IN THE COURT OF APPEAL APPEAL No CA-2026-000007

ON APPEAL FROM THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

INTELLECTUAL PROPERTY LIST (ChD)

Mrs Justice Joanna Smith DBE

Judgment dated 4 November 2025: [2025] EWHC 2863 (Ch)

BETWEEN:

(1) GETTY IMAGES (US) INC

(2) GETTY IMAGES INTERNATIONAL U.C.

(3) GETTY IMAGES (UK) LIMITED

(4) GETTY IMAGES DEVCO UK LIMITED

(5) ISTOCKPHOTO LP

Claimants/Appellants

and

STABILITY AI LIMITED

Defendant/Respondent

RESPONDENT'S SKELETON ARGUMENT

Hugo Cuddigan KC

Edward Cronan

Henry Edwards

21 September 2026

Instructed by Bird & Bird LLP

The definitions used in the Appeal Skeleton ("AS") are hereunder adopted

Introduction

1 These proceedings concern legacy versions of Stable Diffusion, each being AI models capable of generating synthetic images from natural language or image-based prompts. The Stable Diffusion models are based on an innovative AI latent diffusion architecture. As the Judgment records at [J30], this architecture represents a significant technical advance, being less resource-intensive than previous pixel-based diffusion models and (because of this) capable of generating higher-resolution output images. The Court will be aware of the current and increasing significance of the role played by AI models in society. [CB1/1/12-13]

2 At the relevant time, Stability provided services based on certain of the legacy models. It also made some of their model weights available for free download on an open source basis.

3 The Appellants, Getty, are a well-known stock image licensing business. Getty's copyright case at trial was that the training and development of these Stable Diffusion models involved the reproduction in the UK of Getty Works (UK copyright owned by or exclusively licensed to Getty). They said that such reproduction constituted acts of copyright infringement. Further, they said the resulting models produced synthetic output images which were themselves reproductions of their works, whose production constituted further acts of infringement.

4 Getty never asserted that the model weights themselves comprised reproductions of any Getty Works. This position reflected what was common ground between the parties' experts.

5 The training and development claims were dismissed on the basis that no relevant activity took place in the UK and the copyright output claims were also dismissed, having been abandoned at trial: Getty was unable to maintain their case on reproduction of any Getty Works.

6 All that remained was a claim of secondary infringement. The critical context for that claim was that the Stable Diffusion models in issue never contained[1] a reproduction of any Getty works, and they could not be deployed to synthesise a reproduction of any Getty works. The Appeal therefore raises a single question of construction: can an article be an 'infringing copy' although it is not, and never has contained, a copy of the work? The judge held it cannot at [J597]-[J601]. She was right. **[CB1/1/116-168]**

7 On Getty's construction, the status of an article depends not on what it is, or on how it was made, but on events in the development of some earlier article, wherever in the world they occurred. That construction has no basis in the language of the Act and would give copyright a form of process protection which Parliament has conferred elsewhere only in express and limited terms. It would carry through into criminal and remedial provisions which use the same definition. Getty fail to engage with or even acknowledge the alarming consequences of their 'copyless' interpretation: infringement becomes capricious and without rational connection to the protected subject-matter of copyright, which is the intellectual creation of authors.

8 Further issues arose on: (i) the meaning of the term 'article' in ss.22 and 23 CDPA – must articles be tangible? – and (ii) the meaning of the term 'imports' under s.22 CDPA, and the acts covered by s.23 CDPA – do these provisions cover making works available for download on the internet? These points are the subject of Stability's Respondent's Notice. **[CB1/8/251-259]**

9 There is an important nexus between Respondent's Notice and Appeal: it was the judge's position on intangible articles which opened the door to Getty's argument on 'making' copies. That argument extends the 'making' of an article into its pre-history, so as to include any aspect of the development of its precursor materials. That in turn gives rise to manifest absurdity, wherein it is an act of infringement to import an article into the UK, but not to copy it here, or to distribute those copies.

[1] The word 'contained' is taken from Laddie J in *Sony v Ball* ["*The fact that it did not contain the copy before and will not contain the copy later does not alter its physical characteristics while it does contain a copy.*"] We suggest that in the context of electronic memory, it is accurately encapsulates the issue without deploying a loaded or ambiguous word.

10 It is for this reason that we address 'article' in Section 1 of these submissions. We then set out our answer to Getty's Appeal, and explain why it should be dismissed even if 'article' is held to extend to information – Section 2. [CB1/7/247-250]

11 The third section deals with the remaining Respondent's Notice point, importation and distribution. In that regard, the Court should note that Getty expressly disavowed any and all claims of joint liability, as recorded in a recital to the Order of 28 March 2025. Accordingly, liability could only be established in respect of acts carried out by Stability itself (through its officers and employees). [CB1/8/251-259]

12 We begin with a rehearsal of the applicable facts. As to these, there was no dispute at trial. There is however a significant technical error in the judgment which must be addressed.

Technical facts

Training of Stable Diffusion

13 The proceedings ultimately concerned ten versions of Stable Diffusion released between August 2022 and November 2023: [J33]-[J45][2]. There are no allegations concerning later models, such as 3.0 and 3.5, Stable Video and so on [J498]. [CB1/1/13-16] [CB1/1/138]

14 The key findings on the training of the models in issue are set out at [J552]-[J560]. In short, AI models like Stable Diffusion are trained through an iterative process of optimisation. The operation of the models is determined by the model weights. Before training the weights are initialized with random values; as the network is exposed to training data they are iteratively updated by stochastic gradient descent [J5], [J555]. Diffusion models do not store their training data but learn the statistics of patterns in it [J554]. The experts agreed that "*the model weights do not directly store the pixel values associated with billions of training images*" [J555]. The weights for v1.1–1.4 are a file [CB1/1/151-154] [CB1/1/7, 152-153] [CB1/1/152]

[2]Stable Diffusion v.1.0, 1.1, 1.2 and 1.4 (together "v1.x"), v.2.0 and 2.1 (together "v2.x"), XL 0.9, XL Base 1.0 and XL Turbo, and v.1.6 (together "XL"); Getty's Appeal is only concerned with the five versions which were released by Stability on an open source basis (Stable Diffusion v2.x and Stable Diffusion XL 0.9, XL Base 1.0 and XL Turbo)

of 3.44GB, some five orders of magnitude smaller than the LAION-5B dataset at 220TB [J554]. [CB1/1/152]

15 Each model in issue was trained through exposure to millions of electronic records of images. For the purposes of this Appeal, the Court can proceed (as the trial did) on the basis that some Getty Works[3] were used in training the models in issue. In short, this involved the storage of electronic copies of those works in AWS data centres outside of the UK [J48], [J556]. [CB1/1/16, 153]

16 Once trained, the model's weights are set, and do not change. The model can be used to synthesize images in response to input prompts. The models in issue were responsive to both text and image prompts. The process of synthesizing is called "inference".

Electronic storage

17 When the training process has been completed, a record of the final model weights will be stored in the memory of the computers carrying out that training, i.e. outside the UK. Subsequently, as mentioned above, some model weights were made available online. There is a significant technical factual error in the judgment in relation to electronic and online storage. [J579] begins as follows: [CB1/1/161]

> "At the time of the CDPA – as is common ground – storage media capable of storing electronic copies would have involved physical, tangible means of storage such as a 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)."

