

ENGLAND AND WALES / JUDGMENT

Trustees of the AFM and SAG-AFTRA Intellectual Property Rights Distribution Fund & Ors v The Secretary of State for Science, Innovation and Technology

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Neutral Citation Number: [2025] EWHC 3262 (Ch) Case No: Claim No IL-2022-000132 IN THE
HIGH COURT OF JUSTICE BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
INTELLECTUAL PROPERTY LIST (ChD) Rolls Building Fetter Lane, London, EC4A 1NL 11
December 2025 Before: MR JUSTICE RICHARDS MASTER BRIGHTWELL

- ----- Between: TRUSTEES OF THE AFM AND SAG-AFTRA
INTELLECTUAL PROPERTY RIGHTS DISTRIBUTION FUND (as listed in the continuation
sheet to the claim form) & OTHERS Claimants/ Respondents
- AND – THE SECRETARY OF STATE FOR SCIENCE, INNOVATION AND TECHNOLOGY
Defendants/ Applicant
- -----
- ----- Martin Howe KC and Jaani Riordan (instructed by Reed Smith LLP)
for the Claimants/Respondents Ewan West KC, Ravi Mehta and Will Perry (instructed by
Government Legal Department) for the Defendants/Applicant James Segan KC (instructed by
Seddons GSC LLP) for Phonographic Performance Limited (intervening) Hearing dates: 5
November to 6 November 2025
- ----- Approved Judgment This judgment was handed down remotely at
10.30am on 11 December 2025 by circulation to the parties or their representatives by e-mail
and by release to the National Archives. Mr Justice Richards and Master
Brightwell: 1. This is our joint judgment on a number of issues arising at
the Costs and Case Management Conference (the CCMC). This judgment should be read
together with the earlier judgment of Richards J reported at [2025] EWHC 1944 (Ch) (the July
Judgment). We will assume that any reader of this judgment is familiar with the matters
described in the July Judgment. Unless we specify otherwise, terms defined in the July
Judgment have the same meaning in this judgment. 2. The following issues were before us at
the CCMC: i) ii) whether to permit claims by C9-C12 to go ahead as representative claims
under CPR 19.8 (the CPR 19.8 Issue); whether to adjourn the trial which is presently fixed to
take place in a window beginning in March 2026 (the Adjournment Issue); iii) whether to

permit PPL to intervene by making written submissions on a particular issue (the Intervention Application); iv) a few issues relating to disclosure (Disclosure Issues); v) some issues arising out of the parties' cost budgets (Costs Budgeting Issues); vi) the costs of the various applications determined in the July Judgment, which have been reserved (Reserved Costs Issues). During the CCMC itself, we decided that we would adjourn the trial and gave oral reasons for doing so. We gave brief oral reasons for our decision on the Disclosure Issues. We indicated that Reserved Costs Issues would remain reserved pending the release of this judgment. We also said that we would allow the Intervention Application with reasons to be set out in this judgment. Following the CCMC, it is not clear whether any judgment is needed on Costs Budgeting Issues and, if it is, it will be given separately. It follows that this judgment focuses on the CPR 19.8 Issue and the Intervention Application. 3. 4. PART A – THE CPR 19.8 ISSUE 5. 6. 7. C9 to C12 seek to bring claims for Francovich damages in a representative capacity under CPR 19.8 on behalf of approximately 30,000 US Performers (a group of non- featured performing musicians and vocalists with some connection to the US) who, they say, have suffered loss as a consequence of the UK government's defective implementation of the Directive. At the time of the July Judgment, the SoS was advancing a number of arguments as to why the CPR 19.8 procedure was inherently unsuitable for these claims. Richards J rejected many of those arguments in the July Judgment. However, he concluded that there was real force in the SoS's argument that a need for an "individual assessment of damages" of the claims of each US Performer made those claims unsuitable for the CPR 19.8 procedure. At [70] of the July Judgment, he listed a number of issues that he considered needed to be resolved before the court could be satisfied that the CPR 19.8 procedure was appropriate. At [72] he emphasised that these were not necessarily the only such issues. Given the presence of those issues, he considered bringing to an end the ability of C9 to C12 to bring representative claims under CPR 19.8 but, on balance, decided to give them a further opportunity to address the issues. He said at [72]: If the court is to allow these claims to progress as representative claims under CPR 19.8, the court will need to see firm and workable proposals that deal with all practicalities. In essence C9 to C12 say that they have now presented the necessary workable proposals. The SoS says that they have not and that the representative claims should finally be brought to an end. Before considering those competing arguments, it is necessary to recap various aspects of the proposed representative claims under CPR 19.8 and to update that analysis by reference to further evidence that is available on PPL's processes. The class definition and the role of PPL 8. C9 to C12 seek to bring representative claims on behalf of a class described in paragraph 15 of their Amended Particulars of Claim (APOC) as follows (see [45] of the July Judgment): ... (respectively) the other members of AFM and of SAG- AFTRA and on behalf of the estates of deceased members. Such claim extends to all exploitation in the United Kingdom of any sound recording which includes a performance by at least one member of AFM and/or SAG-AFTRA and for which that member (or his or her estate) has not received equitable remuneration in the United Kingdom. In these Particulars of Claim, the expression "the Claimants" is used to refer collectively to the named Claimants, to the other members of AFM and of SAG-AFTRA and to the personal representatives of their estates,

and the term “US Performers” is used to refer to all members (including deceased members) represented by AFM and by SAG-AFTRA who: 15.1 have given a performance in the United States which has been incorporated in a published phonogram; or 15.2 have had a performance (given in the United States or elsewhere) incorporated in a phonogram which was: (a) published by a producer who is a United States national or resident; or (b) first (including simultaneously) published in the United States; or 15.3 are or were at the material time United States nationals or residents... 9. Central to that claim for damages is the undisputed fact that domestic UK law provides performers falling within paragraphs 15.1 to 15.3 of this definition with only a “limited entitlement” to equitable remuneration (see [18] of the July Judgment). That is a “limited entitlement” because it means that only certain types of exploitation of phonograms incorporating a performance by such performers, give rise to an entitlement to equitable remuneration. In her First Witness Statement on behalf of the Fund, Ms Cynthia Sanchez was able only to mention “Digital Non-Interactive Exploitation”, a limited category of digital transmissions that includes satellite radio, as a type of exploitation in the UK that would entitle those performers to equitable remuneration. This “limited entitlement” can therefore be understood also as “no entitlement” to equitable remuneration in relation to certain types of exploitation in the UK.

