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CONTRACTS, NON-COMPENSATORY DAMAGES, AND THE INTANGIBLE ECONOMY

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This paper intends to contribute to the debate concerning the foundation and place of non-compensatory damages as a class of remedy applicable to contract law. It pursues this objective based on the theory that non-compensatory damages serve in modern contract law to incentivise and promote the creation of knowledge-based public goods through contracts. Connected with this argument is the view that the settled acceptance of non-compensatory damages in contracts can help in the deployment of contracts to supplement intellectual property ("IP") law regimes in the creation of knowledge-based public goods. The postulations of this article are, chiefly, as follows: a) contract law remedies must respond to contemporary transactional hazards thrown up by the intangible economy; and, b) contracts can be assets *per se* when they border on critical social interests.

I. Introduction: The Concern for Examination

There is the vexed question of how contract law can support the intangible economy in matters of information exchange and the enablement of access to intangible facilities.[1] There is also the thorny question of how to justify non-compensatory damages in contract law. These questions inform the thesis of this article, which is that non-compensatory damages are well-suited to and should apply in preserving the social capital needed to facilitate the exchange of information and access to intangible assets. Non-compensatory damages as default rules or remedies can serve to maintain the social capital required by modern trade patterns and also help address the novel transactional hazards that stem from the peculiarities of the intangible economy (*ie* spillover and network failure risks).

Generally, we understand contracts as agreements entered by parties intending to create or exchange private gains. Contracts, however, create numerous knowledge-based public goods (*ie* unintended social benefits that result from the pursuance of activities, whether private or public ones) by encouraging interactions between parties with varying levels and qualities of human capital which occur in the enablement of novel techniques, technologies and business ideas or possibilities. For example, a retail travel agency that serves a large number of customers buying flight tickets

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[1] See Miriam Cherry, "The Sharing Economy and the Edges of Contract Law: Comparing US and UK Approaches" (2017) 85 Geo Wash L Rev 1804.

and holiday plans may be able to aggregate and mine a body of customers' data that may be processed to extrapolate a variety of useful commercial information such as consumer behaviour, expectations, and travel trends. The data so collected have public goods potentials, in that they can result in socially useful products not directly intended at the time of transactions. The data, especially when processed, may inform the flight agency's pricing models, marketing, and service offers. The said data may equally be used by government agencies for regulatory purposes. Relevant research entities may also apply them to their varying needs. In these different ways, the information creates public goods that serve crucial social interests such as the reduction of information costs and the enablement of new business practices, among numerous novel social outcomes.

How then can we harness the potentials of contract law as a legal infrastructure to facilitate public goods creation? The answer, as this article submits, lies in recognising non-compensatory damages as a standard class of monetary remedy in contract law, existing side-by-side with the compensatory principle (which is that contract law only serves to compensate for the loss of an innocent promisee and no more). The novel contribution of this paper towards the justification of non-compensatory damages as a class of remedy in modern contract law is based on the theory that they serve to incentivise and promote the creation of knowledge-based public goods through contracts.

The term 'non-compensatory damages' is a connotation for the various monetary remedies awarded without the objective of compensating for loss in the traditional sense of the word 'loss'.[2] In contract law parlance, when we talk of loss, we generally refer to two classes of 'suffering' or private injury resulting to a promisee from contractual wrongdoing. One class relates to pecuniary losses. We generally describe pecuniary loss as expectation-based when it concerns lost gains, measurable in financial terms, suffered by the promisee owing to breach (*eg* loss of profits or the loss of a specific benefit sought to be derived from the said contract).[3] Pecuniary loss is described as reliance-based whenever it relates to an alternative gain lost or a resource wasted, which could have been avoided if a breached contract had not come into existence (*eg* the loss of the opportunity to sell to someone else or expenses incurred in preparation towards the performance of a breached contract).[4] Reliance-based pecuniary losses are only claimed as a fall-back strategy whenever the expectation-based route is inauspicious to a promisee. However, non-pecuniary loss relates to 'inconveniences' or difficulties, which although are not generally estimable in a financial measure (*eg* pain, suffering, distress and significant inconveniences), but are by-products of the breach and the law considers that the need to avoid them arising was within the purview of the bargain in issue.[5]

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[2] See James Edelman, *McGregor on Damages*, 20th ed (United Kingdom: Sweet and Maxwell, 2017) at 447-486; James Edelman, "Non-Compensatory Damages for Breach of Contract and Torts" (2002) 76 Austl LJ 328; see also Johanna Khoo, "Non-Compensatory Damages for Breach of Contract: Far Reaching and Disruptive?" (2011) 7 Cambridge Student L Rev 21.

[3] See *Clark v Macourt* [2013] HCA 56; *The Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64.

[4] See *McRae v Commonwealth Disposal Commission* [1951] HCA 79; see also *Anglia Television v Reed* [1972] 1 QB 60.

[5] See *Fidler v Sun Life Assurance* [2006] 2 SCR 3 at para 45, where the court stated that "[t]he matter is otherwise, however, when the parties enter into a contract, an object of which is to secure a particular psychological benefit. In such a case, damages arising from such mental distress should in principle be

Non-compensatory damages, however, do not address concerns bordering on loss in that traditional sense (or, in fact, to any form of loss). Instead, they relate exclusively to 'gains' or benefits accruing to promisors from a breach.[6] The chief forms of non-compensatory damages are restitution (not being *quantum meruit* or unjust enrichment), disgorgement and negotiation damages. However, there is a tendency, as reflected in legal scholarship and in some judicial outcomes on the subject, to rationalise the remedy as a form of compensation. The tendency is usually the case with negotiation damages, which is often explained as reparation for the loss of a contractual right. This paper submits that such rationalisation of the remedy is unsustainable given that the remedy operates exclusively in response to perceived gains accruing from breach to promisors, and that the only appropriate condition warranting the application of the remedy is the need to protect critical special interests.

In chief, this paper argues that the ascendency of the compensatory principle in contract law no longer holds well in our intangible economy. The principle's ascendency was more suited to the dispensation of an industrial economy, mainly characterised by the exchange of goods and services. However, in our intangible (or post-industrial) economy, exchanges of goods and services are by-products or 'shadows' of the exchange of information, technical knowledge and other intangibles (*ie* branding, competences, commercial advantages, and network effects, etc).[7] In other words, data and other intangible assets that enable the production of goods and services, at a larger scale, at less cost and with more quality, are just as significant as good and services. This economic paradigm-shift renders the continued ascendency of the compensatory principle anachronistic to modern contract law, mainly, as that policy does not cater to the novel and pervasive contractual concerns or hazards that the intangible economy throws up. These are the risks of spillover effects and network failure, which are explained below, that can have not just private costs, but also implications for public goods creation.[8]

One might assume that IP regimes are sufficient to address concerns bordering on the exchange of information and access to intangibles. The reality is that IP regimes are only a minimal route for addressing such concerns.[9] One factor is that IP regimes can exclude socially valuable informational matters from protection. For example, a novel but non-inventive drug formulation may not qualify for patent

recoverable where they are established on the evidence and shown to have been within the reasonable contemplation of the parties at the time the contract was made". See also *Baltic Shipping Co v Dillon* (1993) HCA 4 and *Jarvis v Swans Tours Ltd* [1973] QB 233.

6 See *Denaro Ltd v Onyx Bar & Cafe (Cambridge) Ltd* [2011] BCL 199 at para 26; see also part II.B of this paper.

7 See Jonathan Haskel and Stian Westlake, *Capitalism without Capital: The Rise of the Intangible Economy*, (New Jersey: Princeton University Press, 2017); see also Jeremy Rifkin, *The Zero Marginal Cost Society: The Internet of Things, the Collaborative Commons, and the Eclipse of Capitalism*, (New York: St Martin's Griffin, 2015) [*Zero Marginal Cost Society*].

8 Matthew Jennejohn, "The Private Order of Innovation Networks" (2016) 68 Stan L Rev 281 [*Private Order*]; see also Andrew Schrank and Josh Whitford, "The Anatomy of Network Failure" (2011) 29 Sociological Theory 151; see also Laura G Pedraza-Farina, "The Social Origins of Innovation Failures" (2017) 70 Southern Methodist U L Rev 377.

9 Viva Moffat, "Human Capital as Intellectual Property: Non-Competes and the Limits of IP Protection" (2016) 50 Akron L Rev 903; see also Liza Vertinsky, "Boundary-Spanning Collaboration and the Limits of Joint Inventorship Doctrine" (2017) 44 Hous L Rev 401.

protection, despite its incremental curative advantages.[10] Business methods and software however valuable are not generally patentable or, at least, may be difficult to patent, and copyright is often inadequate in protecting them.[11] There is also the likelihood of inventorship disputes arising between joint inventors or authors.[12] IP rights owned by different entities may even overlap, as often seen in cases of patents, trademarks, and design rights.[13] There are numerous private and social costs associated with IP regimes making them unable to address a vast swathe of concerns relating to information, knowledge and intangibles.[14] Unfortunately, the question of how best to address the numerous problems and limitations of IP law, particularly patents, remains enigmatic to scholars of IP law and as well as economists interested in IP.[15] In any case, how to address that concern is beyond the focus of this article.

Non-disclosure agreements ("NDAs") are often considered alternatives to IP. However, arrangements of this kind have limitations. The chief reason is that information is inherently dynamic and opaque, and its expression can be selective.[16] One can reveal certain aspects of a piece of information while withholding the rest. Another thing is that a piece of information is not discrete, but is in fact, multi-layered.[17] Therefore, non-disclosure contracts open room for opportunism in ways that are not hard to see.[18] For example, a party may charge another a price for the disclosure and exploitation of broadly described information when in fact only aspects of it have been disclosed, leaving that party (the discloser) free to exploit its other aspects, as the proprietary scope or 'metes and bounds' of the disclosed information is vague. The opportunistic gain accruing to the discloser would arise from the strategic description, which leaves the discloser free to exploit other aspects of the information, thus leaving the other party short-changed.

In modern times, formal contractual mechanisms fill the void left by IP and NDAs. Studies have also shown that relational contracting is secondary to formal

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[10] See Robert Chalmers, "Evergreen or Deciduous? Australian Trends in Relation to 'Evergreening' of Patents" (2006) 30 Melbourne UL Rev 29.

