



Neutral Citation Number [2023] EWHC 3090 (Ch)

Case No: IL-2023-000007

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**INTELLECTUAL PROPERTY LIST (ChD)**

Rolls Building  
Fetter Lane  
London, EC4A 1NL

1/12/2023

**Before :**

**MRS JUSTICE JOANNA SMITH**

**Between :**

- (1) GETTY IMAGES (US) INC
- (2) GETTY IMAGES INTERNATIONAL UC
- (3) GETTY IMAGES (UK) LIMITED
- (4) GETTY IMAGES DEVCO UK LIMITED
- (5) ISTOCKPHOTO LP
- (6) THOMAS M BARWICK INC

**Claimants**

**- and -**

**STABILITY AI LTD**

**Defendant**

**Ms Lindsay Lane KC and Ms Jessie Bowhill** (instructed by **Fieldfisher LLP**) for the  
Claimants

**Mr Nicholas Saunders KC and Mr Jaani Riordan** (instructed by **Bird & Bird LLP**) for the  
Defendant

Hearing dates: 31 October & 1 November 2023

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**APPROVED JUDGMENT**

This judgment was handed down remotely by email at 10.30am on Friday 1 December, 2023  
by circulation to the parties or their representatives by email and release to the National  
Archives

**Mrs Justice Joanna Smith:**

1. These are proceedings for copyright infringement, database right infringement, trade mark infringement and passing off against the Defendant, an open-source generative artificial intelligence (“**AI**”) company incorporated in England and Wales in November 2019 with registered offices in London. The claim concerns the Defendant’s deep learning AI model (known as “**Stable Diffusion**”), which the Defendant makes available to users in the United Kingdom by a variety of means, including via a commercial platform operating under the name of Dream Studio (“**Dream Studio**”) and by way of download on an open-source basis. Stable Diffusion generates synthetic image outputs in response to commands entered by users.
2. The First to Fifth Claimants are members of a group of companies (“**the Getty Images Group**”) ultimately owned and controlled by Getty Images Holdings, Inc. The Getty Images Group is described in the Particulars of Claim as a “pre-eminent global visual content creator and market place”.
3. The Getty Images Group licenses its content (in the form of millions of visual assets (“**the Visual Assets**”) including photographs, video footage and illustrations, together with associated captions and key words (“**the Captions**”) covering a broad range of subject matter) through websites at [gettyimages.com](http://gettyimages.com), [gettyimages.co.uk](http://gettyimages.co.uk) and [istockphoto.com](http://istockphoto.com) (“**the Getty Images Websites**”) to creative, corporate and media customers in more than 200 countries. The Visual Assets, which each bear a Getty Images watermark, thus appear in newspapers, magazines, advertising campaigns, films, television programs, books and websites all around the world.
4. A substantial proportion of the Visual Assets are said to comprise original artistic works and/or film works in which copyright subsists (“**the Copyright Works**”). The Particulars of Claim assert the existence of millions of Copyright Works.
5. It is the Claimants’ case that the Visual Assets, the Captions and other information (such as information relating to the creator and/or owner of the rights in relation to the Visual Assets) (“**the Data**”) are held in a sophisticated database that has been developed by the Getty Images Group since 1995 (“**the Database**”) and in respect of which a very significant financial investment has been made.
6. The Visual Assets that appear on the Getty Images Websites are said to be highly desirable for use in connection with AI and machine learning because of their high quality and because they are accompanied by content specific, detailed captions and rich metadata.
7. The Particulars of Claim were served by the Claimants on 12 May 2023. For the purposes of this hearing, it is common ground that, as alleged in the Particulars of Claim (i) copyright subsists in the Copyright Works and is owned by, or licensed to, the First Claimant on an exclusive basis<sup>1</sup>; (ii) the First and/or Second Claimants are the owners of the database right which subsists in the Database both prior to, and after, 31 December 2020 (i.e. the end of the Brexit implementation period); (iii) the First Claimant is the registered proprietor of a number of UK registered trade marks for GETTY IMAGES and the Fifth Claimant is the registered proprietor of a number

of UK registered trade marks for ISTOCK in respect of photographs and a variety of digital imaging goods and services (“**the Trade Marks**”); and (iv) the Claimants have rights in passing off by virtue of the use of the Trade Marks.

8. In broad terms, the Claimants’ complaint in the proceedings is that the Defendant has “scraped” millions of images from the Getty Images Websites, without the Claimants’ consent, and used those images unlawfully as input to train and develop Stable Diffusion; further that the output of Stable Diffusion in the form of synthetic images (accessed by users in the United Kingdom) is also itself infringing in that it reproduces a substantial part of the Copyright Works and/or bears the Trade Marks.
9. The Defendant has not yet filed a defence to the claim but has instead made the application to which I shall now turn.

### **The Applications before the Court**

10. Each party pursues applications made by way of notices dated 28 July 2023 and 25 September 2023 respectively.
11. The first in time is the Defendant’s application which seeks:
  - a. reverse summary judgment and/or strike out in respect of various issues arising on the Claimants’ claim (“**the SJ Application**”), namely
    - i. a claim of copyright and database right infringement arising from the Claimants’ allegation that during the development and training of Stable Diffusion, Visual Assets and associated Captions, including the Claimants’ Copyright Works, were downloaded on servers and/or computers in the United Kingdom (“**the Training and Development Claim**”). This application is pursued solely under CPR 24.2;
    - ii. a claim of secondary infringement of copyright said by the Claimants to arise by reason of the importation of an “article”, namely the pre-trained Stable Diffusion software, into the UK (“**the Secondary Infringement Claim**”). This application is pursued under CPR 3.4(2)(a), alternatively CPR 24.2;
    - iii. trade mark infringement and passing off claims relating to the “output” of images generated by Stable Diffusion (“**the Trade Mark and Passing Off Claims**”), again pursued under CPR 3.4(2)(a), alternatively CPR 24.2. These claims are pleaded at paragraphs 56, 57, 58 and 61 of the Particulars of Claim.
  - b. further responses to be given to identified requests made in the Defendant’s CPR Part 18 Request (“**the RFI**”) dated 12 May 2023 (“**the RFI Application**”). The key focus of these requests is to obtain particulars of infringement not presently included in the Particulars of Claim as pleaded, which identifies a sample of Copyright Works for the purpose of subsistence and ownership only.

12. During the course of the hearing, the RFI Application was resolved, with the Claimants agreeing to provide examples of Copyright Works that are alleged to have been infringed by the Defendant. The provision of these examples appears to me to be important in circumstances where no particulars of infringement have previously been given. The Defendant is entitled to know the case it must meet at trial and it is entitled to have an opportunity to respond to that case in its defence. It was agreed between the parties that the examples that would be identified by the Claimants need not be representative and that the production of the examples would not be characterised as “experiments”, such that the details of the internal work carried out in order to produce the examples will be privileged and will not be disclosable in the proceedings. In respect of each of the examples identified, it was also agreed that the Claimants would respond to questions 8-11 and 19-21 of the RFI<sup>2</sup>.
  
13. Upon clarification of the Claimants’ case by way of a new proposed amendment to paragraph 50 of the Particulars of Claim, together with a draft Amended Annex 8<sup>3</sup>, provided on the second day of the hearing, and upon the Claimants confirming that they did not rely for the purposes of advancing their positive case on *Louboutin v Amazon* (C-148/21 and C-184/21)<sup>4</sup> the Defendant indicated that it no longer intended to pursue the SJ Application in relation to the Trade Mark and Passing Off Claims. Following the hearing, the Claimants provided a further draft amendment, removing a typo in paragraph 50 as to the year in which the text prompts were inputted and ensuring the addition of wording in paragraph 58 which makes it clear that the case now pleaded in paragraph 50 also applies in respect of the passing off claim. I confirm that permission is granted (as reflected in the Order of 1 November 2023 (“**the Order**”)) in relation to these amendments. The Defendant’s agreement not to pursue this part of the SJ Application is recorded in the agreed recitals to the Order.
  
14. In written submissions on the form of order to be made following the hearing, the Defendant submitted that the SJ Application in relation to the Trade Mark and Passing Off Claims should be adjourned pending the provision of additional information which the Defendant wishes to see in connection with the responses to the RFI. I reject this suggestion. Although the potential to adjourn this aspect of the SJ Application pending the provision of information was floated by Mr Saunders at the hearing, I did not understand it to be pursued following further argument and clarification as to the nature of the information that the Claimants intended to provide. There was no application in relation to the provision of such information. The court has already spent two days hearing the matters at issue between the parties and, if the Defendant wished to make it a condition of withdrawing part of the SJ Application that additional information was required from the Claimants, it should have made that abundantly clear at the hearing. Any such intention is in any event inconsistent with the agreed recitals to the Order, as provided to me in draft by the parties. Once information has been provided by the Claimants in response to the RFI, no doubt there will be scope for the Defendant to make any additional requests that it may consider appropriate. However, I am not prepared to make any order for the provision of additional information at this stage and nor am I prepared to adjourn this aspect of the SJ Application. Accordingly, I make no order on the SJ Application in so far as it relates to the Trade Mark and Passing Off Claims, although the costs associated with that issue will need to be determined at the consequential hearing.

15. The SJ Application in relation to the Training and Development Claims and the Secondary Infringement Claims now forms the main battleground on the Defendant's application.
16. The Claimants' application seeks:
  - a. an order to fix the CMC, PTR, trial window and related directions ("**the Fixing Application**");
  - b. permission to amend the Particulars of Claim by the addition of a new claim relating to an image-to-image feature of Stable Diffusion which it is said permits users to make "essentially identical copies of copyright works" ("**the Amendment Application**"), now pleaded in paragraphs 33, 39, 50A and 50B, together with new Annex 8B, of the proposed Amended Particulars of Claim ("**the Original Proposed Amendments**").
17. It was common ground that, owing to a shortage of time at the hearing, the Fixing Application (which is opposed by the Defendant) should be adjourned to the consequential hearing following the hand down of this judgment.
18. The Amendment Application was originally unrelated to, and unaffected by, the SJ Application. However, by reason of the production of a further proposed Amended Particulars of Claim on the second day of the hearing, the scope of the Amendment Application was effectively expanded to include both the amendments to which I have referred in paragraph 13 above and proposed amendments to paragraph 43, the latter being designed to set out in more detail the Claimants' case on the Training and Development Claim. The Defendant maintains its application for summary judgment on the Training and Development Claim and submits that, even taking these new amendments into account, the Training and Development Claim has no real prospect of success at trial. Accordingly, the Defendant invites me to refuse permission for the proposed amendments to paragraph 43 of the Particulars of Claim. I shall return to address these proposed amendments in the context of dealing with the Training and Development Claim.
19. The Defendant opposes the Amendment Application in relation to the Original Proposed Amendments for reasons to which I shall return
20. It is important at this stage to make clear that (in addition to the Trade Mark and Passing Off claims which will now proceed to trial), the Claimants also allege (i) copyright infringement by reason of the copying and communication to the public where Stable Diffusion is used to generate an image that reproduces the whole or a substantial part of the Copyright Works contrary to sections 16(2) and 17 of the Copyright Designs and Patents Act 1988 ("**CDPA**"); and (ii) database right infringement by re-utilising a substantial part of the Database. Both of these claims rely upon access to Stable Diffusion by users in the United Kingdom. They are not the subject of any applications before the court and (absent further order) will proceed to trial.

