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 REPLY SKELETON ARGUMENT OF THE APPELLANTS

LINDSAY LANE KC

JESSIE BOWHILL KC

8 New Square, Lincoln's Inn

clerks@8newsquare.co.uk

Instructed by Fieldfisher LLP

Reply Skeleton filed and served: 9 October 2026

Replacement Reply Skeleton filed and served: 21 October 2026

This skeleton uses the same definitions and format for references as in the Appellants' Skeleton. In addition, references in the form **[RS[number]]** are to paragraphs in the Respondent's Skeleton.

INTRODUCTION

1. This Skeleton responds to the two points raised in the Respondent's Notice, following service of the Respondent's Skeleton, that:

   1.1. Stable Diffusion is not an "*article*" for the purposes of ss 22 and 23 CDPA because it is intangible.[1]

   1.2. In respect of the availability for download of Stable Diffusion via Hugging Face, Stability has not carried out any acts of importation under s 22 or distribution under s 23.[2]

2. These points are addressed in sections 1 and 3 of the Respondent's Skeleton. Section 2 of that skeleton responds to the Appeal and will be addressed by Getty Images in its oral submissions in the usual way.

3. The Respondent's Skeleton has a lengthy introductory section which touches on matters that are relevant to both the Appeal and the Respondent's Notice, as well as some matters whose relevance is unclear. We address the points relevant to the Respondent's Notice in this Skeleton. Insofar as the introductory section touches on matters relevant to the Appeal or whose relevance is unclear, these will be addressed by way of oral submissions, as necessary.

4. However, before turning to the main arguments on the Respondent's Notice, there are some matters in Stability's introduction which Getty Images considers it would be helpful to address at the outset.

5. Under the heading "***Technical facts***", Stability suggests for the first time that there is a "*significant technical factual error*" in the judgment [RS17]. As we explain below, this **[CB2/2/32]** appears to be a u-turn by Stability, which amounts to saying that a cloud-based software service is tangible, thus, rendering the whole of Stability's argument on the first point raised in the Respondent's Notice unarguable. The fact that Stability seeks to engage in this

[1] Respondent's Notice [1] **[CB1/8/251]**
[2] Respondent's Notice [2] **[CB1/8/251]**

reversal suggests it rightly has no faith in its arguments on the meaning of the word "*article*" which were rejected by the Judge.

6. Under the same heading, Stability asserts that:

   6.1. These proceedings concern "*legacy versions*" of Stable Diffusion [RS1]. This is incorrect since Stable Diffusion XL is still being made available on Hugging Face (where it is stated that Stable Diffusion XL 1.0 was downloaded 4,300,354 times in the last month alone[3]) and the Developer Platform.[4] [CB2/2/29]

   6.2. The use of Getty Works in training the models in issue involved the storage of electronic copies of those works in AWS data centers outside the UK [RS15]. However, the use was not limited to this. In addition, the training involved retrieving the images and making temporary copies of them in the VRAM of the GPUs performing the training on the AWS Cluster [J48]. [CB2/2/32] [CB1/1/16]

7. Under the heading "***Legal context – infringing acts***", Stability steps through various provisions of the CDPA and its legislative history. There are a number of problems with what is said here, much of which relates to the Appeal, and accordingly is not the subject of this Skeleton. However, in this section Stability also introduces a curious argument that the secondary infringement provisions should be read through the lens of s 20 (as amended) and the case law relating to it [RS44]-[RS47]. As we explain below, this argument ignores the fact that the amendments to s 20 were introduced to comply with EU law, which has never harmonized the provisions relating to secondary infringement of copyright. They therefore have no bearing on the correct interpretation of these provisions. [CB2/2/39]

8. Finally, Stability's introduction reminds the court that there is a nexus between the issues in the Respondent's Notice and the Appeal [RS9]. That must be right, since they both relate to the meaning of the same provisions. Taking a step back, on Getty Images' case those issues essentially involve giving the words "*article*" and "*making*" their natural meaning in their statutory context; having regard to the purpose of the CDPA, to reward authors for their creative efforts; and applying the "*always speaking*" principle of statutory construction to ensure that the CDPA remains applicable to the modern world in which "*high-tech plagiarism*" encompasses "*intangible cloud storage and the mathematical* [CB2/2/30]

[3] stabilityai/stable-diffusion-xl-base-1.0 · Hugging Face
[4] https://platform.stability.ai/docs/api-reference#tag/SDXL-1.0

distillation of works into model weights"[5]. Stability suggests that Getty Images' approach gives rise to manifest absurdity, but the real absurdity would be to construe the CDPA in such a way as to render it a "*museum piece*"[6].