10. C9 to C12 seek Francovich damages calculated by reference to the difference between the “limited entitlement” which US Performers obtain under domestic UK law and the “full entitlement” (see the July Judgment at [18]) that they say they would have had if the UK had complied with its obligations under EU law. On the face of it, and without prejudging C9 to C12’s arguments as to how the process might be adapted to obviate, at least in part, the need for an individual assessment of damages, quantifying that claim would therefore involve: i) ii) iii) identifying, for each performer falling within paragraphs 15.1 to 15.3 of the APOC, performances given by that person which have been recorded in a phonogram which has been exploited in the UK, but for which that person has received no equitable remuneration; calculating the equitable remuneration that those persons would have received if it had been calculated on the basis of full entitlement; determining the difference between the amount of equitable remuneration received in respect of performances in paragraph i) (necessarily zero) and the amount in paragraph ii) to calculate the loss which C9 to C12 assert has been suffered by the class.
11. The process we describe in paragraph 10 would represent an amalgamation of a large number of individual assessments of damage. However, it is important to emphasise the significant role that all sides accept that a uniform process, involving PPL, could play in calculating any damages due. The process by which PPL collects equitable remuneration in respect of UK exploitation of phonograms featuring performers represented by overseas CMOs is described at [25] to [30] of the July Judgment.
12. To describe that process as “automated” would risk understating the hard work of those at PPL and the CMOs who are involved in it. However, it has evolved to be reasonably streamlined and to require little ongoing input from performers. Put very simply, PPL has

data on the exploitation of phonograms in the UK. It also receives income from licensing the right to broadcast or communicate music in the UK. CMOs hold data on their members including as to which members have given performances on which tracks. Each year PPL and the CMOs, whether in the UK or overseas, share information with each other with a view to working out what share of PPL's licensing income should be allocated to each performer represented by a particular CMO in respect of exploitation of phonograms in the UK. The result of this iterative process is to produce a large bank of data to which we refer as "PPL Data" even though it is to an extent shared between CMOs and PPL. 13. Since PPL is each year receiving large quantities of information from multiple CMOs around the world its bank of knowledge has built up significantly over time. As Ms Sanchez put it in her Second Witness Statement: PPL maintains an internal record of all connecting factors associated with a sound recording, including performer citizenship of any qualifying country, performer residency of any qualifying country, and the place where the performance is given. This record is based both on PPL's own internal information and all performer/performance by any claiming CMO. It also benefits from any information acquired by PPL from the phonogram producers for the track, and any information supplied by the Fund and other claiming CMOs. details provided for

14. Of course, the citizenship and residency of a performer ultimately depend on personal circumstances that are largely only within that performer's knowledge. If a performer chooses not to share details such as these, or fails to update information given as circumstances change, the data that PPL holds would be correspondingly inaccurate. Potential limitations associated with the exercise involving PPL
15. We do not, therefore, understand the SoS to dispute that in principle a process of liaison between C1 to C6 on the one hand, and PPL on the other, could enable the figure set out in paragraph 10.ii) above to be determined without the need to obtain any additional information from individual US Performers beyond that already held by PPL and C1 to C6. That liaison is already underway in the form of the "notional claims exercise" described at [58] of the July Judgment.
16. The SoS does not, however, accept that ascertaining the figure in paragraph 10.ii) will enable the loss of any US Performer to be determined, even assuming that liability for Francovich damages is established. The SoS argues that she should be liable only for loss that is caused by the UK's failure to comply with its EU law obligations and it would not be right to take the "raw" figure set out in paragraph 10.ii) as the measure of loss for the following reasons: i) ii) The Parallel Entitlement Issue – C9 to C12 accept that some US Performers have a parallel entitlement to receive full equitable remuneration (of the kind explored at [31] to [34] of the July Judgment). If, for whatever reason, US Performers, or CMOs that represent them, had that parallel entitlement but did not assert it, the SoS argues that she should not be liable in Francovich damages. She asserts that in such a case the loss in question would arise from a failure to assert parallel entitlement rather than from the UK's breach of its EU law obligations. The Atresmedia Issue - The process described in paragraph 10 assumes that US

Performers are entitled to equitable remuneration in relation to the exploitation of audiovisual fixations incorporating phonograms (referred to as “AFIPs” in the July Judgment). However, the SoS’s case is that the judgment of the CJEU in *Atresmedia* demonstrates that the Directive conferred no entitlement to equitable remuneration in respect of AFIPs so that, even if the UK had implemented the Directive fully, US Performers would have received no such equitable remuneration so that the process in paragraph 10 overstates any loss that US Performers have suffered. iii) The Producer/Performer Issue – In theory a performer might own the copyright in a particular sound recording and so be both a “producer” and a performer. In that case, as explained at [28] of the July Judgment, the performer would have received some equitable remuneration in the capacity of producer and its entitlement to *Francovich* damages could be reduced by equitable remuneration received in that capacity. In his oral submissions, Mr Howe KC gave a theoretical example of a performance involving a single performer who was also a producer. The practice described at [28] to [30] of the July Judgment would mean that 50% of the equitable remuneration due would be paid to the artist (in the capacity of producer) and, if the artist had no entitlement to equitable remuneration (in the capacity of performer) the notional remaining 50% would be reallocated to the artist (this time in the capacity of producer). In that, admittedly simplistic situation, the artist would have suffered no loss. More complicated situations, involving multiple performers, can be envisaged in which amounts overpaid to an artist in the capacity of producer might mitigate loss suffered by underpayments in the capacity of performer. 17. For their part, C9 to C12 do not accept that any of these issues would, as a matter of law, operate to reduce the SoS’s liability to pay *Francovich* damages. They assert by way of “Causation Arguments” referred to at [34] and [128] of the July Judgment: i) Even if there was a parallel entitlement that a particular US Performer could have asserted, the SoS remains liable in law to pay damages to that US Performer based on the difference between limited entitlement and full entitlement to equitable remuneration. ii) As a matter of law, *Francovich* damages should not be reduced by reference to the *Atresmedia* Issue (see [138] of the July Judgment).

18. They acknowledge that, in theory, *Francovich* damages payable to “producer/performers” should be reduced for reasons summarised in paragraph 16.iii). By contrast with their position on the Parallel Entitlement Issue and the *Atresmedia* Issue, they advance no legal argument to the contrary. However, they argue that in reality there will be so few producer/performers, and the impact on *Francovich* damages will be so negligible that, the theoretical possibility can safely be ignored as *de minimis*.
19. Therefore, as matters stand, the court is not in a position to determine whether or not *Francovich* damages could, if necessary, be assessed by reference to PPL Data, or whether it might be necessary to ask US Performers to provide further information on their factual position to enable their individual damages to be assessed: i) If C9 to C12 are correct in their Causation Argument summarised in paragraph 17.i), then there would be no need to investigate whether any particular US Performer had a parallel entitlement or not: a) If PPL held data that established a particular US Performer had a parallel entitlement entitling that

performer to “full” equitable remuneration then PPL would already have taken that into account, the performer would have received equitable remuneration and so would be outside the class definition which captures only those persons who have “not received equitable remuneration” (see paragraph 8 above). Since that performer would not be within the class, no question of entitlement to Francovich damages would arise. b) If the US Performer had some attribute (for example residence in a Rome Convention territory) of the kind considered at [31] or [32] of the July Judgment, which was not reflected in the PPL Data (an unknown parallel entitlement), that performer might have a parallel entitlement of which PPL was unaware. However, on C9 to C12’s theory of causation, the existence of that parallel entitlement would not reduce any liability of the SoS to pay Francovich damages. ii) However, if the SoS is correct in her arguments on the parallel entitlement issue then, before any particular US Performer’s entitlement to Francovich damages could be established, it would be necessary to consider whether he or she holds any unknown parallel entitlement. That, by definition, could not be ascertained by reference to PPL’s data. If it were necessary to decide whether every individual US Performer had unknown parallel entitlement or not, the only option would be to contact all members of the class. iii) If C9 to C12 are correct in their arguments on the Atresmedia Issue then there would be no need to investigate the extent to which phonograms were exploited in AFIPs. iv) However, if the SoS is correct in her arguments on the Atresmedia Issue then, before Francovich damages could be assessed, it would be necessary to consider the extent to which each relevant phonogram had been exploited in an AFIP. PPL hold some data on the way in which individual phonograms have been exploited. However, as can be seen from [163] to [165] of the July Judgment, there is room for uncertainty at the margins as to what precisely does constitute an AFIP. Indeed, it is because of that uncertainty that PPL has been given permission to intervene in these proceedings. Accordingly, if the SoS is correct, it is likely that working out any individual US Performer’s entitlement to Francovich damages would not be straightforward. C9 to C12’s proposals to deal with potential limitations to the exercise with PPL