## **The Evidence**

21. There was a substantial amount of evidence served on both sides for this hearing. In so far as this evidence dealt with facts relevant to the SJ Application, it concentrated on the question of whether any of the training and development carried out on Stable Diffusion took place in the United Kingdom. This might ordinarily be regarded as a question that can only be determined at trial, but, it is the submission of the Defendant, that on a proper forensic analysis of the pleaded case and the available evidence, there is nothing whatever to indicate any real dispute of fact.
22. The Defendant relies upon two statements from Mr Toby Bond, a partner at Bird & Bird, three statements from Mr Peter O'Donoghue, Chief Financial Officer of the Defendant since July 2022, one statement from Mr Mohammed Mostaque, founder and Chief Executive Officer of the Defendant who is based in London, and one statement from Mr Tyler Saltsman, who lives in the US and has worked for the Defendant since May 2023 as Director of HPC Cloud Partnerships (often referred to as the Defendant's "Head of Supercompute"). Prior to his role at the Defendant, Mr Saltsman worked at Amazon Web Services Inc ("AWS") for around 3 years.
23. The Claimants rely upon two statements from Mr Nicholas Rose, a partner at Fieldfisher, together with two expert reports from Professor Hany Farid, a professor at the University of California, Berkeley. Permission was given to both sides to rely upon an expert's report in the field of the development, training and testing of generative AI models for the purposes of the SJ Application by the court, by consent, on 28 September 2023 ("**the September Order**"). The Defendant has chosen not to serve, or rely upon, any expert evidence. It is common ground that Professor Farid is a leading expert in AI, albeit that the relevance of his evidence is in dispute. Professor Farid's first report records that he has been involved in academic research which focuses on digital forensics, forensic science, misinformation, image analysis and human perception. Between 2011 and 2018 he was also involved in a company that was developing software to detect manipulated images.
24. Pursuant to an application notice issued on the day before the hearing, the Defendant invites me to permit it to rely upon a second statement from Mr Mostaque dated 26 October 2023 and a statement from Mr Rombach, a research scientist at the Defendant between September 2022 and July 2023 and, since then, the Defendant's Research Director, dated 30 October 2023. Mr Saunders KC, on behalf of the Defendant, submits that these new statements are required to respond to the Claimants' reply evidence served on 24 October 2023 and to a new point raised in the Claimants' skeleton argument. He contends that the Claimants are not prejudiced by the introduction of the new evidence, which simply establishes beyond doubt that the Defendant has a clear answer to various factual matters raised by the Claimants.
25. The Claimants oppose the late introduction of these new statements. In summary, they argue that they are too late, that their timing fails to comply (i) with the provisions of the September Order (to which the parties consented) and also (ii) with the provisions of CPR 24.5(3) which require evidence in reply from an applicant in a summary judgment application to be served on 3 clear days' notice before the hearing. Ms Lane KC, on behalf of the Claimants, contends that an application for relief from sanctions should have been made by the Defendant and she points out that the Claimants are prejudiced by the late introduction of evidence which they would have wished to consider and investigate in advance of the hearing.

26. I indicated to the parties that I would read these two statements *de bene esse* for the purposes of the hearing. Having considered the matter further, in my judgment it would be in the interests of justice to permit Mr Mostaque's second statement (and in so far as is necessary I grant relief from sanctions in relation to that statement) but Mr Rombach's statement will be excluded. My reasons are as follows.
27. The September Order set out a detailed timetable for the service of further evidence relating to the SJ Application. The Defendant had, by that stage, already served its application notice together with the first statements of Messrs Bond and O'Donoghue. The September Order permitted service by the Claimants of the factual evidence on which they wished to rely in response by 25 September 2023, service of any further evidence from the Defendant by 16 October 2023 and service by the Claimants of any evidence in reply to the Defendant's further evidence by 23 October 2023. There was no provision for a further round of evidence from the Defendant, although paragraph 4 of the order gave liberty to apply to the court for permission to vary the deadlines. The 16 and 23 October deadlines were subsequently shifted by one day by consent between the parties.
28. The Defendant's application notice of 30 October 2023, seeking permission to rely upon the new statements, seeks an order "pursuant to paragraph 4" of the September Order, which Mr Saunders characterised as an application to vary that order. However, to my mind, this is not an application to vary the deadlines for the evidence envisaged in that order, but rather an application for a yet further round of reply evidence served less than 3 clear days in advance of the hearing and, in the case of Mr Rombach's statement, after exchange of skeleton arguments.
29. Mr Mostaque's second statement is extremely short and its purpose is to reply to two specific points (made in the second statement of Mr Rose dated 24 October 2023) about six individuals that currently work for the Defendant. The statement was served on 26 October 2023 at 12.13 pm, i.e., just over 36 hours after the Defendant saw the second statement from Mr Rose. The application notice explains that it was prepared as soon as possible, given Mr Mostaque's existing commitments. Ms Lane did not suggest that there were any further investigations that the Claimants would have wished to make in response to this statement and nor did she suggest that she could not deal with it in her submissions. Accordingly, it seems to me to be in the interests of justice and consistent with the overriding objective that I permit the Defendant to rely upon it. I doubt that relief from sanctions is strictly necessary where the evidence is purely intended as a reply to Mr Rose's second statement, but, if necessary, I do not regard this as a serious breach of the order and I consider that the need for the statement and its timing has been adequately explained. In all the circumstances it is just to permit reliance upon Mr Mostaque's second statement.
30. Although Mr Rombach's statement is short, it appears to me to fall into a different category. It is said to be designed to address a criticism raised by the Claimants in their skeleton argument as to the lack of evidence produced by the Defendant from individuals in the team which worked on the training and development of Stable Diffusion. However, this criticism was quite plainly made by Mr Rose in his first statement at paragraph 40 and again in his second statement at paragraph 31. If the Defendant wished to address the point, I can see no reason why it did not do so earlier

and no reason has been identified. I accept Ms Lane's submission that if the Claimants had been given more notice of the Defendant's intention to rely upon evidence from Mr Rombach they would have wished to carry out investigations in advance of the hearing and that the very late service of his evidence has precluded any opportunity of their doing so. In the circumstances, I do not consider it to be consistent with the overriding objective to permit reliance upon his evidence (whether I am being asked to do so by way of variation of the September Order or on the basis of a deemed application for relief from sanctions). I observe in any event that I do not consider that my refusal to permit this evidence in any way affects the outcome of the SJ Application, for reasons which will become clear in due course.

31. Before turning to the substance of the applications, I should record that a confidentiality order was made on 10 October 2023 ("**the Confidentiality Order**") for the purposes of protecting confidential information disclosed in these proceedings on or before the date on which judgment in the Defendant's application of 28 July 2023 is handed down. This has led to parts of the materials and evidence before me being designated "confidential" or "highly confidential". It has also led to my being invited to make an order on 31 October 2023 pursuant to CPR 31.22(2) that the evidence served in connection with the application and included in the hearing bundles be treated as confidential and that no use may be made of such documents save for the purposes of these proceedings and in accordance with the terms of the Confidentiality Order. I made the order sought.
32. For the purposes of this judgment I have tried, in so far as possible, to confine myself to making direct reference only to materials that are not designated as "confidential" or "highly confidential" by the parties. If necessary, this is an issue that may be revisited at the consequential hearing.

## **The Relevant Principles**

### **Summary Judgment**

33. The principles to be applied on an application for summary judgment are largely uncontroversial - the court may grant summary judgment "on the whole of the claim or on an issue", if it considers that "the party has no real prospect of succeeding on the claim, defence or issue" (CPR r.24.3(a)) and "there is no other compelling reason why the case or issue should be disposed of at a trial" (r.24.3(b)). In determining a summary judgment application, evidence is admissible to establish that the pleaded case is fanciful – albeit that the court will be very cautious about rejecting the claimant's factual case at the summary stage.
34. Although they inevitably sought to highlight different aspects, the parties both relied upon the well-known judgment of Lewison J in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15], approved by the Court of Appeal in *AC Ward & Sons Ltd v Catlin (Five) Ltd* [2009] EWCA Civ 1098:

"i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 2 All ER 91;



ii) A “realistic” claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8];

iii) In reaching its conclusion the court must not conduct a “mini-trial”: *Swain v Hillman*;

iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10];

v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;

vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725”.

35. The overall burden of proof on a summary judgment application rests on the applicant to establish that there are grounds to believe that the respondent has no real prospect of success and that there is no other compelling reason for trial. Once the applicant

adduces credible evidence in support of her application, the respondent becomes subject to an evidential burden of proving a real prospect of success. However, the standard of proof by way of rebuttal is not high - the respondent's case must be more than merely arguable; it must carry some degree of conviction (*Easyair* at 15(ii) above).

36. The Defendant also drew my attention to:

- a. the decision of the Court of Appeal in *Kawasaki Kisen Kaisha Ltd v James Kemball Ltd* [2021] EWCA Civ 33, per Popplewell LJ at [18], a case concerned with the merits test to be applied on an application to serve a claim on a defendant out of the jurisdiction (that merits test being the same as applies in a summary judgment application), and *Elite Property Holdings Ltd v Barclays Bank Plc* [2019] EWCA Civ 204, per Asplin LJ at [41] and [42]. These passages appear to me to reformulate and restate the test as set out in *Easyair*. I note, in particular, however, that it is not enough to plead allegations which, if true, would establish a claim; there must be evidential material which establishes a sufficiently arguable case that the allegations are correct. This will include a sufficiently arguable case as to the drawing of an inference by reference to the facts.
- b. *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725, a case involving a short point on construction, in which Moore-Bick LJ made clear (at [13]) that “It is the responsibility of the respondent to **an application of this kind** to place before the court, in the form of a witness statement, whatever evidence he thinks necessary to support his case” (**emphasis added**). I pause to observe that the Training and Development Claim does not give rise to a short point on construction and nor is it a case in which I am being invited to “grasp the nettle” and decide a short point of law. In my judgment, one must be careful not to import propositions which are relevant to the situation in which the court is being asked to decide a discrete point of law, into situations where the court is being asked to grant summary judgment on the grounds that there is no evidential material which establishes a sufficiently arguable case and no real expectation of any such material being available at trial. In the latter case there is certainly no requirement that a respondent need place before the court all the factual evidence on which he wishes to rely at trial. As Lewison J said in *Easyair*, the court must take into account not only the evidence actually placed before it on the application for summary judgment, “but also the evidence that can reasonably be expected to be available at trial”.

37. Indeed, the need to consider the evidence that might reasonably be expected to be available at trial was recently confirmed in *HRH Emere Godwin Bebe Okpabi v Royal Dutch Shell plc* [2021] UKSC 3, a case in which the Supreme Court had cause to consider the summary judgment test of real prospect of success. Lord Hamblen JSC pointed out (at [127]) that: “As Lord Briggs JSC stated in *Vedanta* [202] AC 1045, para 45: ‘the court cannot ignore reasonable grounds which may be disclosed at the summary judgment stage for believing that a fuller investigation of the facts may add to or alter the evidence relevant to the issue’”. Lord Hamblen formulated the question to be posed at [128] as follows: “...are there reasonable grounds for believing that

disclosure may materially add to or alter the evidence relevant to whether the claim has a real prospect of success”

38. On the issue of “compelling reason”, it may be inappropriate to grant summary judgment where similar issues would remain to be determined at a full trial and extensive factual and expert evidence would have to be called, meaning that there would be much less in terms of saving costs and court time than is normal (see *Illiffe v Feltham Construction Ltd* [2015] EWCA Civ 715 at [71]-[73] per Jackson LJ). However, as the Defendant submitted, the mere existence of other arguable claims which must go to trial cannot, of itself, be a compelling reason why an unarguable claim must proceed to trial.

### **Strike Out**

39. Once again, the principles are largely common ground between the parties. The court may strike out a statement of case pursuant to CPR 3.4(2)(a), read together with 3.4(1) which makes clear that a statement of case may include part of a statement of case, on the grounds that it “discloses no reasonable grounds for bringing the... claim”. In considering a strike out application, the court must assume that the facts pleaded in the relevant statement of case are true and ask itself whether the claim advanced on the basis of those facts has a real prospect of success.
40. Practice Direction 3A provides some guidance as to when it may be appropriate to strike out particulars of claim pursuant to CPR 3.4(2)(a), including claims “which are incoherent and make no sense” and claims “which contain a coherent set of facts but those facts, even if true, do not disclose any legally recognisable claim against the defendant”.
41. Further guidance is found in *Begum v Maran (UK) Ltd* [2021] EWCA Civ 326, per Coulson LJ at [22]-[24]:

“22. As to the applicable test itself:

- (a) The court must consider whether the claimant has a “realistic” as opposed to a “fanciful” prospect of success: *Swain v Hillman* [2001] 1 All ER 91. A realistic claim is one that carries some degree of conviction: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472. But that should not be carried too far: in essence, the court is determining whether or not the claim is “bound to fail”: *Altimo Holdings v Kyrgyz Mobil Tel Ltd* [2012] 1WLR 1804 at [80] and [82].
- (b) The court must not conduct a mini-trial: *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2003] 2 AC 1, in particular paragraph 95. Although the court should not automatically accept what the claimant says at face value, it will ordinarily do so unless its factual assertions are demonstrably unsupported: *ED & F Man Liquid Products v Patel*; *Okpabi and others v Royal Dutch Shell Plc and another* [2021] UKSC 3, at paragraph 110. The court should also allow for the possibility that further facts may emerge on discovery or at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550; *Sutradhar v Natural Environmental Research Council* [2006] 4 All ER 490 at [6]; and *Okpabi* at paragraphs 127-128.