INTANGIBLE ARTICLES

Introduction

9. We have explained in the Appellants' Skeleton that the Judge summarised the principles of statutory construction at [J562]-[J564]. In addressing the issue of whether Stable Diffusion is capable of being an "*article*" for the purposes of ss 22 and 23 of the CDPA the Judge applied these principles in an entirely conventional manner. In particular, she considered: [CB1/1/155]

    9.1. The interpretation of the word "*article*" [J567]-[J578]. [CB1/1/158]

    9.2. The "*always speaking*" principle [J579]-[J583]. [CB1/1/161]

    9.3. The statutory context. [J585]-[J589]. [CB1/1/162]

    9.4. The purpose of the provision [J590]. [CB1/1/164]

    9.5. Stability's arguments on Hansard [J591]. [CB1/1/164]

10. For the reasons explained in detail below, the Judge's reasoning in relation to each of these matters was unimpeachable and the arguments raised by Stability in the Respondent's Skeleton do not withstand scrutiny.

The meaning of the word "*article*"

11. The Judgment on this issue starts by explaining that there is no relevant statutory definition of "*article*" [J567]. The Judge goes on to state that "*...the word "article" will almost invariably take its colour from its surrounding context*" [J569]. This is obviously right. The relevant context can be provided by a qualifier (as in the case of the examples given by the Judge: an article of clothing; a household article; a newspaper article; an article of faith). It can also be provided by the surrounding material in the document within which it appears. The word "*article*" is a very general term that is perfectly apt to cover both tangible and intangible items, depending on the context. [CB1/1/158]

---

[5] See "*The Ghost in the Machine: Getty Images v Stability AI and the Erosion of Section 27 CDPA*" by Dr Deming Liu (2026) EIPR Issue 9 at 613.
[6] *Ibid*.

12. Thus, Stability's submission that the word "*article*" without a qualifier, denotes a physical object [RS49] is wrong and, in any event, sheds no light on the question to be decided. Likewise, to rely on *Stroud's Judicial Dictionary* as containing no example of "*article*" used in a statute to denote intangible matter or to say that "*[g]enerally, the term is used in statutes or contracts to refer to a moveable chattel or physical object of some kind*" [RS49], does not assist. [CB2/2/40]

13. It is indeed the case that the word "*article*" is not invariably used in statutes to denote a tangible thing. See, for example, the National Security Act 2023 ss 1(2) and 2(2) which define "*protected information*" and a "*trade secret*" respectively as meaning *"any information, document* ***or other article…"*** (emphasis added). Since the word "*article*" covers the two preceding nouns it includes intangible items (information).

14. Accordingly, the Judgment is also obviously right to identify at [J570] that: [CB1/1/159]

    14.1. ss 22 and 23 provide the relevant context against which to construe "*article*";

    14.2. it is implicit from these sections that any article which falls within the definition of an "*infringing copy*" is intended to be capable of being subject to the secondary types of dealings referred to in those sections; and

    14.3. the first question for the court must be whether an infringing copy is capable of encompassing an intangible article.

15. This follows from the wording of those sections (emphasis added):

> "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**."
>
> "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,
>
> (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**."

16. However, although Stability accepts that ss 22 and 23 provide the relevant context [RS52], it criticises the Judge's reference to "*infringing copy*" on two grounds. [CB2/2/42]

17. First, it claims that the Judge ignored the guidance of Lord Hodge in *R(O) v Secretary of State for the Home Department* [2022] UKSC 3 at [29], to the effect that statutory phrases should be read in the context of the section as a whole and in the wider context of a relevant group of sections [RS53(i)]. However, it is clear from [J562] where she set out the guidance (which is cited in *Al-Thani v Al-Thani* [2024] UKPC 35) that the Judge had this guidance well in mind. It is also clear from the Judgment that she applied it. Her analysis of ss 22-23 is at [J584]-[J585] and her analysis of s 17 is at [J572]-[J574] (both of which we deal with below). [CB2/2/42] [CB1/1/155] [CB1/1/162] [CB1/1/159]

18. Accordingly, it is wrong to suggest as Stability does [RS52] that the Judge "*...excluded [importation and possession] entirely from her analysis*". She considered Stability's arguments in this regard in detail at [J585] (see below). [CB2/2/42] [CB1/1/162

19. Second, Stability contends that the Judge's reasoning about consistency between the meanings of "*article*" and "*infringing copy*" empties all meaning from the word "*article*" but fails to explain why this is so [RS53(ii)]. Requiring consistency of meaning is the only rational approach in circumstances where each of ss 22 and 23 use the term "*article*" in the context of "*infringing copy*" – "*...an article which is ... an infringing copy"*. In circumstances where "*infringing copy*" is capable of covering intangible items it would be very odd, to say the least, if "*article*" were construed as meaning only tangible objects. Stability's reliance on s 24 (where "*article*" and "*infringing copy*" are not joined in the same way) does not detract from the requirement of consistency in sections where the concepts are joined. [CB2/2/42]