Save that RAM chips were invented in the 1960s[4], this is correct. The paragraph continues:

> "However, in today's world, electronic copies can be stored in an intangible "cloud" with no physical instantiation. Given the breadth of the words "any medium", it seems to me that section 17(2) was plainly intended by Parliament to cover any

[3] Note this is not UK copyright works, because all use was overseas.

[4] Storage on disc, tape and chip were all known and dealt with by Parliament in copyright legislation in the 1980s, including by the Copyright (Computer Software) Amendment Act 1985.

means of storing electronic copies and thus must be capable of including modern means of storage such as cloud storage."

18 This first sentence is fundamentally wrong. The 'cloud' is not some metaphysical or technically distinct type of storage. On the contrary, cloud data is held on ordinary physical media: magnetic hard drives or Flash memory. Cloud storage is distinguished from a user's computer storage by its location, and the means to access that location. It is located in a data centre, owned and operated by a third party rather than the user. It is accessed over an internet connection. 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. This is all well-established and has been summarised in earlier copyright decisions such as Advocate General Szpunar's Opinion in C-265/16 *VCAST Ltd v RTI SpA* EU:C:2017:649 at [1]-[3].

19 The judge's statement in [J579] is not based on any evidence or even submissions. **[CB1/1/161]**

Infringement and electronic storage

20 The judge held that, subject to the meaning of 'infringing copy', Stability would have been liable for importing and distributing some of the relevant model weights in the UK. The applicable technical facts are as follows:

i Stability possesses an electronic record of the model weights on electronic memory owned or controlled by Stability.

ii Stability uploads these model weights to a Hugging Face webserver. Obviously this does not involve the transport of physical media. Instead, the model weights are transmitted as a stream of data from one electronic memory to another. The result is that the Hugging Face memory contains a new but identical copy of the record of model weights ("the Hugging Face Copy").

iii A user who is browsing the Hugging Face website can send a download request to the Hugging Face webserver, which is connected to the Hugging Face electronic memory. The automatic response is for the model weights to be transmitted as a stream of data to the user's local electronic memory (likely a magnetic hard drive or local Flash memory). The result is that the user's local

memory contains a further new but identical copy of the record of model weights ("the User's Copy").

21 Both the Hugging Face Copy and the User's Copy are physically present on physical media. Those copies were produced by the reproduction of the pre-existing model weights. It is common ground that the production of both the Hugging Face Copy and the User's Copy from those pre-existing model weights involved no reproduction of any Getty Works.

Legal context – infringing acts

The CDPA as enacted

22 As the judge held [J565], there is overlap between the two primary construction issues – 'infringing copy' and 'article'. Accordingly, we begin with our overview of the statutory scheme. Both are features of the statute which were present when it was originally enacted, and it is necessary to start with the original drafting (see eg *Boss Holdings Ltd v Grosvenor West End Properties Ltd* [2008] UKHL 5, [2008] 1 W.L.R. 289 at [23]). **[CB1/1/158]**

23 In common with other IP rights, infringement of copyright is exclusively conduct-based. Chapter II is titled "*rights of copyright owner*". It begins with "*The acts restricted by copyright*". These are the primary acts of infringement: copying the work; issuing copies to the public; communicating the work, etc. There is a significant distinction amongst the acts listed in s.16. With one exception, they are acts done to the work itself: copying it; performing it; broadcasting it; making an adaptation of it. The outlier is s.18, which has as its object copies of the work.

24 The foundational act of infringement is copying, which is explained at s.17:

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

> (3) In relation to an artistic work copying includes the making of a copy in three dimensions of a two-dimensional work and the making of a copy in two dimensions of a three-dimensional work.
>
> …
>
> (6) Copying in relation to any description of work includes the making of copies which are transient or are incidental to some other use of the work."

25 The first sentence directs reference to this section wherever the words 'copying', 'copies' or 'copy' are used in Part I of the Act. As we explain below, that must include within the phrase 'infringing copy'.

26 Each limb of s.17 defines copying by reference to the output of the applicable action. Copying occurs where that output is a reproduction of the work in any material form (s.17(2)); a 3D copy of a 2D work, or vice versa (s.17(3)); a photograph of an image forming part of a film (s.17(4)); or a facsimile copy of a typographical arrangement (s.17(5)). In the case of literary, dramatic, musical and artistic works the definition is exhaustive: copying "*means*" reproducing the work in a material form. Whether copying has occurred is therefore determined by comparing the output of the act with the copyright work. It is not determined by asking what acts might have preceded it.

27 S.16(3) (acts done directly or indirectly) and s.17(6) (transient or incidental copies) address the route by which a copy comes to exist, and the period for which it must exist. Neither dispenses with the requirement that what is made must be a reproduction. We deal with Getty's argument on s.17(6) separately below.

28 S.18, issuing copies to the public, is drafted to co-operate with the secondary infringement provisions of ss.22 and 23. The s.18 restricted act is confined to the first putting into circulation of copies, those "*not previously put into circulation, in the United Kingdom or elsewhere*"[5], and s.18(2) excludes from it what is subsequently done with "*those copies*": distribution, sale, hiring or loan under paragraph (a), and importation into the UK under paragraph (b). Those are the dealings in s.23 and the act in s.22. The three sections track the same copies through successive stages. That points to a consistent

[5] This provision has since been amended, but the amendments are not relevant to this analysis.

interpretation as between 'copies' within s.18 and 'infringing copies' within ss.22 and 23.

29 S.20 covers broadcasting and cable programme services. It is in the same family as s.19 and s.21, in that the object is the work and not any copy thereof. For present purposes, this is particularly significant in the context of s.24(2), which covers transmission of a work by means of a telecommunications system otherwise than by broadcasting or in a cable programme service.

30 The secondary infringement provisions begin in s.22. They are broadly addressed to dealings which are one step removed from those covered by primary infringement. Because the perpetrator might be unaware of the illicit nature of their wares, secondary infringement is accompanied by a knowledge requirement. The provisions nonetheless all remain act based.

31 For s.22, what is imported must be an article, and that article must be an infringing copy. S.23 is addressed to specific commercial dealings in infringing copy articles. Note that the word 'article' is not deployed simply as an object against which knowledge is tested. In s.24(2) the corresponding knowledge requirement is tested by reference to infringing copies of the work.

32 The acts specified in ss.22 and 23 are done to something which already exists. That thing (to use a neutral word) must have been made before it can be imported, possessed, sold, let for hire, exhibited or distributed. That is the function of the word 'article', which is the assumed context for s.27: "*An article is an infringing copy if…*". The requirement that the article be an infringing copy is what turns the combination of thing and act into an infringement, subject to knowledge.

33 S.24 creates two further categories of secondary infringement. The first, s.24(1), concerns "*an article specifically designed or adapted for making copies of that work*". Note that this 'article' is not a copy of anything, nor is it an 'infringing copy'. Where Parliament intended liability for dealings in articles whose connection with copying is instrumental, as opposed to based on their content, it made separate provision with its own, narrow, gateway.

34 S.24(2) as enacted covers the aspects of transmission not addressed in s.20: neither broadcasting nor a cable programme service. The premise is that no article travels. Instead the work itself is transmitted. Any infringing copy comes into existence on reception. The word 'article' is not used because, as with s.20, the subject of the act of transmission is the 'work' itself. A different drafting approach is taken because there is no pre-existing thing which is imported, possessed or sold: liability attaches to the transmission, coupled with knowledge that "*infringing copies of the work will be made by means of the reception of the transmission*".