23. The other principle relevant to the present appeal is that it is not generally appropriate to strike out a claim on assumed facts in an area of developing jurisprudence. Decisions as to novel points of law should be based on actual findings of fact: see *Farah v British Airways* (The Times 26 January 2000, CA). In that case, the Court of Appeal referred back to the decision of the House of Lords in *Barrett v Enfield DC* [2001] 2 AC 550 where Lord Browne-Wilkinson said at 557e-g:

“In my speech in the Bedfordshire case [1995] 2 AC 633, 740 – 741 with which the other members of House agreed, I pointed out that unless it was possible to give a certain answer to the question whether the plaintiff’s claim would succeed, the case was inappropriate for striking out. I further said that in an area of the law which was uncertain and developing (such as the circumstances in which a person can be held liable in negligence for the exercise of a statutory duty or power) it is not normally appropriate to strike out. In my judgment it is of great importance that such developments should be on the basis of actual facts found at trial not on hypothetical facts assumed (possibly wrongly) to be true for the purposes of the strike out”.

...

24. The same point arose more recently in *Vedanta Resources PLC & Another v Lungowe & Others* [2019] UKSC 20. That was a case where the underlying duty of care was alleged against a parent company, rather than the company involved in the day-to-day running of the mine said to have caused the pollution. Lord Briggs said:

“48. It might be thought that an assertion that the claim against Vedanta raised a novel and controversial issue in the common law of negligence made it inherently unsuitable for summary determination. It is well settled that difficult issues of law of that kind are best resolved once all the facts have been ascertained at a trial, rather than upon the necessarily abbreviated and hypothetical basis of pleadings or assumed facts.”

42. Where the strike out plea is based on the nature of the pleading and there is also a summary judgment application made in the alternative which depends purely upon the way in which the case is pleaded, “there is no difference between the tests to be applied by the court under the two rules” (*Begum* at [20]).

### **The Training and Development Claim**

43. It is common ground that copyright (like database right) is a territorial right which confers protection on its holder only within the territory of the United Kingdom. As Lord Neuberger PSC said in *Starbucks (HK) Ltd v British Sky Broadcasting Group plc* [2015] UKSC 31 at [59], approving Professor Wadlow in *The Law of Passing-off – Unfair Competition by Misrepresentation* 4<sup>th</sup> ed, 2011, para 3-131: “...the nature of copyright as a legal right of property arising in any given jurisdiction from national legislation, common law or self-executing treaty, means that it must be wrong to speak as if there were a single international copyright”.

44. The question at the heart of the SJ Application in relation to the Training and Development Claim is whether there is any *prima facie* evidence that the training and

development of Stable Diffusion took place in the United Kingdom (“**the Location Issue**”). If there is no such evidence, then, submits the Defendant, that claim is bound to fail.

45. To examine this question, it is necessary to begin by looking closely at the way in which this claim is pleaded in the existing Particulars of Claim.
46. Paragraph 34 of the Particulars of Claim pleads that “[f]rom a date currently unknown to the Claimants” but prior to the launch of Stable Diffusion version 1.0 on 22 August 2022, “Stable Diffusion 1.0 (and the various sub-versions that were subsequently released) was trained using various subsets of the LAION-5B dataset, specifically LAION-2B-en, LAION-high-resolution, LAION-improved-aesthetics, and LAION-aesthetics v.2 5+.” Paragraph 34 proceeds to define the LAION-5B dataset as the “**LAION-5B Dataset**” and the subsets, also used to train Stable Diffusion 1.0 as the “**LAION-Subsets**”.
47. Paragraph 35 pleads that the LAION-5B Dataset and the LAION Subsets were created by LAION e.V. (“**LAION**”), an association registered in Hamburg, Germany. It goes on to assert that LAION created the LAION-5B Dataset “with support from the Defendant”.
48. Paragraphs 36 and 37 plead details as to the LAION-5B Dataset, in particular that it comprises some 5.85 billion CLIP<sup>5</sup> filtered image text pairs, created by “scraping links to photographs and videos, together with associated captions, from the web” including from the Getty Images Websites. The pleading describes the links in the LAION-5B Dataset and the LAION-Subsets that match to Content on the Getty Images Websites as “**the Scraped Links**” and asserts that the Claimants have identified “around 12 million” of these links, obtained without their consent. Paragraph 38 pleads that Stable Diffusion 1.0 was trained using around 12 million Visual Assets (of which around 7.3 million are Copyright Works), together with associated Captions, from the Getty Images Websites.
49. Paragraph 39 refers to the launch of Stable Diffusion 2.0 on or about 24 November 2022 and paragraph 40 pleads that “[f]rom a date currently unknown to the Claimants” but prior to that date, Stable Diffusion 2.0 was trained “using the LAION-5B Dataset...”. Paragraph 41 pleads that Stable Diffusion 2.0 was trained using around 7.5 million Visual Assets (of which around 4.4 million are Copyright Works) together with associated Captions, from the Getty Images Websites.
50. Paragraph 47 of the Particulars of Claim sets out in some detail the steps that it is alleged the Defendant took to train Stable Diffusion, albeit there is no allegation as to where they took place. These steps are accepted by the Defendant as accurate for the purposes of the SJ Application and I need not set them out in detail here. Suffice, for present purposes, to observe that the training process is said to involve numerous iterative steps involving the creation and storage of content in various different forms. The Defendant has not sought to address the detail of the training process in its evidence.
51. Paragraph 43 of the Particulars of Claim pleads as follows:

“The Defendant’s development team includes a significant number of individuals who reside and work in the UK, who will be identified upon receipt of appropriate confidentiality undertakings, including the Defendant’s lead generative AI developer. It is to be inferred that, during the development and training of Stable Diffusion, visual assets and associated captions, used for the development and training of Stable Diffusion, including Visual Assets (including Copyright Works) and Captions from the Getty Images Websites, were downloaded on servers and/or computers in the UK”.

52. Pausing there, I make the following observations about this pleading:

- a. it is common ground that paragraph 43 is the only paragraph in the Particulars of Claim as it stands which seeks to connect the Training and Development Claim with any activity taking place within the United Kingdom. It does so, not by making any positive averment of fact, but rather by inviting an inference that during development and training of Stable Diffusion the Claimants’ Copyright Works were downloaded on servers and/or computers in the UK.
- b. on close analysis, the pleading provides no particulars of any separate or distinct process in relation to the “development” of Stable Diffusion. The paragraphs to which I have referred all focus on the “training” of Stable Diffusion by using the LAION-5B Dataset and the LAION Subsets, which is the essential means by which Stable Diffusion gained access to the Copyright Works. Nevertheless, paragraph 43 does appear to distinguish between development and training and, accordingly, I reject Mr Saunders’ suggestion that the plea of “development” is “a dead duck”. I note that Professor Farid’s (for present purposes unchallenged) evidence supports the proposition that the development of diffusion models (in the broad sense) will include the development of the neural architecture of the model followed by several stages of iterative training and evaluation.
- c. Mr Saunders invited me to focus on the date of release of the LAION-5B Dataset (referred to by Mr Rose in his first statement), namely 31 March 2022. It is his submission that given the pleaded case as to the training of Stable Diffusion using the LAION-5B Dataset, any claim pursuant to paragraph 43 can only be restricted to the time period between 31 March 2022 and 22 August 2022 (i.e. the date of launch of Stable Diffusion 1.0), or between 31 March 2022 and 24 November 2022 (i.e. the date of launch of Stable Diffusion 2.0). This he says is important when looking at the Location Issue for the purposes of the SJ Application. I reject this proposition. As Ms Lane correctly points out, the Claimants’ pleaded case at paragraphs 34 and 40 expressly refers to training taking place “[f]rom a date unknown” and there is presently no separate temporal plea in relation to development. Furthermore, (i) Mr Rose’s evidence very clearly refers to 31 March 2022 as the date on which LAION made the LAION-5B Dataset “publicly available”, evidence which is supported by a screenshot from LAION’s website presenting the new dataset; (ii) there is no evidence as to when LAION launched the LAION Subsets which it is specifically alleged were used to train Stable Diffusion; and (iii) the pleading expressly refers to the LAION-5B Dataset being created

“with the support of the Defendant” – in other words, it is alleged that there was a close commercial relationship between LAION and the Defendant even before the public launch of LAION-5B. This appears to be borne out by the screenshot from LAION’s website which thanks “our sponsors”, including the Defendant, “for providing computing resources to produce this dataset”.

53. Paragraph 52.1 of the Particulars of Claim pleads that the Defendant has infringed the copyright in the Copyright Works by:

“As regards the acts identified above at paragraphs 43 and 47, reproducing the whole or a substantial part of the Copyright Works or each or any of them, contrary to section 17 CDPA...”.

54. Paragraph 55.1 pleads that, further or alternatively, the Defendant has infringed the database right in the Database by:

“As regards the acts identified above at paragraphs 43 and 47, extracting a substantial part of the contents of the Database contrary to Article 7(1) of the Directive and Regulation 16(1) of the Regulations...”.

55. In its skeleton argument, the Defendant emphasised that the First Claimant has already brought a parallel claim against it (and its US parent company Stability Inc), commenced in February 2023, in the United States District Court for the District of Delaware. The Delaware proceedings make substantially the same allegations concerning the training and use of Stable Diffusion, albeit they allege that the Defendant “maintains cloud computing and physical server resources in the United States” and that by training Stable Diffusion, the Defendant has engaged in “infringing conduct in the United States and in Delaware”. The Defendant said in its skeleton that it is “striking” that the Claimants’ resistance to the SJ Application “is premised on the contrary assertion that training of Stable Diffusion took place in the UK”. However, given the way in which paragraph 43 of the Particulars of Claim is pleaded, there need be no inconsistency between the allegations in the Delaware proceedings and the allegations in this case and Mr Saunders accepted during his oral submissions that the existence of the Delaware proceedings is in no way determinative of the application before this court; it is not inconsistent to allege that training occurred in the United States but that during that process (or indeed during an earlier stage of development) Copyright Works were downloaded on servers and/or computers in the UK.

56. Against that background, and in summary only, the Defendant contends that its evidence establishes that: (i) all of the computing resources used by the Defendant for its training of Stable Diffusion have, at all times, been located outside the United Kingdom; in particular, all of the training “compute” infrastructure is located in two USA datacentres operated by AWS; (ii) although services have been provided to the Defendant in the United Kingdom by AWS, they have not related to the training or development of Stable Diffusion; and (iii) none of the Defendant’s employees based in the United Kingdom has ever worked on (or had the right equipment to work on) developing or training Stable Diffusion. Mr Saunders described the Defendant’s factual case as being that it had “built one of the world’s largest supercomputers based in the AWS cloud” and that no work had been done as part of that process in the United Kingdom. Accordingly, the Defendant submits that it is safe for the court to

conclude that all acts of training and development took place outside the United Kingdom and that, accordingly, the Training and Development Claim is bound to fail.

