

ALERTER

Representative Actions? *Getty Images (US) Inc & Ors v Stability AI Ltd* [2025] EWHC 38 (Ch)

Lucy McCormick & Vishnu Patel



Stability AI is a London-based AI developer behind a range of different generative AI systems, including its ‘Stable Diffusion’ system, which automatically generates images based on text and/or image prompts input by users. It is being sued by Getty Images and others for intellectual property infringement, in what is one of the significant pieces of ongoing artificial intelligence litigation in the UK today. The latest judgment, handed down on 14 January 2025, has plenty for group actions lawyers as well.

BACKGROUND

In broad terms, the Claimants’ complaint is that the Stability AI has scraped millions of images from Getty Images websites, without the Claimants’ consent, and used those images unlawfully as input to train and develop their AI model, Stable Diffusion. Further, the Claimants say that the output of Stable Diffusion is itself infringing, not least because it is said to reproduce a substantial part of the Claimants’ Copyright Works and/or bears the Claimants’ trade marks. The claim is framed in terms of copyright infringement, database right infringement, trade mark infringement and passing off.

The First to Fifth Claimants are members of the Getty Images Group, a “pre-eminent global visual content creator and market place”. The Sixth Claimant is a US picture and video library that had granted an exclusive licence of its works to Getty, and was seeking to act as ‘representative’ for a class of 50,000+ copyright owners.

In this latest skirmish between the parties, the Defendant sought an order that the Sixth Claimant may *not* act as a representative.

Readers will be aware that in this jurisdiction, multiparty litigation is usually ‘opt-in’, that is to say a claimant must individually take the decision to opt into the litigation. However, there are some exceptions to this, including ‘representative actions’ under CPR 19.8.

The ‘representative actions’ procedure involves a single claimant bringing a claim as the representative of a much larger group. This requires that that the representative and class members have the “same interest”; and that the court exercises its discretion to allow the instant claim to be brought as a representative claim. Historically this has been rarely used, with several recent attempts to bring claims using this mechanism stumbling on the ‘same interest’ test (see *Lloyd v Google* [2021] UKSC 50 et al). However, in 2023 the High Court did approve the use of the representative action mechanism in *Commission Recovery Ltd v Marks & Clerk LLP* [2023] EWHC 398,

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a ‘secret commission’ claim, a decision upheld by the Court of Appeal ([2024] EWCA Civ 9).

It was against that background that the Defendants argued that the Claimants’ proposed class was not sufficiently defined to meet the “*same interest*” requirement in order to allow them to bring a representative action.

THE “SAME INTEREST”?

The Claimants had pleaded in their Amended Particulars of Claim that the Sixth Claimant “*represents and has the same interest in this claim as the parties who are owners of artistic works and film works that have been licensed on an exclusive basis to the First Claimant.*”¹

This was expanded on in a Response to a Request For Information as following:

“ *...the class of persons represented by the Sixth Claimant are those who are owners of the copyright subsisting in the artistic works and film works that have been licensed on an exclusive basis to the First Claimant, the copyright in which has been infringed by the Defendant. The Persons that fall within such class can be identified on the basis that (i) they have entered into an exclusive licence with the First Claimant in respect of artistic works and/or film works;² and (ii) the exclusively licensed works include works which were used to train Stable Diffusion...* ”³

The Defendant stated that this was unclear and imprecise, and that there could not be any “*same interest*” as each member of the class would have to show (i) whether their content was used to train Stable Diffusion, (ii) whether their copyright was infringed, and (iii) whether they were entitled to damages. Their position was that this was an individualised assessment inconsistent with the requirements of a representative action.⁴

The Claimants’ proposed answer was that whilst not all members of the proposed class have identical licensing terms, the various licensing terms always contained the provision that the relevant content was licensed exclusively to the First Claimant on a worldwide basis, and that the First Claimant could bring proceedings for infringement of the licensed content. The Claimants asserted that any diversity of interest (which they denied existed) could be resolved by an inquiry as to damages or account of profits.⁵

Ultimately the Defendant contended that if the representative claim was permitted to continue, the court would be left with “*an untriable mess*”.⁶

THE OUTCOME

In coming to a decision on the Defendant’s application, Mrs Justice Smith focussed on whether the class was sufficiently defined and on whether the members of the class could satisfactorily be identified at all.⁷

The law is clear that whether a particular individual meets the criteria for membership of the proposed class cannot depend on the outcome of the litigation (see *Emerald Supplies Ltd v British Airways Plc* [2011] Ch 345 per Mummery LJ at [62]-[63] and [65] and *Lloyd v Google* at [56] and [78]). Mrs Justice Smith found the RFI definition’s first sentence to be impermissibly circular: whether a person is a member of the class there depends on whether the copyright has been infringed by the Defendant, which is a “*question that can only be determined at trial*”.⁸

To illustrate this point, Mrs Justice Smith considered the parallel of the class in the *Duke of Bedford v Ellis* [1901] AC 1 where the class was “*growers of fruit, flowers, vegetables, roots or herbs within the meaning of the Covent Garden Market Act 1828*”. The question to be determined at that trial was whether individuals in that class had certain statutory rights, which is a different question from whether an individual was actually within that class at all. The composition of the class may have been subject to fluctuation, but it

