Court of Appeal Ref: CA-2026-000007

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM

Claim No. IL-2023-000007

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

INTELLECTUAL PROPERTY LIST (ChD)

B E T W E E N:

(1) GETTY IMAGES (US), INC.

(a company incorporated under the laws of the State of New York)

(2) GETTY IMAGES INTERNATIONAL U.C.

(a company incorporated under the laws of Ireland)

(3) GETTY IMAGES (UK) LIMITED

(4) GETTY IMAGES DEVCO UK LIMITED

(5) ISTOCKPHOTO LP

(a company incorporated under the laws of Canada)

Claimants/Appellants

-and-

STABILITY AI LIMITED

Defendant/Respondent

REPLACEMENT SKELETON ARGUMENT OF THE APPELLANTS

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In this skeleton: (i) the First to Fifth Claimants/Appellants are referred to as "**Getty Images**"; (ii) the Defendant/Respondent is referred to as "**Stability**"; (iii) the Judgment of Joanna Smith J [2025] EWHC 2863 (Ch) is referred to as "**the Judgment**"; (iv) references in the form **[J[number]]** are to paragraphs in the Judgment; and (v) references to documents in the bundles are in the form [**bundle/tab/page number**]. Bundle references are in the following form: Core Appeal Bundle (Volume 1): [**CB1/tab/page**]; Core Appeal Bundle (Volume 2): [**CB2/tab/page**]; Supplementary Appeal Bundle: [**SB/tab/page**].

INTRODUCTION

1. This is an appeal from the Order of Joanna Smith J dated 17 December 2025 ("**the Order**")[1] following the trial of allegations of copyright infringement, database right infringement, trade mark infringement and passing off made by Getty Images against Stability in relation to Stability's use of millions of photographs, the copyright in which was owned by or licensed to Getty Images, without its consent, to develop and train an image generating AI model known as Stable Diffusion. This was the first trial relating to infringement of intellectual property rights in connection with a generative AI model to reach judgment in this jurisdiction.

2. In parts of the Judgment with which this appeal is not concerned, the Judge concluded that Stability had infringed Getty Images' trade marks. This appeal relates to the Judge's dismissal of Getty Images' claim for secondary infringement of copyright (at paragraph 4 of the Order and [J543]-[J609]). Getty Images' claim for primary infringement of copyright and database right infringement was abandoned by it at trial following cross-examination of Stability's witnesses, on the basis that *inter alia* the acts relating to training and development of Stable Diffusion using Getty Images' photographs had occurred outside the jurisdiction. **[CB1/1/149]**

3. Getty Images' claim for secondary infringement of copyright is brought under ss 22 and 23 of the Copyright Designs and Patents Act 1988 ("**CDPA**") which provide that the doing of certain acts (with the requisite knowledge), such as importing and distributing in the course of business, an "*infringing copy*" as defined in s 27 of the CDPA is an act of infringement.

[1] Order dated 17 December 2025 **[CB1/2/220]**

4. This appeal relates to whether the Judge correctly construed s 27(3) of the CDPA which defines "*infringing copy*" as follows (emphasis added):

> "An article is also an infringing copy if –
>
> (a) it has been or is proposed to be imported into the United Kingdom, and
>
> (b) **its making in the United Kingdom would have constituted an infringement of the copyright in the work in question,** or a breach of an exclusive licence agreement relating to that work".

5. Getty Images' position is that all the requirements of s 27(3) are met in this case:

   5.1. Stable Diffusion is an article (as found by the Judge [J590]). **[CB1/1/164]**

   5.2. It has been imported into the UK (as found by the Judge [J604(ii)]). **[CB1/1/168]**

   5.3. If its making had occurred in the UK, as opposed to outside the jurisdiction, that would have constituted an infringement of copyright in the photographs, since its making involved the storage and reproduction of Getty Images' photographs. As to the latter point the Judge found [J604(i)] that "*Copyright Works were used for training the Model*".[2] **[CB1/1/168]**

6. However, the Judge held that the article itself "*must be a copy*" [J597], despite no requirement to that effect being set out in s 27(3). Instead, the definition makes clear that it is the act of "*making*" of the article that is relevant. On the Judge's approach an AI model whose making involved large-scale copying outside the UK, where the same acts would have infringed copyright had they occurred within the jurisdiction, falls outside s 27(3) because the finished model does not itself contain copies of the relevant works. Getty Images says this finding is wrong on the plain wording of the provision, which is directed to the acts involved in "*making*" the article, and following standard principles of statutory interpretation. Moreover, the Judge's interpretation is contrary to the clear intention of the legislature to prevent copyright law in the UK from being circumvented by allowing the importation of an article whose making would have constituted an infringement if it had been made here. **[CB1/1/166]**

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[2] See also her finding at [J600] **[CB1/1/161]** that the development of Stable Diffusion "*involved the reproduction of Copyright Works"* and her finding at [J605] **[CB1/1/163]** that the training involved "*the reproduction and use of infringing copies"*

7. Permission to appeal was granted to Getty Images by the Judge on the ground that the appeal "*concerns a pure question of law, namely a matter of statutory construction on which the minds of reasonable lawyers may differ*".[3]

8. Stability has served a Respondent's Notice[4] relating to the Judge's findings that (i) Stable Diffusion is an article; and (ii) Stability has carried out an act of importation into the UK within the scope of s 22 of the CDPA or an act within the scope of s 23 CDPA. These points will be addressed in reply, once Stability has set out its case as to why it says the Judge was wrong on these issues in its skeleton argument.