57. Furthermore, the Defendant contends that, on a proper analysis of the evidence, there is no factual dispute identified by the Claimants that matters for the purposes of the Location Issue; on the contrary, much of the Claimants' case is little more than, in Mr Saunders' words, "kicking up dust". Mr Saunders goes so far as to say that the court could accept all of the Claimants' evidence but still conclude that; (i) it does not contradict the Defendant's evidence; (ii) much of it is purely speculative and therefore (iii) it is irrelevant to the Location Issue.
58. It is not possible for me in this judgment to go through all of the detailed factual evidence set out in each of the many statements on which the Defendant relies. However, focussing specifically on the critical points in the evidence to which my attention was expressly drawn by the Defendant, I can summarise as follows:
- a. Mr Mostaque's evidence is to the effect that there was no one at the Defendant working on image generation models in 2021, specifically that no one undertook training and development of Stable Diffusion in 2021. He explains that in November 2021, the Defendant secured access to a cluster of high performance computing resources from AWS based in datacentres in the United States. This is confirmed by Mr O'Donoghue in his first statement and by Mr Saltsman in his statement and appears to be uncontroversial. Mr Saltsman, who built the Defendant's AWS cluster in the United States, says that he used a very large number of high-performance graphical processor units ("GPUs") for that purpose.
  - b. Mr Mostaque explains that the Defendant's aim was to offer this "high-performance compute" to academic and non-profit researchers to promote the development and growth of open-source AI models; one of the first individuals to be given such access (in December 2021) was Katherine Crowson who was not an employee of the Defendant at this stage, but was working on training her own text-to-image model. Katherine Crowson subsequently became an employee of the Defendant in March 2022 but she, and another researcher hired at the same time, were living in the United States and were accessing Stability's AWS cluster for the purposes of "finishing Ms Crowson's model".
  - c. Mr Mostaque says that, towards the end of May 2022, he was contacted for the first time by Mr Rombach, lead author of a paper first published in December 2021 ("**the Latent Diffusion Paper**") on which Mr Mostaque says Stable Diffusion was ultimately based. Following his contact with Mr Rombach, Mr Mostaque says that he gave Mr Rombach and a colleague, Mr Esser (both of whom were living outside the UK), access to Stability's AWS cluster to develop the work they had done in connection with the Latent Diffusion Paper. He denies that they had any access to Stability's AWS cluster before that date. Mr Mostaque says that it was the work undertaken by Mr Rombach and Mr Esser using the Defendant's AWS cluster "to further develop their work on the Latent Diffusion Paper" that resulted in the release of Stable Diffusion in August 2022 – i.e. all training was done on the AWS cluster (a



proposition that is consistent with an LMU Press Release of 1 September 2022). Mr Rombach was employed by the Defendant in September 2022 but continued to live outside the UK.

- d. Mr Mostaque is based in the UK and says that he has never worked on the development or training of Stable Diffusion himself. His evidence is that it is his understanding that “none of [the Defendant’s] current and/or former employees who have worked on the development and/or training of Stable Diffusion on behalf of [the Defendant] have been located in the UK”. In his first statement he explains that he ruled out certain individuals simply based on their job titles and, in respect of the remainder, he states that (for individuals still employed by the Defendant) he asked his HR team to contact them directly to seek confirmation that they have never worked on Stable Diffusion, and (for individuals who are no longer employed by the Defendant) he asked his HR team to contact their manager to seek a similar confirmation. He gives no evidence as to any responses received, but says that “[a]fter completing that exercise, I am confident that no Stability employee based in the UK has ever worked on developing or training Stable Diffusion”. In his second statement Mr Mostaque refers (as I have already said) to six additional individuals located in the UK, saying that he has asked his legal team to carry out the same process that the HR team conducted for the purposes of his first statement and that again, following that exercise he is “confident” that none of these individuals ever worked on developing or training Stable Diffusion.
- e. Regarding the location of computing resources, Mr Mostaque says that the Defendant used its US-based AWS cluster for all of its work on Stable Diffusion. He accepts that employees who have accessed the Defendant’s AWS cluster to work on Stable Diffusion will have done so from local machines, but he says that because none of these employees are or have been located in the UK, he can say with confidence that no local computing resources based in the UK have been used by the Defendant for its work on Stable Diffusion. Mr Mostaque says that he does “not see how training data could have been downloaded by Stability to local devices in the UK as part of its work on Stable Diffusion”.
- f. Mr O’Donoghue’s evidence is said to be entirely supportive of the points made by Mr Mostaque. Mr O’Donoghue has reviewed financial and usage information made available to the Defendant via an online management portal provided by AWS, as provider of the Defendant’s cloud services. This is referred to as the Stability AWS Account which includes a “Cost Explorer” function and a “Billing Dashboard”. Subject to the caveat that such information does not differentiate between services provided in respect of Stable Diffusion and other services provided to the Defendant, Mr O’Donoghue’s evidence is that it nevertheless confirms his understanding that the computing resources used by the Defendant for its training of Stable Diffusion “have at all times been located outside the United Kingdom”. When purchasing services from AWS, the Defendant selects a region for those services from the available regions offered by AWS. The region selected will determine the physical location of the AWS data centres which provide the relevant services. Mr O’Donoghue says that the only AWS processing

services that the Defendant has used for training Stable Diffusion have been in regions in the United States.

- g. In his third statement, Mr O'Donoghue says that the Defendant has offices in Notting Hill, that employees use standard laptops (not high-powered workstations containing expensive GPUs) and in some instances shared keyboards and monitors. He confirms that the Defendant has no server racks containing GPUs, or the power supply, cabling, storage and cooling facilities this would require. He exhibits a list of IT assets purchased by the Defendant since 11 February 2022.

59. Pausing here, I observe that if this were the trial of this action, the evidence to which I have referred above would (on its face) provide strong support for a finding that, on the balance of probabilities, no development or training of Stable Diffusion has taken place in the United Kingdom. This is not, however, the trial of this action and if I am to grant summary judgment I must be satisfied that there is no real prospect of the Claimants being able, at trial, to refute this evidence and to establish on balance that there are grounds for the inference that they invite the court to draw at paragraph 43 of the Particulars of Claim (as now amplified by proposed amendments to which I shall return). Further, I must be satisfied that there are no reasonable grounds for believing that a fuller investigation into the facts would add to or alter the evidence available to the trial judge and so affect the outcome of the Location Issue.

60. Having examined with care all the evidence before the court, I am not so satisfied. There seems to me to be (i) evidence potentially pointing away from the factual determination on the Location Issue that I am invited to reach by the Defendant; (ii) evidence raising unanswered questions and inconsistencies relevant to that determination; and (iii) reasonable grounds for believing that disclosure may add to or alter the evidence relevant to the question of where the training and development of Stable Diffusion took place. All of this clearly supports the proposition that the Training and Development Claim has a real prospect of success and must be permitted to go to trial. The Location Issue is certainly not an issue on which I can say at present that the Claimants' claim is doomed to fail.

61. In this context, it is worth observing that the Claimants do not hold, or have access to, any of the relevant information on the central question of whether any development and training may have taken place in the United Kingdom and so could not sensibly be expected at this stage (at least until disclosure, when the position may change) to plead anything other than a purely inferential case. Whilst the inference pleaded at paragraph 43 of the Particulars of Claim appears somewhat weak (reliant as it is in the original pleading purely upon the location of the Defendant's development team), it has now been supplemented in the proposed amended pleading by additional factual material which, in my judgment, when taken together with the evidence and the arguments to which I shall now turn, is sufficient to raise a realistic, as opposed to a fanciful, case. I would have held that this was the position on the pleading as it stands (given the evidence), but the amended pleading has, to my mind, substantially strengthened that position.

62. It is not for the court to conduct a mini-trial on an application of this sort and so it does not appear to me to be appropriate to conduct a detailed analysis of the evidence

to which I was taken at the hearing and the arguments on that evidence. However, having regard to the central points only, my reasons for concluding that the Training and Development Claim has a real prospect of success at trial are as follows:

**(i) Human Resources:**

63. It is common ground that the Defendant is based in the UK, has its principal place of business in the UK and has (and had both prior to and after March 2022) a number of UK-based employees in its development team. Notwithstanding Mr Mostaque's evidence that none of these employees worked on the training and development of Stable Diffusion, there are contemporaneous documents which appear to tell a different story. Furthermore, to my mind, these documents raise the spectre that Mr Mostaque's evidence is either inaccurate, or incomplete; at the very least they suggest a conflict of evidence and thus reasonable grounds for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to the trial judge in respect of the Location Issue. Thus:
- a. Screenshots from an interview with Mr Mostaque uploaded to YouTube on 13 August 2022 with the tag line "The Man behind Stable Diffusion", show Mr Mostaque responding to the question, "What is Stable Diffusion?" with the answer "this is an image model that we built off LAION-5B...**the LAION guys were obviously here a while ago very close kind of working with us some of them are actually Stability employees as well**" (emphasis added). In response to the question, "What if your model produces bad outputs?" Mr Mostaque replied "as an example we took some **programmers out of Russia** because they spoke out against the government there, you know and they came some came from the Ukraine as well and **we fast tracked their residency in the UK**" (emphasis added). Mr Saunders suggested that this evidence is not inconsistent with Mr Mostaque's existing evidence, that the Russian and Ukrainian individuals could have been working on other products with which the Defendant is involved and that it goes nowhere unless it is suggested that these individuals were involved in the development and training of Stable Diffusion. But that is being suggested and on one reading of Mr Mostaque's response to the interview questions, he was focussing specifically on individuals working on Stable Diffusion (as built from the LAION 5B Database). I note that the evidence in both of these documents is now deployed in the proposed amendment to paragraph 43 to support the inference that the Claimants seek to draw. Mr Mostaque has provided no explanation in relation to these examples and, indeed, it is worthy of note that none of his statements makes any reference whatever to LAION or to the involvement of LAION "guys" working together with the Defendant, or as its employees, in respect of the development or training of Stable Diffusion, or any other of the Defendant's products. Despite providing his second witness statement shortly before the hearing in circumstances to which I have already referred, Mr Mostaque does not address this evidence at all and does not deal with the obvious question raised as to whether the Defendant used independent contractors based ("here") in the United Kingdom in developing and/or training Stable Diffusion.

- b. Screenshots from an interview with Mr Mostaque uploaded to YouTube by the TWIML AI Podcast on 12 December 2022 regarding Stable Diffusion 1.0 show Mr Mostaque saying “I literally took Ukrainian developers the houses were destroyed and **brought them to the UK**” (**emphasis added**). Once again this raises the possibility of developers working in the United Kingdom in connection with the development and training of Stable Diffusion, whether as independent contractors or otherwise. Again this evidence is not addressed in Mr Mostaque’s second statement.
- c. Furthermore, there is evidence to suggest that Mr Mostaque, who resides in London, may have been personally involved in developing Stable Diffusion, notwithstanding his evidence to the contrary. I note in particular the Defendant’s (and Mr Mostaque’s) statement to the court in what have become known for these purposes as the “**Hodes Proceedings**” (i.e. proceedings in the United States District Court Northern District of California San Francisco Division (case 3:23-cv-03481-MMC)), which describes Mr Mostaque as “a technology entrepreneur and one of the most recognised pioneers in generative artificial intelligence” and contends that from as early as May 2021 Mr Mostaque shared generative AI images with Mr Hodes (the plaintiff in the Hodes Proceedings) and posted publicly on Twitter (now known as “X”) about the development of generative AI, including in October 2021, November 2021 and May 2022. Whether these posts relate to Stable Diffusion or not (and it is impossible to say), this evidence potentially implies a more hands-on approach by Mr Mostaque than he has admitted to in his statements in these proceedings. Mr Mostaque responds in his evidence that the work reflected in these tweets was undertaken in his personal capacity, again seeking to distance himself from any involvement with Stable Diffusion. However, the Hodes Proceedings refer to “**Stability AI’s** generative imaging experiments” (not Mr Mostaque’s generative imaging experiments). This all raises a question, as Ms Lane submits, over whether Mr Mostaque may himself have been working on Stable Diffusion from the UK, including in conjunction with “The LAION guys” – “working with us” (**emphasis added**).

64. In addition, I accept the Claimants’ submissions that given the central importance of the question of whether any of the UK based team worked on Stable Diffusion, Mr Mostaque’s own evidence in his statements remains incomplete and continues to give rise to queries which cannot be determined on an application of this sort. In so far as he has given evidence about his investigations into UK employees on his development team (identified as a subset of a list of 38 employees and bearing job titles which could suggest that they worked on Stable Diffusion), he has not contacted any of those employees directly (but has done so only via his HR team or his lawyers). Having explained this procedure, he has not confirmed that responses were even received from each employee, let alone identified exactly how they responded. In other words, he has not explained the source of his stated “confidence” that none of these employees has worked on developing or training Stable Diffusion. Mr Saunders’ submission that his evidence is satisfactory because it sets out “the confirmations given” appears to me, on analysis, to be incorrect. I reject the Defendant’s submission that Mr Mostaque’s evidence as to these UK based employees is “clear” or definitive.

