IN THE COURT OF APPEAL **Court of Appeal Ref: CA-2026-000007**
ON APPEAL FROM

THE HIGH COURT OF JUSTICE **Claim No: IL-2023-000007**
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

- and -

BPI (BRITISH RECORDED MUSIC INDUSTRY) LIMITED

~~Applicant/Proposed~~ Intervener

REPLACEMENT SKELETON ARGUMENT OF BPI, THE ~~PROPOSED~~ INTERVENER

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8 September 2026

Replacement Skeleton filed and served on 21 October 2026

Solicitors: DLA Piper UK LLP | Ref: JW/TN/380838/29

*In this skeleton, the judgment of Mrs Justice Joanna Smith (the "**Judge**") in [2025] EWHC 2863 (Ch) is referred to as the "**Judgment**" (references to which appear as 'J' plus paragraph number, so Judgment paragraph 590 appears as [J590]), the Appellants are referred to as "**Getty**", and the Respondent is referred to as "**Stability**".*

Bundle references are in the following form:

*Core Appeal Bundle (Volume 1): **[CB1/Tab/Page]**.*

A. INTRODUCTION

1. This is the skeleton argument of the ~~proposed~~ Intervener BPI (British Recorded Music Industry) Limited ("**BPI**") in this important appeal (the "**Appeal**").

2. BPI is a trade association and a representative voice promoting and protecting the copyright and other intellectual property ("**IP**") rights of the UK's recorded music industry. BPI's membership comprises hundreds of record labels, large and small. BPI is also mandated to help protect the IP of the members of Phonographic Performance Limited ("**PPL**")[1]. Together, BPI and PPL members (the "**Members**") own or control approximately 99% of the copyright in all sound recordings legally made available in the UK each year. BPI's perspective therefore reflects the whole UK record industry.

3. BPI has a significant interest in the subject matter and outcome of this Appeal, which deals for the first time in English law with the intersection of artificial intelligence ("**AI**") models and secondary copyright infringement. BPI therefore wishes to assist the Court by offering BPI's wider perspective and different expertise on the matters in issue. BPI has read Getty's skeleton in the Appeal[2] and

[1] The UK entity that licenses public performance and broadcast of recorded music on behalf of its performer and record company members.

[2] Stability's skeleton is due on 21 September 2026.

supports those submissions. In this skeleton therefore, BPI addresses the following four areas, some of which may not otherwise be apparent to the Court:

(1) first, ***ramifications***. Although the action was concerned with copyright in photographs, it has far-reaching ramifications across the scope of the creative industries, and specifically for the music industry. In particular, the use of sound recordings (which embody a plethora of other rights) to train AI models which are then made available in the UK;

(2) second, ***jurisprudence***. BPI will set out its understanding of the scheme and purpose of copyright protection insofar as is relevant to the question of secondary infringement by importation of articles made outside the jurisdiction;

(3) third, ***the Judge's errors***. BPI wishes to explain how in its opinion the Judge erred in her statutory interpretation of the definition of secondary infringement; and

(4) lastly, ***what is not in issue***. BPI highlights the significance of what is not in issue in this Appeal – namely the question of whether, outside the agreed narrow facts of the case, AI models in general contain copies of works on which they have been trained.

B. RAMIFICATIONS OF THE APPEAL FOR THE MUSIC INDUSTRY (AND WIDER CREATIVE INDUSTRIES)

4. The Judge rightly held at [J583] **[CB1/1/162]** that an AI model like Stable Diffusion is an *"article"* for the purposes of ss. 22, 23 and 27 of the Copyright, Designs and Patents Act 1988 ("**CDPA**"). However, the finding that it was not an *"infringing copy"* for the purposes of CDPA s. 27(3)(b) was, we submit, incorrect

and opens up a dangerous fracture in the scheme of copyright protection for the creative industry as a whole and, in particular, the music industry. Specifically, regarding AI, it invites third parties to exploit IP (without permission) in jurisdictions in which it may be difficult or impossible for rightsholders to enforce their rights, enabling third parties to create AI models which can be imported into the UK to attack the legitimate interests of those rightsholders. We submit that it is precisely this type of activity that CDPA s. 27 was designed to prevent.