35 The term 'infringing copy' is then defined in s.27:

> "(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…"

36 The question whether an article's "*making constituted an infringement of the copyright in the work in question*" is a reference back to the acts of 'making' which the Act says constitute infringement. That means copying under section 17[6]. Each branch of s.17 is defined by what the act produces: its outcome. An article's making constitutes an infringement of copyright where the output is a copy (or adaptation) of the work.

37 S.27(3)(b) poses the same question, but notionally relocates the act of making to the UK. The article to which it applies is one which "*has been or is proposed to be imported into the United Kingdom*", so its making can be expected to have taken place outside the UK,

[6] It also covers the making of an adaptation under s.21. That route is not engaged on these facts, for the reasons given below.

where it would not infringe UK copyright. That apart it makes no change, and the question remains the same: was what was made a copy of the work?[7]

38 The rest of the section is consistent with this approach. Section 27(4) imposes a temporal presumption in proceedings where "*the question arises whether an article is an infringing copy*". It operates where it is proved that an article is a copy of the work, and copyright does or has subsisted in the work. The presumptive scheme is founded on the status of the article as a copy, and reasons from there to the time of its making. The provisions listed in s.27(6), under which things are "treated as" infringing copies, each concern copies of the work.

39 The term 'infringing copy' bears the same meaning wherever it is used in Part I, including in the provisions for delivery up (s.99), seizure (s.100), criminal offences (s.107), forfeiture (s.108) and the treatment of infringing copies as prohibited goods by Customs (s.111).

The legislative history

40 In the context of its remedial provisions, the Copyright Act 1956 defined an 'infringing copy' in s.18(3), in relation to an artistic work, as *"... a reproduction otherwise than in the form of a cinematograph film... being... an article the making of which constituted an infringement"* or, if imported, would have done so if made in the place of importation.

41 The concept thus combined two requirements: that the article be a reproduction, and that its making infringe. The 1988 Act used the same label, and s.172(2) provides that a provision corresponding to the previous law is not to be construed as departing from it merely because of a change of expression.

42 Getty rely on s.5(2) of the 1956 Act, the predecessor of s.22, which applied to an imported 'article' where "*the making of that article constituted an infringement*", without express reference to reproduction. However, the two provisions were applied as one: "*The same test is used [in s.5(2) as] in section 18 (3) of the Act dealing with the copyright owner's*

[7] "also" in s.27(3) introduces a further route to infringing-copy status according to where the article was made; it does not introduce a different test.

remedies in conversion" (*CBS United Kingdom Ltd v Charmdale Record Distributors Ltd* [1981] Ch 91, 99F (Browne-Wilkinson J)[8].

43 At [AS39-40] Getty rely on the 1952 Gregory Report, which preceded the 1956 Act, in support of a submission that the purpose of the secondary infringement provisions is to prevent circumvention of the copyright statute by moving infringing acts abroad. The Gregory Report does not support such a generalised submission. On the contrary, it is apparent from [270] of the report and onwards that the committee sees 'infringing copies' as containing copies of copyright works. The aims of the secondary infringement legislation are discussed solely in that context: **[CB2/1/16-17]**

> "While in the case of the primary infringements by copying, public performance, translation, dramatisation and the like, it is no defence that the person responsible was not aware that he was doing wrong, in the case of the secondary infringements of sale, distribution, or importation of infringing copies, it has to be proved that the Defendant knew that the copies in question were unlawfully made or, in the case of imported copies, would have been unlawfully made if made in the United Kingdom."

The CDPA as amended

44 This Act has been extensively amended. For present purposes, perhaps the only important amendment relates to s.20. This was amended by the Copyright and Related Rights Regulations 2003 (SI 2003/2498), itself a transposition of the Information Society Directive. In place of broadcasts and cable programmes, the amended section is addressed to "communication to the public" of applicable copyright works.[9] It is expressed to cover internet dissemination by the wording of s.20(2):

> "References in this Part to communication to the public are to communication to the public by electronic transmission, and in relation to a work include… the making available to the public of the work by electronic transmission in such a way that

[8] See also *Fablaine Ltd v Laygill Ltd* [1981] FSR 597, 599–600)

[9] Literary, dramatic, musical or artistic works, sound recordings, films, and broadcasts.

members of the public may access it from a place and at a time individually chosen by them".

45 This communication right is subject to extensive jurisprudence. One requirement which has been read into the provision relates to targeting of the territory of reception (download). The position was explained as follows by Arnold LJ in *TuneIn v Warner Music* [2021] EWCA Civ 441 at [60]:

> "As the judge explained, the internet is global and users in the UK can, in the absence of geo-restriction, access websites hosted, and content posted on or streamed from such websites, from anywhere in the world. Intellectual property rights, however, are territorial. At least in the case of copyright and similar rights and trade marks, the CJEU has held that accessibility of a website from a member state is not sufficient to give rise to an infringement of rights conferred by the law of that state, and that the relevant act must be targeted at that state."

46 In addition to targeting, there is a host of further elements of "*communication to the public*". So for example, it has been held that 'the public' within the meaning of s.20 means "*an indeterminate number of potential recipients and implies a fairly large number of persons*" – see *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles* (Case C-306/05) [2007] Bus LR 521 at paras 37-38. A communication to a single recipient does not satisfy that requirement.

47 That jurisprudence matters here in two respects. First, s.20 as amended is the *lex specialis* for online dissemination, which bears on the Respondent's Notice below. Second, it shows that Parliament has already performed an updating exercise in response to this very class of technological change, which constrains any resort to the 'always speaking' principle.

Section 1 - Respondent's Notice: intangible articles

48 It is Stability's position that an 'article' for the purposes of ss.22 and 23 cannot be intangible.

49 We start with the word 'article' itself. Without a qualifier – a 'newspaper' article, an article 'of faith' – the word denotes a physical object. Stroud's Judicial Dictionary contains no example of "article" used in a statute to denote intangible matter [J568]. **[CB1/1/158]**

Generally, the term is used in statutes or contracts to refer to a moveable chattel or physical object of some kind.

50 Both the context of ss.22–24 and the usage elsewhere in the Act support the physical meaning:

i Importing. To import is to bring goods into the country. Importation of an infringing copy "*must have occurred when the goods were physically received in this country, for only then would the article become subject to the jurisdiction of this court and subject to the provisions of the 1988 Act so as to constitute within the jurisdiction an infringing copy*" (*L.A. Gear Inc v Hi-Tec Sports plc* [1992] FSR 121, 130, Morritt J). The same understanding underlies s.111, under which infringing copies may be treated as prohibited goods at the customs border.

ii Possession. Possession denotes physical control over a tangible object of some kind. The default approach in law is that intangible information cannot be 'possessed' in this sense. Although these relate to common law liens or claims in detinue or conversion, where a necessary element is possession (or a right to possess) tangible goods of some kind, they are fundamental principles of the common law that form part of the context of the statute: "*Parliament is presumed to know the common law, and to legislate by reference to it*" (see *Lachaux v Independent Print Ltd* [2015] EWHC 2242 (QB) at [44]). See eg *Your Response Limited v Datateam Business Media Limited* [2014] EWCA Civ 281*;* [2014] 3 WLR 887 at [15], [25]-[32] (Moore-Bick LJ), [37] (Davis LJ), [42] (Floyd LJ).

iii Section 24(2): if Parliament intended 'article' to extend to electronic signals, the drafting of this section would have been straightforward. It would have conferred liability on a person who "*transmits by means of a telecommunications system ... an article which is, and which he knows or has reason to believe is, an infringing copy of the work*". Instead, as discussed above, s.24(2) was carefully framed on the premise that no copy travels. The subject of the transmission is instead the work itself. And liability is contingent on infringing copies being made on reception.

iv Other usage: UK unregistered design rights may arise in "*the shape and configuration of…an article*" under s.213(2) and it is clear from s.216(1) that this means a physical object that embodies the design. Schedule 4 of the CDPA furthermore restated the Registered Designs Act 1949, which includes an express definition that "*"article" means any article of manufacture and includes any part of an article if that part is made and sold separately*".