[11] See the Australian case of *Encompass Corporation Pty Ltd v InfoTrack Pty Ltd* [2018] FCA 421; see the United States case of *Alice Corp v CLS Bank International* [2014] 573 US 208 (Supreme Court); see the United Kingdom case of *Aerotel Ltd v Telco Holdings Ltd* [2006] EWCA Civ 1371 [*Aerotel*]; see also Yinliang Liu, "Patenting Business Methods In The United States and Beyond—Globalization of Intellectual Property Protection Is Not Always An Easy Game to Play" (2011) 42 Intl Rev of IP & Competition L 395.

[12] Eric Ross Cohen, "Clear As Mud: An Empirical Analysis of the Developing Law of Joint Inventorship in the Federal Circuit" (2013) BTLJ 283; see also Moshood Abdussalam, "Identifying 'the invention' in Inventorship Disputes" (2014) 11 Scripted 28.

[13] Andrew Christie and Chris Dent, "Non-Overlapping Rights: A Patent Misconception" (2010) 32 Eur IP Rev 56; see also Neil Wilkof and Shamnad Basheer, *Overlapping Intellectual Property Rights*, 1st ed (United Kingdom: Oxford University Press, 2012).

[14] Per Sir Robin Jacob, in *Aerotel, supra* note 11, at para 20 "The patent system is there to provide a research and investment incentive but it has a price. That price (what economists call "transaction costs") is paid in a host of ways: the costs of patenting, the impediment to competition, the compliance cost of ensuring non-infringement, the cost of uncertainty, litigation costs and so on.".

[15] Dan Burk & Mark Lemley, "The Patent Crisis and How the Courts Can Solve" (Chicago: University of Chicago Press, 2011); see also Ted Sichelman, "Purging Patent Law of Private Law Remedies" (2014) 92 Tex L Rev 528; see also Jay Plager, "Challenges for Intellectual Property Law in the Twenty-First Century: Indeterminacy and Other Problems" [2001] U Ill L Rev 69.

[16] Michael Burstein, "Exchanging Information Without Intellectual Property" (2012) 91 Tex L Rev 227.

[17] *Ibid* at 247-258.

[18] *Ibid* at 262.

contracting in the intangible economy.[19] Formal contracting employs a combination of IP licensing agreements, NDAs, relational contracting, and most importantly, use the disclosure of information or access to intangibles as consideration or the price to secure contractual obligations from another party or parties.[20] These mechanisms may even go further, adopting governance systems and dispute settlement arrangements.[21] However, formal contracts are unavoidably incomplete. Factors of information costs, transaction costs, and bounded rationality can make it impossible for a complete spelling out of the rights, obligations and risks of parties concerning future contingencies.[22] Therefore, the law has to fill this contractual gap by selecting the appropriate 'default rules.' The compensatory principle alone does not fill the gap because it does not cater to the unique contractual concerns and hazards associated with the intangible economy. This paper submits that non-compensatory damages, should supplement the compensatory principle and that the availability of non-compensatory damages should not be subject to the condition that contracts must relate to property, IP or confidential information.

In making a case for non-compensatory damages as a standard species of legal remedy in contract law, this paper furthers the minority judgement reasoning of Lord Sumption in *Morris-Garner and Another v One Step (Support) Ltd*[23] that contract law remedies must correspond to economic reality and that contracts are assets. The view that contracts can *per se* be assets is one categorically rejected by other judges of the United Kingdom Supreme Court ("UKSC"). The division of the article is into three major parts. Part II restates the pith of Lord Sumption's reasoning on why non-compensatory damages should be a standard class of remedy. Part III establishes the social interest foundation of this species of legal remedy. To do this, it discusses the gaps of current efforts at justifying the remedy and the weaknesses of arguments against the legal remedy. In this part, among other things discussed, it is conceded that a promisor should be entitled to breach contracts whenever they can make reparation for breach. Part IV renews the case for the recognition of the remedy as a standard one in contract law.

II. Understanding Modern Transactional Risks

In the UKSC's decision of *Morris-Garner,* Lord Sumption, in delivering his minority judgment, made a case for the use of non-compensatory damages in contract law, reasoning that the historical categorisation of contract law rules is necessarily out

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19 Iva Bozovic & Gillian Hadfield, "Scaffolding: Using Formal Contracts to Build Informal Relations in Support of Innovation" (2012) USCL & Econ Working Paper No 144.

20 See Lisa Bernstein, "Beyond Relational Contracts: Social Capital and Network Governance in Procurement Contracts" (2015) 7 J Leg Analysis 561; see also Ronald Gilson, Charles Sabel & Robert Scott, "Contract and Innovation: The Limited Role of Generalist Courts in the Evolution of Novel Contractual Forms Ronald" (2013) 88 NYUL Rev 171; Ronald Gilson, Charles Sabel & Robert Scott, "Braiding: The Interaction of Formal and Informal Contracting in Theory' (2010) 110 Colum L Rev 1377; see also Ronald Gilson, Charles Sabel & Robert Scott, "Text and Context: Contract Interpretation as Contract Design" (2010) 110 Colum L Rev 1377.

21 See Matthew C Jennejohn, "Contract Adjudication in a Collaborative Economy" (2010) 5 Va L & Bus Rev 173.

22 See Juliet P Kostritsky, "A Bargaining Dynamic Transaction Cost Approach to Understanding Framework Contracts" (2018) 68 Am U L Rev, forthcoming.

23 (2018) UKSC 20 [*Morris-Garner*].

of tune with modern economic reality. In essence, he used his minority judgment as an avenue to warn against traditionalism in the design of contract law rules, as it could hinder contract law's dynamism.[24] Zamir made similar warning against a traditionalist design of contract law rules, as he said, among other things, that:

> Concepts and categories shape the way we think about anything, including legal doctrines and judicial decisions. Once a certain classification takes root in our minds, however, it can dominate our thinking and thus preclude us from seeing the entire complex picture.[25]

Lord Sumption founded his case for non-compensatory damages on two grounds; one is that a lawmaker must bear economic reality in mind when designing legal rules, and the second is that a contractual right to performance is an asset.[26] However, the majority in the *Morris-Garner* decision, while not addressing the first ground, discussed the second. They reasoned that a contract, *per se,* is not an asset, and as such, does not ordinarily warrant the application of non-compensatory damages. They ruled that contracts only command recourse to such a legal remedy when it relates to assets *properly so called*, such as property, intellectual property, and confidential information.[27]

In furthering Lord Sumption's position, it is the submission of this article that the institution of contract law must enforce contracts against the backdrop of new transactional hazards that feature in our intangible economy, and must apply remedies that correspond to that reality. Thus, it is of primary importance to establish two things: a) the need for contract law remedies to be dynamic; and b) that contracts, *per se,* can be assets.

A. *The Need for Remedial Dynamism in Contract Law*

As observed by Bray, there remains a wide fissure in the interactions between scholars of law-and-economics and scholars of legal remedies.[28] This situation is particularly the case in Commonwealth jurisdictions. A clear consequence of this interactional gap, in contract law scholarship, is that legal remedies are not understood as vital supporting levers of contract law as infrastructure but simply as responses to contractual infractions. The law scholar with no understanding of or lacking interest in law-and-economics is generally concerned with the question of 'what remedies apply to what rights or interests'. Such scholar is often less concerned with the need for a thorough investigation into why particular remedies apply to certain rights or interests. However, when such scholar is concerned with *why* remedies apply,

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[24] *Ibid* at para 103.

[25] Eyal Zamir, "The Missing Interest: Restoration of the Contractual Equivalence" (2007) 93 Va L Rev 59 at 60.

[26] *Morris-Garner, supra* note 23 at paras 103-115 ("The claimant's right to performance is an asset.").

[27] *Ibid* at para 93.

[28] Samuel Bray, "Remedies, Meet Economics; Economics, Meet Remedies" (2018) 38 Oxford J Leg Stud 71.

they often pursue their inquiries using doctrinal analysis, which Ronald Coase once, pejoratively, likened to stamp collecting.[29]

On the other hand, lawyer-economists are a lot more concerned with investigations into 'why certain remedies apply to given legal rights or entitlements' rather than simply 'what remedies apply'. Lawyer-economists perceive legal remedies as incentives that serve just like market prices in shaping decisions. Remedies, as they rightly explain, function as tools that advert the minds of decision-makers, at both public and private levels, to costs and benefits.[30]

Concerning the decision makers on the public strata, for example, engagement with investigations bordering on the '*whys*' of the subject of remedies would inform an evaluation on the suitability or adequacy of legal remedies towards the protection of entitlements that lawmakers have chosen to recognise. This evaluation would enable lawmakers to assess whether a choice of legal remedy provides too much protection, and thus wastes resources, or whether it provides inadequate security, and therefore, not likely to provide a viable legal infrastructure as desired. On the private level, however, legal remedies can shape the decision of a party who contemplates a civil infringement (*eg* breach of contract or tort) to assess whether benefits to them from pursuing that wrongdoing is more than the cost from the imposition of a legal remedy.[31] In the same vein, legal remedies available towards the enforcement of rights would determine the confidence a party would have in investing or transacting in a given jurisdiction.[32]

Furthermore, according to lawyer-economists, it is also important to understand why legal remedies, particularly financial ones, exist in contract law, in the first place. Contracts are generally 'incomplete' because of the factors of information costs, transaction costs and bounded rationality that make it impossible for a 'full' contract spelling out the rights, obligations and risks of parties to regulate future contingencies.[33] Therefore, the law fills this contractual void by selecting 'default rules', which apply when the parties have failed to make provision for what happens in certain situations.[34] Principles of contractual remedies are default rules, which are outcomes of the judicial policies that have evolved in response to the economic environment and commercial practices. Therefore, it comes as no surprise that Lord Sumption re-echoed the advice of Oliver Wendell Holmes, made over a century

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[29] Ronald Coase, "Law and Economics at Chicago" (1993) 36 JL & Econ 239 at 254; see also John N Drobak, "Beyond Stamp Collecting: Ronald Coase and "Scientific" Legal Scholarship" [2017] JL & Pol'y 21.

[30] See Klaus Mathis, *Efficiency Instead of Justice: Searching for the Philosophical Foundations of the Economic Analysis of Law*, 1st ed (Netherlands: Springer, 2009) at 12-14; see also Christine Jolls, Cass Sustein & Richard Thaler, "A Behavioral Approach to Law and Economics" (1998) 50 Stan L Rev 1471; Charles Wright, "The Law of Remedies as a Social Institution" (1955) 15 U Det LJ 376.