65. Had I permitted Mr Rombach's statement into evidence I would have observed that it is wholly insufficient to put the genie back into the box. It refers only to employees; it makes no mention of independent contractors, of "the LAION guys", the Russians or the Ukrainians. It does not descend into the details of the names, dates or locations of individual employees and would have carried little weight in all the circumstances. Whilst it would have remedied the absence of evidence from anyone admittedly involved in the development and training of Stable Diffusion, it would not have cleared up the issues to which I have already referred; it would certainly not have left me in a position where I could properly determine that the Claimants have no prospect of success on the Training and Development Claim at trial. Importantly, Mr Rombach's statement did not even attempt to explain exactly what the development and training of Stable Diffusion actually involved, evidence which, to my mind, is crucial background to a proper determination of the Location Issue.
66. In this context I also note Professor Farid's unchallenged evidence to the effect that the development and training of a generative AI model is a complex, iterative process requiring input from a team of individuals over a relatively long period of time. Whilst this tells me little about what the Defendant actually did, I accept that (absent challenge from the Defendant) it supports the real possibility (when seen in conjunction with the other evidence to which I have referred) that human intervention of one kind or another may have occurred through the Defendant's employees or independent contractors operating in the United Kingdom, whether at the stage of development or training.
67. I should add that I am not deflected from this view by the content of the LMU press release on which Mr Saunders relied in his responsive submissions, which records, as at 1 September 2022, that The Machine Vision & Learning Group led by computer scientist Bjorn Ommer "has developed one of the most powerful image synthesis algorithms in existence", a reference to the "new Stable Diffusion AI model". Although this press release goes on to say that "[t]he underlying algorithm was developed" by the Machine Vision & Learning Group, it also says "[i]n their project, the LMU scientists **had the support of the start-up Stability.Ai**, on whose servers the AI model was trained". The question of what this support involved and whether it went beyond providing access to its AWS cloud resources, lies at the heart of this application. It is not, however, a question that I can determine on a summary basis.

**(ii) Computer Resources**

68. The Claimants' evidence as to computer resources again appears, on close analysis, to raise legitimate (and relevant) factual questions which cannot be resolved without further investigation.
69. Professor Farid opines in his first report that the development of Stable Diffusion "may or may not have used AWS services and may have included using and evaluating data in the UK as well as moving data into the UK either on desktops or via other cloud services depending on where [the Defendant's] development team and their management was located". Professor Farid (quite properly) accepts that he cannot say where, or how, Stable Diffusion was developed but he observes that "it would have been possible to train the open-source version of Stable Diffusion on a desktop computer, and so it is feasible, and indeed likely (given the huge costs

involved in using the powerful cloud services) that a combination of local laptop/desktop devices and AWS cloud services was used to develop the model...”. Mr Saltsman rejects the proposition that the development of Stable Diffusion would have been more cost-effective if done on local machines and so rejects Professor Farid’s evidence, but he does not say in terms that local machines were not used in the development of Stable Diffusion and he was not, in any event, employed by the Defendant prior to May 2023. Mr Mostaque’s evidence is that the Defendant’s employees who accessed the AWS cluster to work on Stable Diffusion will have done so from local machines although he says those individuals were all outside the UK. However, given the holes in his evidence as to individuals who might have worked on Stable Diffusion, there appears to me to be a prospect, which is more than merely fanciful, that local machines were used during this process in the UK.

70. The list of computer assets produced by Mr O’Donoghue goes no further back than assets purchased in February 2022; it says nothing about any assets that may have been purchased by the Defendant prior to that date. Mr O’Donoghue says in his third statement that the Defendant’s assets do not include server racks containing GPUs and that the Defendant’s UK employees are not provided with standard laptops or high-powered workstations containing “expensive GPUs”. Professor Farid confirms in his second report that he cannot say what assets the Defendant may have had, but he reiterates the view expressed in his first report that “much of the early part of the development process would not have required the computing power offered by cloud services” (i.e. the AWS cluster) and that many of the standard laptops that the Defendant’s UK employees had “would have been suitable for the early part of the training and development of Stable Diffusion”, further that they “will have contained GPUs”. This evidence does not appear to be directly challenged and it is not addressed by Mr Saltsman’s evidence to the effect that his work on the AWS cluster involved the use of specialist GPUs. I note also that the Defendant does not challenge Professor Farid’s evidence that, from his own experience “it is common practice” for employees of technology start-ups to use their personal computers for work purposes. Whilst, of course, Professor Farid cannot say what resources the Defendant had, his evidence (when taken together with the evidence to which I have already referred) raises the genuine possibility that at an early stage of development and training, including when the Defendant was offering “support” to the LMU scientists, local UK computing resources may have been used by employees or independent contractors not yet addressed (adequately or at all) in the Defendant’s evidence.
71. In all the circumstances I cannot determine, as Mr Saunders’ invites me to do, that all of the evidence points solely to development and training taking place on the AWS cloud in the US.
72. Furthermore, and importantly in my judgment, there is unexplained evidence of data transfers to London from AWS in the United States:
  - a. Mr O’Donoghue identifies in his first statement that the AWS Billing Dashboard records a number of entries for data transfer services which have a description which contains reference to an AWS code associated with the Europe (London) region. The charge associated with these transfers is small (it is very slightly updated in his second statement) and confidential. Mr O’Donoghue has sought to investigate them with the assistance of a technical

employee of the Defendant who has not provided a statement. He says that following discussions with this employee and with Mr Saltsman he is “confident” that none of the transfers concerned data which was used by Stability for its training of Stable Diffusion, but he says that he has “yet to determine exactly what they relate to”.

- b. Mr O’Donoghue’s “confidence” that these transfers do not relate to data used by Stability for its training of Stable Diffusion is said by him to be justified because (i) none of Stability’s current (or former employees) involved in training Stable Diffusion are (or were) based in the United Kingdom – this is not definitive in light of my analysis above; (ii) the Defendant’s computing equipment located in the United Kingdom consists of standard laptops and PCs “without the high powered GPUs which are required for training large AI models such as Stable Diffusion” – this says nothing about development and nor does it address the evidence to which I have referred in paragraph 70 above. Finally, Mr O’Donoghue refers to confidential information, raising an issue about the relative size of the transfer. Professor Farid responds, making the point that the transfer relates to a not insignificant amount of data and that it could cover a large number of images (evidence which is not anywhere challenged by the Defendant). In his statement, Mr Saltsman explains that the transfers are between AWS data centres in the London region and three AWS data centres in the US; in other words, they are cloud to cloud transfers. Ms Lane submits that although this does not establish data being downloaded onto local computing devices, it does provide evidence of the transfer of data from the US into the UK and therefore potential evidence of copyright infringement by reason of a reproduction in the UK.

73. Pausing there, I have now addressed the evidence on which the Claimants seek to rely in putting forward their proposed amendments to paragraph 43. I agree with Ms Lane that these amendments provide a stronger factual premise from which to invite the court to draw the inference pleaded and I cannot determine that they have no real prospect of success. No criticism is made in respect of the way in which these proposed amendments are pleaded. Accordingly, I am prepared to grant permission for these amendments.

74. The matters to which I have already referred are, in my judgment, sufficient to determine that the Claimants have a real prospect of success on the Training and Development claim at trial. However, Ms Lane also relied upon conflicts of fact on the evidence, which I accept provide an additional reason why this claim is unsuitable for summary judgment; they are not conflicts which can be determined at this hearing.

75. I have already identified some of these conflicts, but I note in particular:

- a. That there is a significant issue on the evidence over when work on Stable Diffusion commenced. Mr Mostaque says it began in late May 2022 in his evidence, but Professor Farid’s (unchallenged) evidence is that, in his experience, a development period of 9 months “or more” to the final training stage is likely for software of this type. Potentially consistent with Professor Farid’s views, but inconsistent with Mr Mostaque’s evidence, is (i) the evidence in a tweet from Mr Mostaque dated 9 April 2023 in which he states

that it took “18 months” to create “an org...that can make models of all media types, produce cutting edge infra code for the RLHF etc and run one of the largest public supercomputers in the world on 50-100x less spend than others is impossible. Except we did it & will keep scaling”; and (ii) the evidence in a screenshot of an interview with Mr Mostaque uploaded to YouTube on 6 January 2023 in which Mr Mostaque says that “it kicked off probably about 14 months ago saying let’s do all the types of AI...from language models to... image and others”. If the latter is a reference to work commencing on image models in about October 2021, then it also appears at odds with Mr Mostaque’s statement that no one at the Defendant was working on image generation models in 2021. Whilst the tweet and interview may not be referring to Stable Diffusion, it is simply impossible at this juncture to say one way or the other; if they are referring to Stable Diffusion at the early stages of its development, then Mr Mostaque’s evidence in his statement is plainly inconsistent.

- b. There is also an issue on Mr Mostaque’s evidence arising from the interview to which I have just referred, which suggests that he was first contacted by Mr Rombach in February 2022 (rather than at the end of May 2022 as he says in his statement). This apparent inconsistency is not dealt with in Mr Mostaque’s second statement (and would not have been addressed by Mr Rombach’s statement either).
- c. I have already referred to the question-mark on the evidence over whether Mr Mostaque carried out work in a personal capacity or as a representative of the Defendant.
- d. Mr Saunders says, essentially, that these factual questions are merely peripheral issues, of no relevance to the central (and only) question of whether Stable Diffusion was developed or trained by individuals in the UK and that they should not carry any real weight in the face of two statements verified by statements of truth from Mr Mostaque. I disagree. To my mind they are issues which raise obvious question-marks over the credibility of Mr Mostaque’s evidence – evidence which it is essential the court should accept at face value if the Defendant has any hope of success on the SJ Application.
- e. Furthermore, the question of *when* work commenced on the development and training of Stable Diffusion feeds directly into the question of whether the Defendant’s evidence to the effect that there were no interventions from individuals working in the UK is complete, in the sense that it covers the whole of the relevant time period. Without knowing exactly what time period the court is dealing with (and what exactly the work involved – a point I have made earlier), it is impossible to determine that the Defendant’s evidence is complete or entirely accurate. Equally, the apparent inconsistencies between Mr Mostaque’s evidence and other available evidence casts doubt over the credibility of his statements generally. At this stage, it is impossible for the court to determine whether a witness will come up to proof at trial, and nor should it. Disclosure may establish that Mr Mostaque’s evidence is unimpeachable. However, the court cannot ignore evidence available on a summary judgment application which might suggest that a statement of truth



(confirming the truth of evidence which is central to the relevant factual issue) will be tested by cross examination at trial and may be found wanting.

- f. A rather separate issue arises in respect of confidential evidence which suggests, by reference to an AWS Migration Plan, that computing resources other than AWS cloud resources were being used by the Defendant prior to their migration to AWS. There appears to be no explanation from the Defendant of this evidence, but if it shows computing resources other than AWS cloud resources being used for the early stages of development or training of Stable Diffusion prior to migration to AWS cloud resources, then that would appear to be inconsistent with the Defendant's evidence to date and certainly requires investigation. Looking closely at paragraphs 7 and 8 of Mr Saltsman's evidence, I reject the suggestion by Mr Saunders that it was intended to, or does, address this point. In reply, Mr Saunders said on instructions that this migration was, in reality, all US based because the particular processors involved are US based; however, he accepted that there is no evidence from the Defendant to this effect. On a summary judgment application of this sort – providing (on instructions) evidence of potentially relevant facts is simply not satisfactory. It is another indicator that the Location Issue requires a much fuller investigation than can be undertaken on such an application.