51 There is also a link between the 'importing' issue discussed above and the 'articles' point, which the judge herself recognised at [J604(ii)] "*Given that I have found that an article may be intangible, I accept that downloads of the Model amounted to importation*". Stability's approach allows for a consistent and conventional meaning to be given to both words. **[CB1/1/168]**

The judgment on 'article'

52 [J570] then contains the first limb of the judge's reasoning for rejecting Stability's case. The judge started by stating (correctly) that ss. 22 and 23 provide the necessary colour for the exercise of interpretation. She accepted that importation and possession "*may ordinarily connote physical transfer or control of a tangible object*" [J585]. But she then excluded them entirely from her analysis, saying "*it seems to me to be implicit in [ss.22, 23] that any article which falls within the definition of an "infringing copy" is intended for the purposes of this statute to be capable of being subject to these secondary types of dealing*" [J570]. **[CB1/1/159]** **[CB1/1/162-163]** **[CB1/1/159]**

53 We comment as follows:

i First, in proceeding in this way, the judge ignored the guidance of Lord Hodge which she had quoted at [J562] 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. **[CB1/1/155-156]**

ii Second, the judge's reasoning about consistency between the meanings of 'article' and 'infringing copy' empties all meaning from the word 'article'. There is no warrant for that approach, and it is notable that s.24(1) uses 'article' in relation to something which is not a copy at all; and s.24(2) uses 'infringing copy' without any reference to an article.

54 The second limb of the judge's reasoning has 3 steps. The first step, in [J572], is the reliance on s.17. The judge recorded the fact that s.17 extends to "*storing the work in any medium by electronic means*", and said ([J574]) that this is relevant to the interpretation of 'article'. To be clear, we do not say s.17 is irrelevant. It is part of the overall infringement scheme, and was proper for the judge to take it into account. **[CB1/1/159]** **[CB1/1/160]**

55 The problem comes in the second step, [J579], where the judge explained the consequences. She reasoned that because works could now be stored electronically "*with no physical instantiation*", s.17 supported the argument for intangible articles. As discussed in paras 18 to 19 above, the proposition that electronic copies are now stored in an intangible 'cloud' with no physical instantiation is technically wrong, and was not based on any evidence. In truth, all electronic storage takes place in physical form on tangible physical media, as indeed it did in 1988. **[CB1/1/155]**

56 The third step is to apply the 'always speaking' principle to this purported new technology so as to fill a gap in the protection provided by the Act. As to that, since all the relevant principles of electronic storage of copyright works were known at the date on which the CDPA was enacted, the technology on which the judge relied was not new and there is no gap. The 'always speaking' principle is of no application in these circumstances (see *CPS v Beaumont* [2022] EWHC 849 (Admin) at [32]). That is so whatever the content of the file in question: a file of model weights is stored and transmitted like any other. And in so far as online dissemination is a relevant development since 1988, Parliament has addressed it expressly, by amending s.20 rather than ss.22–23 (paragraphs 43 to 46 above and paragraph 57 below).

57 Further, as is apparent from ss. 6 and 7 of the Act, Parliament had considered technically related issues in the context of the location for a cross-border transmission of intangible electromagnetic signals (the location of the satellite uplink, and not the location of receipt), and the sending of information by a telecommunications system at different times in response to requests by different users. Note too, that here, and in the definition of 'telecommunications system' in s.178, the Act addresses the distribution of information without reference to an 'article'.

58 Further yet, notwithstanding ss. 7 and 24, s.20 of the Act was amended so as expressly to address communications of works over the internet, and there is a complex and developed jurisprudence addressing the territorial and other issues which arise in that regard (see above). Parliament had already performed an updating exercise in response to the Infosoc Directive, which itself related to this class of technological change. The scope for a further judicial updating of the same statute for the same class of change was accordingly narrow.

59 Finally, it is significant that the defined term 'infringing copy' also appears in certain CDPA provisions relating to criminal liability, such as s.107(1) CDPA. The result should be to apply a restrictive counterbalance to any desire to interpret the term expansively – see by analogy *News Corp UK & Ireland Ltd v HMRC* [2023] UKSC 7 at [47].

60 To the extent that the meaning of 'article' remains unclear notwithstanding these submissions on the wording of the 1988 Act, the Hansard debates resolve it for the reasons explained below.

Hansard materials

61 The Copyright, Designs and Patents Bill was debated in committee by the House of Lords on 3 December 1987, at volume 490. Lord Beaverbrook (the Lord in Waiting) was promoting the Bill on behalf of the government in the Lords. Lord Lloyd of Kilgerran, who had practiced at the Patent Bar (3 Pump Court), proposed amendment no.94. This would have expanded the scope of s.22 so that, in addition to covering physical articles, it also covered the receipt of intangible electronic signals. The proposed amendment inserted the following words after 'article' in the draft section:

> "… or he receives signals originating outside the United Kingdom in electronic or other non physical forms from which an article can in principle be reproduced, and which he knows or has reasons to believe are, an infringing copy of the work…"

62 As above, the judge held that downloading an intangible copy of the model weights constituted importing an article. However, it is also the receipt of "*signals… in electronic… form from which an article can in principle be reproduced…*" Accordingly, the whole transaction would fall squarely within the terms of Lord Lloyd's proposed amendment.

63 Lord Lloyd explained that his amendment "seeks to ensure that the clause is not limited to physical articles but also includes the importation of [electro-magnetic, radio or optical] signals." Lord Mottistone had proposed an amendment to the same effect, whose purpose he described as "to ensure that [section 22] is not limited to physical articles but also included is the importation of signals which will convey the articles through the ether". Thus both amendments were ranged at a perceived limitation in the s.22 which was said to be unjustified: that it applied only to physical articles.

64 Lord Beaverbrook acknowledged the concerns underpinning the two amendments:

> "It is undoubtedly true that in this day and age 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. Similar arguments are applied with respect to distribution within the United Kingdom."