BACKGROUND

Relevant parts of the Judgment

9. The Judgment was necessarily lengthy due to the number of issues in dispute between the parties. However, much of the Judgment relates to matters not relevant to this appeal. Although the Judgment contains a helpful table of contents, we attach as an Annex to this skeleton argument, a guide to the key parts of the Judgment relating to copyright infringement, identifying their relevance (or otherwise) to this appeal.

The facts

10. The following summary of the factual background relevant to the appeal is taken from the Judgment. It is derived from the following sections of the Judgment: [J1]-[J50] ("*INTRODUCTION*" and "*FACTUAL BACKGROUND*"); [J56]-[58] ("*Relevant Copyright Works*"); [J552]-[561] ("*Preliminary points about the nature of Stable Diffusion*") and [J603]-[609] ("*The factual questions*", under the main heading "*SECONDARY INFRINGEMENT*"). **[CB1/1/7]** **[CB1/1/18]** **[CB1/1/151]** **[CB1/1/168]**

11. The First to Fifth Claimants are members of the Getty Images Group, which is a pre-eminent global visual content creator and market-place [J17]. The claim seeks to protect what Getty Images describes as "*the lifeblood*" of its business, namely millions of high-quality photographic images of, amongst other things, world events, sporting moments, celebrities, architecture, nature and travel ("**the Visual Assets**"), created over many years by hundreds of thousands of photographers [J8]. The Visual **[CB1/1/9]** **[CB1/1/8]**

[3] Reasons for Allowing Permission to Appeal **[CB1/4/230]**
[4] Respondent's Notice **[CB1/8/251]**

Assets are made available through websites at gettyimages.com, gettyimages.co.uk and istockphoto.com ("**Getty Images' Websites**") [J21]. [CB1/1/10]

12. Stability carries on business in the field of machine learning software, including deep learning models for image and music generation, and large language models for the generation of text output [J29]. The claim concerns Stability's deep learning AI model (known as "**Stable Diffusion**" or "**the Model**") [J1]. [CB1/1/12] [CB1/1/7]

13. At the heart of the case is the allegation that, in order to develop and train Stable Diffusion, Stability scraped millions of Visual Assets (a substantial proportion of which are said to comprise original artistic works and/or film works owned by, or exclusively licensed to, the First Claimant in which copyright subsists ("**the Copyright Works**") from Getty Images' Websites, without consent, and used those images unlawfully to train and develop a number of versions of Stable Diffusion [J8]. [CB1/1/8] The Visual Assets are said by Getty Images to be highly desirable for use in connection with AI and machine learning because of their high quality and because they are accompanied by content specific, detailed captions and rich metadata [J20]. [CB1/1/10]

14. Stable Diffusion is a type of generative AI model known as a latent diffusion model. It transforms an input (a user command or "prompt" in the form of written text or a "seed" image) into a desired output in the form of a synthesised image by modelling a probability distribution based on its training data and then sampling from that distribution [J4]. The development of a stochastic model of this type typically [CB1/1/7] involves designing and building the architecture for the model which is then trained by repeated exposure to massive quantities of data, in this case in the form of human-generated digital images contained in datasets created by crawling and scraping images and associated descriptive captions from the Internet [J4].

15. The model parameters ("**model weights**") define the network connections in the model and are learnable parameters controlling the functionality of the network. Before training begins, the network's weights are initialized with random values. As the network is exposed to the training data, the weights are iteratively updated to better satisfy an optimization criterion specified by engineers [J5]. [CB1/1/7]

16. Diffusion models do not directly store their training data, but learn the statistics of patterns which are associated with certain concepts found in the text labels applied to their training data, i.e. they learn a probability distribution associated with certain

concepts. This process of learning the statistics of the data is a desired characteristic of the model and allows the model to generate new images by sampling from the distribution [J554]. Thus, the experts agreed that the model weights do not directly store the pixel values associated with billions of training images [J555]. [CB1/1/152]

17. Once the model is trained, running the network (referred to as "**inference**") is an input-output system in which the user specifies inputs, the trained network performs computations on those inputs and then generates the desired output [J5]. Inference itself does not require the use of any training data, however, a large part of its functionality is indirectly controlled via the training data [J7]. [CB1/1/7] [CB1/1/7]

18. Stability has made various versions of Stable Diffusion available to end users in the UK by various means. Those of relevance to the appeal are:

    18.1. Stable Diffusion v2.x, XL 0.9, XL Base 1.0 and XL Turbo (described at [J39], [J41]), model weights for which have been made available by Stability for download on Hugging Face [J604(ii)]. GitHub and Hugging Face are portals from which the Stable Diffusion inference code and model weights can respectively be downloaded, allowing a user to run the software [J34]. The Judge found that there will have been many downloads of Stable Diffusion 2.x and SD XL on to computers in the UK (perhaps running into millions) [J604(ii)]. [CB1/1/14] [CB1/1/168] [CB1/1/13] [CB1/1/168]

    18.2. In addition, model weights for XL Turbo have been made available by Stability for download as part of an AI model licensing programme [J604(iv)]. [CB1/1/169]

19. All versions of Stable Diffusion were trained on millions of images from various subsets of the LAION-5B dataset ("**LAION-5B**" and "**LAION-Subsets**"), which were assembled by LAION e.V. ("**LAION**"), a not-for-profit organisation registered in Germany. The dataset was created by LAION by filtering the Common Crawl public web archive for images and storing these alongside their HTML alt-text (hidden text associated with the image on a web page). LAION-5B comprises metadata including 5.85 billion URL-text pairs. The LAION-Subsets (said by Getty Images to contain millions of Copyright Works) were produced by filtering LAION-5B against specific sets of requirements and together comprise approximately 3 billion URL-text pairs from the LAION 5B dataset [J46]-[J47]. [CB1/1/16]

