IN THE COURT OF APPEAL (CIVIL DIVISION) **Appeal Ref CA-2026-000160**
On appeal from: High Court of Justice (ChD) [2025] EWHC 3262 (Ch)
Decision of Richards J and Master Brightwell

B E T W E E N :

TRUSTEES OF THE AFM SAG-AFTRA INTELLECTUAL PROPERTY RIGHTS DISTRIBUTION FUND (as listed in the claim form continuation sheet) & ORS
Claimants/Appellants

- and -

SECRETARY OF STATE FOR BUSINESS, INNOVATION, SCIENCE AND TRADE
Defendant/Respondent

APPELLANTS' REPLACEMENT SKELETON ARGUMENT

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*In this skeleton argument, unless otherwise stated, the same defined terms are used as in the judgment under appeal by Richards J and Master Brightwell dated 11 December 2025, [2025] EWHC 3262 (Ch) (the "**Judgment**"). Bold paragraph numbers **[nn]** refer to paragraphs of that Judgment. The earlier judgment of Richards J dated 30 July 2025, [2025] EWHC 1944 (Ch) is called the "**July Judgment**" and its paragraphs are referenced in the form **[JJ-nn]**. References to the Appellants' Core and Supplemental bundles are given in the form **[volume/tab/page]**).*

Both Judgments deal with other issues and applications apart from the CPR r 19.8 matter which is the subject of this appeal so the paragraphs needing to be read for this appeal are:

July Judgment: ***[JJ 1-35]; [JJ 42-72]; [JJ 80 and 94-95]****;*

The Judgment: ***[1]*** *to* ***[87]****.*

28 August 2026 (updated 16 October 2026)

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A. INTRODUCTION

1. The Appellants seek to pursue a representative action under CPR r 19.8 on behalf of approximately 30,000 performers, all of whom are members of C7-C8 and have consented to royalties and other forms of remuneration arising from the exploitation of the performers' performances in countries including the United Kingdom being collected and pursued on their behalf by C1-C6 ("**the Fund**") and its two constituent trade unions, C7 and C8. The Fund represents, in particular, 'non-featured' performers such as background vocalists and musicians, many of whom are sessional musicians for whom equitable remuneration is likely to be an important source of income. The Fund administers the mandates to collect royalties on the non-featured performers' behalf. The Judgment held that the Fund's proposed methodology for calculating damages in the event of success at trial on liability would be outside legal norms (at **[44] [CB/6/78]**) and contrary to the principles established by the UKSC in *Lloyd v Google* LLC [2021] UKSC 50; [2022] AC 1217 ("***Lloyd v Google***") (at **[55] [CB/6/81]**). The Appellants respectfully challenge the correctness of these findings of law and principle, which are important both to the Appellants' claims in this case and more generally.

2. The Appellants' claim arises from the UK's admittedly defective implementation of Directive 2006/115/EC on rental and lending right ("**Directive**"), as a result of which American performers were generally denied equitable remuneration when their performances were broadcast, performed and played in public in the UK in the period since 2016, by reason of the qualification requirements imposed by the relevant Order in Council made pursuant to ss 206(4) and 208 of the *Copyright, Designs and Patents Act 1988* ("**CDPA**") **[JJ19-23] [CB/7/97]**. It is common ground between the parties that the UK failed to implement the Directive correctly **[JJ24] [CB/7/98]**. The principal issue in dispute is whether the defect in UK law was "sufficiently serious" to result in an entitlement to *Francovich* damages. That issue (along with others) is due to be decided at the trial of the action which is currently listed from 1 March 2027.

3. Damages are sought by four individuals who are members of the Fund and Unions (C9-C12)[1] in a representative capacity on behalf of the other performers who (1) are members of C1-C8, and (2) have not received equitable remuneration for exploitation in the UK of their performances in the claim period (see the class definition quoted at **[8] [CB/6/69]**) in the sums

[1] A separate claim brought by the Fund directly in its own name for *Francovich* damages was struck out for lack of standing **[JJ73-95] [CB/7/111]**, so only the representative claims continue with regard to damages.

they would have otherwise received, had their performances fully qualified for equitable remuneration in the UK (see **[10] [CB/6/70]**). There is to be a split trial of liability and quantum, with further directions to be given in relation to quantum in the event that the claim succeeds as to liability at the trial.