65 He then set out the government's position as follows:

> "We do not believe that any of the amendments numbered 94, 95, 105, 106, 112 and 113 are necessary. First, in regard to importation, it is clear that nothing can be done about the person sending the signals since he is outside our jurisdiction. But this does not mean that works can be imported electronically, for example, as a digital signal, without risk. We must remember that as soon as it is recorded, for example, on magnetic tape or in a computer memory, the person doing so has copied the work and committed a primary infringement. Primary infringement is of course a much more powerful weapon in the hands of the copyright owner, since he does not need to establish guilty knowledge.
>
> Distribution by broadcast or cable within the United Kingdom is a primary restricted act. Downloading or recording of any works in a broadcast or cable programme constitutes copying. Both are primary infringements. As to the viewing of a work on a screen or running a program, I have already indicated to the Committee in our discussions on Clause 17 that we are considering whether these too should be primary infringements.
>
> 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? If so, how is one to distinguish between the willing and the unwilling recipient? If liability is only to arise if he does something with the signal, there is no problem, since he will commit a primary infringement. I hope that these observations go some way to explaining our view on this matter to the Committee."

66 The government had accordingly considered the effect of the proposed amendments, and refused to accept them on the basis that this effect was undesirable. The amendments were then withdrawn.

67 There are three requirements which must be met before pre-legislative statements made in Parliamentary debates are admissible on a question of statutory construction (see *R (Coughlan) v. Minister for the Cabinet Office* [2022] UKSC 11; [2022] 1 W.L.R. 2389):

> "The three critical conditions are (i) that the legislative provision must be ambiguous, obscure or, on a conventional interpretation, lead to absurdity; (ii) that the material must be or include one or more statements by a minister or other promoter of the Bill; and (iii) the statement must be clear and unequivocal on the point of interpretation which the court is considering."

68 The judge held that conditions (i) and (iii) were not met, and for that reason declined to refer to these materials.

The judgment on Hansard

69 The judge held that Hansard was inadmissible on the basis that there was no ambiguity in the interpretation of the word 'article'. As we have submitted above, that was because (in particular) she held that anything which was an infringing copy could be an article, rendering the word article redundant surplusage. Absent that erroneous step, she would surely have accepted that there was an ambiguity here. Indeed, the very fact that the House of Lords were of the view that "*non-physical forms*" were excluded demonstrates as much.

70 The only other point made by the judge was that these excerpts were not clear and unequivocal on the point of interpretation in issue "*owing to their apparent focus on broadcasts and cable programmes*" [J591]. We do not accept that the debate was limited to such matters. Indeed, Lord Williams of Elvel, who also supported the amendments, **[CB1/1/164-165]**

emphasized that "*one of the objects of the Bill is to ensure that we keep pace with existing technology and look at technology which may come into existence in the next 10 or 20 years*".

71 More significantly, whatever the primary concern might have been, the premise for the whole debate was the limiting effect of the word 'article'. If, as the judge held, that word was not limited to tangible objects, then there was no need for any amendment to include "*electronic or other non physical form[s]*" within ss.22 and 23. The government would not have argued against the intended effect of the amendment at all. It would have simply stated that the amendment was misconceived because the existing drafting catered for such activities already.

Section 2 - Getty's appeal – infringing copies which are not copies

Introduction to Getty's Appeal

72 The judge held, at [J597] and [J600]-[J601]: **[CB1/1/167-168]**

> "… an infringing copy must be a copy … Consistent with the decision in *Sony v Ball*, I cannot see how an article can be an infringing copy if it has never consisted of/stored/contained a copy."
>
> "… in its final iteration Stable Diffusion does not store or reproduce any [Getty Works] and nor has it ever done so. The fact that its development involved the reproduction of [Getty Works] … is of no relevance."
>
> "… the conception or creation of the model weights (i.e. the process of creation of information) cannot be the relevant act of making – that can only be the act of production of the resulting intangible record of that information … It is that intangible record which, on Getty Images' case, enters the UK and that is the specific article whose making (had it taken place in the UK) must have constituted an infringement of copyright."

73 Getty say that the judge committed three errors when she determined that an 'infringing copy' was required to be or contain a copy [AS31]: she failed to apply the principles of statutory construction correctly; she incorrectly applied the reasoning in *G4S*; and she incorrectly applied the reasoning in *Sony v Ball*. The first purported error (as we **[CB2/1/12]**

understand it) encompasses Grounds 1-4 and 7, the second Ground 5, and the third Ground 6. We address each below. Before that, we invite the Court to consider the immediate consequences of Getty's approach. They say that the model weights constitute 'infringing copies' even though they do not and have never contained copies of any Getty Work. This interpretation leads to patent absurdity.

74 Consider that the model weights have been recorded onto a USB drive. This USB drive is brought by Stability[10] from the US into the UK. Getty say that the model weights are an 'infringing copy' on the basis of the training history, and that bringing them into the UK was an infringing act of importation. Damages would be available in respect of that act, and presumably an injunction to prevent further acts of infringing importation.

75 However, because the model weights contain no copies of Getty Works, once the USB is within the UK Stability could make fresh copies of the weights here, and distribute those copies to the public, without infringing at all: the making of each such copy reproduces nothing. On Getty's case the imported article is an infringing copy, yet the reproduction of that article is accepted not to be an act caught by s.17.

76 The example is even more stark when considered in an Internet context. The model weights are downloaded from Hugging Face by Stability onto a PC in the jurisdiction. Getty say that would be an infringing act of importing an 'infringing copy'. However, a copy of those model weights could then be uploaded to a webserver in the UK (an act of reproduction, but not of infringement) and downloaded by users all over the country (more acts of reproduction, but not of infringement).

77 Thus it can be seen that Getty's interpretation opens a schism between 'infringing copy' and the acts of primary infringement which is incoherent in the context of the law of copyright. The judge rejected this approach, construed s.27 and s.17 in accordance, and thereby endorsed a coherent scheme covering both primary and secondary infringement, with the test for the former directly informing the latter.

78 To be clear, the same incoherence arises well outside the context of AI models. A novel, drafted using other works, but reproducing none of them; a collage of photos of artistic

[10] Stability conceded 'knowledge' on the basis of Getty's broad construction, that is to say knowledge that some Getty Works were used in training of these models.

works which reproduces no substantial part thereof. Their importation would infringe; their reproduction would not.

79 Getty's answer in their oral closing at trial was to say that it must be an act of infringement to copy an infringing copy. There is no provision in the Act which makes it so, and the definition in s.17(2) is exhaustive.

The nexus with tangible articles

80 It is instructive to consider ss.22/23 and 27 in the context of physical objects which are conventional carriers of copyright works. A defendant has imported a book into the UK. The court asks whether the making of that book – as a physical object – involved (or, if carried out in the UK, would have involved) an act of infringement. Because there is a physical object against which to consider the s.27 questions, the inquiry focusses on the manufacture of that object, and asks: did that act of manufacture produce the output required by the CDPA? The required output is a copy of the work. Prior steps involving, for example, the conception of the plot of the book, are not relevant to that inquiry, save to the extent that they are evidenced on the resulting book itself.

81 No difficulty arises when the same issue is considered in the context of realistic electronic memory. Consider the Hugging Face Copy of paragraph 20ii) above on a Flash memory chip. The physical memory containing that record constitutes an article. It was made when an electronic record of the data corresponding to the model weights was written onto the memory chip. Because the model weights contain no reproduction of any Getty Work, the 'making' of that memory chip in the UK would not constitute an act of infringement.

82 When the judge extended the meaning of 'article' to intangibles, she opened the door to Getty's metaphysical argument. There is no longer a physical object against which to answer the 'making' question. It must now be asked of 'information'. That allows Getty to include any antecedent acts relating to the conception of that information within the scope of the 'making' of the article.

