



Neutral Citation Number: [2025] EWHC 1944 (Ch)

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

30 July 2025

Before:

MR JUSTICE RICHARDS

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**

**Defendant/
Applicant**

Martin Howe KC and Jaani Riordan (instructed by **Reed Smith LLP**) for
the **Claimants/Respondents**

Ewan West KC, Ravi Mehta and Hollie Higgins (instructed by
Government Legal Department) for the **Defendants/Applicant**

Hearing dates: 29 June to 3 July 2025

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This judgment was handed down remotely at 10.30am on 30 July 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Justice Richards:

1. These proceedings, brought by a Part 7 Claim Form issued on 22 December 2022, concern the right of performers in the music industry to “equitable remuneration” when sound recordings are broadcast or communicated to the public in the UK.
2. The Claimants in these proceedings are as follows:
 - i) C7 (**AFM**) and C8 (**SAG-AFTRA**) are two US labour unions. Their membership consists of hundreds of thousands of working performers in the music and entertainment industry. As well as carrying out a wide range of activities typical of a labour union, such as negotiating terms of employment, health and pension benefits, they also operate as collective management organisations (**CMOs**) by collecting and distributing equitable remuneration to their members.
 - ii) C1 to C6 are trustees of a fund (the **Fund**) that administers, collects and distributes royalty payments to members of AFM and SAG-AFTRA.
 - iii) C9 to C12 are four individual performers. C9 and C10 are members of AFM and C11 and C12 are members of SAG-AFTRA.
3. The Claimants seek to establish that some 33,000 performing musicians and vocalists with some connection to the US (**US Performers**) were not paid equitable remuneration in respect of UK exploitation of their performances after 2016, to which they would have been entitled but for the UK’s failure to comply with its EU law obligations. The principal relief sought, at least for the purposes of the present applications, consists of damages under the principle in Joined Cases C-6/90 and C-9/90 *Francovich v Italian Republic* (ECLI:EU:C:1991:428) [1993] 2 C.M.L.R. 66. The Defendant (the **SoS**) resists the claims.
4. This is my judgment on the following applications:
 - i) the SoS’s application of 28 October 2024 for an order under CPR 19.8(2) that the individual claimants (C9 to C12) not be permitted to act as representative claimants (the **Representative Claim Application**);
 - ii) the SoS’s application of 28 October 2024 to strike out, or summarily dismiss, the claims for damages made in the names of C1-C8 on the basis that they lack standing, or title to sue (the **C1-C8 Standing Application**);
 - iii) the SoS’s application of 6 August 2024 to strike out all Claimants’ claims for *Francovich* damages that relate to the period after 31 December 2020 (the **Post-Brexit Damages Application**);
 - iv) the SoS’s application of 6 August 2024 to strike out or summarily to dismiss all the Claimants’ claims for damages insofar as they involve performances exploited within audio-visual works, as distinct from phonograms (the **Audio-Visual Works Application**);
 - v) the SoS’s application of 16 May 2025 to amend its Defence;

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- vi) an application by the Claimants to adduce expert evidence of Dr Olivia Ruth Singer on matters of US federal and state law going to the standing of C7, C8 and the Fund to bring, in their own name, proceedings on behalf of US Performers; and
 - vii) an application by the Claimants to amend their Particulars of Claim (**POC**) in the form of draft amended Particulars of Claim (**Draft APOC**).
5. The SoS also made an application of 6 August 2024 to strike out or summarily dismiss the Claimants' claims for declarations insofar as they relate to the UK's asserted non-compliance with its unincorporated international obligations (the **Declaratory Relief Application**). However, shortly before the hearing before me, the Administrative Court gave permission to the claimants in other proceedings, including AFM and SAG-AFTRA, to bring judicial review proceedings that asserted similar non-compliance. In those circumstances, I made an order staying the Declaratory Relief Application at the commencement of the hearing.

[A] – THE CLAIMS IN MORE DETAIL

6. The claims can only be understood in the context of UK law on equitable remuneration and corresponding provisions in treaties and EU directives. That “equitable compensation” is a right to share in the benefits of exploitation, in the UK, of a “phonogram”. Some of the treaties and statutory provisions define that term differently, with those points of difference being relevant to the Audio-Visual Works Application in particular. Unless absolute precision is necessary, I will tend to use the expression “phonogram” and “sound recording” interchangeably. In addition, I will not deal at all with the point that a sound recording will typically engage at least two separate copyrights, namely the copyright in the sound recording itself and the copyright in the underlying musical composition and/or lyrics. The latter species of copyright is not relevant to the issues I must determine in this judgment.
7. A number of treaties and statutory provisions envisage equitable compensation being shared between “producers” and performers. The concept of a performer is straightforward. At a very general level, a “producer” is the person who makes the arrangements necessary for the sound recording to be made and so becomes the first owner of the copyright in that sound recording. In a straightforward case, that will be a “record company”. However, it could be one of the performers, for example, if performers self-produce their own sound recordings. Moreover, a performer or a company controlled by a performer might subsequently acquire the copyright in a sound recording. Therefore, the categories of “performer” and “producer” are not mutually exclusive.