20. C9 to C12 naturally emphasise that they hope to win on their Causation Arguments with the result that the Parallel Entitlement Issue and the Atresmedia Issue will never cause difficulties. However, they put forward some suggestions as to what the court might do, to take account of the possibility that those arguments might fail. 21. In essence, they propose that the court first hold a trial on questions of liability. As well as dealing with threshold questions as to whether liability for Francovich damages has been established, and if so for what period, that liability trial would also address their Causation Arguments. If C9 to C12 succeed both on liability and on their Causation Arguments, the difficulties discussed in this section will not arise except, perhaps, in relation to the Producer/Performer Issue. If, however, C9 to C12 succeed on liability, but their overarching Causation Arguments fail, so that damages cannot be assessed only by reference to the PPL Data, the court could make appropriate case management directions in advance of a second trial on quantum.

22. C9 to C12 do not invite the court to settle appropriate case management directions for a quantum trial now. However, they argue that, in the light of work that they and their advisers have already undertaken, the court can have confidence that suitable directions could be formulated if necessary. C9 to C12's preferred approach
23. C9 to C12's preferred approach set out below is prefaced on an assumption that their Causation Arguments fail at a liability trial. If they win on those arguments they envisage that damages can straightforwardly be assessed by reference to PPL Data alone (see paragraph 20 above).
24. Under their preferred approach, following the liability trial, the claim would continue as a representative action without joining any of the individual US Performers as parties in their own right in accordance with the "bifurcated process" envisaged at [81] of Lord Leggatt JSC's judgment in *Lloyd v Google* [2022] AC 1217 (*Lloyd v Google*).
25. C9 to C12 point out that, to the extent that PPL and C1 to C6 know about a particular performer's parallel entitlement that will have been asserted as part of PPL's ordinary processes described, the performer will therefore have received equitable remuneration in consequence and so will not in any event be a member of the class covered by CPR 19.8 (see paragraph 19.i)a) above). We do not understand that analysis to be controversial.
26. Therefore, argue C9 to C12, the Parallel Entitlement Issue can only arise in relation to unknown parallel entitlement of the kind described in paragraph 19.i)b). That, they submit, will be a modest issue that could appropriately be addressed by: i) ii) In the first instance "filtering out" performers who are known, according to the PPL Data to have listed a place of birth or residential address in a Rome Convention or WPPT country. In effect, C9 to C12 would be prepared to assume that performers with those attributes would have an unknown parallel entitlement which would disqualify them from receiving Francovich damages, should they lose on their causation arguments. Thereafter performing a sampling exercise to estimate the percentage of performers in the class remaining who have an unknown parallel entitlement. If, for example, that sampling exercise indicates that 10% of the remaining performers have a non-US nationality or place of residence, then damages awarded would be reduced by 10% and each member of the class would receive just 90% of the damages notionally awarded to the class by reference to the PPL Data.
27. C9 to C12's advisers have already performed a "dummy run" of a limited sampling exercise that is explained in Ms Pellicano's First Witness Statement. In essence, Ms Pellicano's evidence is that it was reasonably straightforward to interrogate publicly available sources to check whether a particular performer has a non-US nationality or place of residence. Having generated a random sample of 100 performers, Ms Pellicano explains that, spending no more than 5 or 10 minutes per performer, she was able to identify, in 91 out of 100 cases, whether that publicly available information was indicative of a non-US nationality or place of residence.

28. Of those 91 performers on whom information could be found, she concluded that 10 were likely to have a non-US place of residence of nationality with 5 being resident or nationals of a territory that would give rise to a parallel entitlement under either the WPPT or the Rome Convention.
29. C9 to C12 do not suggest that Ms Pellicano's work provides a complete answer. They simply submit that it can give the court confidence that, if necessary, some sort of sampling exercise that involves seeking to ascertain the proportion of US Performers who have an unknown parallel entitlement could be performed in the future.
30. C9 to C12 argue that it is unlikely that there will be many producer/performers in the class because US Performers are, by definition, members of C7 or C8 who represent non-featured performers who are inherently unlikely to own that copyright. However, if the court is not prepared to ignore the Producer/Performer Issue as de minimis, they argue that, if necessary, the percentage of US Performers who own the copyright in a sound recording of their performance could be estimated by reference to publicly available data. Ms Sanchez and her colleagues performed a "dummy run" of such an exercise, focusing on the top 40 highest notional "earners" (i.e. those who would be highest recipients of equitable remuneration in the notional claims exercise being undertaken with PPL) in two particular files of data, on the basis that the highest earners could be considered most likely to own copyright in the sound recording of their performances. Ms Sanchez concluded that only one of those highest earners owned any copyright and he appeared as a non-featured performer on just one track released by a record label that he owned with that track being the subject of just five claims to PPL in the notional claims exercise. Ms Sanchez concludes that this single track accounted for just £1.47 out of total claims totalling £1.097 million made by the 40 highest earners sampled.
31. Turning to the Atresmedia Issue, it appears to be common ground that no amount of questioning of US Performers on their individual circumstances could quantify the extent to which phonograms of their performances are exploited in audiovisual works. Nor even could the PPL Data answer the question since, depending on how the Atresmedia Issue is ultimately determined, it might be necessary to know which phonograms have been exploited in which audiovisual performances which is data PPL simply do not have.
32. C9 to C12 propose, therefore, that this court adopt, if necessary, an approach similar to that adopted by the Commercial Court No 9 of Madrid in *Vodafone España SAE v AGEDI and AEI* (judgment 11/2025, 20 February 2025). That was a case that followed on from the judgment of the CJEU in *Atresmedia* by which Vodafone sought to claw back royalties that it had paid for the exploitation of phonograms in Spain in audiovisual works. The approach that the Commercial Court in Madrid adopted involved obtaining expert evidence from Kantar as to the proportion of exploitation of phonograms that involved audiovisual works and the proportion that involved radio and other (non-audiovisual) broadcasting. Again, they do not invite the court to determine the precise nature of that expert evidence at this stage: they simply suggest that an approach along these lines would be workable. C9 to C12's "first