[31] Steven Shavell, "Damage Measures for Breach of Contract" (1980) 11 The Bell J Econ 466; see also Paul G Mahoney, "Contract Remedies and Options Pricing" (1995) 24 J Leg Stud 139; see also John H Barton "The Economic Basis of Damages for Breach of Contract" (1972) J Leg Stud 277.

[32] See Saul Levmore & William Stuntz, "Remedies and Incentives in Private and Public Law: A Comparative Essay" (1990) Wis L Rev 483.

[33] Roger Halson, *Liquidated Damages and Penalty Clauses*, 1st ed (United Kingdom: Oxford University Press, 2018) at 91-144.

[34] *Ibid*.

ago, that lawmakers and lawyers should equip themselves with an understanding of economics.[35]

The apparent neglect of economic thought and method among Commonwealth judges and scholars accounts for the strong tendency to adhere to orthodoxy in contract law in stark defiance of modern economic realities. As common law tradition has it, the primary remedy in contract law is compensation, but in exceptional cases, specific relief may apply.[36] This rule is preserved in the statement of Justice Parke B in *Robinson v Harman*[37] that "where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed."[38] A slight modification to this orthodoxy was inspired by the decision of *Attorney General v Blake*[39] and follow-on decisions across common law jurisdictions, which recognise that in certain situations non-compensatory damages may apply. Interestingly, Australia has consistently resisted any such modification; holding on to orthodoxy by rejecting non-compensatory damages in contract law.[40] However, in different ways, scholars have criticised the 'monopoly' of the compensatory principle, and very notable is that of Robert Scott and George Triantis, encapsulated, thus, that "despite its profound influence on contemporary contract law doctrine, the compensatory principle has tenuous historical, economic, and empirical support. Its evolution in the common law resulted primarily from ill-conceived path dependency".[41]

The principal weakness of the compensatory principle is that it caters largely to protecting promisees from monetary losses resulting from the risk of contractual opportunism or 'hold up'.[42] In other words, where a promisee does not suffer financial loss owing to contractual wrongdoing, the compensatory principle, in its strict sense, would not provide any substantial monetary remedy beyond nominal compensation.[43] That policy best serves to protect the expectation and reliance interests of

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35 *Morris-Garner, supra* note 23 at para 103.

36 *Co-operative Insurance Society Ltd v Argyll Stores* [1997] UKHL 17, at para 159 ("Specific performance is traditionally regarded in English law as an exceptional remedy, as opposed to the common law damages to which a successful plaintiff is entitled as of right. There may have been some element of later rationalisation of an untidier history, but by the 19th century it was orthodox doctrine that the power to decree specific performance was part of the discretionary jurisdiction of the Court of Chancery to do justice in cases in which the remedies available at common law were inadequate.").

37 (1848) 154 ER 363 (Exch).

38 *Ibid* at 364.

39 [2001] 1 AC 268 (HL).

40 *Biscayne Partners Pty Ltd v Valance Corp Pty Ltd & Ors* [2003] NSWSC 874; *cf Hospitality Group Pty Ltd v Australian Rugby Union Ltd* [2001] FCA 1040, where the High Court of Australia recognised the possibility of the remedy in very limited case, saying: "If he has suffered no loss, he is not entitled to be compensated. In an appropriate case, the aggrieved party may be able to recover (by a claim in restitution) benefits that he has made available to the wrongdoer; for example, he may be able to recover the price paid under an incomplete contract or recover possession of goods sold but not paid for.".

41 Robert Scott & George Triantis, "Embedded Options and the Case against Compensation in Contract Law" (2004) 104 Colum L Rev 1429.

42 Alan Schwartz & Robert E Scott, "Contract Theory and the Limits of Contract Law" (2003) 113 Yale LJ 541 (2003); see also Steven Shavell, "Contractual Holdup and Legal Intervention" (2007) 36 J Leg Stud 325.

43 For *eg*, in the case of *Jackson v Royal Bank of Scotland* [2005] UKHL 3, pecuniary compensatory damages was awarded where the commercial information that was divulged in breach of contract and confidential duty resulted in the loss of certain future business opportunities to the promisee. If the promisee had failed in establishing a nexus between contractual breach and the said head of loss, then

contracting parties. Even if the promisee were to assert their claim for reparation as one for non-pecuniary loss, the reparative outcome may be meagre as its computation would be tailored towards redressing personal inconveniences or distress suffered by the promisee, which may be inconsequential. In essence, the compensation principle appertains majorly to an industrial economy, where goods and services are significant features of trade. In our intangible (or post-industrial) marketplace, where knowledge, information, competencies, collaborations and networks are vital features of trade, the compensatory principle alone is an insufficient remedial standard. This is because, the rule is agnostic about peculiar transactional hazards that confront parties in our intangible marketplace, which are chiefly: difficulties to appropriability and spillover risk, on the one hand, and network or coordination failure risks, on the other.[44] It becomes crucial at this juncture to explain what these risks are.

1. *Appropriability and Spillover Risks*

The term 'appropriability' relates to the ability of an entity to recoup the cost of investing in the enablement of an asset or facility, which may be an informational or intangible one.[45] It could also be described as the ability of an entity to internalise a reasonable portion of the social value of an intangible asset (*ie* make reasonable private gains or returns from investing in the creation of such assets).[46] The inability of a party to achieve appropriability is often due to 'spillover' effects, which occur where other persons can freeride on an entity's investment. Traditionally, entities protect and exploit their intangible assets using IP regimes. However, the weaknesses, uncertainties, and limitations that occasion IP regimes have increased the recourse to contracts to protect and exploit intangible assets.[47] Thus, for example, contracts relating to the exchange of information and access to intangibles may impose positive or negative (*eg*, non-compete) obligations. These obligations may serve as the price or consideration for the disclosure of novel technical or business information between parties, or the access of contracting parties to competitive advantages, collaboration arrangements, or commercial networks. In arrangements of this nature, the risk of spillover is always high.[48] In such cases, where there is a contractual breach, compensation for loss may not be the innocent promisee's concern. Their concern may only be to capture a reasonable portion of the social advantages or surplus value

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the promisee would have received no compensation or, at best, would have received only nominal damages as compensation.

[44] See Matthew Jennejohn, "Disrupting Relational Contracts" (2018) [unpublished], online: <https://pdfs.semanticscholar.org/3b55/52002f043addda9385ac7de8feadce266263.pdf>.

[45] Mark Lemley, "Property, Intellectual Property, and Free Riding" (2005) 83 Tex L Rev 1031.

[46] Harold Demsetz, "Toward a Theory of Property Rights" (1967) 57 The Am Econ Rev 347.

[47] John Hagedoorn & Ann-Kristin Zobel, "The Role of Contracts and Intellectual Property Rights in Open Innovation" (2015) 27 Tech Analysis & Strategic Management 1050 ("In sum, firms active in open innovation seem to have a very strong preference for (renewable) contracts to govern their relationship with their partners when they engage in joint R&D, joint product and process development, and joint design. Not using contracts is very much rather the exception than the rule. Also, open innovation firms value these contracts from both a legal control perspective as well as a more practical process monitoring perspective."); see also Julien Penin & Daniel Neicu, "Patents and Open Innovation: Bad Fences Do Not Make Good Neighbours" (2018) 25 J of Innovation Econ & Mgmt 57.

[48] JE Oxley, "Appropriability Hazards and Governance in Strategic Alliances: A Transaction Cost Approach" (1997) 13 The JL Econ & Organization 387.

resulting from their investments in intangible assets or to avoid others enjoying the fruits of their investments without paying.

Some case law examples, not bordering on fiduciary obligations, illustrate the problem of appropriability or spillover risks in purely commercial settings. One of such cases is *Primary Group UK Ltd v Royal Bank of Scotland and another*.[49] In this case, the claimant had confidential business information, relating to its financial position, with the first defendant. The first defendant, while seeking professional advice from the second defendant, made this information available to a person associated with the second defendant. The defendant's disclosure happened to be in breach of its confidentiality obligations owed to the claimant. The second defendant, as it happens, was the claimant's market competitor. The judge found that although there was potentiality for spillover risk to result from the breach, it did not materialise. Another case is *Vercoe v Rutland Fund Management*,[50] where appropriability or spillover risk emerged. In this case, the claimants had engaged the services of the defendants, venture capitalists, to help in acquiring a business interest, and in the course of things had disclosed valuable business information to the defendant. In breach of the contract the parties had, the defendant sidelined the claimants and exploited the information. The facts of cases like *CF Partners (UK) LLP v Barclays Bank PLC*,[51] *Force India Formula One Team Ltd v 1 Malaysia Racing Team Sdn Bhd*[52] and *CF Partners (UK) LLP v Barclays Bank PLC*,[53] equally exemplify appropriability and spillover risks in commercial settings.

However, there are situations where the appropriability/spillover concerns relate, not to the disclosure of information, but the inability to internalise a reasonable portion of the social benefits resulting from private investments in things or assets (*eg* an IP right), according to an agreement. Such a situation may arise in cases where the nature of the contract is to manage competing or incompatible interests between parties, usually hinged on negative covenants. A good example would be contracts or restrictive covenants to address incompatible uses of trade names or trademarks, as in *WWF—World Wide Fund for Nature v World Wrestling Federation.*[54] It may be to manage competing interests in copyright or creative works as seen in *Experience Hendrix LLC v PPX Enterprises Inc*.[55] It may also be to divide markets or regulate competition between entities; as between licensors and licensees of IP; an employer and an employee;[56] and sellers and buyers of businesses.[57] The promisee's concern, as *per* appropriability, is that they may not be able to internalise a reasonable portion of the social benefits resulting from their investments in matters to which given contracts relate. Where such concern is not addressed, the

[49] [2014] EWHC 1082 (Ch) [*Primary Group UK Ltd*].

[50] [2010] EWHC 424 (Ch).

[51] [2014] EWHC 3049 (Ch).

[52] [2012] EWHC 616 (Ch).

[53] [2014] EWHC 3049 (Ch).

[54] [2002] EWCA Civ 196 [*WWF*].

[55] [2003] EWCA Civ 323.

[56] Ronald Gilson, "The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete" (1999) 74 NYUL Rev 575; see also Jonathan Barnett & Ted M Sichelman, "Revisiting Labor Mobility in Innovation Markets" (2016) USCL Leg Stud Paper No 16-15.