20. Moreover, Stability's criticism is inconsistent with the fact that it accepts that it was proper for the Judge to take s 17 into account [RS54]. Indeed, Stability does not explicitly criticise the Judge's reasoning from [J571]-[J578]. This section of the Judgment carefully and correctly considers the wider statutory context given by s 17 and, in particular: (i) the need for consistency between "*article*" and "*infringing copy*"; and (ii) the correct interpretation of the word "*copy*". [CB2/2/43] [CB1/1/159]

21. As to consistency, at [J575] the Judge sets out a number of passages from the judgment of Laddie J in *Sony v Ball* [2004] EWHC 1738 (Ch), [2005] FSR 9, including [17] where Laddie J held (emphasis added, as in the Judgment): [CB1/1/160]

> "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**."

22. The Judge correctly found that this final sentence is "*strongly supportive*" of the proposition that the concept of "*article*" cannot be divorced from the concept of "*infringing copy*" or "*copying*" [J576]. [CB1/1/161]

23. As to the meaning of "*copy*", the Judge made the following observations about s 17:

    23.1. Under s 17 reproduction of the copyright work can be *"in any material form"* which includes *"storing the work in any medium by electronic means"* [J573]. [CB1/1/159]

    23.2. In *Sony v Ball* the argument proceeded on the assumption that the infringing copy must be tangible, but implicit in the judgment is an interpretation of infringing copy which (in the case of storage of an electronic work) includes the media on which it is stored [J577]. [CB1/1/161]

    23.3. Laddie J did not directly address the question of whether the media must inevitably be tangible. However, the words "*in any material form*" in s 17(2) are addressed at the reproduction of the copy, while the concept of storage in "*any medium*" *"could hardly be more broad or generic"* [J578]. [CB1/1/161]

24. Stability takes no issue with the above reasoning.

25. It follows from the breadth of the words *"in any material form"* and the concept of storage in *"any medium"* in s 17(2) that s 17(2) was plainly intended to cover "*any means of storing electronic copies"* and thus must be capable of including cloud storage, as found by the Judge at [J579]. [CB1/1/161]

26. In order to counteract the obvious logic of this reasoning, Stability makes the surprising (and entirely new) submission that the Judge's conclusion was based on a *"significant*

technical error" by virtue of her statement that "*in today's world, electronic copies can be stored in an intangible "cloud" with no physical instantiation*" [RS55]. That alleged error is addressed at [RS17]-[RS19] where it is said that "*cloud data is held on ordinary physical media: magnetic hard drives or Flash memory. ... the storage media has not become intangible; it is instead remote and networked, such that the user no longer knows or controls which specific physical medium holds their data*". Thus, it appears that Stability now wants to argue that a cloud-based software service is tangible and not intangible. [CB2/2/43] [CB2/2/32]

27. This is a *volte face* and makes no sense, as the whole premise of Stability's argument is that "*article*" cannot cover intangible items. As explained by the Judge, Stability's contention in this regard at trial was that "*...intangible or abstract information, such as the Stable Diffusion Models in issue which are distributed over the internet in intangible form, are not articles*" [J550(i)]. If what Stability is now saying is that cloud-based software is tangible, then this argument and section 1 of the Respondent's Notice falls away. [CB1/1/151]

28. We note further that Stability has waited until this appeal (and indeed service of its skeleton) to raise this so called "*significant technical error*" as opposed to raising it with the Judge upon receipt of the draft Judgment. Nor is it foreshadowed in the Respondent's Notice. In any event, it is plain that in the passage about which Stability complains, the Judge was merely reflecting in her own words the factual position put forward by Stability. Moreover, at the point of importation the electronic copy is transmitted as an intangible article (via the internet), so the Judge's reference to a lack of physical instantiation is correct.

The "*always speaking*" principle

29. Having considered the meaning of "*infringing copy*" and s 17, the Judge went on to apply the "*always speaking*" principle. She had already set out the law relating to this principle at [J563]-[J564], including the dissenting judgment of Lord Wilberforce in *Royal College of Nursing* [1981] AC 800, subsequently approved by the House of Lords in *Quintavalle* [2003] 2 AC 687 which provides that: [CB1/1/156]

> "In interpreting an Act of Parliament it is proper, and indeed necessary, to have regard to the state of affairs existing, and known by Parliament to be existing, at the time. It is a fair presumption that Parliament's policy or intention is directed to that state of affairs… when a new state of affairs, or a fresh set of facts bearing on policy, comes into existence, the courts have to consider whether they fall within the Parliamentary intention. They may be held to do so, if they fall within the same genus of facts as those to which the expressed policy has been formulated. They may also be held to do so if

there can be detected a clear purpose in the legislation which can only be fulfilled if the extension is made. How liberally these principles may be applied must depend upon the nature of the enactment, and the strictness or otherwise of the words in which it has been expressed. The courts should be less willing to extend expressed meanings if it is clear that the Act in question was designed to be restrictive or circumscribed in its operation rather than liberal or permissive."