5. BPI's and the Members' primary interest is copyright in sound recordings. However, those sounds recordings are themselves an embodiment of a plethora of other rights that should be protected under the scheme of the CDPA – including for example musical works, literary works, artistic works, films, as well as related rights in performances and moral rights. Action to protect the copyright in sound recordings therefore also protects the interests of the songwriters, musicians and artists whose work is embodied in those sound recordings.

6. But the Judgment materially prejudices the ability to control and enforce some of those rights at the crucial intersection of AI and IP, because as it currently stands the importation into the UK of an AI model like Stable Diffusion would not be an infringement. The outcome of this Appeal will therefore likely have highly significant commercial implications for the entire music industry to be able to choose whether, and if so on what terms, to license their works and/or to take enforcement action to help protect all the rights embodied in those works.

7. The importance of this Appeal to the music industry has been recognised by the UK Government. For example, in its Report on Copyright and AI of March 2026[3], Government acknowledges that *"[g]enerative AI models will often be trained using*

[3] *https://www.gov.uk/government/publications/report-and-impact-assessment-on-copyright-and-artificial-intelligence/report-on-copyright-and-artificial-intelligence*.

creative works protected by copyright, such as images, text and music"[4], and that a key example of this is a "*song-generation service, which generates music and vocals*"[5]. The Report makes clear that Government is monitoring the outcome of AI licensing and litigation around the world[6], including this Appeal which Government believes *"should be considered properly by the courts, to give certainty to right holders, developers and users of AI models"*[7].

8. To use Government's example of a song-generation service, the unlawful making of synthetic deepfake AI voice models of real artists obviously impacts significantly on the legitimate interests of a range of rightsholders (such as songwriters, artists, music publishers and record labels), in a range of different economic and artistic ways. The music industry (led by BPI) is already contemplating litigation against AI companies to prevent the exploitation of such models in the UK.

9. It may be tempting, when looking at this case in the context of AI models which are trained on multiple photographic images to enable the creation of 'new' images of (say) a geographical feature, to consider that the importation of the model into the UK is only an indirect attack on the interests of a party who took one of those original photographs. This view would ignore the point that the very images imported are competing commercially with the photographic images from which they were generated. Moreover, when viewed in the context of AI models trained without permission on sound recordings to produce a voice model of an individual artist (or indeed to produce any sound recording), the wider significance of this appeal becomes more apparent. The damage caused to the entire music ecosystem by using the original sound recordings without

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4 Report on Copyright and AI, Section D: Input transparency, 5th paragraph.
5 Report on Copyright and AI, Section B, Deployment, 2nd bullet point.
6 Report on Copyright and AI, Section A, The government's approach, 3rd paragraph.
7 Report on Copyright and AI, Section C, Stronger copyright: assessment, 4th paragraph.

permission to train an AI model can then be compounded further where, for example, that content is uploaded to digital music platforms and competes unfairly with the original sound recordings which were copied in the first place.

10. In short, a significant copyright protection tool will be prised from the hands of a whole value chain of UK rightsholders, if secondary copyright infringement action cannot be taken against AI companies who offshore their AI training to seek to avoid obtaining licences by copying copyright works outside of the UK, then bring the fruits of their infringement back into the jurisdiction.

C. THE PURPOSE OF THE SCHEME OF COPYRIGHT PROTECTION ESTABLISHED UNDER S. 27(3)

11. It is instructive to go back to basics, and to the first paragraphs of the first chapters of the two leading text books in the UK. Copinger and Skone James on Copyright, 19th Ed (2024) ("**Copinger**"), Chapter 1, Para 1-01, states as follows:

> "*The law of copyright provides the legal framework for the protection of traditional beneficiaries of copyright … as well as for the protection of investment required in making and producing works within the cultural, publishing, film, broadcasting, music, software, networked and videogaming industries – to name a few. Works protected by copyright and the rights related thereto are part of the creative industries economy … And this sector relies extensively on copyright protections."*

12. Laddie, Prescott and Vitoria The Modern Law of Copyright, 5th Ed (2018), Chapter 1, Para 1.1, states as follows:

> "*Copyright is a topic of long and continuing cultural, political and legal interest. From the earliest legal texts to the present day, the law has recognised in various ways the importance of protecting creative works …"*