20. For training purposes it would have been necessary to download the images from the URLs in the LAION-Subsets, and Stability says that the training process involved downloading and storing copies of each image obtained from the URLs in the relevant dataset on Amazon's Simple Storage Service on the AWS Cluster, retrieving those images and then making temporary copies of them in the VRAM of the GPUs performing the training on the AWS Cluster [J48], [J556]. The AWS Cluster was located outside the UK [J32]. [CB1/1/16] [CB1/1/153] [CB1/1/13]

21. Stability accepts that "*at least some*" LAION-Subsets contain URLs referencing images on the Getty Images Websites and that "*at least some*" images from the Getty Images Websites were used during the training of Stable Diffusion [J49]. Stability further confirmed for the purposes of these proceedings that it would not seek to challenge the case advanced by Getty Images that certain sample Copyright Works it relied upon[5] were used in the training of v1.4, v2.0 (and all its sub-versions) and SD XL (and all its sub-versions) [J58]. [CB1/1/17] [CB1/1/18]

The statutory framework

22. The Judge set out the relevant statutory framework at [J545]-[J547]. For ease of reference, we repeat the main statutory provisions here (emphasis added): [CB1/1/150]

22.1. S 22 of the CDPA provides as follows:

> "22. Secondary infringement: importing infringing copy.
>
> The copyright in a work is infringed by a person who, without the licence of the copyright owner, imports into the United Kingdom, otherwise than for his private and domestic use, an article which is, and which he knows or has reason to believe is, an infringing copy of the work."

22.2. S 23 of the CDPA is in similar terms:

> "23. Secondary infringement: possessing or dealing with infringing copy.
>
> The copyright in a work is infringed by a person who, without the licence of the copyright owner—
>
> (a) possesses in the course of a business,

[5] Known as Sample Works A1-A17 [J56], [J58], **[CB1/1/18]** relied upon in the interests of proportionality.

(b) sells or lets for hire, or offers or exposes for sale or hire,

(c) **in the course of a business** exhibits in public or **distributes**, or

(d) distributes otherwise than in the course of a business to such an extent as to affect prejudicially the owner of the copyright,

an article which is, and which he knows or has reason to believe is, **an infringing copy** of the work."

22.3. "*Infringing copy*" is defined in s 27 of the CDPA as follows:

"27. Meaning of "infringing copy".

(1) In this Part "infringing copy" in relation to a copyright work, shall be construed in accordance with this section.

(2) An article is an infringing copy if its making constituted an infringement of the copyright in the work in question.

(3) An article is also an infringing copy if—

(a) it has been or is proposed to be imported into the United Kingdom, and

(b) **its making in the United Kingdom would have constituted an infringement of the copyright in the work in question**, or a breach of an exclusive licence agreement relating to that work."

The issues

23. At trial the case on secondary infringement raised a number of different issues of law and fact, summarised by the Judge at [J548] and [J551]. **[CB1/1/15]**

24. The issues of law were:

24.1. Whether Stable Diffusion is capable of being an "*article*" for the purposes of ss 22 and 23 of the CDPA.

24.2. Whether Stable Diffusion is capable of being an "*infringing copy*" for the purposes of s 27 of the CDPA.

25. The issues of fact were:

25.1. Whether Stable Diffusion is an "*infringing copy*" as a matter of fact.

25.2. Whether Stability had knowledge or reason to believe that Stable Diffusion is an infringing copy.

25.3. Whether Stability had committed secondary acts of copyright infringement contrary to ss 22 and 23 of the CDPA.

The Judge's decision on the issues in summary

26. As to the first point of law, which is the subject of Stability's Respondent's Notice, the Judge rejected Stability's argument that the term "*article*" is limited to tangible objects. She found (at [J590]) that an "*article*": [CB1/1/164]

> "…is capable of being an electronic copy stored in intangible form. Standing back, I agree with Getty Images that if the word "article" were construed as only covering tangible articles, this would deprive authors of protection in circumstances where the copy is itself electronic and it is then dealt with electronically. Not only would that be inconsistent with the words of the statute, but it would also be inconsistent with the general scheme of copyright protection which is to reward authors for their creative efforts."

27. As to the second point of law, which is the subject of Getty Images' appeal, the Judge held (at [J597]) that: [CB1/1/166]

> "an infringing copy must be a copy, … the essence of the infringement is that there has been an infringement of copyright by the reproduction of the work (including by its storage in any medium by electronic means) in any material form."

28. Therefore, the Judge held (at [J600]) that: [CB1/1/167]

> "The fact that [Stable Diffusion's] development involved the reproduction of Copyright Works (through storing the images locally and in cloud computing resources and then exposing the model weights to those images) is of no relevance. … The model weights for each version of Stable Diffusion in their final iteration have never contained or stored an infringing copy."

29. As a result, she said that it was not necessary for her to make any determination on the facts [J603]. However, she held: [CB1/1/168]

29.1. At [J604(i)] that: [CB1/1/168]

> "There is evidence that Copyright Works were used for training the Model and Stability has made limited concessions to the effect that "at least some"

Copyright Works were used in training the Model and that images from the Getty Images Websites were used in training".