4. The collective management organisation ("**CMO**") which administers and distributes performers' equitable remuneration in the UK, both to UK performers and to those represented by foreign CMOs such as C1-C8, is Phonographic Performance Ltd ("**PPL**").[2] PPL historically was founded by record producers whom it also represents and for whom it collects royalties. The rewarding of rightholders, such as individual performers, for their contributions to music which is broadcast or played in public is almost entirely dependent on an international network of CMOs, with PPL in the United Kingdom representing record producers and performers in respect of exploitation of sound recordings, whilst the Performing Right Society ("**PRS**") separately represents the owners of musical and literary copyrights. This system of CMOs successfully allows large numbers of entitlements, which may individually be of low value, to be paid to rightholders.

5. At the parties' request, PPL conducted a 'notional claims exercise' designed to mimic the normal claims process which takes place regularly between CMOs in different countries, in order to assess what C1-C8's members would have received in the years 2016 to 2022 if, hypothetically, UK law had complied with the Directive: **[JJ25-30] [CB/7/99]** and **[8]-[14] [CB/6/69]**. The results of that exercise were that about 30,000 of C1-C8's members were identified as having notional (counterfactual) claims, with an aggregate value of £21.5m (Sanchez 1, Exhibit CS5/1**) [SB/19/146]**); within that were 4,925 performers with claims worth £500 or more (£19.1m in total), of which 443 performers had claims above £10,000 (£8.7m in total) (see **[34] [CB/6/76],** Sanchez 3 at §7 **[SB/17/132]**). The PPL exercise was granular enough to allocate a notional claim value to each individual performer forming part of the representative class as well as in aggregate.

6. The Appellants propose (obviously only if successful on liability at trial) that the claim should continue as a representative action, and that the court should calculate and award damages based on the PPL notional claims exercise (re-run with updated information and with the benefit of data reconciliation work which is being undertaken between C1-C8 and PPL while the proceedings continue). It is agreed among the Appellants that any recovered damages will

[2] PPL has also intervened in the proceedings below on a related issue concerning the payment of equitable remuneration for exploitation of audio-visual performances.

be distributed to performers by the Fund and Unions (C1-C8) to their members by the normal processes according to which equitable remuneration and other royalties are normally distributed to their members.

B. THE "PARALLEL ENTITLEMENT" ISSUE

7. The problem identified by the court below arises because a proportion of the approximately 30,000 American performers represented by the Appellants may have "idiosyncratic characteristics" **[56] [CB/6/81]** – in particular a non-US nationality or residence – which could theoretically have enabled their performances to qualify for protection under the CDPA under another (non-US) route (a "**parallel entitlement**" as explained at **[JJ31-33] [CB/7/100]**). For example, a musician resident and working in the USA might be a citizen of Canada, which is a Rome Convention country. Where a basis for a parallel entitlement was known from PPL's or C1-C8's data (the "**PPL Data**" as described at **[12]-[13] [CB/6/71]**), the performer **would have been paid** full equitable remuneration in the normal distribution process, so suffered no loss. This parallel entitlement data was also taken into account in the notional claims exercise, so such performers were not recorded as having suffered any loss as compared with the situation if UK law had complied with the Directive (because in both scenarios they were paid). The Appellants do not claim on behalf of such individuals with a known parallel entitlement, and the class definition excludes them **[SB/4/29]**.

8. However, performers with an **unknown** parallel entitlement (e.g. a citizenship which was not recorded into the PPL data or perhaps even unknown to the performer themselves, such as where citizenship was inherited by ancestry) would not have been paid full equitable remuneration in the normal claims process, and therefore *would have* suffered loss. The Appellants contend that that loss was caused by UK law's admitted failure to implement the Directive: if the Directive had been implemented as required, then these performers would have been paid in full whether or not their parallel entitlement was known. The duty of a Member State under a Directive is not merely to make its rights available in theory under its law, but to make them effectively available in practice. It was entirely foreseeable that the gap in protection for US citizens and residents under the 2016 Order would also have a spillover effect on other performers, given that most performers (certainly ones not based in the UK) are unlikely to be aware of the intricacies of the UK's qualification rules and are equally unlikely to supply a detailed account of their residence history or other nationalities to the CMO representing them. The Respondent contends, however, that the UK is not liable for losses suffered where an unknown and theoretical parallel entitlement existed that was not asserted.