76. Finally, Ms Lane relies upon issues in respect of which there are reasonable grounds for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to the trial judge relevant to the Location Issue. Once again, this follows on from many of the points I have already made, but I accept that in summary it is reasonable to assume that evidence will be available at trial to shed light on:

- a. the precise nature of the development and training of Stable Diffusion, including when it commenced and where it was carried out. Given the various inconsistencies and queries on the evidence that I have already identified, I would expect this evidence to provide more detail around both the Defendant's human resources working in the UK and its computing resources;
- b. the nature and purpose of the AWS transfers to London to which I have referred in paragraph 72 above;
- c. the computer resources available to the Defendant prior to February 2022;
- d. the nature and purpose of the migration that took place pursuant to the AWS Migration Plan;
- e. the arrangements between the Defendant and LAION for the use of LAION employees, whether employed by the Defendant or as independent contractors, the computing assets that they used and the location from which they worked;
- f. the arrangements between the Defendant and the "Russian" and "Ukrainian" programmers, their location and the computing assets that they used;

- g. the precise nature of the work done by each and every one of the Defendant's UK development team, including any interventions in respect of the training or development of Stable Diffusion.

77. I reject the Defendant's submission that these enquiries are unnecessary (essentially because the evidence is clear and there is no reasonable prospect of the factual position relating to the location of the training and development of Stable Diffusion changing further to such enquiries). For all the reasons that I have already given, I cannot determine that the Defendant's evidence is clear such that the Training and Development claim is manifestly unsustainable. I also cannot conclude, as the Defendant invited me to do, that a trial on the Location Issue would be "pointless and wasteful" or that, if the matter needs to go to trial, that should relate only to a limited subset of the Location Issue (as Mr Saunders submitted in his reply).

78. For all the reasons set out above, I am unable to conclude that the Training and Development Claim carries no degree of conviction and so has no real prospect of success. I dismiss the SJ Application in relation to this claim.

### **The Secondary Infringement Claim**

79. As developed in the Defendant's skeleton argument, the application in relation to the Secondary Infringement Claim raised a number of arguments. Ultimately, however, as Mr Saunders accepted in his oral submissions, it really stands or falls on one point of law, namely the true interpretation of the word "article" in sections 22, 23 and 27 of the CDPA. In particular, whether sections 22 and 23 CDPA are limited to dealings in "articles" which are tangible things or whether they may also encompass dealings in intangible things (such as making available software on a website).

80. The Defendant argues that there is no real prospect of the Claimants establishing at trial that an "article" is an intangible thing and so no real prospect of them succeeding in the claims of secondary infringement at paragraphs 52.4, 52.5, 53 and 54 of the Particulars of Claim. These paragraphs refer back to paragraphs 44-46, which in summary plead the launch of the Defendant's website through which it sells access to Dream Studio, thereby enabling users to generate images with Stable Diffusion, the availability of Dream Studio to users in the United Kingdom, and the fact that the Defendant also makes Stable Diffusion available to download on an open-source basis to third parties in the United Kingdom via GitHub.

81. Paragraphs 52.4 and 52.5 are in the following terms:

“52.4 As regards the acts identified above at paragraphs 44 to 46, importing into the United Kingdom, otherwise than for private and domestic use, an article, namely Stable Diffusion, which is and which the Defendant knows or has reason to believe is, an infringing copy of the Copyright Works or each or any of them, contrary to section 22 of the CDPA; and/or

52.5 As regards the acts identified above at paragraphs 44 to 46, possessing in the course of a business, selling or letting for hire, or offering or exposing for sale or hire, an article, namely Stable Diffusion, which is and which the Defendant knows or has

reason to believe is, an infringing copy of the Copyright Works or each or any of them, contrary to section 23 of the CDPA”.

82. Paragraph 53 pleads that “pending disclosure and/or evidence” the Claimants’ case that Stable Diffusion is an infringing copy of the Copyright Works is dependent either upon the fact (paragraph 53.1) that the making of Stable Diffusion constituted an infringement (i.e. the Development and Training Claim) or the fact that (paragraph 53.2) Stable Diffusion “has been imported into the United Kingdom” and by reason of the manner in which it was trained as set forth in paragraph 47 of the Particulars of Claim “its making in the United Kingdom would have constituted an infringement” of the copyright in the Copyright Works.
83. Paragraph 54 pleads particulars of knowledge, said by the Defendant in its skeleton argument to be insufficiently particularised, but not pursued at the hearing.
84. The key provisions of the CDPA are in the following terms:

“22. **Secondary infringement: importing infringing copy**

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

23. **Secondary infringement: possessing or dealing with infringing copy**

The copyright in a work is infringed by a person who, without the licence of the copyright owner-

- (a) Possesses in the course of a business,
- (b) Sells or lets for hire or offers or exposes for sale or hire,
- (c) In the course of a business exhibits in public or distributes, or
- (d) Distributes otherwise than in the course of a business to such an extent as to affect prejudicially the owner of the copyright, an article which is, and which he knows or has reason to believe is, an infringing copy of the work.

...

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.

...”

85. It is common ground that section 27(2) requires that the making of the article “constituted an infringement of the copyright in the work” which, pursuant to sections 1(2) and 178 (definition of copyright) must be taken as a reference to United Kingdom copyright and therefore to acts in the United Kingdom. It follows from this that the making of an article outside the United Kingdom is not within section 27(2). Thus, in so far as the Claimants rely upon section 27(2) in paragraph 53(1) of the Particulars of Claim, their claim of secondary infringement will be dependent upon the outcome of the Training and Development Claim and I am not concerned with that here.

86. Section 27(3), on the other hand, relates to an article made outside the United Kingdom which has been, or is proposed to be, imported into the United Kingdom. Such an article can also be treated as an infringing copy only if both of the conditions in 27(3) are met: to succeed, it is therefore essential that it either has been, or is proposed to be, imported. For the purposes of the Claimants’ claims under sections 22 and 23, the acts of importation, possession or dealing must be by the Defendant.

87. There is no relevant statutory definition of “article”. However, the Defendant’s case is that, on a true interpretation of the statutory provisions to which I have referred, an article can only be something which is capable of being “imported” (section 22); “possessed” (section 23(a)); “distributed” (section 23(c)-(d)) and “made” (section 27), i.e. a physical tangible thing. The Defendant’s skeleton notes that the only cases that counsel has been able to identify under sections 22 and 23 all concern physical tangible articles, such as pairs of shoes (*LA Gear Inc v Hi-Tec Sports plc* [1992] FSR 121); compact discs (*Springsteen v Flute International Ltd* [1999] EMLR 180) and football sticker albums (*FAPL v Panini UK Ltd* [2004] 1 WLR 1147).

88. The Defendant points out that it is settled law that abstract information is not property and cannot be the subject of a claim for detinue or conversion, relying in particular upon the following observations made by Floyd LJ in *Your Response Limited v Datateam Business Media Limited* [2014] EWCA Civ 281 at [42]:

“An electronic database consists of structured information. Although information may give rise to intellectual property rights, such as database right and copyright, the law has been reluctant to treat information itself as property. When information is created and recorded there are sharp distinctions between the information itself, the physical medium on which the information is recorded and the rights to which the information gives rise. Whilst the physical medium and the rights are treated as property, the information itself has never been.”

and by Arnold LJ in *Thaler v Comptroller General of Patents, Trade Marks and Designs* [2021] EWCA Civ 1374<sup>6</sup> at [125]:

“There are good reasons of principle and policy for this rule: it would have alarming consequences if there was property in information”.

89. Thus, submits the Defendant, whilst cases relating to whether there is property in information do not bind this court when it comes to the interpretation of sections 22 and 23 of the CDPA, those cases suggest that it is necessary to look to dealings in tangible property (goods or merchandise) which embody information when assessing the “article” for the purposes of secondary infringement. The Defendant contends that examples of this approach may be seen in *Sony Computer Entertainment Inc v Ball* [2005] FSR 9 and in *Wheat v Google LLC* [2018] EWHC 550 (Ch), to which I shall return in a moment.
90. Finally, the Defendant contends that this question of statutory construction is a straightforward question of law, that the Claimants have no real prospect of establishing that “article” includes intangible articles and that the point should be determined (whether in its favour or not) at this hearing.
91. Having considered all the arguments with care, I decline to take the course suggested by the Defendant. In essence I consider there to be good reasons to postpone to trial a decision on the true statutory interpretation of the word “article”.
92. First, I am not satisfied on the arguments that I have heard that the Claimants are bound to fail on this point. I say that for the following reasons:

*Sony v Ball*

- a. Contrary to the Defendant’s submissions, I do not consider that *Sony v Ball* provides the answer. In brief summary only, it was common ground in that case that a silicon chip was capable of being an article. However, a key question for the court was whether a chip that contained an infringing copy of digital data for only a small fraction of a second could be an article given its “ephemeral” state. It was argued that the chip could not be regarded as a “tangible substance” in such circumstances. Laddie LJ did not grapple with the question of tangibility. Rather, he held (at [15]) that there is nothing in the legislation to suggest that an object containing a copy of a copyright work, even if only ephemerally, is for that reason to be treated as not being an article. He went on to say “[o]n the contrary, the definition in s.27 points to the instant of making 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.”
- b. Where the judge simply did not address the argument as to whether the chip (or indeed the information it held) could be regarded as ‘tangible’, I do not agree with the Defendant that it is necessarily implicit in this reasoning that the information stored on the chip could not be an article, or indeed that an article is limited purely to “tangible” objects. The court only addressed the issue of whether the silicon chip was an article in circumstances where the life of the copy on the chip was of extremely limited duration. I reject the suggestion that it is possible to extrapolate from this decision the conclusion that an article must inevitably be a tangible thing.

*Wheat v Google*

- c. True it is that in *Wheat v Google*, the Chief Master expressed the view (at [48]) that “the acts referred to in section 23 CDPA are tangible acts of physical exhibition or distribution, not electronic transmission of information”, a view which appears supportive of the Defendant’s submission that an article can only be a physical tangible thing. However, as Ms Lane correctly points out, the hearing before the Chief Master concerned applications by the claimant (acting in person) to serve Google out of the jurisdiction. The Chief Master does not appear to have heard any detailed argument on this point – certainly he does not set any out – and he provides no reasoning in support of the view he has taken. He does not appear to have been invited to consider any authority or to engage in a textual or contextual analysis of the CDPA. Furthermore, he appears to have been concerned only with acts of “exhibition” and “distribution” and not with any of the additional acts of secondary infringement alleged in this case. In the circumstances, and with the greatest of respect to the Chief Master who appears to have received no assistance whatever on the point, I cannot attach any serious weight to his decision, which is not, in any event, binding on me.

*The full statutory context*

- d. I consider there to be two points about the statutory context which may potentially be relevant but in respect of which I have not heard full argument at the hearing and/or cannot determine that the Claimants are bound to fail.
- e. The first concerns the potential relationship between sections 22 and 23 and section 17 of the CDPA. It is clear from section 17(2) that reproduction of the copyright work (for the purposes of primary infringement) can be in any material form, including “storing the work in any medium by electronic means”. Ms Lane points out that there is no dispute for the purposes of the SJ Application that the making of Stable Diffusion involved reproducing the Copyright Works in a material form contrary to section 17 of the CDPA and she submits that this is of significance in the context of construing the meaning of “infringing copy” in section 27 and “article” in sections 22, 23 and 27. At first blush, I tend to agree, not least because in *Sony v Ball*, Laddie LJ appears to have taken the approach (at [16]-[17]) that when identifying an infringing copy for the purposes of section 27, it is necessary to have regard to what may be an infringing copy for the purposes of section 17. In particular, he observed that “[i]t would produce an unwarranted inconsistency in the [CDPA] were that material form [i.e., the chip containing the reproduction of the copyright work] not to be considered an article for the purpose of s.27”.
- f. Ms Lane referred me to a post Brexit EU authority to the effect that storage in a medium by electronic means can include cloud storage (see *C-433/20 Austro-Mechana Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte GmbH v Strato AG* [2022] ECDR 10 at [15]-[18]), submitting (by reference to *Warner Music UK Ltd v TuneIn Inc* [2021] EWCA Civ 441 at

[90]-[91] per Arnold LJ) that this judgment is highly persuasive, albeit not binding.

