Lord Diplock, the misrepresentation must be 'made by a trader, in the course of trade', and it must be made to 'prospective customers of his or ultimate consumers of goods or services supplied by him'.

The other leading formulation, by Lord Oliver in *Jif*, does not in terms require the defendant to be a trader acting in the course of trade, but it does make the same point implicitly with the requirement that the plaintiff 'must demonstrate a misrepresentation by the defendant . . . likely to lead the public to believe that goods or services offered by him are the goods or services of the plaintiff'.

If Arnold J was correct to say, for the purposes of trade mark infringement, that the BNP were not acting in the course of any trade, and were not using the Marmite mark in relation to either goods or services, then how did he come to reach a conclusion, on passing-off, which seems not only to contradict his own previous conclusions, but to defy two leading decisions of the House of Lords?

Passing-off: the status of political parties

Unfortunately, we do not have Arnold J's reasons, so we must do the best we can unaided. First, there is a respectable tally of cases in which Lord Diplock's cri-

terion of a trader acting in the course of trade has been stretched, perhaps to breaking point. It is well established, for instance, that the action for passing-off applies to churches, charities, clubs, and various kinds of association,⁵⁰ though it may be noted that in all of these the claimant was providing services of some kind to someone, and that all the claimants were in receipt of some sort of income, if only from donations. There is also a smaller, and rather more contentious, line of authorities extending the principle to political parties and similar movements, whether as claimants or defendants.

Coincidentally, the most relevant of these also involved the British National Party, though only indirectly. In *Burge v Haycock*,⁵¹ the individual defendant, who had previously been associated with the BNP, but who was apparently no longer a member, proposed to stand at a parish council election as a 'Countryside Alliance' candidate. The Countryside Alliance, which was a non-party-political organization, did not support the candidature of Mr Haycock, or anyone else. The Court of Appeal rather disingenuously distinguished its own decision in *Kean v McGivan*,⁵² and granted an injunction.

Burge v Haycock is open to objection in at least three separate respects. The procedural objection is that only one side of the case was argued. As regards Mr Haycock personally, that may be fair enough, since it was presumably his decision not to appear. However, a wider principle of public importance was at stake, and if *Burge v Haycock* was wrongly decided, as I think it was, then the public ought not to be burdened in perpetuity with the consequences of Mr Haycock not having the necessary money to instruct lawyers, or the necessary time, inclination, and legal skills to represent himself. The doctrinal objection is that the decision too readily assumes that if a political party (or a non-political interest group, like the *Countryside Alliance*) can have *locus standi* to sue for passing-off, then it follows without further analysis that a passing-off action lies against an individual defendant whose only relevant activities are political. The policy objection is that the action for passing-off has evolved over two centuries to regulate economic competition between businesses, and it is not obviously suitable for regulating other aspects of social and political life.

48 *Erven Warnink BV v J Townend & Sons (Hull) Ltd* [1979] AC 731; [1979] FSR 397; [1980] RPC 31 (HL) ('*Advocaat*').

49 *Reckitt & Colman Products Ltd v Borden Inc* [1990] 1 WLR 491; [1990] RPC 341 (HL) ('*Jif*').

50 Christopher Wadlow, *The Law of Passing-off: Unfair competition by misrepresentation* (4th edn Sweet & Maxwell, London 2011) Ch 3, ss C and D.

51 *Burge v Haycock* [2001] EWCA Civ 900; [2002] RPC 28 (CA).

52 *Kean v McGivan* [1982] FSR 119 (CA). (Rival 'Social Democratic' parties.)

The best that can be said for *Burge v Haycock* in this respect is that although the action for passing-off may have been the wrong tool for the job, there was a job which needed to be done, and passing-off was the only tool which came to hand when needed. The question which remains is whether it was really necessary to rewrite settled law from a desire, no matter how well-intentioned, to mete out summary justice to one particularly objectionable defendant.

Burge v Haycock notwithstanding, I would draw the line in much the same place as Arnold J would have drawn it for registered trade mark infringement. To the extent that a political party (for instance) engages in trade, even as a sideline, or to the extent that it provides services for consideration, or solicits donations in money or money's worth, then it is engaging in economic activity and may be liable in passing off.⁵³ To the extent that it attempts to attract votes, sympathy, or support for its policies or actions, it is acting outside the economic sphere, and the law of passing-off should not apply to it.