9. The lower court accepted that the position of both parties on the above points was arguable, and that this "**Causation Argument**" (summarised at **[17(i)] [CB/6/72]** and **[JJ34-35] [CB/7/101]**) cannot be determined now and needs to be decided at the trial. It is important to note that if the Appellants prevail at trial on this Causation Argument, then it is common ground **[75] [CB/6/85]** – and the court below agreed **[80(i)] [CB/6/86]** – that the claims can fairly be disposed of by representative proceedings on the basis of PPL's notional claims exercise.[3] Therefore the problems arising from parallel entitlement identified by the court below will arise only on the *contingency* that the Appellants lose at trial on that issue. Yet this perfectly viable claim worth tens of millions of pounds was subject to the risk of being terminated because of this contingency, leading the court below to recognise the existence of a serious dilemma at **[80] [CB/6/86]**. Although the Respondent has now accepted in the light of the sampling exercise conducted by the Appellants that he cannot prevent the claim reaching trial on proportionality grounds,[4] it appears that the Respondent still maintains the posture that he may again apply for an order under CPR r 19.8(2) to prevent the claim from continuing on a representative basis even after a successful finding of liability.[5]

10. In his July Judgment, Richards J rejected the Respondent's attacks on the represented class based upon alleged conflicts of interest and vagueness in the class definition, but directed the Appellants to make more detailed proposals for progress of the representative claim, including to address issues identified in the July Judgment concerning how a "bifurcated process" might work to determine common issues of liability followed by an inquiry as to quantum (see **[JJ72] [CB/7/111]**). Following this, the Appellants proposed:

    10.1 A split trial of liability and quantum; the Causation Argument (and a related issue affecting audiovisual exploitation) would be determined as part of the liability stage.

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[3] There was a further causation issue relating to performances exploited in audiovisual media referred to in the Judgment as the "***Atresmedia* issue**"; since the lower court held that this was not a barrier in principle to progress of the representative claim (see **[58] [CB/6/82]**), we focus on the parallel entitlement issue herein.

[4] A concession that was bound to be made in the light of *Mueen-Uddin v Secretary of State for the Home Department* [2024] UKSC 21; [2025] AC 945 at [81] (Lord Reed JSC) (Lord Sales, Lord Hamblen, Lord Burrows and Lord Richards JJSC agreeing).

[5] See §5 of the Respondent's solicitors' letter of 27 April 2026 **[SB/28/191]**; Respondent's skeleton argument dated 19 May 2026 at §§6-7.

If the Appellants prevailed, no difficulty would arise – it would be unnecessary to distinguish performers with parallel entitlements from other represented performers.

10.2 A "**preferred approach**", if the Causation Argument fails, as part of the damages inquiry to "filter out" performers where PPL or C1-C8's birth or residence data points to a parallel entitlement, using standard evidentiary and statistical sampling techniques to estimate the prevalence of performers with parallel entitlements in the residue; and then making an overall adjustment to the sum of damages awarded to account for this; and also if necessary deducting the relevant proportion of non-compensable audiovisual exploitation (see **[23]-[32] [CB/6/74]**).

10.3 A "**fallback approach**" whereby higher value claims, e.g. the 4,925 performers whose claims are worth more than £500, are contacted and invited to be joined as full parties (applying the bifurcated process at [81] of *Lloyd v Google*) and in relation to whom individual determinations of their circumstances could then be made insofar as disputed (see **[33]-[36] [CB/6/76]**). Preferably this should only need to be done after a successful outcome in a trial of liability (see **[39] [CB/6/77]**).