Section 182D

8. Although not the first item chronologically, the starting point for an understanding of the dispute is s182D (**Section 182D**) of the Copyright, Designs and Patents Act 1982 (**CDPA**). That provision has been varied over time, but at material times provided, so far as material, as follows:

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(1) Where a commercially published sound recording of the whole or any substantial part of a qualifying performance –

(a) is played in public, or

(b) is included in a broadcast or cable programme service,

the performer is entitled to equitable remuneration from the owner of the copyright in the sound recording.

(2) The right to equitable remuneration under this section may not be assigned by the performer except to a collecting society for the purpose of enabling it to enforce the right on his behalf. The right is, however, transmissible by testamentary disposition or by operation of law as personal or moveable property and it may be assigned or further transmitted by any person into whose hands it passes.

(3) The amount payable by way of equitable remuneration is as agreed by or on behalf of the persons by and to whom it is payable, subject the following provisions...

9. It is common ground that Section 182D is concerned with the exploitation of a sound recording in the UK only. It can be seen from the remainder of the extract that a performer's entitlement under Section 182D depends on whether the sound recording in question is of a "qualifying performance".
10. That concept is explained in ss181 and 206 of the CDPA. In overview, a performance was, at material times, a "qualifying performance" if:
 - i) the performance is given by a "qualifying individual". That is defined as an individual that is a "citizen or subject of or resident in" a "qualifying country"; or
 - ii) the performance takes place in a "qualifying country".
11. The concept of a "qualifying country" is defined in s206 of CDPA. It has since been amended but prior to 31 December 2020 it included:
 - i) the UK;
 - ii) other member states of the EU;
 - iii) any country that was party to the Rome Convention discussed below; and
 - iv) any country designated as enjoying "reciprocal protection" by an order under s208 of CDPA.
12. It can be seen from the summary in paragraph 10 that, a qualifying individual who is a citizen of, a subject of, or resident in, a qualifying country is in principle entitled to equitable remuneration when a sound recording of a performance is exploited in the UK,

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no matter where that performance took place. I say “in principle entitled” because of certain derogations and exceptions that are mentioned in the next section.

A snapshot of the UK’s EU law and treaty obligations

The Rome Convention

13. In 1963, the UK acceded to The International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (the **Rome Convention**). In very broad terms, Article 12 of the Rome Convention required a “single equitable remuneration” to be paid by the user of a phonogram to the performers, or the producers of that phonogram, or both. Article 4 of the Rome Convention required signatories to confer “national treatment” to performers and producers of phonograms if various “points of attachment” are satisfied: for example if the performance in question took place in another contracting state (a “criterion of performance”) or if the performance is incorporated in a phonogram which is protected under the Rome Convention because the first fixation of the sound was made in another contracting state (the “criterion of fixation”). Articles 5(3) and 16 of the Rome Convention permitted signatories to derogate from that obligation in relation to certain “points of attachment” and in certain other respects.
14. When ratifying the Rome Convention on 30 December 1963, the UK made a declaration under Article 5(3) of the Rome Convention that it would not apply the criterion of fixation. It also declared that it would not give effect to the requirements of Article 12 in certain respects. However, certain of those limitations did not apply if the phonogram in question had been “first published” (which in practice included simultaneous publication) in a signatory to the Rome Convention that gave full effect to Article 12.
15. Neither the US nor the EU was a signatory to the Rome Convention.
16. Section 182D therefore had regard to provisions of the Rome Convention since:
 - i) A person who is a citizen, resident or subject of a Rome Convention signatory is in principle a “qualifying individual”.
 - ii) Article 9 of the Copyright and Performances (Application to Other Countries) Order 2016 (the **2016 Order**) “switched off” entitlement to equitable remuneration to nationals of Rome Convention territories which had derogated from the requirements of Article 12 dealing with equitable remuneration. However, that “switching off” did not take place if the recording in question had been first published in a Rome Convention territory that had not made such a derogation.