fallback” approach

33. The fallback approaches outlined in this section, and in paragraphs 37 to 40 below proceed on the basis that C9 to C12’s Causation Arguments fail at a liability trial.
34. By the time of the CCMC, we understood C9 to C12’s preferred fallback approach to be that set out in Ms Sanchez’s Third Witness Statement. In that witness statement, she acknowledged the class consists of some 33,000 US Performers but many of those have low-value claims. Some 443 performers have individual damages claims that are considered to be worth over £10,000 each, with the aggregate of those claims totalling some £8.7m. The total number of performers who have claims worth more than £500, including the 443 performers just mentioned, is 4,925, with their claims exceeding £19m in value.
35. Ms Sanchez says that, given the Fund’s resources, it simply would not be practicable to contact all 33,000 members of the class to ask for information on non-US residence or nationality. However, she suggested that, if necessary, it would be practicable to contact the 4,925 performers with claims worth more than £500 each. In his oral submissions, Mr Howe KC suggested that this could form the basis of an alternative approach. If the court is not persuaded that the various issues could be dealt with by the kind of sampling that forms the basis of the preferred approach, he suggested that the Fund could be ordered, if necessary following a liability trial, to contact the 4,925 members and invite them to agree to be joined as parties to the claim in their own name (applying the bifurcated process set out at [81] of *Lloyd v Google*). Any such invitation would be accompanied by a requirement that they give details of any non-US residence or nationality since only by providing that information could their individual entitlement to damages be assessed in the light of the Parallel Entitlement Issue. (Conceivably, although Mr Howe KC did not mention it specifically, the performers could be asked for details on any copyright in sound recordings that they own to address the Producer/Performer Issue as well).
36. Anyone who declined to consent to being joined, or would not provide necessary information, would not be entitled to damages at the quantum stage. The quantum stage would therefore proceed as an enquiry into damages on behalf of a number of individual performers. Other fallback approaches
37. C9 to C12 have a further fallback approach. Under that approach, they would identify, from PPL’s annual reports the total licensing revenue paid out to performers each year. They would assume that 35% of that total revenue is allocated to US Performers in line with historical figures. They would then identify the proportion of that figure which would have been attributed to “represented US Performers”. They propose that “[d]eductions could, if necessary, then be made from this headline figure to reflect the Parallel Entitlements Issue and the [Atresmedia Issue]”. Mr Howe KC referred to this proposal in his oral submissions, but it was not developed any further. We do not consider it to be sufficiently articulated and explained to constitute a firm proposal and indeed we took it not to be pursued.

38. A still further fallback approach emerged in response to questions from the bench.
39. The approach described in paragraphs 34 to 36 above would involve the Fund writing to US Performers after a liability trial if C9 to C12 lose on the Causation Arguments with a view to steps being taken to join them as named parties to the claim. That gives rise to the risk that few US Performers agree to be joined, or are eligible to be joined. In that scenario, the liability trial could be an expensive exercise that produces little in meaningful benefits.
40. We canvassed with Mr Howe KC the idea that the Fund might write to US Performers well in advance of any liability trial to give reassurance that a sufficient “critical mass” of US Performers would agree to be joined as named parties if necessary following a liability trial. If US Performers having sufficiently sizeable claims confirmed their engagement with the process, the court might have reassurance that the proceedings are viable. Mr Howe KC explained that he had no instructions on this specific suggestion, which had not formed part of C9 to C12’s proposals, but although the Fund is concerned about the practicalities of writing to large numbers of its members, it would attempt to comply with whatever order the court makes. Would the CPR 19.8 procedure be viable if C9 to C12 fail on their Causation Arguments? C9 to C12’s preferred option 41. 42. For the reasons set out below, we conclude that C9 to C12’s preferred option would not set out a viable basis for the determination of damages in a representative claim under CPR 19.8 should C9 to C12 lose on the Causation Issues. It is, in our judgment, significant that C9 to C12’s preferred option does not fit either of the descriptions of circumstances in which damages could be claimed in CPR 19.8 proceedings that Lord Leggatt considered at [81] and [82] of *Lloyd v Google*: i) ii) C9 to C12 are proposing a split trial with common issues of law or fact being decided at a liability stage and a quantum trial following if necessary. However, despite the fact that, on the face of matters, an individual assessment of damages would be needed, with the Parallel Entitlement Issue, the Atresmedia Issue and the Producer/Performer Issue each potentially operating to reduce individual US Performers’ damages in different amounts, C9 to C12 are not proposing to join individual US Performers as claimants at the quantum stage. Nor is this a case falling within [82] of *Lloyd v Google*. Damages cannot be calculated on a basis that is common to all members of the class since the Parallel Entitlement Issue and the Atresmedia Issue could lead to different outcomes for different class members. (That is theoretically true also of the Producer/Performer Issue, although as will be seen we are prepared to treat that as *de minimis*). Nor, on the face of it, can the damages suffered by the class as a whole be calculated without reference to the losses suffered by individual class members. Indeed, the whole process with PPL to date demonstrates that C9 to C12 have been seeking to calculate the damages awarded by reference to individual US Performers’ losses.
43. C9 to C12 seek to argue that an application of the “broad axe” approach to the assessment of damages (see *Mastercard Inc v Merricks* [2020] UKSC 51 at [50]-[51]) means that they are within the spirit of the situations set out at [82] of *Lloyd v Google*. In essence they say that, since it would simply be impracticable to determine whether each individual US Performer has an unknown parallel entitlement, it is proportionate, and compatible with the “broad

axe” approach, for damages to be assessed on a group- wide basis with a percentage reduction to aggregate damages applied to deal with the effect of the Parallel Entitlement Issue. They make a similar point in relation to the Atresmedia Issue and the Producer/ Performer Issue. They present their preferred option, and the sampling proposals embodied in it, as, in effect calculating damages on a basis that it is common to all members. They invite the court to apply this somewhat rough and ready approach in the particular circumstances of this case and invoke the words of Lord Eldon LC, quoted by Lord Macnaghten in *Duke of Bedford v Ellis* [1901] AC 1: ... it is better to go as far as possible towards justice than to deny it altogether and that, if you cannot realistically make everybody interested a party, you should ensure that those who are parties will fairly and honestly try the right.

44. The difficulty with that approach, however, is that justice has to be applied within the parameters of legal norms. To succeed with an individual claim for Francovich damages, a particular US Performer would need to show that he or she suffered loss as a consequence of the UK’s failure to comply with EU law obligations. While statutory provisions applicable to other types of representative action (for example s47C(2) of the Competition Act 1998, which applies to collective proceedings in the Competition Appeal Tribunal) may vary that rule in particular contexts, nothing in CPR 19.8 does so in the present case. A difficulty with C9 to C12’s preferred approach is that it would almost certainly result in a component of damages being awarded in relation to US Performers who have suffered no loss.
45. Consider, for example a particular US Performer (A) who has an unknown parallel entitlement and another US Performer (B) who has no such entitlement. Assume that PPL’s data indicates that both would be due £100 if liability for Francovich damages is established. Suppose, however, that C9 to C12 lose on their Causation Arguments and the sampling exercise that C9 to C12 favour suggests that a 10% reduction should be made to take into account the general prevalence of hidden parallel entitlement. In that case, A would obtain damages of £90, even though he or she has suffered no loss. B would obtain damages of £90, even though he or she has suffered loss of £100.
46. This example demonstrates that there is more than the application of a “broad axe” going on if £90 is added to the SoS’s liability in relation to performer A. Rather, the SoS would be required to pay an element of compensation in respect of a US Performer who has suffered no loss.
47. C9 to C12 say that this presents no problem, arguing that *EMI Records v Riley* [1981] 1 WLR 923 (EMI) and *Independiente Ltd v Music Trading On-Line UK Ltd* [2003] (Independiente), mentioned, they say, without criticism in *Lloyd v Google* provide precedents for their favoured approach. 48. In EMI, a claimant brought proceedings under the precursor of CPR 19.8 on behalf of all members of the British Phonographic Industry Ltd (the BPI). The defendant was a market trader who admitted selling pirate records and cassettes copied from recordings in which BPI members held the copyright. The claimant sought, as well as an injunction, damages for loss sustained as a consequence of the infringement of their

copyright. The claim came before Dillon J (as he then was) for judgment on admissions.