29.2. At [J605]-[J609] that, on the assumption that Stable Diffusion is an infringing copy because of the training process, Stability had the requisite knowledge or reason to believe. [CB1/1/169]

29.3. At [J604(ii)] that downloads of Stable Diffusion on Hugging Face amounted to importation into the UK for the purposes of the CDPA, which need not be by the defendant. [CB1/1/168]

29.4. At [J604(iv)] that Stability had distributed Stable Diffusion in the course of a business via Hugging Face and via the Model licensing programme. [CB1/1/169]

THE JUDGE'S ERRORS

Introduction

30. The key sections of the Judgment relevant to Getty Images' appeal are [J562]-[J564] ("*The Approach to Statutory Construction*") and [J592]-[J602] ("*The Interpretation of "an infringing copy"*"). However, as the Judge said at [J565], there is overlap between the meaning of the terms "*article*" and "*infringing copy*", and so it is also necessary to have some regard to the section of the Judgment at [J567]-[J591] ("*The Interpretation of the word "article"*"), which is the subject of the Respondent's Notice. [CB1/1/155] [CB1/1/165] [CB1/1/158] [CB1/1/158]

31. We make no criticism of the Judge's summary of the principles of statutory construction at [J562]-[J564]. In summary, the Judge's errors were; [CB1/1/155]

31.1. failing to apply the principles of statutory construction correctly; and instead,

31.2. incorrectly applying the reasoning of Nugee J (as he then was) in *G4S Plc v G4S Trustees Ltd* [2018] EWHC 1749 (Ch) ("*G4S*") at [26]; and

31.3. incorrectly applying the reasoning of Laddie J in *Sony v Ball* [2004] EWHC 1738 (Ch), [2005] FSR 9 ("*Sony*") at [15].

The principles of statutory construction

32. The general approach to statutory construction was summarised by the Privy Council in *Al-Thani v Al-Thani* [2025] UKPC 35, ("*Al-Thani*") at [23]-[28], reproduced by the Judge at [J562]. In short: [CB1/1/155]

32.1. The basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed (*Al-Thani* [23], citing *R (Quintavalle) v Secretary of State for Health* [2003] 2 AC 687 at [8]).

32.2. The controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment (*Al-Thani* [24], citing *Quintavalle* [8]).

32.3. Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections (*Al-Thani* [25], citing *R(O) v Secretary of State for the Home Department* [2022] KSC 3 at [29]-[31]).

32.4. Reports of advisory committees or explanatory notes which accompany legislation can assist or give guidance, but they play a secondary role (*Al-Thani* [26]).

32.5. Statutory interpretation involves an objective assessment of the meaning which a reasonable legislature as a body would be seeking to convey in using the statutory words which are being considered *(Al-Thani* [28], citing *R(O)* at [31]).

33. Applying these principles, the Judge should have **first** considered the wording of ss 27(2) and (3) of the CDPA. What is required under those provisions for an article to be an infringing copy is that "*its making constituted an infringement*". There is no requirement that the article thus made must be or retain a copy of the copyright work. Notably the wording does not, as it could so easily have done, state that an infringing copy is or must contain "*a reproduction*". The provisions direct the analysis to the act

of "*making*" of the "*article*", which terms are not defined. On its ordinary meaning, "*making*" is a wide term which means "*the act or process of producing something*".[6]

34. **Second**, the Judge should have considered the statutory context. The context of the section as a whole sheds limited light: of most relevance, s 27(1) provides that "*In this Part "infringing copy" in relation to a copyright work, shall be construed in accordance with this section*", which effectively directs the reader back to the wording of ss 27(2) and (3).

35. More pertinently, the wider statutory context includes s 17 CDPA which provides that:

> "(1) The copying of the work is an act restricted by the copyright in every description of copyright work; and references in this Part to copying and copies shall be construed as follows.
>
> (2) Copying in relation to a literary, dramatic, musical or artistic work means reproducing the work in any material form. This includes storing the work in any medium by electronic means.
>
> …
>
> (6) Copying in relation to any description of work includes the making of copies which are transient or are incidental to some other use of the work."

36. Thus, the wider statutory context expressly provides that a copy does not need to be retained in permanent form. According to s 17(6) it can be transient or incidental to some other use of the work. See, for example:

    36.1. *Take-Two Interactive Software Inc v James* [2020] EWHC 179 (Pat), [2020] ECDR 14, in which the defendants developed, distributed and sold cheat software for use with a video game which allowed players to gain advantages in play such as "spawning" copies of weapons, vehicles or ammunition. They argued that using the cheat software did not involve copying of a lasting nature, or any permanent or lasting change to anything on the player's hard drive – the game continued to exist unaltered on the hard drive. Falk J (as she then was) held (at [40]) that the way the cheat worked involved making transient copies, since

[6] *Cambridge Dictionary (online)*. Similar definitions are contained in other dictionaries, e.g. *Collins Dictionary (online)* – "*The making of something is the act or process of producing or creating it*" and Oxford Learner's Dictionary (online) – "*the act or process of making or producing something*".

by allowing a player to access weapons or other objects, the cheat software reproduced the image and functions of the object, which involved copying.

36.2. *Chappell & Co Ltd v Columbia Graphophone Company* [1914] 2 Ch 745, a case under the Copyright Act 1911, in which the defendants made a gramophone record of a song which they were entitled to do without consent providing they paid royalties. However, to do so they made a copy of the musical score. Kennedy LJ said at 753:

> "It would seem to be suggested that … because it was a copy with alterations made for the purpose of doing that which, as against the plaintiffs, the defendants were entitled to do, namely, to create a mechanical reproduction of the music; that … therefore the creation of something used in order to produce that reproduction could not be treated as a violation of the plaintiffs' copyright. To my mind the end does not justify the means in that way, and what they ought to have done was, by a proper arrangement with the plaintiffs, to have acquired the right to take that step, and that, unless they so arranged, it was manifestly an infringement of the plaintiffs' rights."