[57] *Morris-Garner, supra* note 23; see also the United States case of *YJD Rest Supply Co v Dib* (1979) 413 NYS2d 835 (NY Sup Ct).

risk is created that entities may feel discouraged to invest confidently in intangibles, and for this reason, potential public goods gains, which may be vital, may not result.

2. *Coordination or Network Failure Risk*

Understanding the risk of coordination or network failure requires a primer on what networks are. One may describe a network as a bundle of inter-firm relationships, without any hierarchical control, that brings about productive outcomes in the economy. A beneficial description provided by Porat and Scott goes, thus:

> Inter-firm networks are mechanisms for coordination and cooperation between formally independent but functionally interdependent firms. They provide firms with access to essential capabilities and resources that are under the control of other firms in their environment. Firms in networks frequently contract with others in the network to further their network project and these contracts can create benefits for, or impose costs on, other network members who are not contract parties.[58]

Networks are pervasive in our intangible economy. Arrangements for franchising, technology standard settings, open source licensing, open innovation, blockchains, joint ventures, credit card platforms, supply chains, *etc*, and other transactional platforms in the sharing economy are examples of networks. The simple reason for networks is the increasing difficulties of single firms alone to handle all aspects of production profitably or efficiently.[59]

Because of the interoperability advantages of network settings (*ie*, bringing disparate suppliers together to achieve an outcome or a set of connected results), they enable huge social advantages called 'network effects'.[60] For suppliers or producers, when networks grow, upon securing a large user-base, profitability prospects increase; which would mean further investment to improve the network's traction to expand its base. For users, because of the interoperability of suppliers enabled, the transaction costs of collecting inputs from different suppliers together is lowered, and as such, the cost of goods and services drop significantly.[61] In essence, network effects are good for the economy, and for this reason, the law should provide support through legal rules to encourage their formations and facilitate their stability. Considering that contracts are foundational to building networks, contractual wrongdoings may pose a risk to the workability of network systems by, for example, devaluing

[58] Ariel Porat & Robert Scott, "Can Restitution Save Fragile Spiderless Networks?" (2018) 8 Harv Bus L Rev 1 at 3 [*Spiderless Networks*].

[59] Ronald Gilson, Charles Sabel & Robert Scott, "Contracting for Innovation: Vertical Disintegration and Interfirm Collaboration" (2009) 109 Colum L Rev 431.

[60] See Michael L Katz & Carl Shapiro, "Network Externalities, Competition, and Compatibility" (1985) 75 The Am Econ Rev 424; see also Mark Lemley & David McGowan, "Legal Implications of Network Economic Effects" (1998) 86 Cal L Rev 479.

[61] Vanessa Katz, "Regulating the Sharing Economy" (2015) 30 BTLJ 1067.

their credibility or making coordination difficult.[62] For this reason, it becomes essential that contract law remedies can respond to such risks. Again, the compensatory rule alone may not serve viably to discharge this purpose.

There are also case law examples that exemplify network failure risks. One good example is *Esso Petroleum Company Ltd v Niad*.[63] In this case, the claimant petroleum supplier established a price management scheme with its various dealers to meet its market competition challenges, by undercutting its competitors' prices. The defendant breached its obligations arising from the project and profited from the breach. One can only imagine a situation where other dealers too assumed that their violation of the project would go unnoticed by the claimant promisee.[64] The risk of rendering the project a failure becomes high, thereby creating a likelihood of costs to fall not just on the promisee but also causing a deprivation of the likely social gains derivable from legitimate strategic commercial competition.

Another case that illustrates this risk is *Pell Frishmann v Bowman Valley Iran*.[65] In this case, the different entities had pooled engineering and business expertise together with other resources. They had agreed not to proceed with a project without one another. In any event, the others breached the negative covenant and pursued the project without the consent of one party to the joint venture. The coordination risk here is noticeable. If the social capital needed for networks to form were low, the confidence of entities to pool expertise and other resources together might plummet. Such a situation would raise the cost of creating such joint ventures, and the potential social gains that could result from them may not potentiate efficiently.[66] Another case law example, albeit an old one, that illustrates this risk is *British Motor Trade Association v Gilbert.*[67]

Besides, it is essential to state that as a network grows it may become difficult for individual members to avoid spillover risks if the network does not operate under a contractual mechanism with obligations imposed, targeted at such risks.[68] Suppose *A*, *B* and *C* are software firms that have entered into non-compete agreements according to which they have agreed to exchange information and access to other intangibles. *C*, for example, may pursue some research collaboration work with *D* and *G*. In the course of this collaboration, which would not appear to breach the non-compete covenant, *C* may apply knowledge gained from *A* and *B* to the

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62 Professors Porat and Scott explain this risk aptly saying: "Here the membership in the network is "vague and fluid;" the actions of any party can create positive externalities for others but the same behavior also motivates moral hazard and free riding by others in the network. These risks undermine what we call a "reciprocity equilibrium." A reciprocity equilibrium results when each network member receives from the network a benefit proportionate to the benefits it creates for others and the costs it incurs. If network participants deviate significantly from a reciprocity equilibrium the network will fail to form successfully and, even if formed, further efficient participation and operation of the network may be precluded." *Spiderless Networks, supra* note 58 at 4.

63 [2001] EWHC Ch 458.

64 In fact, the cost of detecting deviations from contractual specifications in settings like networks justifies the application of non-compensatory damages, as submitted by Omri Ben-Shahar and Oren Bar-Gill in their paper "An Information Theory of Willful Breach" (2009) 107 Mich L Rev 1479.

65 [2009] UKPC 45.

66 See Barak D Richman, "An Autopsy of Cooperation: Diamond Dealers and the Limits of Trust-Based Exchange" (2017) 9 J Leg Analysis 247.

67 [1951] 2 All ER 641 (Ch).

68 See *Spiderless Networks, supra* note 58 at 3; *Private Order, supra* note 8.

research collaboration project. Therefore, there is a significant possibility that *D* and *G* would gain from spillover effects. For this reason, a firm that cares seriously about managing spillover effects, and less for network gains, would apply broader restrictive obligations in contracts with other parties with whom they share information or intangibles. However, if a firm cares to balance spillover risks with gains from network effects, it would desire a network arrangement fashioned around a 'master contract' mechanism—what Porat and Scott liken to a "spider".[69] However, the cost of facilitating such mechanism may be high due to transaction costs. Non-compensatory damages may provide default rules that save on transaction costs, enabling the creation of such a contractual arrangement with minimal details. A third option left to firms desiring to gain from innovative or production scale is vertical integration through mergers or acquisitions.[70] These, however, have their limitations and social costs implications. However, this paper does not address this third option and its features.

B. *Contractual Rights as Assets* Per Se *(in Particular Situations)*

As rightly suggested by McInnes, before we can supplement the compensatory principle, a reconceptualisation of the institution of contract law is necessary.[71] It is the submission of this article that contract law should not only be perceived as an institution for facilitating exchanges between economic actors but also as one that advances distributional goals.[72] The remedial levers of the institution of contract law should be redesigned to be able to support the creation of knowledge-based public goods. Where that lever is so redesigned, it enables contract law in encouraging the exchange of technical and business information, and the cross-fertilisation of productive competences and the viable working of networks. The need for this in our modern intangible economy cannot be overemphasised. This is so, especially considering the limitations of IP law in facilitating such socially valuable goals. The efficacy of contracts in attaining these goals lies in the ability of contractual obligations to affect the decisions and freedom of contractually bound parties on how to allocate their private resources or pursue given ends. Therefore, contracts can *per se* be assets to private entities without them relating to the protection of intellectual property, property or confidential information as required by the majority in *Morris-Garner.* In fact, in *Turf Club Auto Emporium Pte Ltd and others v Yeo Boong Hua*,[73] the Singaporean Court of Appeal recently described the *Morris-Garner* view as "unduly narrow", with Justice Andrew Phang saying:

> Indeed, on the facts of *One Step (SC)* itself, while the majority were unequivocally of the view that the case was "not one where the breach of contract has resulted in

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[69] *Ibid*.

[70] See Peter Lee, "Innovation and the Firm: A New Synthesis" (2018) 70 Stan L Rev 1431.

[71] Mitchell McInnes, "Gains-based Relief for Breach of Contract: *Attorney General v Blake*" (2001) 35 Can Bus LJ 72 at 94. See also Alvin WL See, "User Damages and the Limits of Compensatory Reasoning" [2018] LMCLQ 73.

[72] See Hugh Collins, "Distributive Justice Through Contract" (1992) 45 Current Leg Probs 49; see also Anthony Kronman, "Contract Law and Distributive Justice" (1980) 89 Yale LJ 472.

[73] [2018] 2 SLR 655 (CA).

the loss of a valuable asset created or protected by the right which was infringed" (at [99]), one could argue that the non-compete and non-solicitation covenants breached did protect valuable assets of the plaintiff, namely the goodwill of its business, and its right under the covenants to control the level of competition in the unique market in which the parties operated.[74]

To the extent that contractual obligations attract critical social interests, particularly the creation of public goods, they should be treated as assets for remedial purposes. In fact, in *Marathon Asset Management LLP v Seddon*[75] the primary factor that Justice Leggatt considered essential to determining if non-compensatory damages apply in contractual cases is "the strength of the interest which the law recognises as deserving protection".[76] It is not every contractual obligation that deserves that asset status. This is so whether or not such obligation has "nuisance value" to the promisor.[77] What should matter is the weight of the social interest implicated in the contract. In this connection, the UKSC in determining whether or not non-compensatory damages should apply in *Morris-Garner* should have been concerned only with the question whether the breach in issue had crucial social interest implications (*ie* whether the kind of breach could have demonstrable adverse effects on public goods creation).

As observed by Justice Leggatt, even the particular covenant in *Wrotham Park Estate Co Ltd v Parkside Homes Ltd*[78] (the pioneering case on non-compensatory damages) was considered by Justice Bright as having no nuisance value to the covenantor (*ie* the promisor) of that case. The application of the remedy, in that case, was actuated by the nature of the social vitality of the interest in the issue (*ie* the institution of property). Covenants relating to real property, as in *Wrotham Park Estate,* have been rationalised as tools for creating public goods in that they enable a private regulatory regime, in place of public regulatory systems, in which property owners within proximities to one another can govern their relationships concerning their different uses of land.[79]

To reiterate, the thesis of this article is that non-compensatory damages are essential to shore up the institution of contract law considering the inadequacies of the

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[74] *Ibid* at para 282. See also Man Yip & Alvin WL See, "One Step Away from *Morris-Garner*: *Wrotham Park* Damages in Singapore" (2019) 135 Law Q Rev 36.