13. And at Para 1.2:

> *"The productions of a person's creativity or labour may be protected if, and to the extent that, the law will recognise that they are proprietary or quasi proprietary in nature."*

14. Over 100 years ago, under the Copyright Act 1911, Kennedy LJ in the Court of Appeal in *Chappell & Co. Limited v Columbia Graphophone Company* [1914] 2 Ch 745 ("***Chappell***") set out an important principle that stands good today. The facts were that the appellant (lawfully) acquired sheet music for a musical work protected by copyright owned by the respondent, which the appellant then (unlawfully) adapted and arranged, made a master sound recording of, and then produced gramophone records which it sold. Kennedy LJ held at [754] that although the gramophone records did not contain copies of the musical work per se, *"The appellants cannot be allowed, having done this thing, to retain the benefit, and the Court has the power to take care that that which has been created by the infringement shall cease to exist"*. Accordingly, in that case, delivery up and destruction was ordered of the gramophone records because they were the fruits of the infringement.

15. In her Judgment at [J590] **[CB1/1/164]** the Judge cites Lord Bingham of Cornhill in *Designers Guild Ltd v Russell Williams (Textiles) Ltd* [2000] 1 WLR 2416 ("***Designers Guild***") who rearticulated this principle at [2418]:

> *"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."*

16. As articulated by the Advocate General in *Pelham v Hutter* (C-476/17) [2019] Bus [2019] ECDR 3 (AG) at [83]-[84]:

> *"83. … The main objective of copyright and related rights is to promote the development of the arts by ensuring artists receive revenue from their works, so that they are not dependent on patrons and are free to pursue their creative activity.*

84. It is true that the present case does not directly concern the exclusive right of authors but rather the exclusive right of producers who benefit therefrom on account of their financial and organisational contribution. However, on the one hand, although the EU legislature has provided for exclusive rights for producers, it is because they contribute to the creation and dissemination of works in an auxiliary capacity. The right they hold in phonograms is a guarantee of a return on their investment. …"

17. And similarly, by the CJEU in *Pelham v Hutter* (C-476/17) [2019] Bus LR 2159 at [30] that:

> *"the investment required to produce products such as phonograms, is considerable to such an extent that it is necessary in order to guarantee phonogram producers the opportunity of satisfactory returns".*

18. The issue in this Appeal is the meaning of *"infringing copy"* in CDPA s. 27(3). We submit that the meaning has to be understood against the purpose of the section – which is plainly to prevent unscrupulous traders from bypassing the copyright laws of the UK by off-shoring their infringing activities and then simply importing the fruits of those activities to make profits here. The wording of the section is perfectly clear in this respect – namely 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."*
>
> (Emphasis added.)

19. S. 27(3) is a self-contained definition which is simple and hypothetical. The Court merely has to ask one question – namely if the article had been made in the UK, would it have constituted an infringement of another copyright at the time of its making?

20. In congruence with the principle in *Chappell* (that gramophone records could be destroyed even though they did not contain any actual copies of the original

copyright work), there is nothing in s. 27(3) which imposes any further test to the effect that a copy of an original copyright work used to make the *"infringing article"* must be retained in the *"infringing article"*.

21. A similar statutory formulation appeared in the CDPA's predecessor statute, the Copyright Act 1956[8]. There is nothing in either section of either of those statutes which imposes any test of the article having to retain a copy of any copyright work.

22. These statutes and the principles in *Chappell* and *Designers Guild* are aligned, and are, we submit, further supported by *Kabushiki Kaisha Sony Computer Entertainment Inc v Ball* [2004] EWHC 1738 ("***Sony v Ball***") where Laddie J explained at [15] that:

> "*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* [sic] *in that state since* ***retention as a copy is no part of the definition in the section***."
>
> (Emphasis added.)

23. And further in Copinger, Chapter 7, Para 7-06:

> "*An article becomes an infringing article because of the manner in which it is made and so whether it is an infringing article must be determined by reference to that moment.*"

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[8] The relevant provisions of the Copyright Act 1956, as enacted, were ss. 5(2)-(3):
"(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 such 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****."* (Emphasis added.)