- g. Mr Saunders initially suggested in response to a question from me, that a “medium” (as identified in section 17) is similar to an “article”, albeit that he did not appear to maintain that point. He acknowledged that he had not focussed on section 17 in connection with the interpretation of sections 22 and 23 of the CDPA and indicated that he might wish to come back to the point. However, despite Ms Lane dealing with the point in some detail, Mr Saunders did not revisit it, and (although the Defendant sought to distinguish between primary infringement in section 17 and secondary infringement in sections 22 and 23 of the CDPA in its skeleton argument) I have no clear explanation from the Defendant as to why section 17 is not an important and potentially relevant part of the contextual analysis. Albeit in a slightly different context, Mr Saunders showed me a passage from the decision of the Competition Appeal Tribunal in *Umbrella Interchange Fee Claimants v Umbrella Interchange Fee Defendants* [2023] CAT 49, in which the Tribunal decided (for detailed reasons) not to follow existing EU law. Mr Saunders acknowledged that he could not possibly invite me at this hearing (in so far as it may be relevant) to determine whether this court should follow post Brexit EU authority.
- h. The second arises by reason of a point made by Ms Lane in her oral submissions but which did not appear in the Claimants’ skeleton argument or its supplemental skeleton. Ms Lane took me in some detail to section 27(6) of the CDPA which provides that an “infringing copy” will include “a copy falling to be treated as an infringing copy” by virtue of a variety of other sections of the CDPA (introduced by way of amendment), there identified. She submits, correctly, that an essential part of the exercise of statutory construction is the consideration of the relevant words or phrases in their statutory context. She points to various provisions in these other sections which she submits (i) cast light on the meaning of “infringing copy” and, in particular, suggest that an “infringing copy” can include an “electronic” copy and, thus, an intangible copy; and (ii) suggest that not all of the secondary acts of infringement in section 23 are acts which must necessarily be associated with a tangible article – e.g. the act of selling or letting for hire.
- i. In his reply, Mr Saunders (who had not previously been alerted to this point and was obliged to deal with it “on his feet”) dealt with it only briefly. In essence he submitted that the Statutory Instruments that introduced the amendments to the primary legislation cannot have been intended to affect the true construction of existing provisions. However, he was unable to say whether there is any authority about the extent to which one can refer to later amendments to a statute to construe a pre-existing provision. This caused me at the time to observe that the matter did not appear to be straightforward and to express concern that the court did not have the material it needed to decide the issue. Mr Saunders responded that his primary position was that the argument had been raised too late and that he had not had an opportunity to look at it.

- j. Be that as it may, it appears to me that it would be unsafe finally to decide an important point of statutory construction in such circumstances. Whatever the rights and wrongs of the Claimants raising this argument at the eleventh hour, it has been raised and the Defendant was not in a position fully to deal with it at the hearing. Mr Saunders continued to suggest that the sections to which I was taken by Ms Lane cannot possibly be relevant to the interpretation of the words “infringing copies” or “article”, but I am not satisfied on the limited argument that I have heard that the Claimants have no real prospect of arguing successfully to the contrary at trial.

*The authorities as to information not being property*

- k. I need say little about these beyond agreeing with Ms Lane that the authorities on which the Defendant relies are not directly relevant to the issue of construction that I am asked to determine. This was not disputed by Mr Saunders.
93. Second, and following on from the points I have already made, this argument appears to me to raise a novel question, not definitively determined previously, which would be better resolved once all the facts have been ascertained at trial rather than upon the necessarily abbreviated and hypothetical basis of pleadings or assumed facts. I reject the suggestion by the Defendant, for reasons I have given, that the point was effectively determined in *Sony v Ball* and I also reject the suggestion that it is safe to rely on the decision in *Wheat v Google*. The question of whether an “article” for the purposes of sections 22 and 23 of the CDPA can include an intangible article, has not to my mind been previously argued in detail or decided by this court. It is not straightforward and it arises in connection with a case of secondary infringement involving internet downloading, which (with the exception of *Wheat v Google*) has not previously been considered. In my judgment it would be infinitely preferable for the court to make findings of fact as to the precise nature of the acts said to give rise to the secondary infringement (for example precisely how Stable Diffusion has been imported into the UK) before going on to consider the legal question.
  94. Third, I note Ms Lane’s submission that there are good policy reasons why “article” should be read as meaning both tangible and intangible articles. She points out that on the Defendant’s construction, there would be an infringing copy and secondary infringement if the Defendant had brought a copy of Stable Diffusion into the UK on a memory stick but, because of developments in technology which mean this can now be achieved via a cloud-based service, there would be no infringement. Whilst I make no decision on the impact of this point (which was not accepted by Mr Saunders who maintains, essentially, that if Parliament had intended to include intangible information within the meaning of “article” it would have made that clear), it is yet another factor which appears to me to support the decision I have reached.
  95. For all the reasons given, I dismiss the SJ Application in relation to the Secondary Infringement Claim and decline to decide the point of law identified by the Defendant. That point of law must be decided by the trial judge upon full and comprehensive argument from both sides and further to factual findings as to the nature of the acts said to give rise to the secondary infringement.



## The Claimants' Amendment Application

96. The Claimants' Amendment Application seeks to introduce a new case in respect of an image-to-image feature which enables Stable Diffusion to generate a synthetic image output in response to an image uploaded by a user (either with or without a text prompt). The user is able to determine how closely the synthetic image output matches the image prompt by the use of an "image strength" slider, with the maximum image strength and/or values approaching the maximum image strength providing images which comprise the whole, or a substantial part, of the image prompt.
97. The amendment sought introduces claims of copyright infringement, database right infringement, trade mark infringement and passing off, in relation to the image-to-image feature. The relevant paragraphs are 50A-50B.3 of the draft Amended Particulars of Claim:

"50A. From a date unknown but since at least in or around March 2023 the Defendant introduced an image-to-image feature which enables Stable Diffusion to generate a synthetic image output in response to an image uploaded by a user (either via Dream Studio or via a copy of Stable Diffusion downloaded from GitHub or via commercial offerings using Stable Diffusion), either with or without a text command. The user is able to determine how closely the synthetic image output matches the image prompt by the use of an "image strength" slider, with the maximum image strength and/or values approaching the maximum image strength providing images which comprise the whole or a substantial part of the image prompt.

50B. Accordingly, when a user provides an image prompt (either via Dream Studio or via a copy of Stable Diffusion downloaded from GitHub or via commercial offerings using Stable Diffusion) comprising one of the Copyright Works or the Visual Assets and uses the maximum image strength or a value approaching the maximum image strength (the precise value to be identified by way of disclosure and/or evidence), the synthetic image output comprises the whole or a substantial part of the Copyright Work or Visual Asset. Pending the provision of disclosure and/or evidence, the Claimants rely upon the following facts and matters:

50B.1. In the case of Stable Diffusion downloaded from GitHub, the image strength is a value between 0.0 and 1.0 that controls the amount of noise that is added to the image prompt. As explained in the guidance on the GitHub website (a copy of which is attached hereto at Annex 8A) values that approach 1.0 allow for lots of variations in the synthetic image output by removing all pixel-based information. By contrast, values that approach 0.0 (i.e. the maximum image strength) result in a synthetic image output that reproduces the whole or a substantial part of the image prompt.

50B.2. When an image is uploaded by a user, it is first converted into noise, and this noise pattern is used as an input to the image synthesis process. Thus, the image-to-image feature uses both Stable Diffusion and the pixels of the user-supplied, uploaded image.

50B.3. Copies of synthetic images that were generated in response to image prompts

comprising a Copyright Work or Visual Asset, together with the image strength indicated, uploaded via a copy of Stable Diffusion downloaded from GitHub are attached hereto at Annex 8B”.

98. Cross-references to these paragraphs then appear in amended versions of paragraphs 52.2, 52.3 and 55.2 making express the plea of copyright infringement (by communication to the public or by authorising acts of reproduction or communication to the public, contrary to sections 16(2) and 20 CDPA) and database right infringement (by re-utilising a substantial part of the contents of the Database). Additional amendments to paragraphs 33 and 39 plead that the use of Stable Diffusion to generate synthetic images in response to image prompts commenced on “a date unknown but since at least in or around March 2023”.
99. The Defendant opposes these proposed amendments on two grounds: first that they have no real prospect of success and second that they are inadequately particularised.

### **The relevant principles**

100. The court has a broad discretionary power to grant permission to amend pursuant to CPR 17.3. The principles applicable to amendments are not in dispute. They were summarised by Carr J in *Quah Su-Ling v Goldman Sachs International* [2015] EWHC 759 (Comm) at [36]-[39], albeit primarily in the context of late amendments, and by Lambert J in *Pearce v East and North Hertfordshire NHS Trust* [2020] EWHC 1504 (QB) at [10]. In short, and drawing upon the test for summary judgment, if amendments are to be permitted they must have a realistic prospect of success and carry a degree of conviction; it is not enough that the amendment is merely arguable (see *Kawasaki Kisen Kaisha Ltd v James Kimball Limited* [2021] EWCA Civ 33 per Popplewell LJ at [18(1)]). The court is entitled to refuse an amendment which raises a version of events “which is inherently implausible, self-contradictory or is not supported by contemporaneous documentation” (see *Collier v P&MJ Wright (Holdings) Ltd* [2007] EWCA Civ 1329). The pleading must be coherent and properly particularised (see *Kawasaki* at [18(2)]).
101. The overriding objective is of “central importance”; thus amendment applications will always involve the court striking a balance between injustice to the applicant if the amendment is refused and injustice to the opposing party and other litigants in general if the amendment is permitted.

### **Decision**

102. This was the final application to be heard by the court and was argued more sparingly than the other two applications. However, it became clear during the course of argument that the Defendant’s objections to the Original Proposed Amendments were something of a moveable feast. The Defendant’s skeleton argument focussed on reasons why they were “fundamentally unclear” (many of which have since fallen away) and devoted only two paragraphs in a 48 page skeleton to the argument that the Original Proposed Amendments disclose no real prospect of success – effectively on the grounds that the Claimants have accepted that they generated the synthetic images in Annex 8B themselves such that it cannot be said that there was any act of infringement without the Claimants’ consent. However, I did not understand this

point to be maintained at the hearing. Instead, the Defendant's oral submissions took a rather different form, as I set out in more detail below. This was unfortunate, because it meant that new points were developed at some speed by Mr Saunders on his feet and had to be responded to in the same manner (and without notice) by Ms Lane.

103. Doing the best I can to make sense of the arguments as they developed, the Defendant's key argument appears now to be that when a copy of Stable Diffusion is downloaded by a user from GitHub with a view to then entering the image prompt, it is in fact the user who brings about the copying (i.e. by voluntarily entering into Stable Diffusion a Copyright Work that the user has downloaded from the Getty Images Websites) and not the Defendant. If the image strength slider is fixed to produce maximum image strength, or values approaching the maximum image strength (as the Original Proposed Amendments assume at 50A) then the output image is obviously very close to the image that has been entered – this, says the Defendant, “is no more than an allegation that you end up with what you started with and has little to do with the Defendant's software” because the generational process has been dialled down to the lowest possible setting. Furthermore, the download of Stable Diffusion to GitHub takes place on the user's own computer and the software then responds to instructions from the user. This, says the Defendant, cannot possibly amount to infringement on the part of the Defendant; it is taking place locally and cannot therefore amount to a communication to the public.
104. If, on the other hand, Stable Diffusion is accessed via Dream Studio, then while the Defendant accepts that there is no local download (because the image will be uploaded onto the Dream Studio platform), the Defendant says that it is very difficult to see how it is doing anything more than providing a service by making the Dream Studio platform available – i.e. it is acting merely as an intermediary or host in the sense that there is no active behaviour on its part. Furthermore, the Defendant says that the claim involving Dream Studio is arbitrable under the Dream Studio terms of service and is not within the court's jurisdiction.
105. The Defendant makes similar points in relation to the database right infringement claim, asking rhetorically in oral submissions how an image entered by a user can involve an extraction of the Database by the Defendant.
106. The Claimants respond that the Original Proposed Amendment is clear that although the original image will have been obtained by the user and is then entered into the Stable Diffusion software (just as the text prompt is entered by the user) the synthetic output in the form of an image is the result of differing levels of corruption by noise; it is this output that has been authorised, and communicated to the public, by the Defendant, regardless of whether the user has accessed Stable Diffusion via Dream Studio, by downloading a copy from GitHub or via commercial offerings using Stable Diffusion. The Claimants point to Professor Farid's evidence as to the way in which the synthetic image is created, which is unchallenged. As for the additional point made in relation to Dream Studio, the Claimants say that although they have referred to Dream Studio in the Original Proposed Amendments, and although the pleading is obviously intended to apply to any version of Stable Diffusion, howsoever offered, the particulars that they have chosen to provide relate to GitHub, thereby avoiding the jurisdictional issue which it is accepted arises in relation to Dream Studio.