37. **Third**, the Judge should have considered the general scheme or historical context of the legislation, which is to reward authors for their creative efforts, as the Judge found at [J590] (in the context of considering the meaning of "*article*"), citing the following passage from Lord Bingham of Cornhill in *Designers Guild Ltd v Russell Williams (Textiles) Ltd* [2000] 1 WLR 2416 ("*Designers Guild*") at 2418: [CB1/1/164]

> "The law of copyright rests on a very clear principle: that anyone who by his or her own skill and labour creates an original work of whatever character shall, for a limited period, enjoy an exclusive right to copy that work. No one else may for a season reap what the copyright owner has sown."

38. In the specific case of s 27(3), it is clear from the wording of the provision that the legislature intended to allow the copyright owner to reap the reward in the UK of activity in a foreign jurisdiction which would otherwise not be an infringement (because the CDPA does not extend to that foreign jurisdiction). This provides obvious benefits to UK copyright owners and industry, since otherwise manufacture of articles could simply be moved outside the UK and articles thus made imported into the jurisdiction, without the copyright owner being able to reap the benefit of his or her own skill and labour. The point of this subsection is plainly to prevent

infringers from circumventing domestic law simply by moving the infringing acts abroad.

39. Although not cited to the Judge at trial, this is also clear from the *Gregory Committee Report 1952,* Cmd. 8662 at [280], which resulted in the introduction of ss 5(2) and (3) of the Copyright Act 1956, the predecessor to s 27(3), which stated as follows (emphasis added):

> "(2) The copyright in a literary, dramatic, musical or artistic work is infringed by any person who, without the licence of the owner of the copyright, imports an article (otherwise than for his private and domestic use) into the United Kingdom, or into any other country to which this section extends, if to his knowledge **the making of that article constituted an infringement of that copyright, or would have constituted such an infringement if the article had been made in the place into which it is so imported.**
>
> (3) The copyright in a literary, dramatic, musical or artistic work is infringed by any person who, in the United Kingdom, or in any other country to which this section extends, and without the licence of the owner of the copyright,—
>
> (a) sells, lets for hire, or by way of trade offers or exposes for sale or hire any article, or
>
> (b) by way of trade exhibits any article in public,
>
> if to his knowledge **the making of the article constituted an infringement of that copyright, or (in the case of an imported article) would have constituted an infringement of that copyright if the article had been made in the place into which it was imported.**"

40. The Gregory Committee Report stated at [280] (emphasis added):

> "The question of infringement by importation is of importance by reason of the fact that, although as a result of international Conventions a copyright work may enjoy copyright protection in a number of different countries, it often occurs that copyright is owned by different persons in those different countries. Authors in the United Kingdom may, for example, enter into publishing agreements with British publishers under which they retain the United Kingdom copyright and grant a licence to the publishers; at the same time they may sell outright the copyright in the work so far as it exists in other countries. Similar arrangements may exist in respect of musical or artistic

works. **It would therefore be of considerable importance to the owners of the United Kingdom copyright or their licensees that they should be able without undue difficulty to prevent the importation of material which, though lawfully made in another country, would be an infringement if made in the United Kingdom, and would compete with material lawfully made in this country.**"

41. These considerations support a construction of s 27(3) which rewards authors for their creative efforts, by preventing defendants from escaping copyright infringement by developing and training an AI model in another jurisdiction, in circumstances where if the development and training had occurred in the UK it would have amounted to copyright infringement. Indeed, the reasons the Judge gave for construing the term "*article*" widely, apply *mutatis mutandis* to the construction of "*infringing copy*". In particular, her acceptance of Getty Images' submission that the principle in *Designers Guild* is of particular importance in the modern world, owing to developments in technology.

42. Each of the three matters addressed above point to a construction of s 27(3) which clearly encompasses an article whose making infringed copyright, even if copies of the copyright works are not present in the article.

43. However, the Judge's reasoning failed to engage properly with these matters.

44. **First**, she effectively ignored the wording of s 27(3) because, having recited the submissions made by each side, the first part of the Judge's analysis (at [J595]-[J596]) is rooted entirely in the words "*infringing copy*" as opposed to the definition of that term. Thus, she wrongly allowed the decision in *G4S* to override the application of the principles of statutory construction in *Al-Thani*. In fact, her application of *G4S* was also wrong, for the reasons set out below. **[CB1/1/166]**

45. As a result of ignoring the wording of the provision, the Judge never focussed on what is meant by the words "*its making…constituted an infringement*". The closest the Judge gets to the necessary analysis is at [J599]-[J601], but this part of the Judgment simply reveals that the Judge has not considered the key issue at all. **[CB1/1/167]**

46. In particular, she states at [J600]: **[CB1/1/167]**

> "While it is true that the model weights are altered during training by exposure to Copyright Works, by the end of that process the Model itself does not store any of those Copyright Works; the model weights are not themselves an infringing copy and they do not store an infringing copy. They are purely the product of the patterns and features which they have learnt over time during the training process."

This passage dismisses the training of the model weights, rather than considering whether that might amount to, or be part of, the "*making*" of the model weights and instead considers the end result only.

47. She finds at [J600] (emphasis added) that: **[CB1/1/167]**

> "The fact that its development involved the reproduction of Copyright Works (through storing the images locally and in cloud computing resources and then exposing the model weights to those images) **is of no relevance**."

Likewise, the Judge dismisses the development of the Model and model weights by finding it irrelevant, rather than considering whether development might amount to, or be part of, "*making*".

48. At [J601] she opines (emphasis added) that: **[CB1/1/167]**

> "…sections 27(2) and (3) require the article that is made to be a "copy". They **are not concerned with a process** which (while it may involve acts of infringement) ultimately produces an article which is not itself an infringing copy."