C. THE DECISION OF THE COURT BELOW

11. The lower court's reasoning at **[42]-[58] [CB/6/77]** explains its conclusion at **[41] [CB/6/77]** that the preferred option advanced by the Appellants does not set out a viable basis for the determination of damages in a representative claim, should they lose at trial on the Causation Argument. That reasoning is based on the court's assessment of questions of law or principle, rather than on discretionary considerations. This is evident, for example, in the court's invocation of the '*parameters of legal norms*' at **[44] [CB/6/78]**, and from the court's view at **[55]-[56] [CB/6/81]** that the preferred option is contrary to the principles established in *Lloyd v Google*, and "*contrary to principle*" as it could result in damages being awarded by reference to the claims of some individuals who might have suffered no loss.

12. The court's reasoning has three main limbs: (i) a reading of *Lloyd v Google* which involves treating the question of whether an "individualised assessment" is called for as a bar in its own right to a representative claim (see **[54(ii)] [CB/6/81]**) and rejecting the Appellants' argument that damages can be calculated on a common basis using the standard PPL methodology because this "*could lead to different outcomes for different class members*" with parallel entitlements or audiovisual exploitation (see **[42(ii)] [CB/6/78]**), (ii) the invocation of a supposed general principle that damages cannot be assessed on a "*group-wide basis with a percentage reduction to aggregate damages*" in order to adjust for any adverse findings on the

Causation Argument (see **[43]-[45] [CB/6/78]**), and (iii) distinguishing other cases in which representative claims in copyright actions have been allowed to proceed, despite the likelihood that only the works of some (unidentified) claimants within the class had been infringed.

13. Lord Leggatt's statement of principle at [80] of *Lloyd v Google* was that "*In the ordinary course*" an individualised assessment of damages cannot fairly or effectively be carried out without the participation in the proceedings of the individuals concerned. This will ordinarily be so, but in the present case the Appellants seek to use data which is centrally held by PPL and C1-C8 to compute entitlements and the total sum. Such use of centrally held data does not contravene Lord Leggatt's principle because it does not give rise to a need for individuals to participate and indeed the CMO system can only effectively operate on the basis of centrally held data. It appears that the court below must have accepted the Appellants' view on this issue since it was satisfied that such an exercise could viably be carried out on a representative basis, absent the parallel entitlements and (possibly) *Atresmedia* issues. The Court described the PPL process as a "uniform process" at **[11] [CB/6/70]**, and at **[15] [CB/6/71]** noted the Respondent's acceptance that it could be accomplished without the need for additional information from the individuals. Indeed there is no pleaded dispute between the parties as to the accuracy of PPL's figures or the position of any specific individuals. It appears that the Court must have accepted that this process amounted to an assessment of damages on a common basis as postulated by Lord Leggatt, or at least is sufficiently analogous to such a process to be permissible and appropriate in the circumstances of this case.

14. The Appellants' preferred approach (if claims of performers with unknown parallel entitlements have to be excluded) does not involve the collection of any additional information from individuals or even about their individual claims, and indeed is designed to avoid it. A uniform process would be applied commonly to all represented performers using the PPL Data and PPL's 'notional claims process', but the total would be scaled down to reflect the prevalence of parallel entitlements among the class. For example, if it turns out based on a sampling exercise undertaken during the quantum phase of the proceedings that, for every 100 performers, 6 turn out to have a parallel entitlement, then a 6% deduction can be made to the total sum. The overall result will be fair to the Defendant, since the correct global amount of damages will be payable. The result will also be fair to the performers, because they have agreed that the Fund should determine the proper distribution of any recovered damages to them in accordance with its normal distribution policies. However, the process will not identify which specific individuals within the class have or do not have a parallel entitlement.

15. The lower court's objections arise from it effectively assuming that the court must be able to identify which individuals have a claim and which do not. That might be a requirement in e.g. cases (like *Lloyd v Google* itself) where members of the represented class have no connection with each other, but in the present case they are all members of C1-C8 who have authority to collect and give good discharge for this revenue on their members' behalf and the power to distribute the revenue among members according to their distribution policies. In this respect the present case is indistinguishable from *EMI* and *Independiente*, considered further below, where damages were claimed on a collective basis by a class of record companies, it being unnecessary to identify which among them might have a cause of action.