83 Although intangibility opens the door to an erroneous interpretation, the correct interpretation of s.17 still closes it: unless the act of making the record of model weights produced the required output – a copy of one or more Getty Works – there is no

infringement in that act of making. As for s.17(6), that allows for infringement in relation to a materially different act: the making of transient or incidental copies. As we explain below, that does nothing to affect the position regarding the making of the ultimate non-transient, non-incidental materials.

Purported error 1: the approach to statutory construction (Grounds 1-4 and 7)

The Structure of the Act

84 The construction of ss.22, 23 and 27 proceeds in the context of the statutory scheme set out at paragraphs 22 to 39 above [AS32.2, 32.3]. While Getty take in ss.17, 22, 23 and 27, it is necessary also to consider ss.16 and 18. Two features of that scheme are decisive. First, the role of s.17, which has its own definition of both 'copying' and 'copies' applying throughout Part I – which must include the composite phrase 'infringing copy' – and which determines infringement by reference to the output of the act. Second, the relationship between s.17 and s.27. **[CB2/1/13]**

85 As to that relationship, there is a second distinct and complementary route by which the s.17 definition informs s.27. Ss.27(2) and (3) raise the question whether an article's "*making constituted [or would have constituted] an infringement of the copyright in the work in question*". The Act only provides for two routes by which such 'making' can constitute an infringement: s.17, infringement by the making of a copy, and s.21, infringement by the making of an adaptation. There are no other candidates for acts of 'making' which constitute infringement.

86 Accordingly, the answer to the question at the core of 'infringing copy' status is found in s.17. Section 21 is not engaged on these facts. The restricted act of making an adaptation applies only to literary, dramatic and musical works, whereas the Getty Works are artistic or film works. There is accordingly no adaptation right in play.

S.17 and 'making'

87 In their Appeal Skeleton, Getty consistently approach the word 'making' in s.27 as if it were unencumbered by surrounding context. Getty make repeated calls for a wide approach to construction [AS33, 41, 75], for a natural reading [AS75(2)], and ultimately **[CB2/1/3-27]** **[CB2/1/13-14, 17, 25-26]** **[CB2/1/26]**

rely on culinary usages in the form of cake baking. This is all in service of excluding the characteristic of 'copyness' from a copy.

88 Even without the nested definitions of ss.17 and 27, this approach would be wrong. The meaning of such a term is always dependent on context. See Lord Hoffmann in *Charter Reinsurance Co Ltd v Fagan* [1997] AC 313 at 391 and Lord Mance in *Bloomsbury International Ltd v Sea Fish Industry Authority* [2011] UKSC 25 at [10]. Getty are guilty of precisely the error identified by Lady Rose in *Cornerstone Telecommunications Infrastructure Ltd v Compton Beauchamp Estates Ltd* [2022] UKSC 18 at [106]:

> "[T]he starting point here is not to try to define the word "occupier" and then allow that definition to mandate how the regime established by the code works. The correct approach is to work out how the regime is intended to work and then consider what meaning should be given to the word "occupier" so as best to achieve that goal."

89 Getty seek to displace the overall scheme of the Act, discussed above, by referring to 'making' in the abstract. They accuse the judge of artificially and arbitrarily limiting the meaning of 'making' so as to exclude prior acts of conception or contribution [AS50]. **[CB2/1/19]** The error they make is to overlook that the test for 'making' infringements in s.17 directs the consideration of the output of the act.

90 Getty deploy two examples in support of their interpretation [AS50]: **[CB2/1/19]**

i First, they say the judge's approach is "like saying that the writing of an infringing computer program cannot be the relevant act of making, only the production of the intangible record of that computer program". This misses the point. If a computer program is a copy of a prior work, the act of writing that program is an infringing act as a direct result of its status as a copy. Conversely, if as with the model weights in issue, it is not a copy, then the act of writing it is not an infringing act.

ii Second, the cake. The notional question here is whether making the cake is an act of infringement. The answer depends on whether the cake is a copy of a copyright work. For present purposes, assume that work is a sculpture. Getty suggest that answer is not judged when the cake is taken out of the oven. That is quite wrong, because what matters is whether the cake is a reproduction of the

sculpture. The "weighing and combination of ingredients" do not determine whether the output of the act of making is or is not a copy.

91 Of course, that does not mean that the prior outcome of making the cake batter escapes liability by virtue of that being an interim stage of cake development. S.17(6) operates to police such transient (or incidental) steps. However, as explained further below, that does not assist Getty. The cake batter (i.e. the VRAM copies of Getty Works) has never been present in the UK. The 'imported' model weights are a different 'article' (on the judge's approach, an intangible one) to those transiently produced during training.

Reason why the term "making" was used in the statutory definition

92 A further point relates to Getty's suggestion that the statutory draftsmen could have used the term "reproduction" instead of "making" if they had intended s.27(3) CDPA to have the meaning found by the judge [AS33]. The obvious answer is that the term "making" was used because it permits the application of the definition in s.27(3) CDPA to the various acts of copying set out in s.17 and to the making of an adaptation. **[CB2/1/13-14]**

Transient Copies and s.17(6) – (Ground 4)

93 See [AS34-36 and 53-54]. S.17(6) CDPA specifies that copyright may be infringed by the creation of transient or incidental copies of a copyright work. It is instructive to consider how this works in the context of Stable Diffusion, assuming training to have taken place in the UK. **[CB2/1/14, 19-20]**

94 As discussed above, the training process involves copies of some Getty Works being made in AWS data centres. These copies were not subsequently commercialised. They were present on a transient basis in memory media controlled by Stability. According to s.17(6), the transient nature of those copies provides no defence to Stability in relation to the act of making those transient copies. So if it had occurred in the UK, absent some other defence, Stability would have been liable for copyright infringement in relation to the transient act of making transient copies.

95 Such a transient incident of liability has no relevant impact on the act of making the model weights, or indeed making the Hugging Face Copy, or the User's Copy. Those downstream acts remain non-infringing, because the output of none of them was a copy

of any Getty Work. Further, because the transient act occurred overseas, there is no conceivable route to liability.

96 Getty's argument starts by saying, by reference to s.17(6), that copies need not be retained in any permanent form. We agree. They say that copies made during training were transient, we agree. That, they say, is sufficient to satisfy s.27(3), which asks only whether the article's making constituted an infringement. But here they are speaking of a different article (intangible). They are no longer addressing the transient copies. They are instead addressing the model weights. Those are not transient. They contain no copies, so the act of making the model weights was *ex hypothesi* non-infringing.

97 The critical relationship between act and output is then reinforced by the distinction between primary and secondary infringement. The infringing act for s.17 is the act of making. If an act of making has occurred in the jurisdiction – even a transient act – infringement has taken place. Getty rely on *Take-Two* and *Chappell*, but these were both primary infringement cases within the jurisdiction. In that context, the fact that copies were transient, or incidental to some other use provided no defence. Copies were still made. An act of infringement therefore occurred.

98 By contrast ss.22 and 23 involve doing something – importing, distributing etc – to pre-existing articles. In that context, there is little room for transience. Liability is established by reference to the article itself, and whether it is a copy.