24. Other provisions of the CDPA itself also suggest that the CDPA does not intend to limit the protection of copyright law to cases where the original work is replicated and stored in some way in the infringing work. For example:

(1) similar to *Chappell*, CDPA ss. 16(1)(e) and 21 give rightsholders the ability to take copyright enforcement action against unauthorised adaptations of literary, dramatic and musical works – for example when a non-dramatic work is turned into a dramatic work (s. 21(3)(a)(ii)), or when a literary work is turned into an artistic work (s. 21(3)(a)(iii));

(2) CDPA s. 16(3)(b) provides that copying is actionable whether done *"directly or indirectly"*; and

(3) CDPA s. 17(6) clarifies that *"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"*.

D. THE ERROR IN THE JUDGE'S STATUTORY INTERPRETATION

25. The complete text of CDPA S. 27(1)-(3) provides 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."*

26. The Judge correctly found that Stable Diffusion could be an *"article"* for the purposes of the CDPA [J583] **[CB1/1/162]**, and that downloads of Stable Diffusion had been imported into the UK [J604] **[CB1/1/168]**.

27. But the Judge made an error and a classic false syllogism when she interpreted the meaning of an *"infringing copy"* under s. 27(3)(b). Her 3-step reasoning was essentially as follows:

    (1) the *"article"* Stable Diffusion is only an *"infringing copy"* if in fact it contains/stores a copy of a copyright work that has been infringed [J597] **[CB1/1/166]**;

    (2) Stable Diffusion does not contain/store a copy of a copyright work that has been infringed [J600] **[CB1/1/167]**; and

    (3) therefore, Stable Diffusion is not an *"infringing copy"*.

28. However, this is a misdirection. There is no authority for the Judge's proposition at (1). Moreover, as explained in s. 1.2 of Bennion, Bailey and Norbury on Statutory Interpretation, 9th Ed (2026) ("**Bennion**") at Ch. 1, p. 3: *"The overriding objective when interpreting legislation is to ascertain, and give effect to, the legislative intention"*.

29. The textbook approach to legislative intention is set out Code 10.1 of Bennion, as follows:

> *"10.1 Legislative intention*
> (1) *Statutory interpretation involves identifying the legal meaning of the words used in a statute for the purpose of applying them to particular facts.*
> (2) *The legal meaning is arrived at by drawing inferences as to the intention of the legislature expressed in the legislative text.*

(3) *This involves analysing the statutory text, read in context and in the light of its purpose and all other relevant principles of statutory interpretation, and reasoning from them as to the legislature's intended meaning."*

30. The legal meaning of the phrase *"infringing copy"* is given by s. 27(3) itself. The section is clear and there is certainly no requirement in the section mandating that a copy of a copyright work that has been infringed must be retained in an article. There are also few, if any, inferences that need to be drawn in order to interpret s. 27(3). But, we submit, to the extent that inferences are needed, these should be taken from the jurisprudential scheme of copyright protection.

31. CDPA s.27(3) creates a hypothetical test which asks whether, if an article had been created in the UK then, at the moment in time that it was created, would it have infringed another copyright work? Accordingly, applied to Stable Diffusion, the correct 3-step reasoning that the Judge should have used is as follows:

(1) if Stable Diffusion had been made in the UK, and if making it would have infringed another copyright work, then Stable Diffusion would be an *"infringing copy"*;

(2) the making of Stable Diffusion did include the copying of a number of Getty's copyright photographs ~~[J597]~~ [J600] **[CB1/1/167]**. This would have amounted to an infringement if done in the UK; and

(3) therefore, Stable Diffusion is an *"infringing copy"*.

32. This analysis aligns with the principles of statutory interpretation. It also aligns with the spirit of the scheme of copyright protection which the Judge herself accepts at [J590] **[CB1/1/164]** *"is to reward authors for their creative efforts"*. In the same paragraph, she also cites Lord Bingham's guiding principle in *Designers*

Guild at [2418] that *"No one else may for a season reap what the copyright owner has sown"*.

33. So, with the right mindset, and correctly holding at [J583] **[CB1/1/162]** that an AI model was capable of being an *"article"* for the purposes of CDPA ss. 22, 23 and 27, how then did the Judge fall into error?