30. The Judge correctly held that the "*always speaking*" principle was of assistance in this case. She found that the "*fresh set of facts*" arises by reason of the prevalence in the modern world of intangible electronic storage, which has been brought about by the enormous strides in technology since the date of the CDPA; and the purpose of the CDPA being to provide protection for copyright owners would be fulfilled by an interpretation which encompassed modern technology [J580]. **[CB1/1/161]**

31. Stability contends that the Judge was wrong to apply the "*always speaking*" principle for a number of reasons.

32. First, it says that all of the relevant principles of electronic storage of copyright works were known at the date on which the CDPA was enacted [RS56]. However, the Judge considered **[CB2/2/43]** and rejected this point at [J581] on the basis that it was Stability's own submission that in **[CB1/1/161]** 1988 intangible means of storage had not yet been invented. Thus, it matters not that electronic storage of copyright works was known to Parliament in 1988. The means of electronic storage in 1988 was very different from the modern means of storage, such as cloud storage, and downloading of intangible copies of software via the internet did not exist. The Judge referred in particular at [J579] to the "*common ground*" at trial that at the **[CB1/1/161]** time of the CDPA the media capable of storing electronic copies would have involved "*physical, tangible means of storage such as floppy disk or magnetic tape (more recently a hard drive, flash drive or USB stick and, by the date of Sony v Ball, a RAM chip)"*.

33. Second, if contrary to Stability's primary submission, online dissemination (and storage) is a relevant development since 1988, Stability says that Parliament has addressed it expressly by amending s 20, rather than ss 22-23 [RS56]. This argument ignores the critical fact that **[CB2/2/43]** the amendment of s 20 arose from the need to harmonise the law in this jurisdiction with EU law on primary infringement of copyright, in particular, the Information Society Directive[7]. EU law has never harmonised secondary infringement of copyright. The

[7] 2001/29/EC.

Copyright and Related Rights Regulations 2003[8], which were made by the Secretary of State pursuant to his powers under s 2(2) of the Communities Act 1972, were intended to implement, among other things, the right of communication to the public provided by the Information Society Directive by amending s 20[9], as is clear from the Explanatory Memorandum. Accordingly, it is wrong to suggest that Parliament has expressly addressed the position of online dissemination by amending s 20 rather than ss 22-23.

34. Third, Stability makes a similar point in relation to ss 6 and 7 [RS57]. It is bad for similar reasons. The location for cross-border transmission was harmonised by the Copyright and Related Rights Regulations 1996[10], which implemented the Satellite and Cable Directive[11]. Secondary infringement was not under consideration. In this context, Stability also refers to "*telecommunications system*" and its definition in s 178 CDPA [RS 57]. These are different provisions which deal with a different area of copyright law, namely broadcasts. They simply do not shed any light on the separate provisions relating to secondary infringement in issue here. [CB2/2/43]

35. Fourth, Stability refers to the complex jurisprudence relating to territorial and other issues in the context of s 20 as amended [RS58]. Again, this jurisprudence has nothing to do with secondary infringement, arising as it does, from the harmonisation of EU law on communication to the public. [CB2/2/44]

36. Fifth, Stability says that the term "*infringing copy*" appears in certain CDPA provisions relating to criminal liability, such as s 107(1). It maintains that this acts as a *"restrictive counterbalance"* to any desire to interpret the term expansively [RS59]. In this context, Stability cites *News Corp UK & Ireland Ltd v HMRC* [2023] UKSC 7 at [47] "*by analogy*". However, the point the Supreme Court was dealing with there was, in the context of VAT, "*the EU law constraints imposed by the standstill provision and the principle of strict interpretation of exemptions*" (see [48]). Thus, there is no analogy. Stability does not explain why it would be appropriate to restrict criminal liability for making or dealing with infringing articles to tangible articles only. [CB2/2/44]

[8] SI/2003/2498.
[9] The Regulations also amend s 24(2), but this is explicitly a consequential amendment, see reg 2(1) and schedule 1, para 5, arising from the need to change the words "*broadcasting or inclusion in a cable programme service*" to "*communication to the public*".
[10] SI/1996/2967.
[11] 93/83/EEC.