107. Ms Lane explained during her submissions that, although not directly relevant to the question of whether the image-to-image case has a real prospect of success, the vice in respect of which the Claimants are seeking protection is more than merely hypothetical. Ms Lane points out that Stable Diffusion can provide a means by which a user can obtain an image that is almost exactly the same as a Copyright Work but without being required to pay for it, thereby facilitating unfair competition with the Claimants' Copyright Works which have involved acts of intellectual creation.
108. Having regard to the arguments as they were presented in court, I consider that the image-to-image claim as pleaded (and subject to the additional points I raise below) has a real prospect of success and that, having regard to the balancing exercise to which I have referred, it is plainly a claim that should go to trial. My reasons are as follows.
109. The claim of copyright infringement as advanced is based on more than the Defendant merely acting as intermediary, or host (cf. *Google France SARL v Louis Vuitton Malletier SA* C-236/08 EU:C:2010:159 at [55]-[58] in the context of trade mark infringement). As is pleaded in 50B.2, and as is confirmed by Professor Farid, an image which is entered into the Stable Diffusion software is ingested into the model, is pixelated, made into a noisy image and is then used to create part of the output. In other words, the software is reacting to, and engaging with, the image that is entered by the user, thereby undertaking a process which leads to the generation by the software of output in the form of an image. This factual case, which is said to apply regardless of whether the image strength is set to a value that allows for lots of variations in the synthetic image output or whether it is set to a value approaching the maximum image strength, is not challenged by the Defendant.
110. Upon close analysis of the technology at trial, the factual position may prove to be different. It may be possible to establish that, as Mr Saunders submits, the user who inputs the image (particularly where the image strength slider is set to produce a maximum image strength) is "doing the interaction" and that Stable Diffusion is really playing an immaterial part. However, I cannot possibly determine that factual technical issue at present and I note that in its skeleton argument the Defendant was unable to go further than to say that its software "has little to do" with the creation of the output image, a tacit admission that it at least has something to do with it. Resolution of this issue will require the court to hear detailed evidence as to the workings of the Stable Diffusion software, including the extent to which (if at all) the positioning of the image strength slider affects the way in which the software functions. For the purposes of the amendment application, I certainly cannot determine at this stage that the claim as pleaded has no real prospect of success.
111. Furthermore, the points I have made at 109 and 110 above appear to me to place this claim (at least on the facts as presently pleaded) in very similar territory to the text-to-image claim. Where there is no challenge to the text-to-image claim and it is accepted by the Defendant that that claim must go to trial, I agree with Ms Lane that it would be rather odd if the court were to find itself in a position where it could not also determine the image-to-image claim, which relies upon the same technology and a very similar mechanism for generating images – the only difference being the nature

of the prompt required for the generation of the image. I disagree with Mr Saunders that the proposed amendments necessarily concern a “fundamentally different kind of case”, or, at least, that that is a conclusion that the court is able to reach at this stage.

112. As for the question of whether the “local” nature of the activity (when there is a downloading of Stable Diffusion from GitHub onto a user’s personal computer) negates any prospect of the Claimants establishing a case of infringement, the Claimants say that they have a sufficiently arguable case of (i) communication to the public (which they say includes communication to a “new public” in the form of users; i.e. not the public that the Claimants originally intended to have access to its Copyright Works) together with (ii) authorising reproduction by users. In this regard:
  - a. as for the issue of communication to the public, Ms Lane correctly points out that Mr Saunders only raised concerns over this pleading for the first time on his feet, that there is a substantial amount of complex case law on communication to the public (none of which had been relied upon by the Defendant until Mr Saunders sought to rely in his oral reply upon an authority that had been included in the bundle for a different purpose<sup>7</sup>) and that it has never previously been suggested by the Defendant that the Claimants cannot establish a real prospect of success in relation to communication to the public. No such case is advanced in respect of the allegations of primary infringement involving the text-to-image prompt, notwithstanding that exactly the same point (if correct) could presumably have been made on the SJ Application. In all the circumstances, I cannot conclude that the Claimants have no real prospect of success on this point. If this was a serious argument, I would have expected it to be identified well in advance of the hearing so that both sides could prepare to take the court to the relevant case law. As it is, the court has little more than a bare assertion from the Defendant that communication to the public cannot include the users with which this claim is concerned, notwithstanding its apparently inconsistent stance in not seeking to challenge the issue of communication to the public in connection with the text to image claim in its SJ Application.
  - b. As for the issue of authorising reproduction by users, I did not understand Mr Saunders to suggest that this plea in itself failed to give rise to an arguable case.
113. Given that the Claimants say that every version of Stable Diffusion that is distributed to UK users is infringing, whether it is via Dream Studio or GitHub, I do not consider there to be any reason for present purposes to require particulars of the claim in so far as it concerns Dream Studio prior to granting permission. Particulars in relation to downloads via GitHub should suffice. Accordingly, the jurisdictional issue raised by the Defendant takes matters no further.
114. The claim of database right infringement, as I understand it, raises the same issues; certainly the parties did not address me by way of any different arguments. In focussing upon the “extraction” of the Database, the Defendant appears to have overlooked the fact that this claim is pleaded (in this context) at paragraph 55.2 of the original Particulars of Claim as involving the re-utilisation of a substantial part of the contents of the Database. This plea was originally the subject of the RFI which

prompted clarification from the Claimants to the effect that the re-utilisation involved the provision of access to Stable Diffusion. Ms Lane explained this during her submissions on the RFI Application as re-utilisation by doing the acts pleaded in paragraphs 44-46 and 48 to 49 of the PoC, in other words these were the acts by which the Database was made available to the public. I did not understand Mr Saunders to pursue his request for further particulars in relation to this, or indeed to maintain that this plea should be struck out. There is no reason to suppose, given the analysis I have set out above, that a different position pertains to the database right infringement claim now that the cross reference to paragraphs 50A and 50B has been included in paragraph 55.2 of the Original Proposed Amendments and accordingly I reject the Defendant's case that this claim has no real prospect of success for all the reasons I have identified in connection with the copyright infringement claim.

115. For the sake of completeness, I record that:

- a. the Defendant dropped its complaint that no particulars have been given as to the sample images in Annex 8B in light of the fact that particulars have now been provided in the second statement of Mr Rose. I accept Mr Saunders' submission, however, that those particulars should now be reflected in the amended pleading.
- b. the Defendant accepted that its criticism of the wording used in 50B.3, in particular the use of the word "uploaded" to refer to the entry of an image into Stable Diffusion, could be sensibly addressed by replacing the word "uploaded" with the word "entered". Once again, this should be reflected in the amended pleading.
- c. there is no basis to refuse the application to amend on the grounds that the phrase "commercial offerings" is unclear, as submitted by the Defendant in its skeleton argument. This was a phrase used in paragraph 46 of the original pleading; no CPR Part 18 request was made in respect of it and it has now been explained in court as the provision of Stable Diffusion to third parties who are free to use it in any way they wish. Once again, I consider that this should be made plain on the face of the amended pleading. I should add that although Mr Saunders suggested for the first time in oral submissions that the reference in paragraph 50A to making Stable Diffusion available "via commercial offerings" could not possibly have a real prospect of success, this point was barely developed and was not raised in connection with the existing plea at paragraph 46 of the Particulars of Claim. In particular, he did not explain how or why the Claimants have no real prospect of establishing their plea of authorising reproduction by users in connection with this form of distribution. I am not going to refuse permission to amend on the basis of points raised at the eleventh hour in submissions which were not properly developed and in respect of which the Claimants had no proper opportunity to respond. That is particularly so given that, if the point has merit, it could also have been raised on the SJ Application, but was not.

**What Order should be made on the Applications?**

116. Prior to circulation of a draft of this Judgment to the parties, I have determined the final issues arising in relation to the Order and my reasoning in relation to those matters is set out in the early part of this judgment.
117. For reasons set out above, I intend to dismiss the SJ Application and permit the amendments to the Particulars of Claim identified in this judgment subject to sight of a final draft Amended Particulars of Claim dealing with the additional points I have raised.
118. Accordingly, I invite the Claimants to produce a final form of Amended Particulars of Claim for review in advance of the consequential hearing. In light of my judgment, I do not expect the terms of the Amended Particulars of Claim to be controversial.

Footnotes:

1. The Sixth Claimant is included as a representative party of the parties that have concurrent rights of action with the First Claimant under ss 101 and 102 CDP 1988, pursuant to CPR 19.6. The Defendant reserves its position as to the way in which this representative claim is put, but it was not a live issue at the hearing.
2. After the hearing there was a dispute between the parties over the terms of the order reflecting this agreement. The Claimants were concerned that the Defendant was seeking in the draft order to preserve its position to argue later that it would be entitled to disclosure relating to the exercise undertaken by the Claimants to produce the example synthetic outputs for the purposes of responding to the RFIs. This would not have reflected the concession the Defendant made at the hearing and I do not consider that it is now in a position to try to resurrect any such entitlement. However, my understanding of the Defendant's position in light of further short written submissions is that it takes the view that any decisions concerning experiments and disclosure going beyond the process required for the purposes of responding to the RFI Application will be matters for the CMC at a later stage. This does not appear to me to cut across its concession made at the hearing. The final Order dated 1 November 2023 but sealed on 23 November 2023 reflects these points.
3. A second dispute arose after the hearing as to the scope of an Amended Annex 8 to be provided by the Claimants which will include examples of the synthetic output relied upon using a prompt. At the hearing, the Claimants indicated that they would provide examples in relation to text prompts which "are not exactly the Getty Images caption". However, the Defendant then stated that if the Claimants are seeking to maintain a case that the use of different words nevertheless prompts infringing output "it would be helpful to have an example of that". I understood this to be accepted by Ms Lane, albeit that the transcript does not record her physical acknowledgment. Accordingly, the Order reflects the requirement to provide examples using a prompt which is not the whole of a Getty Images Caption, but also adds the requirement (in so far as the Claimants seek to maintain a case that words other than words used in the Getty Images Caption prompt the production of infringing output) to provide an example of the same.
4. A third issue arose between the parties on the draft Order following the hearing as to the scope of the Claimants' agreement in this regard. I understood it to be the case that the Claimants were confirming at the hearing that they did not advance a positive case arising by reason of the decision in *Louboutin v Amazon*. I did not understand them to be accepting that they could never again refer to that case in the context of, for example, responding to any pleading from the Defendant. I amended the draft Order to reflect this position. Given the extent to which the parties have disagreed on numerous issues in these proceedings, I do not consider that this is an issue that should be left to be addressed, if necessary, by reference merely to the transcript of the hearing.
5. Contrastive Language-Image Pre-training
6. I understand this case to have been heard on appeal in the Supreme Court, albeit not on this point.
7. *Warner Music UK Ltd v Tunein Inc* [2021] RPC 11 per Arnold LJ at [70]. The summary of CJEU case law in this paragraph runs to 15 sub-paragraphs. What appears from the summary is that 'communication to the

public' must be interpreted broadly and, further, that determining whether there has been a communication to the public requires an individualised assessment based on various different factors, including the factual circumstances in which the works have been made available to recipients together with the number of persons who have had access to the works. Assuming these to be relevant factors under domestic law, they will be matters for evidence at trial; I cannot see how I can be satisfied by reference purely to this authority that there is no real prospect of the Claimants succeeding on the image-to-image claim. Further and in any event, I note that paragraph [70] is not part of the *ratio* of this decision – neither Rose LJ, nor Sir Geoffrey Vos MR agreed with it at paragraphs [181] and [191] respectively and neither of them considered it helpful to provide such a summary where it was unlikely to be valid for long and where the restatement of CJEU principles in domestic judgments were not strictly on point. To my mind this merely serves to emphasise that this court is in no position to determine that the Claimants' case of communication to the public has no prospect of success.