[75] [2017] EWHC 300 (Comm) [*Marathon Asset Management LLP*].

[76] *Ibid* at para 229.

[77] *Ibid* at para 197.

[78] [1974] 1 WLR 798 (EWHC) [*Wrotham Park Estate*].

[79] See Clayton Gillete, "Courts, Covenants and Communities" (1994) 61 U Chicago L Rev 1375; see also Steven Davies, "Laissez Faire Urban Planning" in Steven Davies, Peter Gordon & Alexander Tabarrok, eds, *The Voluntary City: Markets, Community and Urban Planning*, 1st ed (India: Academic Foundation, 2006) 51 at 69, 70 ("… covenants were a way around a classic public goods problems. The services—such as environmental quality, lighting, paving, street easements, and the like—are all "public" goods. This is that they have the quality of nonexcludability, so that once they have been provided everyone benefits from them regardless of whether they have paid or not. This creates, in economic theory, the "free-rider" problem, where every individual has an incentive to not pay for or provide a good but instead rely on others. The consequence is that the good is underprovided or not provided at all. Covenants were a means whereby developers and landlords could provide such public goods and sell them to the ultimate consumer by "bundling" the public goods with the private good of land use."). See also Moshood Abdussalam & Saurav Satyal, "How Progressive Judicial Enforcement Can Alleviate the Social Cost of Excessive Land Covenants in New Zealand" (2019) 27 Austl Prop LJ 157.

compensatory principle. The submission is so because: a) contract law remedies must respond to contemporary transactional hazards; and, b) contracts can be assets *per se* when they border on critical social interests. It becomes essential, at this stage, to show that non-compensatory damages only serve to advance social interests. In the next section, the argument that non-compensatory damages help to promote social interest is pursued by addressing the weaknesses of principal arguments in favour of non-compensatory damages and by showing the lapses in cases made against non-compensatory damages in support of the exclusiveness of the compensatory principle.

III. The Social Interest Basis of Non-Compensatory Damages in Contract Law

The purpose of this part of the article is to demonstrate that the only defensible basis for the application of non-compensatory damages in contract law is for the protection and advancement of critical social interests that arise in contract matters, especially the preservation of public-goods effects. In *Attorney General v Blake*, Lord Nicholls re-echoed academic concerns that the topic of non-compensatory damages in contract law is a "devilishly difficult" one.[80] The perceived difficulty of the subject induced one writer to conclude that: "the continued search for a doctrine underpinning gains-based remedies cannot lead anywhere productive".[81] The writer simply urged that we should accept the remedy as a pragmatic response to cases where the compensatory principle offers no remedy to contractual losses.[82] However, some judges have rationalised the remedy as compensatory, and have done so based on the reasoning that the loss a contractual right is, in substance, the loss of legal entitlement.[83] On the contrary, some other judges, such as Allan J of the New Zealand High Court in *Denaro Ltd v Onyx Bar & Cafe (Cambridge) Ltd*,[84] disapprove of the explanation of the remedy as compensatory;[85] rather, they have sought to explain the remedy as restitutionary on the ground that it serves to restore value transferred to breaching promisors.[86] In particular, Allan J reasoned that cases to which the remedy will apply would be "fairly rare".[87]

The perceived difficulty in establishing a stable doctrinal foundation for the remedy can be significantly eased by simply recognising the class of remedy as advancing social interests. Barnes provides a very illuminating explanation on why non-compensatory damages, otherwise known as restitutionary damages, apply in contract law, saying as follows: "Because damages based on restitution depend on benefits received by the breaching party rather than loss suffered by the injured party,

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80 *Ibid* at 278.

81 Tom Stafford "Gains Based Remedies: The Misguided Search for a Doctrine" (2016) 4 IALS Student L Rev 3 at 12.

82 *Ibid*; see also Andrew Phang & Pey Woan Lee, "Rationalising Restitutionary Damages in Contract Law: An Elusive or Illusory Quest?" (2001) 17 J Contract Law 240.

83 See *WWF, supra* note 54; see also *Giedo Van der Garde BV v Force India Formula One Team Ltd* [2010] EWHC 2373 (QB) [*Giedo Van*].

84 *Supra* note 6 at para 26.

85 *Ibid* at para 26.

86 *Ibid* at para 20.

87 *Ibid* at para 28.

the restitution interest is more an interest of society than of the injured party."[88] Barnes' statement goes to show that the remedy is not compensatory of loss but rather, it aims at advancing social interest.

As established in common law, restitutionary damages generally apply to deter interference with proprietary entitlements.[89] In essence, they serve to preserve the exclusivity of rights, such that where any gain is derived from an interference, restitution or disgorgement is made to the owner. Therefore, where the law considers the remedy applicable to contract, it must mean that the obligations that feature in the contract attract society's interests. Where the law considers that interference with entitlement is likely to have high social cost consequences, the law would generally protect that right with proprietary remedies or property rules.[90] The essence of this is to show abhorrence for interference or/ and to compel a would-be wrongdoer to negotiate with the entitled party for access to the entitlement.[91] However, where the law considers that it is sufficient that the wrongdoer should internalise the cost of interference (*eg* the wrongdoer can adequately compensate the innocent party), and the social cost of doing is low, then proprietary remedies or property rules would not apply.[92] Equally, the law may allow the innocent party's loss to lie where it falls in cases where compensation would be generally inadequate so long as the social cost of not remedying the loss is inconsequential.[93]

Balganesh's thesis on why the law would apply property rules to relational liability regimes, such as contract and tort law, corroborates the preceding discussions of this article. He posits that the State may treat a relational liability regime as creating quasi-property rights where:

> [T]he law might nonetheless choose to endow the interest in question with limited exclusionary significance. Often, it turns out that these reasons have little to do with the abstract connection between the interest-holder and the object—believed to be central to property—but rather derive from a specific context or setting within which that connection becomes necessary to further *other* values or goals.[94]

He goes on to identify three reasons why the law may confer a relational entitlement with quasi-property status.[95] The first is to preserve economic value. The rationale

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88 David Barnes, "The Net Expectation Interest in Contract Damages" (1999) 48 Emory LJ 1143 at 1149.

89 See Graham Virgo, *The Principles of the Law of Restitution*, 3d ed (United Kingdom: Oxford University Press, 2015) at 448-450.

90 Keith Hylton, "Duty in Tort Law: An Economic Approach" (2006) 75 Fordham L Rev 1501 at 1505-1510.

91 *Ibid*; see for *eg, Ministry of Defence v Ashman* (1993) 25 HLR (EWCA); see also *Strand Electric Co v Brisford Entertainment* [1952] 2 QB 246.

92 *Ibid*; see also Keith N Hylton, "Missing Markets Theory of Tort Law" (1996) 90 Nw UL Rev 977; see also Daniel Markovits & Alan Schwartz, "The Myth of Efficient Breach: New Defenses of the Expectation Interest" (2011) 97 Va L Rev 1939 ("The law protects an entitlement with a property rule when it makes the entitlement holder's acquiescence a necessary condition for transfer of the entitlement. Contract law would protect the expectation with a property rule if it required the promisor always to render the promised performance rather than a monetary substitute for it.").

93 *Ibid*.

94 Shyamkrishna Balganesh, "Quasi-Property: Like, But Not Quite Property" (2012) U Pa L Rev 1889 at 1907.

95 *Ibid* at 1910-1912.

behind this, Balganesh explains, is that compelling the wrongdoer to internalise the cost of the interference (*eg* by privately bearing the cost of the victim's compensation) may not serve adequately in prohibiting the wrong outright. He explains further that in such a case, the purpose is to preserve the value of the entitlement. The second reason Balganesh provides is the need to create an identifiable focal point for coordination. By this, he means the conferral of quasi-property rights serves as a signal for parties to coordinate their affairs or behaviour on the understanding that the law would not tolerate interference with the entitlement. The third reason is the need to expand remedial options for protecting the relevant relational right. Balganesh's thesis cohere with the justification for applying non-compensatory in contract law where there are social interest implications.

With the social interest basis of non-compensatory damages in contract law laid out, it becomes necessary to shift focus towards addressing the weaknesses in current arguments in support of non-compensatory damages in contract law and, equally, the gap in the case for remedial orthodoxy. The purpose of highlighting these differences is to accentuate social interests (*eg* the promotion of 'public good' creation) as being the catalyst for the application of the remedy in contract law.

A. *The Gaps in Prevailing Arguments for Non-Compensatory Damages*

The purpose here is not to criticise the works of scholars who have advanced arguments in favour of the application of non-compensatory damages to contract law. Rather, the aim is to show that their arguments, while very stimulating and refreshing, do not adequately justify the application of non-compensatory damages to contract law. They have the chief lapse of not postulating that it is only special factors, those attracting critical social interests, which deserve the application of non-compensatory damages.

One major line of argument often made to justify the remedy is that in certain situations the 'net loss' rule,[96] the fulcrum of the compensatory principle, may be difficult to satisfy, particularly its 'certainty of loss' component. In other words, that it can sometimes be manifestly difficult for promisees to make a proper approximation of the loss they stand to suffer owing to a contractual breach. Where the compensation principle is difficult to satisfy, some proponents for the remedy argue that this would result in inadequate protection for the promisee's interest, which would be unjust or unfair.[97] This argument is prevalent in court judgements that have dealt with the subject, and it has unfortunately been the basis for treating the non-compensatory remedy as a form of compensation for loss of contractual bargain where lost value cannot be proved.[98]

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[96] The principle, as expressed by Nourse LJ's statement in *Kennedy v Van Emden* [1996] PNLR 409 at 414 (EWCA), goes thus: "damages are to be assessed in the real world. Compensation is a reward for real, not hypothetical loss. It is not to be made an occasion for recovery in respect of a loss which might have been, but has not been, suffered.".

[97] See Tareq Al-Tawil, "Can Corrective Justice and Deterrence Co-Exist?" (2013) 6 Eur J Leg Stud 140.