D. ERRONEOUS APPROACH TO PARALLEL ENTITLEMENTS (GROUNDS §1.1-1.4)

16. **First**, the lower court's conclusion at **[46] [CB/6/79]**, that the 'preferred option' would lead to the Respondent being required to pay an element of compensation in respect of a US Performer who had suffered no loss, is wrong. This confuses the means of assessment with the result (in terms of what is payable at the end of the day). The correct analysis is that the **result** of a damages assessment would be that the Respondent could only ever be required to pay compensation in respect of the represented performers who had suffered a recoverable loss. That result is reached using a calculation method which involves quantifying the loss suffered by the entire pool of represented performers using a common methodology, and then making an adjustment to reflect the proportion of performers whose losses are not (if that be the result at trial) recoverable on causation grounds. But the result of that calculation is an evidentiary finding as to the quantum of loss that has in fact been suffered by all of them. That results in no element of overpayment.

17. **Second**, the lower court's reasoning was based on an assumption that there is a requirement that damages must always be calculated on an individual-by-individual basis, rather than collectively, such that making a downwards adjustment to a collective figure would be contrary to principle. Such reasoning was wrong because:

    17.1 There is no such requirement. The issue of how damages are distributed within the represented class is distinct from how damages payable to the class are calculated in the first place. As explained above, there is no need for individual entitlements to be ascertained by the court in the present case because of the nature of the represented class and each individual's relationship with C1-C8.

    17.2 To the contrary, the authorities make clear that there is a large measure of discretion in the assessment of damages, and that an overly technical and rigid approach is to be

avoided in favour of one which uses a "broad axe" to quantify so far as possible the compensation on the available evidence:[6] see *Morris-Garner v One Step (Support) Ltd* [2019] AC 649, [2018] UKSC 20 at [37] (Lord Reed JSC), [128] (Lord Carnwath JSC) (agreeing); and see by analogy *Mastercard v Merricks* [2020] 2 All ER 637, [2020] UKSC 51 at [46]-[54] (Lord Briggs JSC). In the latter case, Lord Briggs JSC described this as a "*principle of entitlement to quantification notwithstanding forensic difficulty*" and quoted with approval the observation of Popplewell J in *ASDA Stores Ltd v Mastercard Inc* [2017] 4 CMLR 32 that: "*The court will not allow an unreasonable insistence on precision to defeat the justice of compensating a claimant for infringement of his rights*". Although these were competition claims, it is clear that the principle applies more widely in intellectual property claims, breach of contract, and tort.[7]

17.3 The court's objection at **[44] [CB/6/78]** that this would involve fashioning a non-statutory "collective proceedings regime" is both wrong and irrelevant: if this action meets the requirements of CPR r 19.8 then that is sufficient; and the proper interpretation of that rule does not depend on unrelated enactments. In any case, the court would be doing no more than fashioning its armoury of evidentiary and procedural tools in order to make the necessary factual findings as to loss in a proportionate way.

17.4 The court accepted that "*statistical and economic techniques*" **[56] [CB/6/81]** were commonly used to arrive at an estimate of the proportion of individuals affected by particular traits in a larger population, and also accepted unchallenged evidence showing that – based on a pilot sample of 100 performers – it was possible in a very high proportion of cases to determine performers' nationality and residence with comparatively modest effort based on publicly available information (at **[27] [CB/6/75]** and Sanchez 2 at §30 **[SB/16/124]**).

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[6] The expression derives from the observation of Lord Shaw in *Watson Laidlaw & Co Ltd v Pott Cassels & Williamson (a firm)* (1914) SC (HL) 18 at 29–30 that the assessment of damages may call for "*the exercise of a sound imagination and the practice of the broad axe*".

[7] See, e.g., *Experience Hendrix LLC v Times Newspapers Ltd* [2010] EWHC 1986 (Ch), [204]-[205] (Blackburne J); See *Chaplin v Hicks* [1911] 2 KB 786, 792 (Vaughan Williams LJ); and *Morris-Garner*, [37] (Lord Reed JSC), [116]-[120] (Lord Sumption JSC).