99 Since ss.22 and 23 are primarily addressed to products which ready for commercialisation, transience is unlikely to be a relevant consideration. S.17(6) would nonetheless apply where articles which were transient copies were imported or distributed (with knowledge). So going back to the facts of this case, if Stability had taken memory media from the AWS data centre while it still contained copies of Getty Works, importing it into the UK would be an act of infringement. Conversely, the importation of articles containing the finished model weights - the Hugging Face Copy or the User's Copy – is unobjectionable.

100 For Getty's argument to work, it would have to be apparent from s.17(6) CDPA that Parliament intended to extend the reproduction right in s.17 CDPA to the making of articles which do not reproduce the expression of a copyright work <u>at all</u>. There is nothing

to suggest this. On the contrary, it is a fundamental principle of artistic work copyright that only matter which reproduces the expression of the underlying copyright work can infringe it (see e.g. *Lidl Great Britain Ltd v Tesco Stores Ltd* [2024] EWCA Civ 262 at [43]).

Purpose, history and consequences [AS37–41, 55–56] (Ground 7) **[CB2/1/15-17, 20]**

101 Getty's charge against the judge of circular reasoning in [J602] is misconceived. Having construed the words in their context at [J595]–[J601], the judge considered whether Getty's purposive argument could displace that construction and concluded that it could not. The scheme of the Act is "*to provide protection to the owners of copyright works against acts of infringement involving copying*" [J602]. The passage from *Designers Guild* on which Getty rely [AS37] makes the same point: the right is "*an exclusive right to copy that work*". **[CB1/1/168]** **[CB1/1/166-168]** **[CB1/1/168]** **[CB2/1/15]**

102 Getty rely on [280] of the Gregory Report to suggest that the 1956 Act was concerned with a general purpose of preventing circumvention by making abroad [AS38]–[AS40]. That is not what it says. The Committee was addressing the case where "*copyright is owned by different persons in those different countries*", and the need for UK owners to prevent "*the importation of material which, though lawfully made in another country, would be an infringement if made in the United Kingdom, and would compete with material lawfully made in this country*". The concern was with divided-ownership and parallel-imports. It presupposes that what is imported is a copy of the work, competing with UK copies. It says nothing about articles which contain no copy as in the present case. **[CB2/1/15-17]**

103 We have explained above how Getty's construction leads to absurdity. It also treats an article as infringing not by reference to its own substance, but by reference to the process of its development. Where Parliament has conferred protection of that kind, it has done so expressly and has confined it. Section 60(1)(c) of the Patents Act 1977 extends infringement to dealings in "*any product obtained directly by means of*" a patented process, and the word "*directly*" excludes products separated from that process by intermediate steps. Section 27 CDPA contains no process language and no equivalent limit. Getty's construction would therefore give copyright a wider process protection

than Parliament conferred in respect of a patented invention, and without any textual foundation.

104 Nor does s.60(1)(c) assist Getty on territory. It is true that the patented process may be performed abroad. But that is because Parliament said so in terms, and confined the extension by the requirement of directness. Parliament has legislated expressly for foreign making in copyright too, in s.27(3)(b), and has prescribed the test to be applied: was what was made a copy of the work? There is accordingly no gap for the Court to fill. Further, even applying the patent test, a copy of a file of weights produced by millions or billions of gradient updates on latent representations of images [J555] could not be described as "*obtained directly*" by any act of copying. **[CB1/1/152-153]**

105 Furthermore, because the definition applies throughout Part I, Getty's construction would make it a criminal offence under s.107 to possess in the course of a business, or distribute, an article whose development anywhere in the world involved an unlicensed copy of a work, although the article contains no copy; and would expose files which may lawfully be reproduced in the UK to delivery up, seizure and forfeiture. A definition which founds criminal liability should not be given an uncertain or wide meaning.

106 Finally, Parliament is itself considering the position of AI systems. Section 136 of the Data (Use and Access) Act 2025 required the Secretary of State to report on the use of copyright works in the development of AI systems, taking into account AI systems developed outside the UK. The Report on Copyright and Artificial Intelligence (March 2026) proposes to "*continue monitoring global developments and judicial outcomes*" in that respect. While this material is not relied on as an aid to construing the 1988 Act, it serves to illustrate why extending s.27 to foreign-trained models is properly a matter for Parliament.

Purported error 2: defined expressions and the decision in *G4S* (Ground 5)

107 We now move on from statutory interpretation in the round to a particular issue concerning definitions. There is no dispute as to the meaning and effect of *G4S Plc v G4S Trustees Ltd* [2018] EWHC 1749 (Ch). As Getty states at [AS60], "*the reasoning of Nugee J makes clear that the ordinary meaning of the defined expression (or to use, Nugee J's language "the distillation of the meaning of a concept") can be used to* **[CB2/1/21]**

construe the words of the definition". In other words, for this issue, the meaning of the words 'infringing copy' may be used to construe the words of s.27(3).

108 Getty complain that the judge misapplied this reasoning at [AS60-62]. They accept that, in accordance with *G4S*, the court is entitled to account for the meaning of 'infringing copy' in construing section 27(3). However, Getty argue that it is illegitimate to give effect to the meaning of the defined term beyond resolving an ambiguity in the construction of section 27(3) itself. Thus Getty seek to distinguish between the definition and the defined expression. **[CB2/1/21]**

109 First, the effect of Getty's argument is that the court must ignore the defined expression entirely, unless it resolves an ambiguity in the construction of the definition, i.e. it acts as some kind of 'tie-breaker'. This is contrary to more general principles of statutory construction. In choosing the defined term the legislature has selected a term which must be expected to match the meaning of the definition.

110 Second, the argument has no effect in the particulars of this case. The term 'infringing copy' is not a defined term in the classic sense. Contrast s.9(1) and s.27(3):

> "In this Part "author", in relation to a work, means the person who creates it."

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

111 The former is a straight definition in the form 'X means Y'. The latter phraseology instead asks the reader to construe the term infringing copy in a particular way. The requirement for "*accordance*" in no way displaces the impact of the defined expression itself.

112 Perhaps more importantly, it certainly does not require that the meaning set out in s.27 displace or supersede that in s.17(1). That section begins with its own overarching direction: "*references in this Part to copying and copies shall be construed as follows*". It then provides that copying means reproducing the work in any material form.

113 Getty accept that reference to s.17 is legitimate: see [AS32.2] and [AS70]. With this in mind, the Judge's approach, which gives effect to (i) the defined expression 'infringing copy', (ii) s.17(1)'s 'copy', and (iii) is also "in accordance" with s.27 cannot be faulted. [CB2/1/13, 24]

114 In any event, the judge was bound to look beyond s.27, because the definition in s.27 expressly directs the reader outside it, as discussed above. So the distinction Getty seek to draw between the defined expression and the words of the definition is immaterial, and no question of circularity arises: the route to s.17 is prescribed by the words of the definition. That is in substance the judge's reasoning at [J596], where she says that "*the statute provides in section 17 (entitled "Infringement of copyright by copying") that it shall have a particular meaning and it seems to me that that meaning must inform the proper interpretation of the composite phrase "infringing copy"*". [CB1/1/166]

Purported error 3: *Sony v Ball* (Ground 6)

115 In *Sony v Ball* the question was whether a RAM chip holding a copy of a game for a fraction of a second was an infringing copy for the purposes of s.296 CDPA.