[98] See for *eg, Giedo Van, supra* note 83; see also *Abbar & Anor v Saudi Economic & Development Company (Sedco) Real Estate Ltd & Ors* [2013] EWHC 1414; see also *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hong Kong) Ltd and another appeal* [2017] 2 SLR 129 (CA); and, *WWF, supra* note 54.

However, as shown above, an inability to prove loss should not, of itself, be a reason to award non-compensatory damages. Lack of reparation does not of itself cause any diminution in social wealth nor present a risk of social loss. As Calabresi and Melamed postulated, the law may 'grant' wrongdoers freedom from reparative obligation because of the cost of trying to do justice.[99] Thus, they submitted:

> Perhaps the simplest reason for a particular entitlement is to minimize the administrative costs of enforcement. This was the reason Holmes gave for letting the costs lie where they fall in accidents unless some clear societal benefit is achieved by shifting them. By itself this reason will never justify any result except that of letting the stronger win, for obviously that result minimizes enforcement costs. Nevertheless. administrative efficiency may be relevant to choosing entitlements when other reasons are taken into account.[100]

Justice Leggatt reasoned similarly in coming to the statement that the mere inadequacy of compensation or the difficulty of proving loss should not be the reason for awarding non-compensatory damages. He reasoned that in most cases where loss cannot be proved, then it may be fair to hold that no loss was suffered.[101] Further, that where loss cannot be shown to be suffered, then nominal damages should be awarded. He, however, distinguished situations of this kind from those in which the defendant actions made it impossible for the promisee to prove loss. In cases of this latter kind, Justice Leggatt suggested that courts may take robust steps to compute loss, but must not conjecture an estimation that has no foundation in reasonable evidence.

Consequently, however, His Honour came to the reasoning that non-compensatory damages may be awarded in cases where, inherently, compensation cannot redress the nature of the loss suffered by the claimant, even if the quantum of loss could be properly ascertained.[102] In essence, it is the special nature of the concerns to which contracts relate which would warrant the application of non-compensatory damages. Equally important and persuasive is the argument of Dagan that non-compensatory damages should apply (in unusual cases) where the promisee's loss mirrors the promisor's profits, not where loss cannot be proved, but the promisee made profits.[103]

Another significant line of argument often advanced by proponents of the remedy is that contracts are 'property rights'[104] or, alternatively, that the right to performance is *per se* an asset.[105] Thus, as generally argued by these proponents, in cases of

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[99] Guido Calabresi & Douglas Melamed, "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral" (1972) Harv L Rev 1089 at 1093.

[100] *Ibid*.

[101] *Marathon Asset Management LLP, supra* note 75 at paras 214, 215; see also the Singaporean case, *Marken Limited (Singapore Branch) v Scott Ohanesian* [2017] SGHC 227.

[102] *Ibid* at para 215.

[103] Hanoch Dagan, "Restitutionary Damages for Breach of Contract: An Exercise in Private Law Theory" (2000) 1 Theo Inq L 115 at 117.

[104] See Daniel Friedmann, "Restitution for Benefits Obtained Through the Appropriation of Property or the Commission of a Wrong" (1980) 80 Colum L Rev 504.

[105] See for *eg*, Andrew Botterell, "Contractual Performance, Corrective Justice and the Disgorgement for Breach of Contract" (2010) 16 Leg Theory 135; see also Anthony Sangiuliano, "A Corrective Justice

breach, the promisor deprives the promisee of a thing of value or an asset. For this reason, where compensation cannot remedy the wrong, reparation that represents the price that the promisor would have paid to be relieved of contractual obligation(s) should be provided. A set of writers has argued that there is virtually a 'demise of nominal damages' as mirrored in a significant diminution in their award by courts in modern case law, which is attributable to a judicial awakening to the socio-economic importance of contracts.[106] Cunnington rationalises this stance by asserting that contracts help facilitate the transfer of resources from those who value them less to those who value them most.[107] He also posits that a society characterised by a devaluation of the institution of contracts owing to an attitude of tolerance towards breach would have the social capital needed for the exchange of goods and services hampered.[108] Some others have based the remedy's foundation on the need to deter contractual breach.[109]

Some scholars have advanced economic arguments, towing this line of reasoning, that a promisee has a right to performance. This paper addresses the salient ones in the literature. One set of scholars, Thel and Siegelman, submit that the standard remedy for contract law should be disgorgement, not compensation for loss of promisee's expectations.[110] Thel and Siegelman reason that when courts apply the disgorgement, they are doing the standard thing of giving the promisor only what he would have benefitted from the bargain if he had not breached. To illustrate, suppose the promisor would have earned $50 from the contract if there had been contractual performance but had earned $70 from engaging in a breach (*ie* with $20 being the incremental gain from the breach); disgorgement would ensure that the incremental gain is given to the promisee. This way, the promisor only gets to keep the $50, which he had all along been entitled to. They submit that way the promisor would have every incentive to perform contracts, and as the remedy functions as a "bonding mechanism" that limits the promisor's reparative obligations to the gains derived from a (deliberate) breach.[111] Another merit they attach to the use of disgorgement as the standard remedy is that it increases the value of contracts to promisors.[112] They argue, with hypothetical illustrations, which are not very persuasive, that most cases that are often understood as furthering the compensatory principle are, in fact, cases of disgorgement.[113]

Account of Disgorgement for Breach of Contract by Analogy to Fiduciary Remedies" (2016) 29 Can J L and Jurisprudence 149; see also Katy Barnett, *Accounting for Profits for Breach of Contract*, 1st ed (United Kingdom: Hart Publishing, 2012) at 18.

[106] David Pearce & Roger Halson, "Damages for Breach of Contract: Compensation, Restitution and Vindication" (2008) 28 Oxford J Leg Stud 73 at 75-77.

[107] Ralph Cunnington, "The Inadequacy of Damages as a Remedy for Breach of Contract" in Charles Rickett, ed, *Justifying Private Law Remedies* (United Kingdom: Hart Publishing, 2008) at 115; Ralph Cunnington, "The Assessment of Gain-Based Damages for Breach of Contract" (2008) 71 Modern L Rev 559.

[108] *Ibid*.

[109] See Nicholas Sage, "Disgorgement: From Property to Contract" (2016) 66 UTLJ 244.

[110] Steve Thel & Peter Siegelman, "You Do Have to Keep Your Promises: A Disgorgement Theory of Contract Remedies" (2010) 52 Wm & Mary L Rev 1183.

[111] *Ibid* at 1227.

[112] *Ibid* at 1186.

[113] *Ibid* at 1192-1198.

Eisenberg also presents economic arguments in favour of the right to receive performance.[114] According to him, protection of the disgorgement interest exists side-by-side with the compensatory principle, and are, necessarily, mirror images of each other.[115] He reasons that the compensation principle serves to preserve the promisee's performance interest, while the disgorgement interest ensures the promisee does not get more than he is entitled to, judging by his contractual obligations. Eisenberg articulates that courts only apply whichever of the two is germane in relevant cases. The economic pivot of Eisenberg's argument is that the application of the disgorgement remedy is most useful in thin or differentiated markets—in essence in situations where the contractual subject matter is unique or limited in supply.[116] In such (market) situations, the remedy encourages contracting parties to incorporate an 'implicit premium' into their pricing calculation. This premium, he argues, would cause the promisor to be indifferent between breaching and performing the contract, in such (market) situations. However, in homogenous markets or markets (*ie* where there are substitute goods to satisfy the promisee) the disgorgement remedy cannot fairly apply as there are market alternatives available to the promisee, and as such, an attribution of the promisor's gains to the breach would be questionable.[117] In any event, the chief flaw of Eisenberg's argument for non-compensatory damages is that it is not founded on the need to protect or advance crucial social interests. Rather, it treats contractual rights as something akin to a proprietary right.

Lastly, worthy of mention is Elkin-Koren and Salzberger's economic case for disgorgement made based on the promisee's right to receive performance.[118] They submit that this is both economically and non-economically justifiable. Its non-economic merit is that the remedy is usually less concerned about wealth maximisation but more directed at preserving the deontological purpose that the institution of contract serves. However, they opine that it has the economic merit of discouraging breach and thus economising on litigation, transaction and other third-party costs that breach may throw up. They cite the Israeli Supreme Court's decision in *Adras—Building Materials Ltd v Harlow and Jones GMBH*[119] as a good instance of where such consideration informed the court's decision. Another economic advantage is that it has 'information forcing' value. When renegotiating the contract, they argue, it encourages the parties to engage in information sharing. If the promisor stands to make better gains from the breach, then the promisee can let the promisor deal with a third party, and both can share the gains resulting. If however, the promisee has information on better rewarding avenues or uses than the promisor, then the promisor would avoid breaching, as the latter's gain would not surpass the former's.

In response to the arguments of these scholars, Dagan rightly submits that the 'right to performance' argument is particularly weak because it is content-neutral. This is that it does not give us any guidance on whether we should apply disgorgement to complement the compensation principle or keep the compensation principle, or in

[114] Melvin Eisenberg, "The Disgorgement Interest in Contract Law" (2006) 105 Mich L Rev 559.
[115] *Ibid* at 561.
[116] *Ibid* at 597-599.
[117] *Ibid*.
[118] Niva Elkin-Koren & Eli Salzberger, "Towards an Economic Theory of Unjust Enrichment Law" (2008) 20 Intl Rev L & Econ 551.
[119] (1995) 3 RLR 235 (SC of Israel).

fact, how to enforce contracts at all.[120] As he explains:

> Thus, although the value of promise-keeping indeed requires that some sort of sanction be imposed in cases of non-performance, so that then promised course of conduct is made "non-optional to some degree", there is nothing inherent to this value that dictates any particular degree of non-optionality. Promise-keeping does not entail any preference of one remedy over another. Therefore, it cannot offer any guidance regarding the selection from amongst the various alternative remedies, namely: reliance damages, expectation damages, specific performance, restitutionary damages and punitive damages.[121]

That only public interest concern warrants the use of non-compensatory damages is self-evident from pioneering cases that applied that remedy.[122] One common denominator those cases share is that they relate to interests which, hitherto, were considered unique and judicially earmarked for special protection because they were considered to attract crucial social interests. Prime examples of which are proprietary information and contracts relating to interests in land. However, as the nature of society is dynamic, what counts as a special interest in a given milieu or occasion may not qualify as so in another. Land is an excellent example on which to advance this argument. There is a retinue of cases in which contracts relating to land are considered specifically enforceable (*ie* entitled to enforcement by the award of an injunction).[123] However, in cases where specific relief is unavailable because, in breach of a contract to sell land, the landowner has sold to an innocent purchaser for value, courts would award gain-based damages, treating the landowner as a constructive trustee to the original promisor.[124] These practices were good at a given socio-economic dispensation but not in modern times.[125] In some jurisdictions, land is no longer unique in value, as previously perceived. As sufficiently explained by the Canadian Supreme Court in *Semelhago v Paramadevan*:[126]

> While at one time the common law regarded every piece of real estate to be unique, with the progress of modern real estate development this is no longer the case.