This passage is particularly revealing since, as explained above "*making*" means "*the act or process of producing something*". Yet the Judge concludes that ss 27(2) and (3) are not concerned with a process, overlooking the word "*making*" entirely.

49. Finally, at [J601] she states: **[CB1/1/167]**

> "I agree with Stability that when applying the 'making' concept to an intangible article, the conception or creation of the model weights (i.e. the process of creation of information) cannot be the relevant act of making – that can only be the act of production of the resulting intangible record of that information, which derives from that process of creation."

This passage contains no analysis of the meaning of "*making*". Nor does it explain why the Judge has concluded that the relevant act of making cannot be, or include, the creation of the model weights, but can only be the production of the resulting intangible record of that information.

50. That is an entirely artificial and arbitrary distinction. It is like saying that the writing of an infringing computer program cannot be the relevant act of making, only the production of the intangible record of that computer program. As James Hall explains in the article "*Why Getty Images v Stability AI got secondary copyright infringement wrong*" (*Journal of Intellectual Property Law & Practice* 2026, 00, 1-8):

> "…this misunderstands the term 'making'; this view of the term does not align with ordinary uses of the word. When one makes a cake, it is not the act of taking it out of the oven that is 'making' but of the weighing and combination of ingredients, followed by its baking. When one makes an artwork, it is not the act of displaying it that is 'making', but of sketching, painting or sculpting it. A magic trick is not 'made' when the rabbit is pulled out of the hat."

51. It is also inconsistent with the Judge's summary of the factual position at [J5] which explains: **[CB1/1/7]**

> "The model parameters (the "**model weights**" or "**biases**") define the network connections in the model and are learnable parameters controlling the functionality of the network. Before training begins, the network's weights are initialized with random values. As the network is exposed to the training data, the weights are **iteratively** updated to better satisfy an optimization criterion specified by engineers."

52. This contains no suggestion that there is a separation or distinction between the creation of the model weights and the resulting intangible record of that information, quite the reverse. The same is true of the more detailed explanation from the Agreed Technical Primer set out at [J555]. **[CB1/1/152]**

53. **Second**, the Judge never properly considered the impact of s 17(6) of the CDPA. Having mentioned s 17(6) in the context of Getty Images' submissions [J593], the **[CB1/1/165]** Judge did not return to analyse it. She accepts that s 17 must inform the proper approach to interpretation of the composite phrase "*infringing copy*" [J596], but once **[CB1/1/166]**

again ignores the wording of s 27(3) itself and says nothing about the wording of s 17(6) specifically.

54. Subsequently, the Judge mentions Stability's submission that "*... transient copying can be sufficient to give rise to an infringing copy, but it says that an infringing copy must (at least at some point) contain a copy*" [J598]; she goes on to make reference to the fact that the model weights "*never contained or stored an infringing copy*" [J600]; and then refers to s 17 generally at [J601]. However, at no point does she refer to s 17(6) explicitly or consider what the words "*transient or incidental*" might encompass, particularly in the context of the wording of s 27(3) itself. [CB1/1/167] [CB1/1/166]

55. **Third**, the Judge does mention that "*the scheme of the statute is to provide protection to the owners of copyright works against acts of infringement involving copying*" [J602]. However, she dismisses this by the following entirely circular analysis: "*where an AI model itself is not an infringing copy, it cannot have been the intention of Parliament that it should fall within the meaning of infringing copy in section 27*" [J602]. [CB1/1/168]

56. Thus, the Judge does not attempt to read the controversial provision in the context of the scheme and purpose of the statute at all. She has already reached a foregone conclusion. The Judge's construction of s 27(3) thereby fails to apply the principle in *Designers Guild* (set out above) and fails to engage in a consideration of how copyright law should be interpreted given the clear purpose of s 27(3) to prevent importation of material which, though lawfully made in another country, would be an infringement if made in the United Kingdom; the need to reward authors for their creative efforts; and the huge technological change presented by AI.

The reasoning in *G4S*

57. As foreshadowed above, the Judge's failure to apply the principles in *Al-Thani* was caused partly by her purported application, instead, of the reasoning of Nugee J (as he then was) in *G4S*. In that case, Nugee J had to interpret the term "*pensionable service*", which was a defined phrase in the Pensions Act 1995. At [26] he stated (emphasis added):

> "I am conscious that in section 124(1) of the Pensions Act 1995 the expression "pensionable service" is itself a defined expression, and that ultimately **what I have to construe are the words of the definition, not the words**

> **"pensionable service" as such.** But where a statute (or indeed a contract) uses a defined expression, the ordinary meaning of the word or words defined is part of the material which can be used to construe **the definition.** The defined expression is seldom an arbitrary label; it is usually chosen as a distillation of the meaning of a concept more precisely stated in the definition; see *Birmingham City Council v Walker [2007] 2 AC 262*, para 11, per Lord Hoffmann and compare *Chartbrook Ltd v Persimmon Homes Ltd [2009] AC 1101*, para 17, again per Lord Hoffmann.…"

58. In *Walker v Birmingham City Council* [2007] UKHL 22, [2007] 2 AC 262 Lord Hoffmann (who had to construe the meaning of the definition of "*successor*" under the Housing Act 1980) stated at [11] (emphasis added):

> "Although successor is a defined expression, the ordinary meaning of the word is part of the material which can be used to construe **the definition**"

59. Having set out the principle of construction at [26] in *G4S*, Nugee J went on at [27] to apply it. In particular, he considered the definition of "*pensionable service*" in the Pensions Act 1995 and found that it (i.e. **the definition**) was "*not dissimilar to what I have suggested is the core concept of pensionable service as ordinarily understood*" (i.e. **the defined expression**).