18. **Third**, the lower court's conclusion is wrong that it should require damages in a representative action to be calculated in precise amounts for each represented individual. This is based on three flawed premises:

    18.1 There is no such requirement among claimants who are direct parties to a claim. For example, in a proceeding where claimants are represented in common, the court is not required to identify (if it causes difficulty) which particular claimant has a cause of action, or which particular claimant has suffered a recoverable loss, so long as it is satisfied that the claimants between them have a cause of action and (if damage is the gist of the action) a claim to cognisable loss against the defendant. Such cases arise not uncommonly in practice, e.g. it may be unclear, as between related companies, which of them owns trading goodwill to sustain a passing off action, but as long as all the potential candidates are claimants, the court need not be concerned with investigating this. Yet if there is no such requirement for direct parties, it must be asked why represented claimants should be subject to a higher standard than they would face had they been named as direct parties.

    18.2 The court normally does not exercise a supervisory jurisdiction to control how damages are divided among direct parties. In general, it is a matter for the successful claimants how they choose to apply their damages, and in what proportions they decide to divide both costs and remedy among themselves; and their solicitors can be relied upon to do so appropriately. No principled basis is articulated in the lower court's judgment as to why a different approach should be taken to representative claims. Although the absence of a commitment by the representative claimants to share damages among the represented claimants might well be a relevant factor going to the exercise of the court's discretion to permit the claim to continue on that basis (as noted by Lord Leggatt at [83] of *Lloyd v Google*, citing *Independiente*), there was no such concern here: all of the performers are members of the same CMO and have given their consent to being represented by the CMO on terms which allow that CMO to distribute any recovery in the present claim according to its usual policies and processes.

    18.3 There is nothing intrinsically wrong with the use of statistical and other evidentiary techniques in order to estimate the proportion of performers with a parallel entitlement. Indeed, such methods are frequently encouraged as cost-effective and proportionate means of dealing with issues in large data sets in proportion to their practical importance or otherwise: see Coulson LJ in *Building Design Partnership Ltd v*

> *Standard Life Assurance Ltd* [2021] EWCA Civ 1793 at [1]: "*The use of sampling and extrapolation is not uncommon in the Business and Property Courts (particularly the TCC) as a way of corralling evidence and keeping trials within proportionate limits. The essential proposition is that, if the sampled allegations are found, on the balance of probabilities, to be properly representative of the pool of allegations as a whole, then a detailed investigation into the sample can be extrapolated into a result in respect of the pool.*"

19. The court below was therefore wrong to identify any difficulty in distributing the damages recovered if the claim succeeds: the PPL Data results in a total figure payable to the US Performers representing the total lost remuneration they would have received, which can be scaled down to arrive at the correct figure for the legally recoverable loss in the light of the trial judge's conclusions on the Causation Arguments. One of the key reasons C1-C8 exist is for the very purpose of receiving and distributing such sums in an efficient manner, and C9-C12 (the performers who stand as representative Claimants) have accepted that this will occur in accordance with the Fund's usual policies and rules.

E. FAILURE TO APPLY REASONING IN *EMI* AND *INDEPENDIENTE* (GROUND §1.5)

20. The court below was wrong at **[52] [CB/6/80]** to distinguish the present case from *EMI Records v Riley* ("***EMI***") [1981] 1 WLR 923. In that case, although the number (2,980) of pirated cassettes was known,[8] to convert that into a sum of damages would necessarily have involved some kind of statistical exercise (or broad approximations) to arrive at an average selling price and profit margin of the genuine cassettes which had been displaced, using market averages since the identity of most cassettes was unknown. So considered, the exercise might be thought of as closer to a "bottom up" assessment than a "top down" one, or at least as combining elements of both approaches. Apart from a very small number of specific cassettes which had been identified, it was completely unknown which works among the repertoire of the represented class had been pirated, so any particular record company might or might not

[8] See *EMI* at p 925B-C, where Dillon J records the defendant's admission to having sold 2,980 tapes, of which 2,900 were pirated versions of recordings made by members of the class. And at p 926E-F he pointed out that "*if the plaintiffs can only recover damages in respect of tapes in which they individually own the copyright they will have considerable difficulty in establishing which pirate E.M.I tapes were sold by the defendant among the 2,980 tapes which she admits having sold or among whatever higher number it is found she had sold*".

have a cause of action at all. For this reason it was necessary to determine and apply a 'notional' lost sale price based on the court's findings as to market averages. This approach posed no difficulty and indeed was endorsed in *Lloyd v Google* at [53]-[54].