49. The defendant admitted selling some 2,980 pirated cassettes. However, perhaps given her line of business, she was not very scrupulous in keeping records of which cassettes she had sold. Therefore, any given BPI member could not say whether the defendant had infringed the copyright in their recording or, if so, to what extent. Dillon J was nevertheless prepared to order an enquiry as to damages suffered by the BPI members in aggregate. At 926C to F, Dillon J considered whether the claimant could obtain damages in a representative capacity at all (or whether only a declaration or injunction could be made by way of remedy). He concluded that the claimant could obtain damages in a representative capacity because of the particular position of the BPI in the record industry at the time. Dillon J's reasoning is appropriately captured in the summary provided by Lord Leggatt at [53] of *Lloyd v Google*: Because it was accepted or could safely be assumed that the owner of the copyright in any pirated recording was a member of the represented class [i.e. a member of the BPI], this procedure enabled breach of copyright to be proved and damages to be awarded without the need to prove which particular pirated recordings had been sold in what quantities. Again, what mattered was that the members of the class had a community of interest in suing the defendant.
50. C9 to C12 argue that, in *EMI* it was no obstacle to an award of damages that each individual BPI member could not prove either (i) that the defendant had infringed their copyright or (ii) to what extent. They argue that, by parity of reasoning, there should be no problem arising from the fact that they will not seek to establish whether any particular US Performer does, or does not, hold a parallel entitlement. They argue that the correctness of this approach has been endorsed by the fact that the Supreme Court refer to *EMI*, without criticism at, for example [53] of *Lloyd v Google*.
51. We agree that Lord Leggatt did not doubt *EMI* when he was considering it at [53] and [54] of *Lloyd v Google*. However, at that stage of his judgment, Lord Leggatt was considering the threshold question of whether a claimant suing in a representative capacity could receive damages at all. By that stage of his judgment, he had concluded, at [49] and [50], that there would be "many cases" in which, because damages depend on circumstances personal to each individual member of a class, it would be unlikely to be practical or fair to assess damages on a common basis without each individual member's participation in proceedings. 52. Paragraphs [50] to [53] of *Lloyd v Google* consider examples (by way of exception to Lord Leggatt's other "many cases") where damages could be awarded to a claimant suing in a representative capacity. One example given was of a claimant suing on behalf of a *Lloyd's* syndicate because the damage to which members of the syndicate are collectively entitled does not depend on how the risk is divided among syndicate members. *EMI* was an example in a similar vein. It could be safely assumed that the owner of the copyright in any pirated recording was a member of the represented class. Moreover, damages could accurately be calculated by reference to a "top down" assessment of the loss of the class as a whole without the need for a "bottom up" assessment of the loss of each

individual member (just as it could be in the case of a claimant suing on behalf of a Lloyd's syndicate).

53. As noted at [54] of *Lloyd v Google*, the assessment of damages on a top-down basis in *EMI* gave rise to a different question namely whether the court should enquire as to the basis on which the representative proposed to share the damages among the individual class members. In *EMI* itself, the court held that all the members of the BPI had consented to the BPI bringing the action in a representative capacity and receiving an award of aggregate damages and the question was therefore answered by that consent. In *Independiente*, also a case involving a representative action being brought for copyright infringement on behalf of a class, it could not be shown that the class as a whole had authorised the representative claimant to bring proceedings on their behalf or to receive any award of damages. However, the Chancellor was prepared to conclude that nevertheless all members of the class shared a common interest in the proceedings being brought. He permitted the representative claim to go ahead on the basis that what the claimants did with any damages they received was a matter for them and not the defendants (see [27] to [28] of the judgment).
54. Once all relevant passages of *Lloyd v Google* are read in context, it becomes clear that neither *EMI* (nor *Independiente*) are being endorsed as setting out a general principle that, provided the members of the relevant class have consented, a representative of that class is entitled in all cases to seek damages on a top-down or global basis under CPR 19.8 without any need for individual class members to be joined as claimants. Rather, we see *EMI*, *Independiente* and their consideration in *Lloyd v Google*, as supporting the following propositions: i) If damages of the class as a whole can reliably be calculated on a top-down or global basis without any need to calculate the loss of class members individually, then it may be proper for the court to award damages to a claimant suing in a representative capacity without any need for individual class members to be joined as claimants. ii) Examples of situations in which loss can be calculated on a top-down or global basis are given at [82] of *Lloyd v Google*. All of the examples given are of cases where an “individualised assessment”, that takes into account the particular circumstances of each class member, has no bearing at all on the overall loss suffered by the class. iii) Before embarking on a course that might lead to a representative claimant receiving an award of damages calculated on a top-down or global basis, the court may wish to consider the robustness of the arrangements for the representative to account for (and apportion) any damages received among class members. Lord Leggatt suggested some reservations as to whether that point could in all cases simply be resolved (as in *Independiente*) by concluding that it was none of the defendants’ business how the representative claimants chose to share damages among class members.
55. Having tested our conclusion in paragraph 42.ii) against the invocation of the “broad axe” and the judgments in *EMI* and *Independiente*, we see nothing to alter that conclusion. We consider C9 to C12’s proposals to be contrary to the principles established in *Lloyd v Google* insofar as they involve damages being calculated on a global or top-down basis, even though

the position of individual members of the class clearly has a direct bearing on the damages that should be awarded as the process to date with PPL has demonstrated. Relatedly, we consider the proposal to be contrary to principle insofar as it could result in damages being awarded by reference to the claims of individuals who might have suffered no loss. In our judgment, the fact that the members of the class might be taken to have consented to cede part of their entitlement to such individuals is no answer to that point of principle.

56. C9 to C12 cite difficulties in estimating the effect of the Parallel Entitlement Issue and the Atresmedia Issue as supporting their proposal. However, behind that appeal to pragmatism is a significant extension to the principles relating to representative actions as currently understood in *Lloyd v Google*. The prevalence of many idiosyncratic characteristics in a large population (such as unknown parallel entitlement) can frequently be estimated through statistical and economic techniques. C9 to C12 effectively ask to be excused from the requirement to prove loss in any individual case and be permitted to prove loss on a “class-wide” basis so that damages are awarded to the class by reference to “average loss” rather than the loss of any member of the class. They effectively ask the court to fashion a collective proceedings regime, like that seen in the Competition Appeal Tribunal, but without the statutory underpinning set out in s47C(2) of the Competition Act 1998.
57. Moreover, if C9 to C12’s proposal were acceptable, a similar proposal could have been used to circumvent some of the objections raised in *Lloyd v Google* itself. The Supreme Court was clearly concerned in that case with the fact that the proposed representative action required an individual assessment of the harm that each member of the proposed class suffered (see for example [87] and [145] to [147] of Lord Leggatt’s judgment). If C9 to C12’s proposal was acceptable then objections such as these could have been overcome by a statistical modelling exercise that sought to estimate “average harm” and awarded damages to the class by reference to that harm.
58. We conclude this section by observing that many of the difficulties we have identified with C9 to C12’s approach relate to the Parallel Entitlement Issue. In focusing on that issue, we should not be taken as concluding that the Atresmedia Issue raises no such problems. We do, however, acknowledge that the Atresmedia Issue is much less dependent on personal data on US Performers’ own attributes such as their place of residence or citizenship. Moreover, the best conclusion that we can draw on the evidence we have is that the Atresmedia Issue is likely to go only to the quantum of any Francovich damages rather than to liability. One can envisage hypothetical scenarios in which a particular phonogram is exploited only by audiovisual means (in which case US Performers might have no entitlement to Francovich damages in relation to such phonograms if C9 to C12 lose on their Causation Arguments). However, the SoS does not invite us to treat this as a realistic scenario. C9 to C12’s first fallback position
59. C9 to C12’s first fallback position set out in paragraphs 34 to 36 above draws inspiration from [81] of *Lloyd v Google*.