34. It seems that her attention was distracted at [J595] **[CB1/1/166]** by *G4S Plc v (1) G4S Trustees Limited (2) Sok Wah Lee* [2018] EWHC 1749 (Ch) in which the then Nugee J sought to construe the phrase *"pensionable service"* in the Pensions Act 1995 by unpacking each of those two words. The Judge was persuaded by Stability to draw an analogy between that phrase, and the phrase *"infringing copy"*, then sought to unpack the two words *"infringing"* and *"copy"*. She said at [J596] **[CB1/1/166]** that:

> *"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 meaning must inform the proper interpretation of the composite phrase "infringing copy."*

35. However, as articulated by Lord Sales in *R (on the application of PACCAR Inc and others) v Competition Appeal Tribunal and others* [2023] UKSC 28 at [49]:

> *"Where Parliament has taken the trouble to provide a definition, it is the words of the definition which are the primary guide to the meaning of the term defined"*.

36. CDPA s. 27(3) provides a self-contained definition. The Judge did not need to step outside of that section. But, we submit, when the Judge looked at CDPA s. 17, we submit, she erred because s. 17 does not provide a definition of the noun "copy". S. 17 defines the ambit of the reproduction right that copyright owners have to restrict others from reproducing their works. It is a broad ambit and, as stated in

paragraph 24(3) above, includes at s. 27(6) *"the making of copies which are transient or incidental"*. But the Judge nevertheless carried on to hold at [J597] **[CB1/1/166]** that *"an infringing copy must be a copy"*.

37. At [J596] **[CB1/1/166]**, she supported her reasoning saying that it *"is entirely consistent with the approach of Laddie J in Sony v Ball"*. With respect, this is simply inaccurate, as Laddie J at [15] of *Sony v Ball* regarding CDPA s. 27(3) was clear that *"retention as a copy is no part of the definition in the section."*

38. In coming to her view to the contrary, the Judge ignored the simple and self-contained definition of CDPA s. 27(3). She also prevented CDPA ss. 22, 23 and 27 from performing the very purpose that those sections were designed to achieve – namely giving rightsholders a cause of action in circumstances of importation/possession of an article that might not otherwise be actionable under the primary copyright regime.

39. This is especially more salient given the intersection of AI and IP, where an AI model can be off-shored by being made (or partly made) outside of the UK and then brought back into the UK. In those circumstances, it is even more important for rightsholders to have the tools to respond to infringers who unlawfully reap what a copyright owner has sown.

40. BPI submits that off-shoring is exactly the sort of new mischief to which the secondary copyright infringement regime under CDPA ss. 22, 23 and 27 should respond. A submission supported by another key principle of statutory interpretation in Code 14.1 of Bennion:

> *"14.1 Updating construction*
> *(1) Acts are usually regarded as 'always speaking'. Here, it is presumed that the legislature intends the court to apply a construction that allows for*

changes that have occurred since the Act was initially framed (an 'updating construction')."

41. The Judge addressed this principle at [J563] **[CB1/1/156-157]** where she quoted from the Supreme Court in *News Corp UK & Ireland Ltd v Commissioners for His Majesty's Revenue and Customs* [2023] UKSC 7, [2024] AC 89 at [27]-[30]:

> *"29 What is meant by the always speaking principle is that, as a general rule, a statute should be interpreted taking into account changes that have occurred since the statute was enacted. Those changes may include, for example, technological developments, changes in scientific understanding, changes in social attitudes and changes in the law…*
> *30 The great merit of the always speaking principle is that it operates to prevent statutes becoming outdated. It would be unrealistic for Parliament to try to keep most statutes up to date by continuing passing amendments to cope with subsequent change."*

42. The Judge then concluded, bringing together the principles from *Designers Guild,* Bennion, and *News Corp* at [J590] **[CB1/1/164]** that:

> *"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. The "always speaking" principle of interpretation appears to me to support a construction that facilitates protection for copyright owners."*

43. Having relied on this principle to support her finding that an AI model can be an *"article"*, the Judge appears to have ignored its implications in the next breath when holding that an *"infringing copy"* must contain a copy.

44. There was simply no basis for the Judge to add a requirement to CDPA s. 27(3) that an *"infringing copy"* must contain a copy of a copyright work it infringed. The definition of that phrase is self-contained and clear. It does not require any surgical dissection of its constituent parts and there is no obvious purpose to limiting it in this way.