Passing-off: endorsement or sponsorship

Finally, there is the separate question of what to make of the proposition that 'at least some viewers [were likely] to conclude that the manufacturer of Marmite . . . has endorsed or sponsored the BNP or, at any rate, permitted the use of the image of the Marmite jar, contrary to the fact.'⁵⁴ This is a broad target to take aim at. Were Unilever pitching their case at a level represented by the public vaguely supposing some sort of licence or permission to exist, when it did not, or were they going all out for endorsement or sponsorship? The former, if not based on a supposed copyright licence, looks remarkably like a circular argument, and it is hardly the law that every suspected instance of copyright infringement constitutes passing-off. As a pure matter of law, even the narrower formulation is an understatement of the standard of liability. From *Harrods v Harrodian School* we know that:⁵⁵

To constitute a misrepresentation, the relevant connection must be one by which the plaintiffs would be taken by the public to have made themselves responsible for the quality of the defendant's goods or services. A belief that the plaintiff had sponsored or given financial support to the defendant would not ordinarily give the public that impression.

At this point, the question becomes one of personal judgement rather than the application of strict legal principles. Speaking personally, and leaving the *Burge v Haycock* point to one side, I cannot bring myself to believe that the floating Marmite jar visible at times during the intended BNP election broadcast would have been a sufficiently unequivocal indication of any relevant connection with Unilever at all, let alone one of endorsement. To the uninformed and disinterested viewer it would have been completely bewildering, and the comments on the BNP website (if they were admissible at all) are too speculative (and perhaps too unrepresentative) to take this aspect of the case any further. I take more seriously the closing screen in which the Marmite jar is more prominent, and much more strongly linked with the BNP. This might more plausibly have been taken by unprejudiced viewers as indicating some kind of endorsement or sponsorship, at least if one closed one's eyes to the extreme improbability of Marmite (or rather Unilever) having anything to do with the BNP at all.

Would such an inference of sponsorship or financial support, even if plausibly and consistently drawn, have satisfied the *Harrods* criteria? At first sight no, since no one would seriously believe that Unilever were making themselves responsible for the policies of the BNP in any relevant sense, even if they had gone so far as to sponsor them. In the case of a mainstream political party, or a charity, or the vast majority of single-issue lobby groups, that would probably be enough to negate liability. It is not unknown, for instance, for commercial companies to make donations to two or more political parties with incompatible agendas. There is some flexibility inherent in *Harrods*, however, and in the case of a party as toxic as the BNP, there is a credible argument that no commercial organization would so much as contribute to it, unless it was willing to be identified with the policies which made it so unpopular. That, however, is very much a two-edged argument, since it makes it all the more unlikely that Unilever would actually have endorsed the BNP in the first place, unless, perhaps, as part of some incredibly misguided marketing stunt.

To take the *Harrods* analysis to a conclusion, we must ask why Millett LJ (as he was) required that the claimant should appear to have made himself respons-

53 It is notable that the retail trading arm of the BNP, Excalibur, is separately branded, and separately hosted at www.buyexcalibur.co.uk. The most likely explanation is separation of the revenue-generating parts of the BNP from the parts most likely to incur liability. An alternative explanation, that Excalibur hopes to pick up passing trade from non-BNP sympathizers, is immediately contradicted by the goods on offer.

54 *Unilever Plc v Griffin* [2010] EWHC 899 (Ch) at [20]; [2010] FSR 33. (This is a summary by the judge of the argument for the claimants.)

55 *Harrods Ltd v Harrodian School Ltd* [1996] RPC 697 (CA) (headnote).

ible for the defendant's goods or services. The reason is addressed in *Harrods*, but it was already explicit in *Jif*. According to Lord Oliver's third criterion:⁵⁶

[The plaintiff] must demonstrate... that he is likely to suffer, damage by reason of the erroneous belief engendered by the defendant's misrepresentation that the source of the defendant's goods or services is the same as the source of those offered by the plaintiff.

So a misrepresentation which is not relied on, by the relevant public, as indicating the source (in the sense of the person responsible) of the defendant's goods or services is not likely to be a material one for the purposes of passing off. If it is not relied on in this sense then it is rather unlikely to cause damage, and if it causes no damage, there is no passing off. If an otherwise immaterial misrepresentation does unexpectedly cause damage by a different route, then the implication may be that we should look to one of the other torts, such as defamation or injurious falsehood, for a remedy.⁵⁷ It was libellous for Fry's to imply that Mr Tolley had endorsed their chocolate (because a reasonable inference was that he had sold his amateur status for gold),⁵⁸ but it was never passing-off.