60. The SoS submits that even that position is unprincipled since it treats a first-stage “liability trial” as a desirable end in itself when what is really called for in this case is something like a group litigation order (GLO) that would enable multiple small individual claims, involving an individual determination of damages, to be dealt with. Relatedly, the SoS argues that C9 to C12 are engaged in the sort of “book-building” that was deprecated by Michael Green J at first instance in *Wirral Council v Indivior plc*
- [2023] EWHC 3114 (Ch) (with those observations not doubted in the appeal reported at
- [2025] EWCA Civ 40). In essence, the SoS’s objection is that C9 to C12 seek an accelerated “liability trial” as a means to defer difficult questions of the individual calculation of damages while building a large “book” of potential claimants that could attract litigation funding and put disproportionate pressure on the SoS in settlement discussions.
61. We consider that objection to be overstated. Sir Julian Flaux C described objectionable “book-building” in the following terms at [131] of his judgment on the appeal in the *Wirral Council* case: ...the sort of “book-building” which gets as many claimants as possible joined up to the representative proceedings without having to engage in any work relating to their individual claims in relation to the claimant-sided issues such as reliance and causation unless and until the common issues are decided in the claimants’ favour.
62. Those statements were made in the context of a claim involving alleged fraudulent statements and dishonest omissions relating to securities. It can well be understood that questions of reliance and causation in such cases would be highly fact-dependent and susceptible to different answers in different cases. However, in this case, there is a realistic prospect that causation issues can be dealt with on a common basis at a first- stage “liability trial”: if C9 to C12’s Causation Arguments succeed then the extent of their claim for *Francovich* damages would be well understood. Of course, C9 to C12’s Causation Arguments might fail. If those arguments do fail, the *Atresmedia* Issue would raise potentially difficult questions of quantification even though the *Parallel Entitlement* Issue and the *Producer/ Performer* Issue could be answered by US Performers providing relatively circumscribed information on their personal circumstances. In our judgment it goes too far to say that C9 to C12 are seeking to use a liability trial as a means of avoiding engagement with issues of causation when their case hinges on Causation Arguments that they seek to have determined at that liability trial.
63. At [66] and [70(ii)] of the July Judgment, Richards J raised a potential issue with joining new US Performers as claimants after a liability trial so that, if necessary, damages could be individually assessed. Shortly put, if that joinder involved US Performers beginning new “proceedings” for the purposes of paragraph 39(7) of Schedule 8 of EUWA 2018 then they might not benefit from the saving in that 64. 65. 66. paragraph for “proceedings begun within the period of two years beginning with IP completion day”. If that were the analysis, then paragraph 4 to Schedule 1 of EUWA 2018 would prevent any such new “proceedings” from vindicating any right to *Francovich* damages and joinder of individual US Performers

would achieve nothing. In their skeleton argument, C9 to C12 put forward an analysis, based on relevant provisions of EUWA 2018, [81] of *Lloyd v Google* and the judgment of the Court of Appeal in *Moon v Atherton* [1972] 2 QB 435 to explain why there would be no problem with joining individual US Performers as claimants after a liability trial. In answer to questions from the bench, Mr West KC explained that, while he was not conceding that C9 to C12's analysis is correct, he is not advancing this issue as a free-standing objection, at this stage, to the first fallback position. In those circumstances, we consider we should proceed on the basis that there would be no difficulty under EUWA 2018 with adding US Performers as parties after a liability trial. Paragraph 9 of the SoS's skeleton argument criticised the entirety of C9 to C12's CPR 19.8 proposals for a "failure to address the risk of conflicts between the four representative claimants". However, that point was not pursued in oral submissions. In his oral submissions, Mr West KC suggested that there might be some procedural or conceptual difficulty with limiting a class of successful claimants to those who agreed to be joined as parties after a liability trial. We agree with Mr West KC that, if the liability trial established that the requirements of a *Francovich* claim were established and that C9 to C12's Causation Arguments succeeded, such a determination would benefit all US Performers in the class by operation of CPR 19.8(4). However, we did not understand Mr West KC to disagree with the proposition that the court could, following judgment at a liability trial, make case management directions to the effect that damages would be awarded only to US Performers who came forward within a timescale, agreed to be joined as claimants, and agreed to provide information on, for example, whether they have any non-US citizenship or residence. The court could not, of course, control how many or how few US Performers come forward at this second stage, but it could make orders designed to ensure that only those who come forward would be considered for an award of damages.

67. That then leads to the SoS's criticism of C9 to C12's first fallback position, which we consider has much force. The SoS argues that this course of action would be worthwhile only if significant numbers of US Performers, having between them claims of significant value, agree to be joined as claimants at a second stage. C9 to C12 have offered very little by way of reassurance that this would be the case.
68. At paragraph 40.6 of their skeleton argument, C9 to C12 argued that it is "self-evident" that, after a finding of liability "a significant number of individuals are likely to want to take a relatively simple step to collect the sums that PPL has calculated are due to them, particular since the Fund will be meeting their legal costs...". We do not agree.
69. As Mr West KC pointed out in his submissions, there is no evidence for C9 to C12's position summarised other than Ms Sanchez's statement of her "belief" that a number of US Performers would wish their entitlement to damages to be vindicated at a second stage. She does not explain how she has come to that belief, or even say that she has spoken to a critical mass of US Performers who would definitely be interested in pursuing their claims even if it meant becoming party to the proceedings.