60. Thus, the reasoning of Nugee J makes clear that the ordinary meaning of the defined expression (or to use, Nugee J's language "*the distillation of the meaning of a concept*") can be used to construe the words of **the definition**.

61. Although the Judge set out the reasoning of Nugee J correctly at [J595], she then went on to misapply it at [J596]. In particular, she stated (emphasis added): [CB1/1/166]

> "As I have already indicated, the word "copy" is not arbitrary – the statute provides in section 17 (entitled "Infringement of copyright by copying") that it shall have a particular meaning and it seems to me that that meaning must inform **the proper interpretation of the composite phrase "infringing copy"**."

62. Where the Judge went wrong was in confusing the defined expression (i.e. "*infringing copy*") with the words of the definition (i.e. the words of s 27(3) that "*an article is also an infringing copy if … its making in the United Kingdom would have constituted an infringement of the copyright in the work in question…*").

63. Having considered the concept of part of the defined expression (i.e. the meaning of "*copy*" by reference to s 17) she did not use it to construe the words of the definition, but to construe the defined expression itself (i.e. "*infringing copy*"). This was entirely circular, and contrary to the reasoning of Nugee J. What the Judge should have done, had she applied that reasoning correctly (albeit by considering only part of the defined expression), was to use that concept to construe the words of the definition, i.e. she should have used the meaning of "*copy*" to construe the meaning of the words of s 27(3) as a whole and, in particular, "*its making constituted an infringement of the copyright in the work in question*". On this approach, the meaning of "*copy*" suggests that if copies are created during the process of making the article, that is sufficient.

64. Further, as we have pointed out above, had the Judge followed the correct approach in this regard, she would have taken into account that "*copy*" in s 17 is widely defined and, by virtue of s 17(6), includes the making of copies which are transient or are incidental to some other use of the work. This reinforces the conclusion that, if copies are created during the process of making (but not retained in the final article), this is sufficient.

The reasoning in *Sony*

65. Both sides referred the Judge to the *Sony* case, because the decision of Laddie J provides some consideration of the statutory provisions in issue here. However, the underlying facts were very different, and it is important to have those in mind before considering the reasoning of Laddie J and the Judge's analysis of it.

66. The key facts are set out at [2]-[10] of *Sony*. In short:

    66.1. Sony designed and manufactured games consoles, including the PS2 console. The games designed for use with the PS2 consoles contained sophisticated computer programs together with other creative works, the copyright in which was owned by Sony. The copyright games were recorded onto CDs or DVDs which a user of a PS2 console had to insert to play the game. The CDs or DVDs also had embedded within them various codes which were incapable of being copied by standard copying equipment. This ensured that any unauthorised copy of the CD or DVD would not contain copies of the codes required to allow the game on the CD or DVD to be played.

66.2. The case concerned the defendant's electronic chip, called "Messiah 2" which could be fitted into a PS2 console and worked to trick the console into believing that the CD or DVD being played had the necessary embedded codes. This enabled unauthorised copies of games to be played on a PS2 console.

66.3. Sony brought proceedings for copyright infringement under (amongst others) s 296 of the CDPA, which provides that a person who issues to the public copies of a copyright work in an electronic form which is copy-protected, has the same rights against a person who, knowing or having reason to believe that it will be used to make infringing copies, makes, imports, sells or lets for hire, offers or exposes for sale or hire, or advertises for sale or hire, any device or means specifically designed or adapted to circumvent the form of copy-protection employed.

66.4. There was no dispute that the Messiah 2 chip was a device specially designed or adapted to circumvent the claimant's form of copy-protection.

67. The debate between the parties was whether the defendant knew or had reason to believe that the Messiah 2 chip would be used to make "*infringing copies*" (as defined in s 27 of the CDPA) [12]. The defendant argued that an infringing copy must be an "*article*" and that the RAM chip in the console onto which the copyright works were copied was not an "*article*", as an article must be a "*tangible substance*" [13] and the RAM containing the copy was too short lived to be regarded as tangible [14].

68. Laddie J rejected this argument in a passage at [15]-[17], which is reproduced in the Judgment at [J575] in the context of the meaning of the term "*article*" (save that in the Judgment the extracts from s 17 are omitted): **[CB1/1/160]**

> "15. I do not accept this argument. The silicon RAM chip is an article. When it contains the copy data, it is also an article. The fact that it did not contain the copy before and will not contain the copy later does not alter its physical characteristics while it does contain a copy. It is always an article but it is only an infringing article for a short time. There is nothing in the legislation which suggests that an object containing a copy of a copyright work, even if only ephemerally, is for that reason to be treated as not an article. On the contrary, the definition in s.27 points to the instant of making of the copy as crucial to the determination of whether or not it is an infringing article. An article becomes an infringing article because of the manner in which it is made.

> Whether it is an infringing article within the meaning of the legislation must be determined by reference to that moment. It matters not whether it is remains in that state, since retention as a copy is no part of the definition in the section.
>
> 16. This is also consistent with the provisions of s.17 which, insofar as material, provides that:
>
> "(2) Copying in relation to a literary, dramatic, musical or artistic work means reproducing the work in any material form. This includes storing the work in any medium by electronic means.
>
> (6) Copying in relation to any description of work includes the making of copies which are transient or are incidental to some other use of the work."
>
> 17. Mr Kime accepts that the playing of an unauthorised copy of a PS2 game or a "foreign" authentic game on a PS2 console involves copying a substantial part of the copyright work into RAM and, questions of licence aside, amounts to infringement pursuant to these provisions, but he argues that there is a difference in scope between the act of infringement and those articles which can be regarded as infringing copies. I can see no justification for such a difference. In my view the meaning of the term "infringing copy" takes colour from its context in the Act. Just as a transient act of copying amounts to infringement, so an article which transiently contains a copy is an infringing copy for the purpose of this legislation. Taken together, these two subsections appear to suggest that even making a transient copy of a work can constitute making a reproduction "in a material form". Thus RAM containing a copy of Sony's copyright work is a reproduction in material form. It would produce an unwarranted inconsistency in the Act were that material form not to be considered an article for the purpose of s.27. It follows that Mr Kime's argument on this point fails."