21. The court below also ignored the fact that the US Performers have already consented to the Fund applying its normal distribution policies when deciding how to distribute the sum of equitable remuneration recovered in these proceedings, and that any damages recovered will solely go to the Fund for distribution in accordance with those policies.[9] This is a strong point of similarity with *EMI*. Even in *Independiente*, where there was no binding agreement that money recovered by the representative claimants should go to the collective organisation, the court found that this was not a barrier to the use of the representative procedure (what they did with the recovered sums was a matter between them, the organisation and the class members: *Lloyd* at [54]).

22. Indeed, the unusual feature of the present case – which brings the Appellants far closer to the position of a representative claimant such as the members of the BPI in *EMI* – is that all the represented performers are bound together by preexisting contractual relationships with the Fund and Unions under which they have conferred mandates to collect precisely this kind of remuneration or damages in lieu thereof; **[SB/22/165]** (SAG-AFTRA), **[SB/24/169]** (AFM). That is why, for example, PPL can safely pay over sums to the Fund in respect of individual performers' equitable remuneration claims, and rely upon the Fund to distribute those sums to the relevant individuals. This payment to the Fund discharges the liability that PPL (or its record producer members) would otherwise owe individually to pay those performers their share of equitable remuneration. The same is true of claims that individual Fund members may have held against the Respondent. It is then up to the Fund to distribute any money received according to its distribution rules; that is not the concern of PPL in the case of remuneration payments, and need not concern the court in the case of damages.

F. ERRONEOUS APPROACH TO "INDIVIDUALISED ASSESSMENT" (GROUND §2)

23. There is no direct authority and little indirect authority on the application of the principles in *Lloyd v Google* to the unusual features of the present case.

[9] The court below had extensive evidence as to the Fund's status, its constitutional documents and the mandate granted by the members to the Unions and the Fund to collect and distribute royalties (see the expert report of Olivia Singer, as summarised in the July Judgment at **[JJ80] [CB/7/113]**).

24. The fact that monetary relief is sought is "not a bar" to a representative claim: *Lloyd v Google* at [80]. A representative action is perfectly viable "*if the entitlement [to damages] can be calculated on a basis that is common to all the members of the class*": ibid at [82]. As pointed out above, the court below appears to have accepted (rightly) that the process of applying PPL's longstanding distribution rules to **all** the US Performers based on PPL's historic exploitation data is such a common basis or at least falls within the contemplation of that phrase if more granular individual-level data is used which is held centrally. However, the lower court was wrong not to appreciate that the Appellants' preferred approach makes no difference to this conclusion: the same centrally held data is used in the same way as in the baseline notional claims exercise and some statistical (not individual) data is also applied. This involves no individualised assessment of the kind contemplated by Lord Leggatt but rather the application of a common basis of assessment, and a common basis of adjustment.

25. Indeed, it is a peculiar feature of the PPL claims process that it can **only** be carried out on a common basis: each time the calculation is re-run, it must be re-run for **all** performers, since the sums payable to each one will often depend on what other performers have a claim on a particular track (e.g. their pro rata share may depend on the number of other performers for a given track), so if more performers are treated as qualifying, that can affect the size of the individual shares: see July Judgment at **[JJ28-30] [CB/7/99]** describing the process. In light of this, the court's finding to the contrary at **[42(ii)] [CB/6/78]** was therefore wrong.

26. Even if an assessment were required which, to some extent, depended on the individual circumstances of the represented claimants, this would not necessarily be a fatal bar to the bringing of a representative claim under CPR r 19.8. As Lord Leggatt makes clear at [80] of *Lloyd v Google*, the defining characteristic is whether a damages claim "*necessitates an individualised assessment which raises no common issue and cannot fairly or effectively be carried out without the participation in the proceedings of the individuals concerned*".