'Tell me what you eat, and I will tell you who you are'

Not quite a criminal record

Unilever are by no means the first potential claimants to have had cause to complain about unwanted associations with the British National Party. In 2009, members of bands including Blur and Pink Floyd objected to their songs being included in compilation albums for sale on the BNP's online shop Excalibur, but this appears to have been an ordinary case of Exca-

libur acquiring legitimate stocks of commercial compilation CDs from music wholesalers, and simply passing their retail profit margin over to the BNP.⁵⁹ A similar situation had arisen a few months previously when Dame Vera Lynn had objected to the BNP selling an album of wartime hits which featured two of her performances, including *The White Cliffs of Dover*.⁶⁰ In this case too, the CD was simply an ordinary commercial compilation, albeit one whose title (taken from Dame Vera's song) might have promised an extra *frisson* of pleasure for any BNP members who noticed the unintentional *double entendre*.⁶¹

The forces' sweetheart could, however, count herself fortunate compared with the late Sir Winston Churchill, whose grandson, Sir Nicholas Soames, complained of the BNP using his ancestor's name and image on election leaflets, and for one of their election broadcasts of 2009. In the latter, Mr Griffin also borrowed words from Churchill's famous inaugural wartime speech as a reason for discriminating against recent immigrants, because 'the benefits that come from being [British], were won by the blood, sweat, toil and tears of our past generations'.⁶² That these protests met with no success we have already seen, from the use of Churchill's photograph in the setting for the April 2010 electoral broadcast, and from the historical newsreel footage used on the same occasion. The Royal British Legion objected to Mr Griffin wearing one of their poppies while campaigning,⁶³ claiming that the poppy was their registered trade mark,⁶⁴ and appealing to his sense of honour, to desist.⁶⁵

More fortunate than either Dame Vera or Sir Winston were the Manic Street Preachers, whose record label Sony successfully objected to the unauthorized use on the BNP website of the song *If You Tolerate This Your Children Will Be Next* as the soundtrack for a

56 *Reckitt & Colman Products Ltd v Borden Inc* [1990] 1 WLR 491; [1990] RPC 341 (HL).

57 There is a more than tenable argument that the BNP's conduct amounted to injurious falsehood, despite all the difficulties traditionally associated with that tort, but this is not the place to pursue it.

58 *Tolley v JS Fry and Sons, Ltd* [1931] AC 333 (HL).

59 Nico Hines, 'Musicians demand legal right to stop BNP selling their CDs on its website' *The Times* (27 May 2009); Lee Glendinning, 'Musicians demand BNP stop selling their songs' *The Guardian* (28 May 2009). (The authors of several of the online comments attached to the latter article are much better informed as to what was going on than the item's author, and perhaps the indignant musicians themselves.)

60 Stephen Bates, 'We'll meet again... in court. Dame Vera, 91, takes on BNP' *The Guardian* (19 February 2009). Many sources erroneously identified the BNP as the compilers and producers of the disc, apparently making the same mistake as the local newspaper in which the story originally broke (Naomi Loomes, 'Sussex songstress distances herself from right wing political group' *The Argus* (Brighton, 18 February 2009)).

61 *The White Cliffs* was composed by two Americans, Nat Burton and Walter Kent, and the copyright is owned by Shapiro Bernstein & Co Ltd.

The CD, issued on the Pegasus label, is still available, though not from the BNP. One possible reason is hinted at by *The Guardian*, above, n 60: one of the featured artists was black, and four were Jewish. A simpler reason is that the BNP charged £4.95, compared to £2.99 on Amazon.

62 Murray Wardrop, 'Nicholas Soames in battle with BNP for using Churchill to promote party' *The Telegraph* (20 March 2009) (leaflet); Matthew Taylor, 'Grandson rounds on "monstrous" use of Churchill image by BNP' *The Guardian* (25 May 2009) (broadcast). The broadcast (for the June 2009 European elections) is at www.youtube.com/watch?v=vhP6IppqvkJ4 with the quoted passage at about 3:15 into the recording.