69. The Judge also relied upon the reasoning in *Sony* in the context of her consideration of the meaning of "*infringing copy*" at [J596]-[J598]. **[CB1/1/166]**

70. In particular, at [J596] the Judge indicated that reference to s 17 by way of statutory context was consistent with the approach in *Sony*. We agree, although note that, as explained above, the Judge did not properly consider s 17(6). **[CB1/1/166]**

71. At [J597], the Judge concluded that in *Sony*: **[CB1/1/166]**

> "*the RAM chip … was only an infringing copy while it contained the copy but not otherwise: it was therefore, in the words of the Judge, "only an infringing article for a short time", i.e. for the time that it contained the copy.*"

72. It is important to read the statement in *Sony* at [15], that the RAM chip was "*only an infringing article for a short time*", in the context of the facts of that case. In *Sony* the making of the chip itself did not involve any infringement, so Laddie J took the relevant "*making*" for the purpose of s 27 as being the time when the reproductions of the Sony works were used. In contrast, in this case the time of making of the copies of the Copyright Works coincides with the making of the article, i.e. the model weights. Thus, unlike the RAM chip, as soon as it is made, the AI model is an "*infringing copy*".

73. Accordingly, the Judge was correct to say at [J598] that "*As Sony v Ball also makes plain, an article becomes an infringing copy when the act of reproduction occurs.*" [CB1/1/166] However, she was wrong to continue that "*From that moment the article is an infringing copy – but it ceases to be an infringing copy once it no longer contains the copy.*"[7] This fails to take into account the remainder of the reasoning of Laddie J in *Sony* at the end of [15] (emphasis added) that:

> "… the definition in s.27 points to the instant of making of the copy as crucial to the determination of whether or not it is an infringing article. An article becomes an infringing article **because of the manner in which it is made**. Whether it is an infringing article within the meaning of the legislation **must be determined by reference to that moment. It matters not whether it remains in that state, since retention as a copy is no part of the definition in the section**".

74. This reasoning is entirely consistent with the wording of ss 27(2) and (3), which makes clear that for an article to be an infringing copy what is needed is that "*its making constituted an infringement*" and there is no requirement that the article thus made must be or retain a copy of the copyright work.

CONCLUSION

75. For all these reasons, the Judge should have concluded that pursuant to s 27(3);

[7] See also [J600], [CB1/1/167]

75.1. the key question for the court was whether the "*making [of the model weights] in the United Kingdom would have constituted an infringement*";

75.2. "*making*" has a wide natural meaning, namely the act or process of producing the article;

75.3. a wide interpretation of s 27(3) is supported by the reference in s 17(6) to "*copies which are transient or are incidental to some other use of the work*";

75.4. Getty Images' construction is also supported by the purpose of the CDPA to reward authors for their creative efforts and of s 27(3) to prevent defendants from escaping copyright infringement by making articles abroad and importing them into the UK, in circumstances where their making in the UK would have constituted an infringement;

75.5. the reasoning of Laddie J in *Sony* confirms that what matters is "*the manner in which [the article] is made*";

75.6. the fact that the development and training of the model weights involved the reproduction of Copyright Works (through storing the images locally and in cloud computing resources and then exposing the model weights to those images),[8] meant that the making of the model weights, had those acts been undertaken in the United Kingdom, would have constituted an infringement.

76. Accordingly, this Court is respectfully invited to allow Getty Images' appeal.

LINDSAY LANE KC

JESSIE BOWHILL KC

[8] Which the Judge found as a fact at [J600] **[CB1/1/167]**

ANNEX – GUIDE TO THE KEY PARTS OF THE JUDGMENT ON COPYRIGHT INFRINGEMENT

Judgment paragraphs	**Judgment section headings**	**Relevance**	
[J1]-[J50]	*INTRODUCTION* *FACTUAL BACKGROUND*	Covers the factual background to the copyright infringement claim, but also includes matters relevant only to trade mark infringement.	[CB1/1/7]
[J56]-[J58]	*Relevant Copyright Works*	Identifies the Copyright Works relied upon for the purpose of establishing subsistence and ownership of copyright, as well as Stability's concession that certain Copyright Works were used in training Stable Diffusion. Not the subject of dispute in this appeal.	[CB1/1/18]
[J59]-[J63]	*Identification of the Licensing Issue*	Identifies the dispute between the parties at trial relating to whether some of the Copyright Works relied upon were the subject of exclusive licences. Not the subject of dispute in this appeal.	[CB1/1/18]
[J543]-[J609]	*THE SECONDARY INFRINGEMENT CLAIM*	The main part of the Judgment with which this appeal is concerned.	[CB1/1/149]
[J610]-[J650]	*COPYRIGHT SUBSISTENCE AND OWNERSHIP*	Findings relating to subsistence and ownership. Not the subject of dispute in this appeal.	[CB1/1/171]
[J651]-[J746]	*THE LICENSING ISSUE*	Findings relating to the licensing issue. Not the subject of dispute in this appeal.	[CB1/1/177]
[J757]-[J759]	*CONCLUSION*	[J757], [J758(viii)] and [J758(ix)] are relevant to copyright infringement.	[CB1/1/205]