45. Introducing an unjustified further restriction on the meaning of *"infringing copy"* cannot be what Parliament intended. And even if we are wrong in that submission, then the 'updating construction' and 'always speaking' principle should trigger a construction to reflect technical AI developments and enable rightsholders to pursue secondary infringement action where the training of an AI model has been off-shored then brought back into the UK. Clearly it was not the intent of CDPA s. 27 to permit the off-shore laundering of copyright material. To the contrary, it was drafted expressly and clearly to help prevent that very thing occurring, or at the least to give rightsholders a cause of action if it does occur.

46. On a proper application of the principles of statutory construction therefore, the Judge should have held that s. 27(3) is a hypothetical question which, when applied to the facts of the case, results in a finding of secondary infringement. If made in the UK, Stable Diffusion would have unlawfully copied Getty's copyright protected photographs.

E. WHAT IS NOT IN ISSUE IN THIS APPEAL

47. The final submission from BPI is the importance of the significance of what is *not* in issue in this Appeal – namely the question of whether AI models generally contain copies of works on which they have been trained. As set out above, the trial proceeded on an agreed narrow factual basis that the various versions of Stable Diffusion did not *"include or comprise a reproduction of any Copyright Work"* [J559] **[CB1/1/154]**. The Judgment must therefore be viewed as having no wider significance on that fact specific issue, in particular being specific solely to the Stable Diffusion AI models used in this matter, and the use of Getty's photographic images.

48. This point is also stressed in the Report on Copyright and AI, in which Government, by way of reinforcement of *"the fact specific nature of this ruling"*, highlights that *"a*

recent German court decision in GEMA v Open AI[9] *found that an LLM in that case did retain copies of song lyrics it had been trained on"*[10].

49. In *GEMA v OpenAI*, the Regional Court of Munich (the "**Munich Court**") considered a copyright infringement claim brought on behalf of various German authors against OpenAI, arising from the copying of their song lyrics in order to train its ChatGPT AI generative models. OpenAI argued that its models do not store or copy specific training data but merely learn patterns. In section B.II.2 of its judgment, the Munich Court rejected that defence holding that: "*The disputed song lyrics are reproducibly contained within the models. Their memorization constitutes a copyright-relevant reproduction*".[11]

50. The Munich Court referred to numerous academic papers which suggest that there is no dichotomy between model weights being a product of patterns and features learnt over time, and the storage of a copy of training data, due to a feature of machine learning systems known as 'memorisation' – where a trained model formed of patterns and features is able to reproduce significant parts of its training data as output.[12]

51. A further judgment was subsequently delivered by the Munich Court in the case of *GEMA v Suno*[13], which similarly held that the AI model in issue had memorised the copyright musical works used to train the model.

52. It is therefore clear that different courts can form different views on this issue, based on the facts of each case. Accordingly, the issue of whether more broadly,

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9 *GEMA v OpenAI* (42 O 14139/24).

10 Report on Copyright and AI, Section H, Overview of existing mechanisms, 12th paragraph.

11 See certified translation of *GEMA v OpenAI* (Case No. 42 O 14139/24) at p.34.

12 Carlini et al "*Extracting Training Data from Large Language Models* (2021) arXiv:2012.07805v2; Yang et al, "*Unveiling Memorization in Code Models*" (2024) arXiv:2308.09932v2; and Feder and Grimmelmann, "*The Files are in the Computer: On Copyright, Memorization, and Generative AI*", *Chi.-Kent L. Rev.* 100 (2025): 141.

13 *GEMA v Suno AI* (42 O 763/25).

and outside of the limited agreed facts of *Getty v Stability*, a *"copy"* of a copyright work can be said to be held in some form in an AI model under English law is, BPI submits, a matter of great significance, but it is for another day, in another case, on another set of facts.

53. The Judge's factual conclusions, and the parties' agreed factual positions, are not at issue in this Appeal and BPI is not asking the Court to consider new evidence. Nonetheless, considering the attention which has been given to this aspect of the Judgment, BPI respectfully submits that, in the event that the Court of Appeal considers it necessary to comment on these background matters at all, then the judgment should be expressly restricted to the agreed facts as set out, for example, at [J559] **[CB1/1/154]**.

F. CONCLUSION

54. For the additional and alternative reasons set out in this skeleton, BPI respectfully submits that the Appeal should be allowed.

IAN MILL KC

IAIN PURVIS KC

KIARON WHITEHEAD