63 Matthew Taylor, 'Royal British Legion tell Nick Griffin to stop wearing poppy badge' *The Guardian* (13 June 2009).

64 There are several trade mark registrations, of which the most relevant appears to be No 2,239,583 of 2000 (Poppy device mark) in classes 08, 09, 14, 16, 21, 24, 25, 26, 31, 35, 36, 39, 41, and 42.

65 With predictable results. The Legion might just as well have appealed to his dress sense. No gentleman would be seen wearing a Flanders poppy 6 months before Armistice Day, unless for a specific memorial event.

sequence of film clips denouncing multiculturalism.⁶⁶ The song, which had been written as a tribute to the Welsh volunteers who joined the International Brigades during the Spanish Civil War, adopted its title from a propaganda poster of the Spanish Republican government, presumably without authority, but just as certainly without infringement. The BNP's use of the song (as opposed to the title) was a straightforward case of copyright infringement, and they quickly removed it from their website and YouTube, claiming that it had all been a mistake.⁶⁷ The comment attributed to the BNP spokesman, that 'you can interpret the lyrics any way you want' demonstrates a rare excursion into hermeneutic relativism by that organization, and may contain a further layer of postmodern irony in its implicit allusion to the title of the album from which the song was taken, which was *This Is My Truth Tell Me Yours*.

Dave's Desert Island Discs

Not that Marmite was the only IP to have been appropriated for political purposes in the run-up to the 2010 general election, though *Unilever v Griffin*⁶⁸ apparently remains the only decided case dealing with any such state of affairs. The problem was mainly one affecting celebrities and performing artists, rather than branded consumer products (though a whole article might be devoted to the issues arising from the BNP's appropriation of the Robertson's Golly⁶⁹), and for the most part the law offered no hope of any redress.

One performing artist to whom the 'Marmite' property has been attributed many times over is Steven Patrick Morrissey, formerly of The Smiths. Shortly after his election as leader of the Conservative Party in 2005, David Cameron appeared on the BBC's *Desert Island*

Discs programme, and named The Smiths' single *This Charming Man* as one of his selections.⁷⁰ In a rare display of unity among the former members of The Smiths,⁷¹ Morrissey's songwriting partner and guitarist, Johnny Marr, took to Twitter to ban Cameron from liking anything *The Smiths* had written,⁷² and Morrissey weighed in with his agreement.⁷³ Cameron had already compounded his original offence by confessing to a boyhood crush for *The Eton Rifles*, by The Jam,⁷⁴ thereby exasperating the latter's Paul Weller, who confided his displeasure to the *New Statesman*.⁷⁵ At least The Jam escaped the indignity of being one of Mr Cameron's *Desert Island Discs* selections: his other picks were Bob Dylan (at No 1), and (in no particular order) Pink Floyd, R.E.M., The Killers, Radiohead, Felix Mendelssohn, and Benny Hill.⁷⁶

A third musical partnership which the Conservative leader offended was Keane, whose 2004 hit *Everybody's Changing* was played at the launch event for the Conservative party manifesto. When challenged on Twitter by Keane's 'horrified' drummer Richard Hughes, the party machine responded by adding Keane to Cameron's ever-growing list of all-time favourites, and a spokesman for the party explained that the performance had been covered by a routine PRS licence.⁷⁷

Clearly more research is needed

Since all good things must come to an end, I can only hint at the riches awaiting anyone who is prepared to undertake a serious study of these issues. Who owns the copyright in Winston Churchill's wartime speeches, for instance, and would it matter if the recordings which have come down to posterity were in fact delivered by an understudy?⁷⁸ Could a phrase of a mere four nouns (and one conjunction) constitute a

66 Sam Jones, 'Manics' tribute to International Brigades crops up on BNP website' *The Guardian* (28 March 2009).

67 Mistakes of this sort can happen to anyone. Compare *Far Out Productions Inc v Unilever UK* [2009] EWHC 3484 (Ch), where the underlying dispute (which had settled) was over admitted copyright infringement by the soundtracks for a series of Marmite commercials. The original claim was for £4 million, representing profits of 10% on the amount by which sales of Marmite had increased over a period of about 6 years, less advertising costs. The size of the claim provoked the Deputy Judge (Mr Nicholas Strauss QC) to comment that the possibility that 'a few devotees of cowbell music might have been converted to Marmite by the superior performance in the original sound recording' did not justify recovery of profits on anything like that scale.

68 *Unilever Plc v Griffin* [2010] EWHC 899 (Ch); [2010] FSR 33.