70. The first fallback option involves contacting US Performers with claims worth more than £500. In the absence of evidence to the contrary, we regard it as entirely possible that a good number of US Performers will simply not respond to suggestions that they be joined as parties. Some may be apathetic. Some may be nervous at the general idea of becoming party to legal proceedings in another country. Others may not wish to give personal information on residence or nationality that might be required in order to substantiate a claim for Francovich damages. Of course, Ms Sanchez may be right. It is quite possible that a good number of US Performers do come forward for a second stage, but we are quite unable to conclude at this stage that it is “self-evident” that they will.
71. We consider this to be a fundamental problem with the first fallback option. There is a prospect that C9 to C12 will lose on their Causation Arguments. If they do so, then the court has no reassurance that sufficient US Performers would agree to be joined as claimants at a second stage as the first fallback option envisages. If they do not agree to be so joined, then an expensive liability trial and the process leading up to it would have served little purpose and would not satisfy the overriding objective of dealing with cases justly and at proportionate cost.
72. C9 to C12 argue that there would still be utility in their first fallback option even if relatively few US Performers actually come forward and agree to be joined at the second stage. They submit that there are proceedings going on throughout Europe that seek to ensure that various member states implement Article 8(2) of the Directive “properly”. They argue that, if an English court were to hold that the UK government has committed sufficiently serious breaches of EU law that would not only be an important finding in holding public bodies to account but might also resonate in other European proceedings. We do not accept that. If C9 to C12 simply seek findings as to entitlement to Francovich damages that they consider will resonate elsewhere they are free to pursue their own claims otherwise than in a representative capacity. However, they quite clearly are not satisfied with this: they seek to bring their claims in a representative capacity precisely so as to achieve significant damages for significant numbers of US Performers. Given that is what they seek, the utility of that process would be undermined if relatively few US Performers came forward at a second stage.
73. We conclude that C9 to C12’s first fallback position does not address the flaws in their preferred option. Would the CPR 19.8 procedure be viable if C9 to C12 succeed on their Causation Arguments?
74. Almost all the argument before us focused on the sufficiency or otherwise of C9 to C12’s proposals, should they lose on their Causation Arguments, set out in paragraphs 20 to 31 above.
75. We understood Mr West KC ultimately to accept that, putting the Producer/Performer Issue to one side, should C9 to C12 be successful on their Causation Arguments at a liability trial, any damages due to each member of the class could adequately be assessed by reference to

the PPL Data alone, although he submitted that even in such a case the court should in its discretion refuse to allow the representative claims of C9 to C12 to proceed. If the Causation Arguments succeed then, by hypothesis any unknown parallel entitlement could not limit any entitlement of a class member to Francovich damages and, a performer with “known” parallel entitlement could not be a member of the class (see paragraph 19.i)a) above). In a similar vein, if C9 to C12 succeed on all their Causation Arguments, damages would be payable in respect of audiovisual exploitation and it would not be necessary to consider whether the Atresmedia Issue operates to limit any particular class member’s entitlement to damages. 76. Paragraph [70] of the July Judgment set out a number of practical issues that C9 to C12’s proposals needed to address. Of those, only that set out at [70(i)] (identification of the class) would appear to have relevance if C9 to C12 were to succeed in their Causation Arguments at a liability trial. While Mr West KC referred in his oral submissions to ongoing issues associated with seeking to identify the individuals who are class members, we considered those difficulties to be the natural problems that emerge from the analysis of large quantities of data. Moreover, the SoS is not pressing the point, referred to at [70(i)] of the July Judgment, to the effect that a “class closing exercise” could not be undertaken. As matters stand, we do not consider class identification to be an obstacle to assessing damages by reference to PPL Data if C9 to C12 are completely successful in their Causation Arguments.

77. That, therefore, leaves the Producer/Performer Issue. The SoS is correct to say that, even if C9 to C12 succeed on all issues at a liability trial including on their Causation Arguments, any given member of the class could, in theory, be a producer/performer whose damages are liable to be reduced because of the Producer/Performer Issue. That conceptually engages the kind of issues that we have considered in paragraphs 54 and 55 above since the question whether any individual member of the class is a producer/performer has at least some bearing on any liability of the SoS to pay damages.
78. However, we consider that this difficulty can be overcome by recourse to the “broad axe” principle. The evidence that we have seen suggests that the implications of the Producer/Performer Issue will be small indeed. There has been no challenge to Ms Sanchez’s conclusion set out in paragraph 30 above that it could reduce the claims of the 40 “top earners” that total over £1m by just £1.47 (around 0.0015% of the total value of their claims). Moreover, by contrast with the Parallel Entitlement Issue, it is difficult to envisage a realistic scenario in which the Producer/Performer Issue causes a particular performer to have suffered no loss at all. It would, in our judgment, be a disproportionate exercise of the court’s discretion to conclude that the Producer/Performer Issue of itself makes the CPR 19.8 procedure unsuitable. If this were the only objection, it would defeat the overriding objective to require each individual to pursue their claim separately.
79. We conclude that the CPR 19.8 procedure would be workable if C9 to C12 succeed on their Causation Arguments. The CPR 19.8 Issue – Conclusion

80. The court is placed in a difficult position: i) ii) If C9 to C12 turn out to be correct in their Causation Arguments, the claims of US Performers could fairly be disposed of by representative proceedings. However if C9 to C12 turn out to be incorrect in their Causation Arguments, C9 to C12's preferred option in relation to CPR 19.8 is not suitable and neither is their first fallback option. iii) The court has no way of telling at this stage whether C9 to C12's Causation Arguments are correct or not, but nevertheless has to determine whether C9 to C12's claims should be allowed to proceed as representative claims.
81. The challenge is to determine the most appropriate, and fairest, course of action given this uncertainty. There is much to be said for the SoS's submission that C9 to C12 have not risen to the challenge of producing "firm and workable proposals that deal with all practicalities", in the words of [72] of the July Judgment given that, if they are wrong on their Causation Arguments, neither their preferred option, nor their first fallback option is viable.
82. However, against that, there is potential unfairness in bringing the representative claims to an end now. If the court were to do that, approximately 30,000 US Performers would be deprived of any ability to have their claims determined on a representative basis even though the CPR 19.8 procedure would be appropriate if their Causation Arguments succeeded.
83. The considerations each way are finely balanced. We have concluded that it would be unfair and disproportionate to bring to an end now any prospect of the claims continuing under CPR 19.8. First, there is a realistic scenario (in which C9 to C12 win on their Causation Arguments) in which a CPR 19.8 process is viable. Even if C9 to C12's Causation Arguments fail, our concern at their first fallback option centres on a lack of reassurance, at this stage, that a second stage, at which individual US Performers are joined as parties in accordance with the process envisaged in *Lloyd v Google*, would be viable. In our judgment, the proportionate means of dealing with that concern is to give C9 to C12 a limited further opportunity to provide that reassurance rather than to bring the CPR 19.8 process to an end now.
84. We are very much alive to the SoS's point that there have now been two court hearings at which C9 to C12 have failed to put forward workable proposals for a CPR 19.8 claim. That failure will be taken into account in the court's award of costs in relation to the CPR 19.8 Issue. That failure has also protracted the period during which the Intellectual Property Office has had to devote significant resource to this litigation which still might not be capable of going ahead under CPR 19.8. As Mr Stout explained in his witness statement, this litigation is currently taking up 90% of the time of the Head of Music Copyright Policy and 100% of the time of the Senior Policy Adviser on Music Copyright Policy. This is diverting experienced individuals away from their core duties of developing policy. If the litigation can ultimately go ahead under CPR 19.8, the SoS will need to find a means of staffing it, but it is unfair to require such significant resources to be devoted to it while the viability of CPR 19.8 remains in doubt.