The WPPT

17. On 20 December 1996, the WIPO Performances and Phonograms Treaty (the **WPPT**) was adopted. Unlike the Rome Convention, the WPPT was signed by the US. It was also signed and ratified by the UK, the EU and other EU member states. While Article 15(1) provided for performers and producers to share in a single equitable remuneration on direct or indirect use, the WPPT contained some significant limitations and qualifications:

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- i) Article 2(b) defined the “phonograms” that were within the scope of the WPPT as the “fixation” of sounds “... other than in the form of a fixation incorporated in a cinematographic or other audiovisual work”. This had the effect, for example, of excluding a sound performance incorporated into a movie soundtrack from the scope of the WPPT. Article 11 of the WPPT permitted, but did not oblige, signatories to extend the right to equitable remuneration to performers in respect of the exploitation of their performances fixed in audiovisual fixations. I will return to this aspect of the WPPT when I address the Audio-Visual Works Application.
 - ii) When it ratified the WPPT, the US made an important derogation under Article 15(3) of the WPPT to the effect that it would apply the provisions of Article 15(1) “only in respect of certain acts of broadcasting and communication to the public by digital means for which a direct or indirect fee is charged for reception, and for other retransmissions and digital phonorecord delivered, as provided under the United States law”. Thus, under the WPPT the US was prepared to offer only a restricted entitlement to equitable remuneration when phonograms were exploited in the US.
18. The US’s restrictive approach to phonograms resonated in UK domestic law. By paragraph 11 of the 2016 Order, the US was, as a signatory to the WPPT but not the Rome Convention, designated as enjoying “reciprocal protection”. The US was therefore a “qualifying country” for the purposes of Section 182D. However, the 2016 Order provided for Section 182D to apply in the same restricted manner as the US had itself stipulated pursuant to the WPPT to which I will refer as “**limited entitlement**” because it conferred a right to equitable remuneration only in relation to limited uses of phonograms. I contrast that with the “**full entitlement**” that Section 182D would confer, covering a wider field of use of phonograms, but for this restriction.

European Directives

19. Section 182D was enacted in order to implement provisions of European Council Directive No 92/100/EEC (the **1992 Rental and Lending Rights Directive**). The 1992 Rental and Lending Rights Directive was repealed and replaced in 2006 with Directive 2006/115/EC (the **2006 Rental and Lending Rights Directive**). However, the provisions dealing with equitable remuneration in the 2006 Rental and Lending Rights Directive were identical to those of the 1992 Rental and Lending Rights Directive. I will, therefore, tend to refer to the “**Directive**” and will quote provisions by reference to the 2006 Rental and Lending Rights Directive.
20. Article 8(2) of the Directive provided as follows:

Member States shall provide a right in order to ensure that a single equitable remuneration is paid by the user, if a phonogram published for commercial purposes, or a reproduction of such phonogram, is used for broadcasting by wireless means or for any communication to the public, and to ensure that this remuneration is shared between the relevant performers and phonogram producers. Member States may, in the absence of agreement between the performers and phonogram producers,

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lay down the conditions as to the sharing of this remuneration between them.

21. The Court of Justice of the European Union (**CJEU**) considered the requirements of the WPPT and the Directive in *Recorded Artists Actors Performers Ltd v Phonographic Performance (Ireland) Ltd and others* (Case C-265/19) [2021] CMLR 22 (**RAAP**). The CJEU gave its judgment in *RAAP* on 8 September 2020, just a few months before the UK left the EU legal order.
22. In *RAAP*, the CJEU reached the following conclusions:
 - i) Article 8(2) of the Directive together with the WPPT required individual member states to confer on nationals of third states that were signatories to the WPPT a right to equitable remuneration.
 - ii) Individual member states could not dilute or qualify the right to a single equitable remuneration on the grounds that a particular third state, such as the US, was prepared to offer only a limited right pursuant to the WPPT.
 - iii) It is for the EU legislature alone to decide whether to legislate, on a harmonised basis, to provide that third states who offered only limited rights pursuant to the WPPT would receive only limited rights from the EU in return.