69 www.buyexcalibur.co.uk/index.php?act=viewProd&productId=11 (Golly waving BNP Logo). Alex Morrison, 'Online shop reveals the true BNP' *The Stagers: The New Statesman rolling blog* (10 March 2010).

70 www.bbc.co.uk/radio4/features/desert-island-discs/castaway/8d5bcfb (28 May 2006).

71 See *Joyce v Morrissey* [1999] EMLR 233 (CA).

72 Jo Adetunji, 'Johnny Marr: "I forbid David Cameron from liking the Smiths"' *The Guardian* (4 December 2010).

73 Sean Michaels, 'Morrissey supports Johnny Marr in David Cameron row' *The Guardian* (6 December 2010); 'Message from Morrissey', http://true-to-you.net/morrissey_news_101204_01 (4 December 2010). And if it was wrong for Mr Griffin to pose for the camera with a picture of Churchill behind his shoulder, then what should we make of David Cameron being filmed with an LP of The Smiths' *The Queen is Dead* in a similarly conspicuous position, also for a party political broadcast?

74 Anne MacElvoy, 'Britain just got Weller: meet the Jam Generation' *The Spectator* (13 February 2008); John Harris, 'Hands off our music!' *The Guardian* (18 March 2008).

75 John Wilson, 'Chasing the blues away' *The New Statesman* (15 May 2008); Anon, 'The Modfather sniping at David Cameron and his Eton Rifles' *The Sunday Times* (18 May 2008).

76 Above, n 70.

77 Helen Pidd, 'General election 2010: Keane furious after song used at Tory launch' *The Guardian* (13 April 2010).

78 The urban legend is that although Churchill addressed the House of Commons *in propria persona*, the corresponding radio broadcasts of his speech(es) were recorded by the actor Norman Shelley, better known as

‘substantial part’ of one of those speeches as a copy-right work,⁷⁹ and would it be an infringement to use those five words in a different order?⁸⁰

Conversely, might the Hate Party’s two election broadcasts have constituted an infringement of any of the BNP’s IP rights? The BNP does, in fact, have a portfolio of five registered UK trade marks,⁸¹ but clearly none of these would have been infringed. A more interesting, but ultimately no more rewarding, train of enquiry requires one to assume that the interior set for the Hate Party election broadcasts was actually put together with the 2009 BNP election broadcast as a point of reference. The insuperable problem here is that Mr Griffin’s den or study, which is the only physical entity which can plausibly be alleged to have been copied, cannot be fitted into any of the statutory categories of copyright work. The closest case by analogy is *Creation Records*,⁸² but if the surreal and almost dadaist setting for the Oasis photo shoot did not qualify as an artistic work for the purposes of copyright protection, then what hope for Mr Griffin’s suburban drabness?⁸³

Possibly the BNP’s best case would have been to argue that its 2009 election broadcast constituted a dramatic work, thereby attempting to distinguish *Creation Records*, where the set was ‘inherently static, having no movement, story or action’. If so, then might it be said that the corresponding sequence(s) in the Hate Party

broadcast, or perhaps even the Hate Party set per se,⁸⁴ might have constituted a copy of a substantial part of the recorded film in its capacity as a dramatic work?⁸⁵ In that case, does it matter that his addresses to camera have rather less ‘movement, story [and] action’ than *Krapp’s Last Tape*,⁸⁶ or that his listless rendition of his script seemingly attempts to out-Beckett Beckett in its rejection of the usual dramatic conventions?⁸⁷ Every aspect of the argument bristles with difficulties and uncertainties, and it is a matter of genuine regret that Arnold J, of all people, should never have had the opportunity to address them.⁸⁸

For the rest of us, there remain such ineluctable (and perhaps unanswerable) questions as these: did the youthful David Cameron succumb to the Marmite habit at Eton, and does Marmite play any role in the drunken rituals of the Bullingdon Club? Should Cameron be enjoined in perpetuity from enjoying the music of anyone younger than Cilla Black, cooler than Gary Barlow of Take That, or more right-on than Matt Willis from Busted;⁸⁹ and would this leave room in his life for anyone younger, cooler or hipper than Sir Cliff Richard? Most important of all, does Cameron like Marmite himself, or does he classify it, along with The Jam and The Marmalade, as just another half-forgotten alternative rock band from his schooldays? ‘You might well think that. I couldn’t possibly comment.’⁹⁰

the voice of the popular children’s radio character, *Larry the Lamb*. As the principal source is David Irving, *Churchill’s War* (Veritas, Bullsbrook, WA 1987), one might have expected the BNP to give it credence, even if no one else did. For a refutation, see www.winstonchurchill.org/learn/myths/myths/an-actor-read-his-speeches.