37. Moreover, it is plain from various criminal cases regarding sentencing in the Court of Appeal that in s 107(1) "*an article which is … an infringing copy*" is interpreted as including electronic copies distributed over the internet[12]. If the same interpretation were not given to the same wording in ss 22 and 23 CDPA it would have the unintended consequence of restricting the circumstances in which criminal liability could be imposed for the types of activities described in those cases, such as distributing over the internet counterfeit computer games, recordings of newly-released films taken on a mobile phone at the cinema and music downloads.

38. Accordingly, the Judge was right to conclude that the "*always speaking*" principle supported her construction of "*article*".

The statutory context

39. The Judge turned to other aspects of the statutory context from [J585]-[J590]. She first held that she was unpersuaded by Stability's arguments that the various acts of secondary infringement (in particular, importation and possession) can only apply where there is a tangible article [J585]. **[CB1/1/162]**

40. Stability repeats these arguments on this appeal [RS50]. The Judge was right to conclude that they do not assist. **[CB2/2/41]**

41. Stability's first point at [RS50(i)] is that "*import*" in s 22 means *"to bring goods into the country"*, relying on *L.A. Gear Inc v Hi-Tec Sports plc* [1992] FSR 121, 130. The Judge dealt with this at [J585(i)] and correctly held that the observation from that authority was expressly tied to the particular facts of that case (which concerned the importation of shoes). There is nothing about the act of importation which can only be said to apply to tangible objects. Indeed, "*importation*" is defined in the Cambridge Online Dictionary as "*the act of introducing new goods, **customs, or ideas** into a country from another country; something that is introduced in this way"* (emphasis added). **[CB2/2/41]** **[CB1/1/162]**

42. Next Stability asserts that "*possession*" in s 23 denotes physical control over a tangible object of some kind, relying on *Your Response Ltd v Datateam Business Media Ltd* [2014] EWCA Civ 281; [2014] 3 WLR 887 [RS50(ii)]. That was a claim for sums alleged to be due under a contract for the management of an electronic database and for damages for **[CB2/2/41]**

[12] *R v Lewis* [1996] 1 Cr.App.R.(S.) 208; *R v Nimley* [2010] EWCA Crim 2752; *R v Evans* [2017] EWCA Crim 139 (which provides general sentencing guidance for offences under s 107) and *R v Toschi* [2017] EWCA Crim 141.

breach of contract. The appeal raised the question whether it is possible to exercise a common law possessory lien over an electronic database. The Judge dealt with this at [J585(ii)] and correctly held that the Court of Appeal in that case was not considering the meaning of "*possession*" in the context of the CDPA. [CB1/1/162]

43. Moreover, Stability's assertion at [RS50(ii)] that "*the default approach in law is that intangible information cannot be 'possessed' in this sense"* is simply wrong (presumably prompted by its reliance on cases that relate to common law liens or claims in detinue or conversion). In other areas of law it is clear that intangible information can indeed be "*possessed*". See, for example, the National Security Act 2023 which provides in s.2(1)(a) that it is an offence for a person to *inter alia* "*retain*" or "*disclose*" a trade secret (which may be intangible – see above). S 2(9) then provides that, for the purposes of the section (emphasis added): [CB2/2/41]

> "(a) a person retains a trade secret if they retain it **in their possession** or under their control;
>
> (b) disclosure includes **parting with possession**"

44. Thus, Parliament has expressly recognised that intangible information can be "*possessed*". This also accords with the way the word "*possession*" is used in common parlance: *"He was not in possession of all the facts"*.

45. On appeal, Stability also points to s 24(2) as part of the relevant statutory context. It says that if Parliament had intended "*article*" to extend to electronic signals, the drafting of this section would have been different, with the subject of the transmission being "*an article*" instead of "*the work*" itself [RS50(iii)]. This argument was not run at first instance, hence it is not dealt with in the Judgment. It is a bad point for two reasons. [CB2/2/41]

46. First, s 24 is dealing with a different type of secondary liability, attaching to the provision of means for making infringing copies. The wording is necessarily different and it would be wrong to draw conclusions as to the meaning of ss 22 and 23 from this alternative type of liability. Second, s 24(2) plainly contemplates the resulting infringing copies including intangible ones because the focus of that provision is the transmission by means of a telecommunications system. It therefore supports Getty Images' case that "*infringing copy*" includes intangible copies, which suggests that "*article*" also includes intangible copies, for the reasons explained above.