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[120] Hanoch Dagan, "Restitutionary Damages for Breach of Contract: An Exercise in Private Law Theory" (2000) 1 Theo Inq L 115 at 121.

[121] *Ibid*.

[122] John McCamus, "Disgorgement for Breach of Contract: A Comparative Perspective" (2003) 36 Loy LA L Rev 943 at 973 ("My tentative conclusion is that the Blake Doctrine, permitting disgorgement relief in cases of breach of contract, will most likely be applied in circumstances where the particular breach is of such a nature that it engages policy values fostered by existing tort, crime, breach of confidence, and breach of fiduciary obligation.").

[123] See for *eg, Adderley v Dixon* (1824) 57 ER 239 at 240 (Ch), where Sir Leach VC said, among other things, that: "Thus a Court of Equity decrees the performance of contract for land, not because of the real nature of land, but because damages at law, which must be calculated upon the general money value of land, may not be complete remedy to the purchaser, to whom the land may have a peculiar and special value.".

[124] *Lysaght v Edwards* (1876) 2 Ch D 449; *Englewood Properties Limited v Shailesh Patel, Cornberry Limited* [2005] EWHC 188 (Ch).

[125] See for *eg, Scott v Southern Pacific Mortgages Ltd* [2014] UKSC 52 where the UKSC held that a contract to transfer an interest in land only created personal interests or obligations.

[126] [1996] 2 SCR 415.

> Both residential, business and industrial properties are mass produced much in the same way as other consumer products. If a deal falls through for one property, another is frequently, though not always, readily available.[127]

In our intangible economy, things that hitherto would have qualified as unique or without substitutes, such as land and scarce goods, generally warranting specific relief or non-compensatory damages in related contracts are less so. Innovative knowledge and production capabilities have created viable alternatives and increased availability.[128] Where options are available, the only remedial concern might be the promisee's affordability of the alternative or the additional costs that the promisee might suffer because of adopting the alternative. These are concerns that compensation can address without recourse to specific relief and non-compensatory damages. Our concern should be how we can enhance the creation of novel and useful technical knowledge and productive capability that help reduce scarcity in resources, good and services. IP regimes, as hinted above, impose both private and social costs and, as such, this calls for the use of contract law to make up for IP's failings by enabling people to exchange innovative knowledge, information and economic opportunities or advantages at less cost. It is the thesis of this paper that non-compensatory damages should be recognised as a species of remedy available in the enforcement of contracts to facilitate the creation of public goods, especially knowledge-based ones.

B. *The Gaps in Arguments Against Non-Compensatory Damages*

Antagonists of non-compensatory damages view the remedial orthodoxy as sufficient. They argue that the difficulties that attend the application of the compensatory principle, particularly its proof requirement difficulties, do not warrant upsetting the remedial *status quo*. Some have reasoned that it creates the risk of commercial uncertainty[129] or that it creates a likelihood of windfall for the promisee.[130] One common denominator in the bulk of arguments against the remedy is that the remedy contradicts the theory of efficient breach. This is that a promisor should be able to breach a contract and pay compensation so that the subject matter of the contract can move to a third-party who values or bids for it most.[131] This way, they argue, no party is worse-off as resources are put to their best possible uses, and society is

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[127] *Ibid* at para 20.

[128] *Zero Marginal Cost Society, supra* note 7; see also Mark Lemley, "IP in A World Without Scarcity" (2015) 90 NYUL Rev 460.

[129] See Jessica Rickett, "Disgorgement for Breach of Contract: My Loss, Your Gain" (2001) 9 Auckland UL Rev 375.

[130] See Mitchell Engler & Susan Heyman, "The Missing Elements of Contract Damages" (2011) 84 Temp L Rev 119 at 142 ("The aggrieved party would be permitted to recover the breaching party's profits from breach, even if they exceed the expected value of the breaching party's profits from breach, even if they exceed the expected value of the breaching party's performance, so long as it did not result in "an inappropriate windfall.").

[131] Allan Farnsworth, "Your Loss or My Gain? The Dilemma of the Disgorgement Principle in Breach of Contract" (1985) 94 Yale LJ 1341; see also David Campbell, "The Treatment of *Teacher v Calder* in *AG v Blake*" (2002) 65 Modern L Rev 256.

better for it.[132] This paper does not disagree with the theory of efficient breach nor does it contend that promisors should not have the right to breach. Instead, it claims that considering that the breach of certain contractual obligations can have reverberating implications for crucial social interests, they should be discouraged. However, where breach of such obligations is in the past, it should be remedied based on the balancing of the interests of parties to it (*ie* the promisor should be made to pay for a release from the obligation).

One scholar who has written extensively on this subject, against the use of non-compensatory damages is David Campbell.[133] He advances a body of arguments, of which, only notable ones would be touched here. He reasons that the elevation of 'performance interest', which has induced the surge in the clamour for non-compensatory damages, is not just unnecessary but also have the likely negative impact of shackling the freedom of contract.[134] He reasons that as contracts preserve surpluses or the expected incremental gains of parties, it is sufficient if promisees get paid compensatory sums that measure up to the lost surplus resulting from a breach.[135] To award something other than compensation could have a chilling effect on breach as an option.[136] According to Campbell, there is a right to breach or exit a contract so long as compensation is provided to satisfy the unmet expectations of the promisee.[137] Most relevant to this article is his submission is that a promisee who desires literal performance (*eg* to prevent the promisor saving on performance costs) or one that hopes to prevent a promisor from gaining from breach should bargain for that entitlement separately.[138] In furtherance of this point, he said:

> But contracts are not made *sub specie aeternitatis*. They are made in situations in which the existence of positive transaction costs leads to bounded rationality and the negotiations by which one seeks what one wants from the contract never give perfect assurance that one will get it, much less that the contract will be "just" (whatever that means). If one does not get what one wanted out of a freely negotiated contract, one has to put up with this unless one can show a breach (which also involves transaction costs). Part of one's competence as a commercial party is competence to negotiate in such a way that this will happen. This, not entirely obscure, doctrine is called freedom of contract.[139]

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[132] Tareq Al-Tawil, "The Efficient Breach Theory: The False Assumptions and Reasons" (2011) 27 J Contract L 1; see also Tareq Tawil, "English Contract Law and the Efficient Breach Theory: Can They Coexist?" (2015) 22 Maastricht J Eur & Comp L 396.

[133] David Campbell, "A Relational Critique of the Third Restatement of Restitution §39" (2011) 68 Wash & Lee L Rev 1163; see also David Campbell, "In Defence of Breach: A Critique of Restitution and the Performance Interest" (2002) 22 Leg Stud 208.

[134] *Ibid* at 1110 ("The most telling criticism of the performance interest and restitutionary damages is that the stress they place on performance would not be able even to be pursued as a goal unless freedom of contract in respect of choice of remedies were abolished".).

[135] *Ibid* at 1097.

[136] *Ibid* at 1070.

[137] *Ibid* at 1070-1071.

[138] *Ibid* at 1121.

[139] *Ibid*.

Sidney Delong is another scholar who has equally argued, just as Campbell, that a promisor should be able to privately keep gains from breach so long as the promisee is compensated. Delong asserts that the application of non-compensatory damages would drive up transaction costs. This would result in promisors factoring into their pricing the deterrence effects of disgorgement. In other words, he means promisors "will charge a premium for such a remedy at least equal to the value to them of the lost opportunities."[140] Therefore, he argues, we should let promisors engage alternative avenues that are more rewarding but be required to compensate the promisee. Some more recent writings, such as that of Givati and Kaplan, have reiterated Delong's argument.[141]

However, there is a significant weakness in the claim a so-called efficient breach is always necessarily efficient. One is that we lack empirical information confirming that promisors are always in possession of information on how best to reallocate resources. A promisee might be better informed about better rewarding applications of resources. More importantly, however, compensation may not measure up to the desired expectations of a promisee. A promisee's expectations may be distinctive or unusual.[142]

Additionally, a breach may impose third-party or social costs that compensation may not be able to address, particularly in a networked economy.[143] In this vein, Brooks delivers a fundamental argument that neutralises the seeming force of arguments in favour of the efficient breach theory, and hence, in the advancement of the case against non-compensatory damages.[144] He posits that there is no empirical evidence that the efficient breach theory is superior to a claim for non-compensatory damages. He espouses what he calls the 'efficient performance' hypothesis. According to this theory, the promisee should be able to demand performance or request all or some of the profits of the promisee from non-performance.[145] However, he advises that we must not abrade the promisor's incentives for reallocation. Therefore, there must be compensation for the promisor's costs—in essence there should also be accommodation for reasonable compensation, only where necessary, for expenses incurred in finding rewarding alternatives (if truly the promisor indeed is better informed to find such alternatives).[146] In the end, nobody is disadvantaged, just as in the efficient breach theory—the promisee gains, the promisor suffers no

[140] Sidney DeLong, "The Efficiency of a Disgorgement as Remedy for Breach of Contract" (1989) 22 Ind L Rev 737 at 744.

[141] Yehonatan Givati & Yotam Kaplan, "Over-Reliance Under Contractual Disgorgement" (2018) 20 Am L & Econ Rev 82.

[142] See Daniel Friedmann, "The Efficient Breach Fallacy" (1989) 18 J Leg Stud 1; Melvin Aron Eisenberg, "The Principle of *Hadley v Baxendale*" (1992) 80 Cal L Rev 563.

[143] See Ian R Macneil, "Efficient Breach of Contract: Circles in the Sky" (1982) 68 Va L Rev 947; see also Gunther Teubner, *Networks As Connected Contracts: edited with an introduction by Hugh Collins (International Studies in the Theory of Private Law)* (United Kingdom: Hart Publishing, 2011); David M Driesen, *The Economic Dynamics of Law* (United Kingdom: Cambridge University Press, 2012) at 108, 109.