79 Bearing in mind that the omission of a single word (from a five act play) may be a substantial alteration: *Frisby v BBC* [1967] Ch 932 (Goff J), by reference to the *obiter dictum* concerning Bernard Shaw’s *Pygmalion* (1912). Hint: the word has six letters, ends in ‘y’ and is not the adjectival form of any of ‘sweat’, ‘toil’, or ‘tear’.

80 Compare ‘blood, sweat, toil and tears’ (Griffin, above, n 62) with ‘blood, toil, tears, and sweat’ (Churchill, speech in the House of Commons, 13 May 1940).

81 Nos 2,337,480, 2,337,481, 2,339,803, 2,339,807, and 2,339,845 (all dated 2003). Of these, one is for ‘British National Party’ as a word mark, and four are for the initials BNP, in two cases as plain word marks, once as a stylized word (BNP in stencil-like slanting capitals, revealing the Union Jack beneath), and once as a device (BNP in a roundel). The specification of goods and services is similar across the registrations: always classes 09, 14, 16, and 25, and also either 41, or 26 and 42. Readers will be relieved to know that despite sending two MEPs to Brussels, the BNP has not compromised its principles to the extent of having any dealings with OHIM.

82 *Creation Records Ltd v News Group Newspapers Ltd* [1997] EMLR 444. See Simon Stokes, ‘Art and Copyright: Some Current Issues’, [2006] JIPLP 272.

83 If I am right that the BNP setting was an ordinary domestic room, then *Shelley Films Ltd v Rex Features Ltd* [1994] EMLR 134 is conclusively distinguished.

84 It may be relevant (and it is certainly seasonal) that Bernard Levin, as theatre critic of the *Daily Express*, once wrote a review of a play, *The Geese are Getting Fat*, which consisted entirely of a detailed description of

the stage set, except for the closing words ‘and a Merry Christmas to all our readers’.

85 *Norowzian v Arks Ltd* (No 2) [2000] EMLR 67; [2000] FSR 363; CA. The BNP could undoubtedly claim copyright protection in their film as such, under the Copyright, Designs and Patents Act 1988, s 1(1)(b), but that would provide no relevant protection in this context. The distinction between copyright in a dramatic work, and copyright in a film, is that in the case of the film only frame-by-frame copying would infringe. In the case of dramatic copyright, reproduction by reconstruction of any substantial part of the original work would infringe. This is one of the crucial distinctions between so-called authorial and entrepreneurial works.

86 Samuel Beckett, *Krapp’s Last Tape* (1958).

87 Did you spot the snowclone?

88 See Richard Arnold, ‘Joy: a reply’, [2001] IPQ 10 (replying to Irini Stamatoudi, ‘“Joy” for the Claimant: Can a Film Be Protected as a Dramatic Work?’ [2000] IPQ 117). Richard Arnold QC was counsel for the plaintiffs in *Norowzian v Arks* in the Court of Appeal.

89 Anon, ‘General Election 2010: Gary Barlow unveiled as David Cameron backer’ *The Telegraph* (16 April 2010); John Harris, ‘Uncool Britannia: how British culture turned Tory’ *The Guardian* (3 February 2011).

90 *per* Francis Ewan Urquhart, in any of the ‘House of Cards’ series of novels by Michael Dobbs: *House of Cards* (London: Collins, 1989), *To Play the King* (1992), *The Final Cut* (1995). As footnotes cannot be attached to the section headings of this article for technical reasons, the relevant quotations are identified here. ‘What’s food for one is poison for another’ Lucretius, *On the Nature of Things (De Rerum Natura)*, trans. Anthony M. Esolen (1995), Book 4, line 635; ‘Now hatred is by far the longest pleasure; | Men love in haste, but they detest at leisure’, Byron, *Don Juan* (1819–1824) canto 13, st 4; ‘Tell me what you eat, and I will tell you who you are’, Anthelme Brillat-Savarin, *The Physiology of Taste (La Physiologie du Goût)* (1825) aphorism no 4.