47. In addition, Stability relies upon the meaning of the word "*article*" in Part III of the CDPA in the context of design rights [RS50(iv)]. This point was only mentioned in passing in written submissions at trial and is not dealt with in the Judgment. It is plainly irrelevant since the definition is in a separate part of the CDPA, in the context of a different species of intellectual property right. **[CB2/2/42]**

48. Much more pertinent context is to be found in s 27(6) and s 56(2) of the CDPA which are dealt with by the Judge at [J585]-[J588]. In relevant part they provide as follows: **[CB1/1/162]**

48.1. s 27(6) CDPA:

> "In this Part "infringing copy" includes a copy falling to be treated as an infringing copy by virtue of any of the following provisions
> …
> Section 56(2) (further copies, adaptations, &c. of work in electronic form retained on transfer of principal copy),…"

48.2. s 56 CDPA:

> "(1) This section applies where a copy of a work in electronic form has been purchased on terms which, expressly or impliedly or by virtue of any rule of law, allow the purchaser to copy the work, or to adapt it or make copies of an adaptation, in connection with his use of it.
> (2) If there are no express terms—
> (a) prohibiting the transfer of the copy by the purchaser, imposing obligations which continue after a transfer, prohibiting the assignment of any licence or terminating any licence on a transfer, or
> (b) providing for the terms on which a transferee may do the things which the purchaser was permitted to do, anything which the purchaser was allowed to do may also be done without infringement of copyright by a transferee; but any copy, adaptation or copy of an adaptation made by the purchaser which is not also transferred shall be treated as an infringing copy for all purposes after the transfer"

49. As held by the Judge, these sections provide support for the proposition that an "*article*" which is an infringing copy can be "*intangible*" in the sense that it can encompass electronic copies [J586]. Stability makes no criticism of this part of the Judgment. **[CB1/2/32]**

The purpose of the provision

50. Nor does Stability criticise the Judge's reasoning at [J590] as to the general scheme and purpose of the legislation being consistent with Getty Images' interpretation of the word "*article*". The Judge rightly held that: [CB1/1/164]

> "… 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.
>
> …
>
> As Getty Images submit, the importance of this principle is particularly acute in the modern world where huge numbers of works and copies are in electronic, intangible, form, owing to developments in technology."

51. Stability's analysis on appeal (as at first instance) neglects the purpose of the legislation altogether, contrary to the correct approach to statutory construction. The reason for that neglect is self-evident: Stability's construction is inconsistent with the purpose of the CDPA.

Hansard

52. Instead, Stability seeks to rely upon Hansard. The Judge rejected this approach on the ground that the relevant legislative provisions (insofar as they concern the interpretation of "*article*") are not "*ambiguous, obscure or, on a conventional interpretation, lead to absurdity*" as required by *R (Coughlan) v Minister for the Cabinet Office* [2022] UKSC 11, [2022] 1 WLR 2389 at [14], referring to *Pepper v Hart* [1993] AC 593 at 640 [J591]. [CB1/1/164]

53. Stability argues that the Judge was wrong to say that there was no ambiguity on two grounds. First, because of her alleged erroneous finding that anything which was an infringing copy could be an article [RS69]. We have explained why this finding was not erroneous above. Further, as explained above, the Judge relied on various reasons for reaching her conclusion on the meaning of "*article*". Considering these reasons as a whole, there is no good basis to conclude that there is ambiguity here. [CB2/2/46]

54. Second, Stability says that the very fact that the House of Lords were of the view that "*non-physical forms*" were excluded demonstrates ambiguity [RS69]. This is a naked attempt to circumvent the requirements laid down in the case law for consulting Hansard. It cannot be [CB2/2/46]

appropriate to look at Hansard itself to work out whether there is ambiguity such as to permit reference to Hansard. In any event, as explained below, the references to "*non-physical forms*" in Hansard are in the specific context of broadcasts and cable programmes, not intangible articles generally.

55. Indeed, the Judge also held that it was not appropriate to refer to Hansard because the passages upon which Stability sought to rely were not "*clear and unequivocal on the point of interpretation which the court is considering*" (*Coughlan* at [14]) owing to their apparent focus on broadcasts and cable programmes [J591]. **[CB1/1/164]**

56. As to this, it is clear from the passages cited at [RS64] and [RS65] that Lord Beaverbrook understood the amendment to relate to copyright works being brought into the UK either in a broadcast or through a cable system. See, in particular: **[CB2/2/45]**

    56.1. The following part of the passage cited at [RS64] (emphasis added):

    > "… copyright works can be brought into the United Kingdom in non-physical forms, **either in a broadcast or through a cable system.** It is argued that the secondary infringement of importation needs to embrace importation in **such non-physical forms**."

    56.2. The final paragraph of the passage cited at [RS65] (emphasis added):

    > "All other infringements are committed by a positive action, even if only giving permission, as in Clause 25. Here the suggestion is that infringement **may be committed by a passive recipient**. Is he to be liable if he does nothing with the signal he receives?..."

57. The reference to a "*passive recipient*" makes sense in the context of a discussion about the reception of signals on a TV screen. A discussion about whether the passive recipient of TV programmes should be liable for secondary infringement sheds no light on whether Parliament thought that a willing importer or seller of software in intangible form should be liable for secondary infringement. It should be noted in this context, that the requirement that the passages relied upon in Hansard must be "*clear and unequivocal on the point of interpretation which the court is considering*" was described by the Supreme Court in *Coughlan* at [14] as "*stringent*".