85. To bring the uncertainty to an end, we will order the following steps: i) ii) The SoS need not do any further work on disclosure matters for a period of 8 weeks from the hand-down of this judgment. During that 8-week period, the Claimants (all or any of them) must get in touch with a sample of US Performers, drawn from among those US Performers who are not already known to have a non-US citizenship or place of residence and obtain the following: a) b) details of any place of residence or citizenship outside the US; and a statement as to whether that US Performer consents to be joined as party to this claim. iii) The sample need not be a random sample: we envisage that the Claimants may well wish to focus their efforts on US Performers who are considered to have more valuable claims. iv) No later than eight weeks from the date of this judgment, the Claimants must provide the SoS with a schedule and analysis setting out the outcome of that exercise. One purpose of the schedule will be to demonstrate the value of claims that could confidently be assumed to proceed into a second stage at which individual US Performers are joined as parties. A further function of the schedule will be to provide some further information on the prevalence of unknown parallel entitlement. v) The analysis accompanying the schedule should explain why, taking into account all relevant matters, including (i) the value of claims that can be assumed to go to a second stage and (ii) costs incurred to date and estimated to be incurred up to trial, it is in accordance with the overriding objective for the representative claims to continue. That analysis should deal with costs realistically. C9 to C12 should not assume that they will be awarded all their costs of the dispute about the CPR 19.8 process to date (see paragraph 84 above). It should also recognise that even if C9 to C12 succeed at both a quantum and liability trial, there may well be an excess of costs incurred over budgeted costs that could be recovered from the SoS and so part of any damages awarded to US Performers will presumably need to defray that excess. vi) In short, the schedule and accompanying analysis should explain why, viewed realistically, the CPR 19.8 process is proportionate having due regard to the costs of pursuing it. If, on receipt of that analysis, the SoS remains of the view that this condition is not satisfied, she may notify the court accordingly, and there may need to be a still further hearing.
86. The order summarised in paragraph 85 is a framework, rather than a straitjacket. We would ask the parties to engage constructively with each other as to the process of agreeing an order to expand that framework, or to tweak it, as necessary. The parties should also seek to agree a timetable going forwards. At the hearing, we acceded to an application by the SoS to adjourn the trial previously listed to be heard in a window commencing in early March 2026. We did so partly because of C9 to C12's failure prior to the hearing in June to set out a workable CPR 19.8 process. In doing so, an indication was given that it would likely be possible from the perspective of the court to re-list the trial from October 2026 onwards. It may be that carrying out the steps directed by this judgment will entail the trial being re-listed somewhat later than October 2026. 87. Finally, we note that our order involves the Claimants obtaining information on hidden parallel entitlement. We have not made any order requiring the Claimants to provide any further data on the Atresmedia Issue. That is because, in exchanges between the bench and Mr West KC, we understood Mr West KC to be

accepting that further data will not aid in the resolution of the Atresmedia Issue. Either the PPL Data is already sufficient to deal with that issue if necessary (in which case it can be accessed) or it is not (in which case no better data is understood to exist and some sort of broad axe may be necessary). However, in saying this, we should not be taken as accepting, or rejecting, C9 to C12's proposal set out in paragraph 32. That will be a matter for case management directions following a liability trial should one take place. PART B – THE INTERVENTION APPLICATION 88. PPL seeks permission to intervene in these proceedings by making written submissions in due course on a specific issue namely: the extent to which the owner of the copyright in a sound recording has the right to license: (a) the playing in public of that sound recording by way of the public performance of a television broadcast; or (b) the inclusion of that sound recording in a television broadcast. 89. PPL seeks permission to intervene only by making submissions. It does not seek to rely on witness evidence, although it is possible that any written submissions that it makes will refer to some publicly available documentary material. PPL wishes to intervene because of its role in collecting royalties from users of recorded music when phonograms are exploited in the UK. It foresees that this court's ultimate determination of the Atresmedia Issue will say something about the entitlement of performers to equitable remuneration when phonograms are exploited in audiovisual transmissions. Although ostensibly dealing with the position of performers, it is concerned that the court's analysis of the Atresmedia Issue might have something to say about the need for a licence to exploit phonograms in audiovisual transmissions, or the extent of any licence that is needed. That would have an obvious impact on PPL, and its members, given that PPL seeks to receive revenue from licensing the use of phonograms in a variety of media.

90. Neither the Claimants nor the SoS opposed PPL's proposed intervention although the SoS raised the issue whether, if PPL is permitted to intervene, the court may also wish to hear submissions from potential licensees as well.
91. The application raises a question relating to the correct approach on which there is some divergence of view in previous decided cases: i) ii) In *Golden Eye (International) Ltd v Telefonica UK Ltd* [2012] EWHC 723 (Ch) (Golden Eye), Arnold J (as he then was) observed at [9] that "There being no rule in CPR applicable to intervention in proceedings before [the High Court] the application was made informally under the court's inherent jurisdiction". Arnold J exercised his discretion to permit intervention. In *W Clappison Limited v Aldi Stores Limited* [2025] EWHC 1459 (Ch) (Clappison), Master Bowles, sitting in retirement, dealt with an application to intervene by considering whether it was desirable to add the intervener as a party to the action under CPR 19.2(2)(a). It was common ground between the existing parties to the action that this was the right approach and Clappison accordingly focused on whether the test in CPR 19.2(2)(a) was satisfied. Nevertheless, Master Bowles considered as well whether an application to intervene could be allowed either under the court's general case management power set out in CPR 3.1(2)(p) or under the court's inherent jurisdiction, as Arnold J had in *Golden Eye*. Master Bowles concluded, in essence, that Arnold J's observations in *Golden Eye* were per incuriam because he had not been

referred to CPR 19.2(2)(a) which set out the court's jurisdiction to allow a party to intervene. Master Bowles held, at [27], that neither the court's inherent jurisdiction nor CPR 3.1(2)(p) could be invoked because "...where a more generalised power exists alongside a specific power, it is the parameters of the specific power, intended by the rule maker to apply to a specific situation, which should be applied...rather than the specific power being sidelined in favour of the general".

92. We respectfully prefer the analysis of Arnold J in *Golden Eye*. CPR 19.2 is concerned with applications to join a party and does not, therefore, deal with the situation of a person who seeks to intervene without being joined. PPL is not applying to be added as party under CPR 19.2. It has no legal dispute with any of the Claimants, or with the SoS and so it is not desirable to add PPL as party so that the court can resolve "all the matters in dispute in the proceedings", in the words of CPR 19.2(2)(a). PPL seeks only to make submissions on a matter affecting the interests both of itself and of its members, without being made party. It recognises that, as a non-party to the proceedings, it is likely to face difficulties in obtaining the costs of its submissions.
93. Since PPL does not seek to be made party to the proceedings, in our judgment CPR 19.2 does not force it to become party as the price of being allowed to make submissions. Rather, PPL's request should be approached either by reference to the court's inherent jurisdiction or by reference to CPR 3.1(2)(p). Whichever of those approaches is adopted, we consider that PPL should be permitted to intervene. PPL's intervention is likely to assist in the determination of the Atresmedia Issue. Moreover, the interests of PPL, and its members, would potentially be affected by our determination of that issue so that the case for hearing PPL's views on it is a strong one.
94. We will keep under review the SoS's suggestion that potential licensees, as well as PPL, be permitted to make submissions. In the first instance, PPL's submissions will enable the court to understand whether there are issues of difficulty in which it needs to be aware of other interests. If those submissions suggest that the interests of licensees, as well as those of PPL, are engaged then the court could always invite further submissions from interested parties at that stage. We do not consider that licensees need to be given permission to intervene as a precondition to PPL being allowed to intervene.
95. The Intervention Application is allowed.

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Prepared on 24 October 2026 · Esheria