116 Under s.17(2) CDPA, any unauthorised electronic storage of a copyright work is an infringing reproduction. Sony argued that when Messiah 2 was used to load an unauthorised game onto a console's RAM chip, that RAM chip became an 'infringing copy' (and Sony therefore had an infringement claim under s.296). The defendant's counterargument was that the presence of unlicensed reproductions of Sony's works in RAM was "*far too ephemeral*" for the RAM chip with copied software to constitute an 'article' at all. The judge disagreed with the defendant.

117 For present purposes, the two key passages of the judgment are in [15]. First:

> "I do not accept this argument. The silicon RAM chip is an article. When it contains the copy data, it is also an article. The fact that it did not contain the copy before and will not contain the copy later does not alter its physical characteristics while it does contain a copy. It is always an article but it is only an infringing article for a short time." (emphasis added)

118 The term 'infringing article' is a response to the defendant's argument. The judge's point here was that the RAM chip is always an article, but that it stops being an infringing copy

article when it no longer contains a copy of Sony's works. He reached that conclusion on the basis that s.27 CDPA is subject to the definition of "copy" in s.17.

119 Laddie J then continued:

> "There is nothing in the legislation which suggests that an object containing a copy of a copyright work, even if only ephemerally, is for that reason to be treated as not an article. On the contrary, the definition in s 27 points to the instant of making of the copy as crucial to the determination of whether or not it is an infringing article. An article becomes an infringing article because of the manner in which it is made. Whether it is an infringing article within the meaning of the legislation must be determined by reference to that moment. It matters not whether it remains in that state, since retention as a copy is no part of the definition in the section." [emphasis added]

120 In the context of the prior passage, and all relevant activity being in the UK, the judge's reasoning is clear. S.27, together with s.17, do indeed result in the critical issue being whether a copy has been made. The manner of an article's making – is it or does it contain a copy? – is indeed determinative.

121 As to the final sentence, the judge had concluded earlier in this same passage that the RAM chip "*is only an infringing article for a short time*." Accordingly, when he says that it does not matter whether the RAM chip "*remains in that state*", he means that it does not matter for the question before the court, which was whether the defendant's chip "*will be used to make infringing copies*" within the meaning of section 296(2). The fact that the RAM was subsequently wiped, and the copies were removed, did not mean that infringing copies had not been made. It did not matter whether the RAM chips were no longer infringing articles, because they had once been so, and were at all times within the jurisdiction. As a result, the Messiah 2 had in fact been used to make infringing copies, and relief was properly granted.

122 Getty rely on the final sentence of [15] of Laddie J's judgment [AS73]–[AS74]. For the reasons given above, it does not mean that an article, once an infringing copy, remains one after the copy has gone. As the held, an article "*ceases to be an infringing copy once it no longer contains the copy*" [J598]. That accords with ss.22 and 23, which apply to "an article which **is** … an infringing copy" at the time of the relevant dealing. A reading **[CB2/1/25]** **[CB1/1/166-167]**

which fixes infringing copy status would make dealing in since-blanked or hard drives infringing. In any event, the point does not assist Getty, because the article relied on – the model weights – never held a copy [J600]. Getty's contention that in this case "*the time of making of the copies of the Copyright Works coincides with the making of the article*" [AS72] was rightly described as "*entirely misconceived*" [J600]: the copies of the Getty Works in VRAM and the model weights are different things. [CB1/1/167] [CB2/1/25] [CB1/1/167]

Section 3 - Respondent's Notice: importation and distribution

123 The issue here is whether, on the statutory interpretation asserted by Getty, the facts set out in paragraphs 20 and 21 above involved the carrying out by Stability of an infringing act of importation or distribution. The judge held that both claims would be made out. As to importation, she stated as follows:

> "I find that, as Stability acknowledged in closing, the model weights for [v2.x and XL] have all been made available by Stability for download on Hugging Face. This involves making intangible copies of these Models available for download onto a local device in the UK. Given that I have found that an article may be intangible, I accept that downloads of the Model amounted to importation for the purposes of the Act and that they have taken place within the United Kingdom… 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." [J604(ii)] [CB1/1/168]

124 The last sentence must be wrong. S.27(3) contains a definition of 'infringing copy'. It does not set out the requirements for infringing by importing. Those are found in s.22, which states in terms that infringement is committed by "*a person who… imports into the United Kingdom, otherwise than for his private and domestic use*". Since Getty had disavowed any claim of joint liability, they could only succeed by proving an act of importation was carried out by Stability. It is implicit in this passage that the judge did not decide that Stability had itself imported the model weights when they were downloaded by a user from Hugging Face. The judge's decision on importing must therefore be set aside.

125 The second problem with this approach to s.22 is that it runs straight into s.24(2). That provision confers liability on a party who transmits a work by means of a telecommunications system, but only where he knows or has reason to believe that

infringing copies of the work will be made upon reception of the transmission. The corresponding requirement in s.22 is markedly less demanding: knowledge, or reason to believe, that what is transmitted (on the judge's approach) is itself an infringing copy. The same party, transmitting the same file into the UK, is thereby more readily caught, because no enquiry is needed into what is made on reception. The condition which Parliament placed on the transmitter's liability is effectively bypassed.

126 The third problem relates to s.20 as amended, discussed above. According to the judgment, s.22 dispenses with the limits which accompany s.20 (no targeting, no communication to a public) and in their place substitutes knowledge. Where that is satisfied, 'importing' by a website proprietor would be established whenever an individual in the UK downloads a single electronic copy of a copyright work from a webserver anywhere in the world. There is thus a clear mismatch in scope as between s.20 and s.22 on the judge's interpretation.

127 By contrast, if we are right about article, the position is straightforward and consistent: in the original Act, Parliament dealt with the transmission of works in ss. 20 and 24(2), and when it created the right of communication to the public in accordance with Art.3 of the Infosoc Directive, both those sections were amended. No changes were made to ss.22, 23 or 27.

128 In this regard, it should be noted that Getty properly asserted targeting in respect of the DreamStudio website[11], but had no corresponding case in relation to the model weights and Hugging Face. Further, they never asserted primary infringement of copyright in the form of communication to the public of the model weights or pleaded that those model weights reproduced Getty works in the sense set out in s.17 CDPA.

129 Fourthly, we note that the concept of importing is used elsewhere in the Act with its conventional meaning of moving goods across a customs border – see eg s.111(4), which addresses the importation of infringing copies. Words are generally presumed to have the same meaning throughout a statute on the grounds that "*the drafters of the statute*"

[11] para 45, Re-Re-Re-Re-Amended Particulars of Claim

are "*seeking to create a coherent statutory text*" (*For Women Scotland Ltd v The Scottish Ministers* [2025] UKSC 16 [13]).

130 As to distribution in the course of business, the same reasoning also applies. Anyone who makes copyright material available online without a licence would (subject to knowledge) be liable for infringement, even where that material is downloaded by an individual in the UK on one isolated occasion. For conventional internet usage, the judge's interpretation would circumvent the safeguards which have been built up in the s.20 case law.

131 The judge held that distribution was established "*via Hugging Face*", and that "*Stability is responsible for these acts of distribution*" [J604(iv)]. 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. **[CB1/1/169]**

132 Furthermore, Getty in closing pursued no case that Hugging Face or its servers were located in the UK, [J100]. There is no act to which s.23 extends. **[CB1/1/28]**