58. Stability's reliance on the statement of Lord Williams of Elvel [RS70] does not assist it on this point. His comments were made in the same context, where the amendment was clearly understood by those debating it to focus on broadcasts and cable programmes. This is also **[CB2/2/46]**

apparent from the reply given by Lord Mottistone to the statement of Lord Beaverbrook, which discusses reception on a television screen.

59. Stability's final point that the premise for the debate was the limiting effect of the word article, such that if the word was not limited to tangible objects there was no need for any amendment at all [RS71], is misconceived. Other parts of the debate on the Bill make very clear that the promoters understood the relevant clause to cover intangible articles. In particular, the amendment introduced to clause 27(6) to ensure that it covered "*copies of works in electronic form*" and "*ephemeral*" copies (see Hansard, 2 November 1988, cols 225-226). [CB2/2/47]

60. Accordingly, Hansard does not yield a clear indication of Parliament's intention on the point which this court is considering and the Judge was right to place no reliance on it.

61. Even if Hansard were admissible, it does not override the other aids to construction which the Judge correctly relied upon in the Judgment (discussed above).

IMPORTATION AND DISTRIBUTION

62. Getty Images' case on secondary infringement at trial (see [J544]) was that: [CB1/1/149]

    62.1. Stable Diffusion is an "*infringing copy*" under s 27(3) because it has been imported into the UK and its making in the UK would have constituted an infringement of copyright.

    62.2. Infringement has occurred by reason of the importation of Stable Diffusion pursuant to s 22 and/or its distribution in the course of business pursuant to s 23.

63. Stability's skeleton starts with a fundamental misunderstanding of the Judgment on these points and that misunderstanding permeates throughout its submissions on this aspect of the Respondent's Notice. It points to [J604(ii)] and asserts that the Judge held that both the infringing acts of **importation** and **distribution** were made out. However, the Judge was not at [J604(ii)] considering the infringing acts of Stability, but the question of whether (on the assumption that Stable Diffusion was capable of being an "*infringing copy*" in law) it was in fact an "*infringing copy*" under s 27(3). [CB1/1/168]

64. S 27(3) provides that an article is 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". In [J604(ii)] the Judge was considering whether the first limb of that test was satisfied, i.e. whether Stable Diffusion had been imported into the United Kingdom (which act of importation need not be an act of the defendant). [CB1/1/168]

65. Accordingly, Stability's assertion that the last sentence of [J604(ii)] "*must be wrong*" [RS124], is itself incorrect. The last sentence of [J604(ii)] explains that "*Under section 27(3) the importation need not be by the defendant and so it matters not whether the download is characterised as an act of the defendant or otherwise*". That is clearly right on the wording of s 27(3). [CB1/1/168]

66. The Judge's decision on the infringing acts is at [J604(iv)] and was as follows (emphasis added): [CB1/1/169]

> "As I understood Getty Images' submissions on the facts in closing, it contends that it is "clear that, at the very least, Stability has distributed Stable Diffusion in the course of business via Hugging Face". I agree in relation to v2.x, SD XL and v1.6. I accept that Stability is responsible for **these acts of distribution** which (if the other statutory requirements are met) thereby amount to acts of secondary infringement pursuant to section 23(d) CDPA. The same applies in relation to downloads from the Model licensing programme."

67. Stability goes on to say that the Judge's decision on **importing** must be set aside because in [J604(ii)] the Judge did not decide that Stability itself had imported the model weights. However, [J604(ii)] was dealing with a different point. In the relevant passage of the Judgment ([J604(iv)]) the Judge did not make a decision on whether Stability had imported, so there is nothing to set aside. [CB1/1/168] [CB1/1/169]

68. Stability's skeleton then turns to arguments on s 24(2), s 20 and the "*concept of importing*" [RS125]-[RS129]. The first two arguments are addressed above. [CB2/2/59]

69. In addressing s 20 in this context, Stability also says that "*it should be noted that Getty properly asserted targeting in respect of the DreamStudio website, but had no corresponding case in relation to the model weights and Hugging Face*" [RS128]. The relevance of this point is not understood. If it is a point on the law relating to s 20, that has no bearing for the reasons explained above. If it is a point on the facts, there was no need for an allegation of targeting because there was no dispute between the parties, and the Judge decided, that users in the United Kingdom accessed the model weights from Hugging [CB2/2/60]

Face. See, e.g. the Judge's finding at [J238] in the context of trade mark infringement: "*I also consider that on balance at least one user of each of Stability's v2.x Models accessed via DreamStudio and/or the Developer Platform and/or Hugging Face and GitHub in the UK will have come across a Getty Images watermark* generated on a synthetic image*".[13] **[CB1/1/70]**

70. On the "*concept of importing*", Stability refers to s 111(4) CDPA and appears to suggest that because importation is used in that provision in the context of goods, that has some bearing on the issues in this case. This section of the CDPA relates to the giving of notices to Customs and Excise in respect of "*prohibited goods*", it sheds no light whatsoever on the question of whether there is importation of an "*infringing copy*" in the context of the secondary infringement provisions at issue here.