[144] Richard Brooks, "The Efficient Performance Hypothesis" (2006) 116 Yale LJ 568 [*The Efficient Performance Hypothesis*].

[145] *Ibid* at 581-584.

[146] *Ibid*.

loss, and resources move to end users. However, as regards the claim that disgorgement would impose higher distributive or renegotiation costs as compared to under a regime of compensatory damages, Brooks rightly submits that we lack empirical evidence to make such an assumption.[147] Vitally, however, Brooks postulates that since we cannot tell which of the two regimes or theories is superior, we must settle the contest against social considerations, particularly ethics.[148] He opines ethics would be on the side of respecting performance obligations and, as such, the efficient performance theory wins.

This article agrees with Brooks' thesis. It submits that considering our agnosticism about the superiority of either remedial theory, the need to ensure that promisors internalise the social cost of contractual breach warrants the application of non-compensatory damages. To the extent that contractual breach can upset the optimal creation of essential public goods, and as such, impose social costs, there is a need for non-compensatory damages. This is because by making promisors pay reparation that represents, at least, the value of what they would have paid to be released from contractual obligations bordering on vital information and intangibles, the social capital for such exchanges may be preserved. This position also provides an apt response to the argument in favour of the right or freedom to breach. A promisor whose breach is likely to upset social ordering or public goods gains should be free to breach but be prepared to pay for release from such obligations.

At this stage, it becomes necessary to renew the case for non-compensatory damages in contract law based on the need to consolidate the social capital needed for transactions bordering on the creation of vital public goods.

IV. Renewing the Case for Non-Compensatory Damages in Contract Law

Based on the preceding discussions, one can glean that the only proper justification that can be advanced for the application of non-compensatory damages is an advancement of social interests. No particular social interest concern warrants implementation of the remedy more than the promotion of knowledge-based public goods. As Levmore reasons, restitution as a remedy can fill contractual gaps where parties have failed due to high transaction costs to reach terms to govern their affairs vis-à-vis the conferral of benefits by one party to the other.[149] Porat builds upon Levmore's thesis, arguing that restitution may serve to encourage the private creation of public goods.[150] He articulates that the remedy of restitution should be applied where transaction costs are high; where market transactions alone cannot support the creation of the public goods; where the government alone cannot provide such benefits;

[147] See *ibid* at 585; see also Daphna Lewinsohn-Zamir, "Questionable Efficiency of the Efficient-Breach Doctrine" (2012) 168 J Institutional & Theo Econ 5; see also Jeffrey L Harrison, "A Nihilistic View of the Efficient Breach" (2014) 2013 Mich State L Rev 167.

[148] *The Efficient Performance Hypothesis, supra* note 144 at 587-591.

[149] Saul Levmore, "Explaining Restitution" (1985) 65 Va L Rev 71.

[150] Ariel Porat, "Private Production of Public Goods: Liability for Unrequested Benefits" (2009) 108 Mich L Rev 189; see also Robert Cooter & Ariel Porat, *Getting Incentives Right: Improving Torts, Contracts and Restitution*, 1st ed (New Jersey: Princeton University Press, 2014) at 151-164.

and where the cost of enforcing restitution does not exceed the value of the benefits created.[151] The most significant difficulty likely to confront parties in contracts bordering on access to information and intangibles is a combination of information and transaction costs, and bounded rationality. These factors render contracts incomplete, making it difficult for parties to contract over significant matters like breach and incorporate contractual terms that would apply where breach arises.

In filling this contractual void, non-compensatory damages can serve, depending on the justice needs of the particular case, to make breach affordable to promisors while rewarding the promisee for the value extended to the promisor throughout their exchange. Hence, as the remedy does not seek to redress any loss of value (*ie* expectation or reliance) suffered by the promisee, the application of the remedy should not discourage promisors from contemplating breach nor should it foreclose the right to breach. The implication of this is that, as social interest concerns raised by each case would be different, so too would be reparative outcomes of each case to which the remedy is applied to differ. This would explain why in some instances there would be the need a full disgorgement (*ie* 100% account of profits). However, in some other, there might only be a restitution of a quantum of gains (*eg* 50%, 20%, or 3% of profits earned from breach). And, while in others, especially in network settings, even though no measure of profit is attributable to the breach, the promisor would still be required to make payment of a just sum on account of the relevant facts, where it is demonstrated that the breach can have rupturing or upsetting effects on social capital. In cases of this kind, the gain to promisor is the release from future obligations arising from network membership.

Campbell and Wylie, submit that the application of the non-compensatory damages represents an unfortunate translocation of IP remedies to contracts, and one bereft of signposts.[152] Responding to this criticism brings us to the conditions that should qualify the availability of the non-compensatory damages. Applying non-compensatory damages to contract law is not to treat contracts as same as IP but as a supplementary or an alternative institution to IP. Just like IP, contracts enable the creation of vital knowledge-based public goods, even at less social cost. However, contracts can do this better, so long as hazards of spillover and network failure as hedged against. Scholars of information economics have rightly argued that it would be socially costly to provide legal facilities to creators of information (*eg* inventors or authors) to enable them to capture the full social value of their works.[153] However, it would also be socially costly, if they were not able to at least catch a reasonable portion of the social benefits they have created by making gains for themselves. Thus, the law should protect creators who employ contractual mechanisms to contribute to public goods by remedying breach in a fashion that preserves their incentives. Equally, non-compensatory damages can encourage networks to adopt formal contracting arrangements, with a firm-like structure, so that a breaching member can be made to pay reparation to the network as a whole.[154]

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[151] *Ibid* at 194.

[152] David Campbell & Philip Wylie, "Ain't No Telling (Which Circumstances Are Exceptional)" (2003) 62 Cambridge LJ 605.

[153] See Mark Lemley, "*Ex Ante* versus *Ex Post* Justifications for Intellectual Property" (2004) 71 U Chicago L Rev 131.

[154] *Spiderless Networks, supra* note 58 at 3.

What should guide the application of the remedy? The application of the remedy should represent a hypothetical bargain between the promisor and the promisee in which the promisor 'purchases' the right to be discharged from the bargain. The price would always depend on the circumstances of each case. For example, in cases of networks, the mere breach of a network contract should attract payment of reparation. This is because of the need to preserve the formation of networks. However, the value of a given network and the benefits (*eg* springboard) derived from it by the promisor should be taken into account in assessing reparation. However, in cases (not being network settings) where appropriability or spillover concerns arise, the remedy should apply only when risk has materialised, not merely where there is a creation of such risk. Two cases illustrate this point. One is *Primary Group UK Ltd*,[155] where the risk of spillover risk was created but did not materialise because the person to whom information was disclosed did not abuse it. Strangely, the court awarded £5000 as representing a sum that the promisor would have paid to be discharged from the obligation in the particular situation to which the breach related. The second case is *Marathon Asset Management LLP*,[156] where even though the breach created spillover risk, the risk did not materialise, and the court refused to award any sum as reparation because to do otherwise would not match the remedy to the situation. The court reasoned that there was no legitimate foundation for such a hypothetical bargain. Doing otherwise would be unrealistic. Thus, as Justice Leggatt, said:

> The obvious answer is that no reasonable person in Marathon's position would have sought to charge more than a token sum for such a release, as copying files containing confidential information onto USB drives would not, without more, involve any detriment to Marathon. Equally, no reasonable person in the defendants' position would have agreed to pay more than a token sum for such permission, as copying the files would not by itself confer a benefit of any value if there was no right to use the files for any purpose other than Marathon's purposes.[157]

Finally, the circumstances of the promisor must be taken into account in computing the reparation. Thus, where a given piece of information or intangible provided in the course of a contract is something that the promisor could have obtained in the market then the value of the cost saved by the promisor in receiving the benefit from the promisee may be the promisor has to restore to the promisee. Also, regard must be had to whether the advantage is something that the promisor already has within reach, without need obtain from the market, that devalues its interest to him/her. Circumstances as these would reduce the reparative liability of the promisor to the promisee.

To summarise the renewed case for, the following considerations are proposed for judicial guidance in the application of the remedy:

a) Non-compensatory damages should apply to cases where the courts are convinced that contractual breach can have adverse implications for vital

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[155] *Supra* note 49.
[156] *Supra* note 75.
[157] *Ibid* at para 255.

public goods creation through contractual arrangements, particularly where contracts relate to *novel* and *useful* technical and business information or intangibles;

b) that the computation of non-compensatory damages should mimic a transaction for release from contractual obligations, in which the outcome is not exorbitant to the promisor but certainly valuable to the promisee. The court must also have regard to the need to preserve the social capital needed for exchanges. This would be determined using a sliding scale for reparation depending on the needs of each case.

c) it should always be recognised that the remedy is not compensatory in that it does not serve to redress any loss of value suffered by a promisee, but rather to preserve and promote crucial social interests such as the creation of public goods and social capital needed for transactions. Therefore, the justice needs of each case would determine the quantum of reparation required of the promisor.

d) the legitimate interest and realistic needs of the parties in pursuing the hypothetical bargain must also be taken into account (*eg* whether the risk created by breach required remedy at all; the informational or technical alternatives available to the breaching promisor; and, the value of the benefit accruing to the promisor from breach, *etc*, among other factors).

V. Conclusion

As this paper has shown, the only basis upon which the application of non-compensatory damages can be justified in contract law is the advancement of special social interests, particularly the creation of knowledge-based public goods. The cases that pioneered the translocation of the non-compensatory remedy from property law to contract law did so on account of the underlying interests in the contracts in the relevant contracts. Most of these interests bordered on property, intellectual property and confidential information. However, in our intangible economy where technical knowledge, business information, and intangibles are the new foundations of social and economic capital, and they are also exchanged to secure contractual obligations, a narrow application of non-compensatory damages to only a given class of contracts cannot be sustained. Contracts concerning the exchange of information and access to intangibles create public goods, and do so at a lot less social cost than intellectual property and even save on the cost of mergers and acquisitions. Thus, exchanges of this nature have social interest implications and, as such, deserve the application of non-compensatory damages. This is particularly so on account of the peculiarities of transactional risks that occasion such exchanges—the dangers of spillover and network failure—concerning which the compensatory principle alone is insufficient.