27. The lower court was wrong at **[54]-[55] [CB/6/80]** to regard the present claim for damages as being in any way inconsistent with the principles laid down in *Lloyd v Google*:

    27.1 In the first place, even if determining the sums due to the performers could be said to involve an individualised assessment, it is one with numerous common issues: whether the PPL Data is accurate, whether that is the correct measure of loss, whether any forms of exploitation (e.g. audio–visual) fall to be deducted from all performers' claims, etc. It is entirely consistent with the representative procedure, and in furtherance of the overriding objective, that those common issues be determined together in a single set of proceedings.

27.2 Secondly, even insofar as the common calculations may ultimately be applied to identify the sums due to individual performers, their participation is in no sense required:

(a) PPL's exploitation data will stand as evidence for all performers of the relevant exploitation of their performances in the UK;

(b) The Appellant's preferred proposal involves ascertaining by statistical methods the prevalence of parallel entitlements and does not entail seeking information from individual performers about their own claims.

27.3 Thirdly, when considering what form of assessment or involvement is required for the claims of each represented person, it is important to consider what is and is not in dispute on the pleaded case. Matters that are not in dispute do not provide a basis on which to refuse to permit the claim to be advanced on a representative basis: see *Independiente* at [27]. In circumstances where there is not yet any pleaded issue as to the parallel entitlements of any specific US Performers, it is premature to assume that the circumstances of any, all or even substantially all performers will need to be examined. Insofar as they are, then, as noted above, the court remains capable of dealing with that.

28. More broadly, when considering the boundaries of what amounts to an impermissible "individualised assessment", one should compare the very centralised and targeted nature of the exercise which the Appellants wish to undertake with the inherent impracticality of joining 30,000 or so individuals as claimants; or requiring 30,000 separate claims to be brought (most of which are, individually, likely to be worth far less than the costs of bringing the claim). This is a paradigm case where representative proceedings are appropriate and indeed necessary to further the overriding objective (as per *Lloyd v Google* at [75]).

29. There is widespread use of the representative procedure in large intellectual property claims on behalf of members of CMOs for non-payment of royalties.[10] Notably, PPL itself brought a

[10] See, e.g., *Warner Music UK Ltd v TuneIn Inc* [2023] EWHC 2875 (Ch) at [3] (where Cs sued for themselves and as representatives of 137 other owners of sound recording copyright); *Young Turks Recordings Ltd v British Telecommunications plc* [2021] EWHC 410 (Ch) at [1] (Miles J) (where Cs sued for themselves and as representatives of other record company members of BPI and PPL); *Capitol Records v British Telecommunications plc* [2021] EWHC 409 (Ch) (same);

Francovich claim in which there was no suggestion that it was inappropriate to do so on a representative basis on behalf of its 3000 record company members: see *PPL Ltd v Department of Trade and Industry* [2004] EWHC 1795 (Ch); [2004] 1 WLR 2893. If PPL and other CMOs could **not** bring such claims on behalf of their members, the system of effective protection would be greatly if not fatally undermined; but if PPL can bring such claims on a representative basis, there is no reason of principle why performers cannot do so. There is nothing intrinsically different about the damages recoverable for infringement of copyright or performers' right and those recoverable following the success of a *Francovich* claim which is brought on behalf of rightholders arising from a failure to confer a right to such royalties, which would render the former suitable for determination on a common representative basis, but not the latter.

G. CONCLUSION

30. For these reasons, the Appellants respectfully submit that the appeal should be allowed.

Dated 28 August 2026

Replacement skeleton dated 16 October 2026

Independiente Ltd v Music Trading On-line (HK) Ltd [2007] FSR 21 at [1] (Evans-Lombe J) (where Cs sued for themselves and in a representative capacity for all other members of BPI and PPL); *Twentieth Century Fox Film Corp v Harris* [2014] EWHC 1568 (Ch) at [1] (Barling J) (where Cs sued for themselves and in a representative capacity on behalf of all other members of the Motion Picture Association of America Inc); *EMI Records Ltd v British Sky Broadcasting Ltd* [2013] FSR 31 at [1] (Arnold J) (where Cs were record companies suing on their own behalf and as representatives of the other members of BPI and PPL).