71. Turning to the infringing act of distribution in the course of business, Stability again relies on s 20 [RS130], which we have already addressed. Its main point is that, on the Judge's interpretation, the safeguards which have been built into s 20 case law would be circumvented, because material downloaded by an individual in the UK on one isolated occasion could give rise to liability. However, liability could only arise if the requirements for secondary infringement were met. The secondary infringement provisions include a number of safeguards, in particular, the requirement of knowledge and in the case of distribution, either that it be "*in the course of business*" (s 23(c)) or "*to such an extent as to affect prejudicially the owner of the copyright*" (s 23(d)). **[CB2/2/61]**

72. In addition, Stability seeks to impugn the Judge's finding at [J604(iv)], set out above, that "*Stability is responsible for these acts of distribution*" on the ground that "*Hugging Face is a third party website. Any acts of distribution would have been carried out by Hugging Face. Any claims against Stability would have to have been founded on joint tortfeasance, and there were none*" [RS131]. **[CB1/1/169]** **[CB2/2/61]**

73. This point is entirely misconceived because Stability effectively accepted at trial that it was responsible for the distribution on Hugging Face. This is clear from at least the following matters.

74. First, one of the issues at trial was whether Stability was responsible for the making available of Stable Diffusion v1.x via the CompVis GitHub and CompVis Hugging Face

[13] See also [J265(i)] **[CB1/1/76]** as to the identity of the average consumer, who must be someone in the UK, for the purposes of infringement under the Trade Marks Act 1994.

platforms (see [J99]), there was no such issue in relation to the other versions of Stable Diffusion in issue. [CB1/1/28]

75. Indeed, the section of the Judgment dealing with this issue explains, in relation to the issue of Stable Diffusion v2.0 at [J124]: [CB1/1/35]

> "On this occasion, (in contrast to the release of v1.x) Stability refers anyone interested in the release of v2.0 of the Model to "**our GitHub**: https://github.com/Stability-AI/Stable Diffusion"(**emphasis added**) and states that "[w]e are releasing these models into the Stability AI API Platform (platform.stability.ai) and DreamStudio in the next few days". The Stability GitHub page refers to the fact that:
>
> > "The weights are available **via the StabilityAI organization at Hugging Face** under the CreativeML Open RAIL++-M License" (**emphasis added**)."

76. Further, the conclusion in the same section of the Judgment records at [J133]: "*It is common ground that Stability is responsible for the release of the other versions of Stable Diffusion in dispute in these proceedings.*" [CB1/1/37]

77. Second, in the context of trade mark infringement, the Judge held at [J339] that: [CB1/1/96]

> "…this case also involves active behaviour and control on the part of Stability because … it makes the Model available to consumers through GitHub, Hugging Face, the Developer Platform and DreamStudio (which I have accepted in relation to v2.x; SD-XL and v1.6. For v1.x the position is more complex); … None of this can be said to be the independent action of another economic operator."

78. Further and in any event, an argument that the Judge wrongly concluded that Stability was carrying out the acts of distribution, is a challenge to a finding of fact by the Judge. Therefore, to succeed on this point, Stability would have to show that the finding is "*plainly wrong*": Phillips LJ in *Kynaston-Mainwaring v GVE London Ltd* [2022] EWCA Civ 1339; [2023] RTR 17 at [16]-[19]. There is no basis on which to conclude that the Judge was "*plainly wrong*" on this point, particularly bearing in mind the facts and matters set out above.

79. Moreover, as is clear from the Judgment at [J604(iv)], the decision on distribution was also based on "*downloads from the Model licensing programme*". See [J604(iii)] which explains that: [CB1/1/169] [CB1/1/168]

> "In closing there was some discussion about Stability's case that, since 14 December 2023, SD XL Turbo has been made available for download on new licensing terms.

> This appears to have been part of an AI model licensing programme which (given the period it has been available) I find on balance has involved downloads in the UK."

80. Stability's skeleton does not suggest that it was not responsible for this programme. In any event, this would be another challenge to a finding of fact by the Judge.

81. Accordingly, Stability's case that there is no act to which s 23 extends is untenable.

LINDSAY LANE KC

JESSIE BOWHILL KC