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Lucy McCormick & Vishnu Patel

could be identified before and was independent of the outcome of the litigation.⁹

Manifestly this is different from the current case where whether the copyrighted works have been infringed necessarily depends on the outcome of the action. It is only after the action that it would be possible to work out, on an individualised basis, whether any one member fell to be part of the class; and therefore, if the claim failed and was dismissed, it would not be possible to work out which parties the judgment binds for *res judicata* purposes, as the class would have no members.¹⁰

The Claimants had no success in their reliance on the second sentence of the class definition identified in the Further Information (that the persons have entered into an exclusive licence with the First Claimant, and whether their works have been used to train Stable Diffusion). Whilst the first portion of the definition (the question of exclusive licences) is provable and independent of the trial, the second portion (which artworks were used to train Stable Diffusion) is unprovable. The Defendant had only made limited admissions that “at least some” images from the Claimants were used to train Stable Diffusion, which does not extend to “one or more of the works of the 50,000 (of unknown identity) authors that have licenced content to the First Claimant”. Whether any individual work was used to train Stable Diffusion would require an individualised assessment and “be wholly dependent on its own facts”, as the author would have to show that the work was “(i) downloaded; (ii) by the Defendant; and (iii) in the UK”.¹¹

Mrs Justice Smith went on to decide that even if she was incorrect, she would not have permitted the representative claim to proceed to trial as a matter of her discretion, due to the inadequacy of the proposed class definition, and the fact that the parties and the Court did not know how the representative claim would be dealt with at trial.¹²

Additionally, Mrs Justice Smith noted that the proposed class shares no common interest, and the Claimants’

could not satisfy the “same interest” requirement, even at the highest level of generality.¹³ As the copyrighted works are alleged to have been infringed by text, images, or both, taking the text prompts claim alone would not be equally beneficial to all members of the class: it is confined to some examples of work authored by some individuals. Therefore, an individualised assessment would be required to determine whether any Stable Diffusion-generated image, created by text prompt, infringed the copyright of work authored by a member of the proposed class.

The Claimants had made a proposal in the alternative (albeit without a formal application) that the Court should permit them to pursue their claims in the absence of joinder of owners of Copyright Works, with whom they have concurrent rights of action, pursuant to CPR 19.3. The Claimants contended that if this court refuses to permit a representative claim then the interests of justice could only be served by the grant of permission under CPR r.19.3(1). The Court found that “in many ways an order under CPR 19.3 would make very good sense”, but declined to make the order at this stage as they had failed to make a formal application supported by sufficient evidence.

SIGNIFICANCE

This case highlights the importance of defining the proposed class clearly, and early on in proceedings. Mrs Justice Smith was critical throughout her judgment, particularly about: (i) case management proceeding without any focus on the representative claim, despite it having been identified at the outset of proceedings (at [22]); (ii) the late stage at which amendments to the proposed class definition were raised (at [96]); and (iii) that neither party had produced clear proposals on how the representative claim should proceed (at [85]).

In an appropriate case there is much to be said for a bifurcated process, whereby common issues of law or fact are decided through a representative action, leaving any issues which require individual determination to

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Lucy McCormick & Vishnu Patel

be dealt with later. However, practitioners should not let that distract from the fundamental rule in *Emerald Supplies*: i.e. that membership cannot depend on the outcome of the litigation.

ENDNOTES

¹ See *Getty Images* at [15].

² During the hearing, the Claimants suggested in a supplemental skeleton that the words “in which they own the copyright” be inserted here in response to the Defendant’s criticisms of the class definition (see *Getty Images* at [69]).

³ See *Getty Images* at [16].

⁴ See *Getty Images* at [19].

⁵ See *Getty Images* at [20].

⁶ See *Getty Images* at [41].

⁷ See *Getty Images* at [66]-[67].

⁸ See *Getty Images* at [73].

⁹ See *Getty Images* at [74].

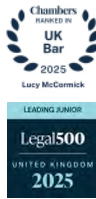
¹⁰ See *Getty Images* at [75].

¹¹ See *Getty Images* at [75]-[82].

¹² See *Getty Images* at [84]-[85].

¹³ See *Getty Images* at [89]-[94].

ABOUT THE AUTHORS



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Lucy is a commercial barrister with a particular emphasis on product liability and related areas. A substantial part of Lucy’s practice concerns group actions or other multi-party litigation. Lucy is particularly well known for her expertise in matters with a technology element, and contributed to *The Law of Artificial Intelligence* (Sweet & Maxwell 2021 & 2024) and *The Law and Autonomous Vehicles* (Routledge 2019).

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Vishnu is developing a broad practice across all of Chambers’ main areas, with a particular focus on commercial litigation and group actions. He has assisted in various parts of different Equal Pay litigations, the DPF claim, a proposed environmental-waste nuisance group action, as well as the Post-Office Inquiry.

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