Some relevant aspects of the claims

Divergences and alleged divergences between UK law and EU law

23. Some central features of the proposed claims can be considered by reference to the position of performers who are US nationals, citizens or residents, although as will be seen the claim is advanced on behalf of a wider category of claimant than this:
 - i) UK domestic law, as set out in Section 182D and the 2016 Order meant that a performer's status as a US national, citizen or resident alone would confer only a limited entitlement to equitable remuneration that mirrored the limited entitlement that the US was prepared to offer under the WPPT. (I emphasise the word "alone" because of the possibility of "parallel entitlement" considered below.)
 - ii) However, *RAAP* suggested that UK domestic law failed to comply with requirements of the EU legal order and that US nationals, citizens or residents were entitled to more generous equitable remuneration when phonograms on which they performed were exploited in the UK.
24. The SoS accepts that there was a divergence between UK domestic law and the requirements of EU law as explained by *RAAP* set out in paragraph 23 above. Because of that divergence, and similar divergences affecting performers who were not nationals, citizens or residents of the US, but had given performances in the US, the Claimants seek to bring a *Francovich* claim for losses they say the US Performers have suffered as a consequence of UK law not properly reflecting EU law. The Claimants accept that, in order to recover such damages, they must satisfy the familiar three requirements of a *Francovich* claim:

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- i) The rule of EU law infringed must be intended to confer rights on individuals.
- ii) The breach of EU law must be “sufficiently serious”.
- iii) There must be a direct causal link between the UK’s breach of its obligations and the damage sustained.

The role of PPL

- 25. In practice, performers worldwide rely on CMOs to collect equitable remuneration for them. In the UK, Phonographic Performance Limited (**PPL**) is the CMO which tends to represent most UK performers and record companies and which licenses music users when music is broadcast or communicated to the public in the UK. PPL collects royalties from users of recorded music when phonograms are exploited in the UK. It distributes those sums directly to performers linked to the UK and to UK record companies. Where a performer is based outside the UK and is a member of another (overseas) CMO, PPL liaises with that CMO in order to ascertain that performer’s entitlement and pays over equitable remuneration due to that CMO.
- 26. In very broad summary, in the ordinary course of events, each year PPL would make available to AFM and SAG-AFTRA details of all phonograms exploited in the UK. AFM and SAG-AFTRA hold information on the artists that they represent and would in turn determine which of those tracks included performances by such artists and make “claims” for equitable remuneration accordingly.
- 27. PPL’s standard processes involve it classifying all performers on a sound recording into various categories: “contracted feature performer”, “other featured performer”, or “non-featured performer”. “Featured performers” for these purposes can be understood as “main or lead” artists who obtain some sort of credit for the performance, for example by being named as an artist on a “record sleeve” or modern equivalent. As an aside, it is noted that AFM and SAG-AFTRA tend to represent “non-featured” performers, such as session musicians and backing vocalists, with US featured performers tending to be represented by a different CMO (**SoundExchange**). However, the groups of “featured” and “non-featured” performers are not mutually exclusive. A person might start their career as a non-featured artist, but achieve success and later become a featured artist, for example.
- 28. PPL would allocate 50% of licence fees that it receives to “producers”. It would allocate the remaining 50% to the three categories of performer summarised in paragraph 27 on the basis of a formula set out in its Distribution Rules.
- 29. After making that allocation between performers and producers, PPL would consider whether any particular performer is “qualifying”. It would do so by applying parameters based on UK domestic law including, but not limited to, Section 182D. It is a matter of some dispute whether PPL’s algorithm properly reflected all of the complexities of Section 182D in relation to audiovisual works. However, PPL’s processes reflected Section 182D to the extent that artists represented by the Fund tended to be regarded as “qualifying” for equitable remuneration by reference only to the limited entitlement summarised in paragraph 23.i) above.

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30. To the extent that any performer is not “qualifying”, then that performer’s notional share of the equitable remuneration allocated as set out in paragraph 28 is notionally re-allocated to producers. Thus, in a simple situation where none of the performers on a particular phonogram is entitled to any equitable remuneration for exploitation of that phonogram, the producer would receive both its notional 50% share of that equitable remuneration and the notional share of the performers that is reallocated to it.

Parallel entitlements to equitable remuneration

31. A US national, citizen or resident might have what I will term a “**parallel entitlement**” to equitable remuneration under UK domestic law without any need to invoke principles of EU law. For example:
- i) A particular performer might be resident in the US, but be a national of (or give a performance in) a country (such as Canada) that is a signatory to the Rome Convention or WPPT which has made no limiting declaration pursuant to Article 16 or Article 15 respectively of those treaties. In that case, the US Performer’s US residence would confer only limited entitlement to equitable remuneration under UK domestic law, but Canadian nationality or place of performance could confer a parallel entitlement to full equitable remuneration.
 - ii) A particular performer might be resident in the US but be a national of (or give a performance in) a country, such as Japan, which has filed a reservation under the WPPT or Rome Convention narrower in scope than that filed by the US under the WPPT. In that case, the performer’s Japanese nationality might confer a better parallel entitlement under UK domestic law to equitable remuneration than the limited entitlement that is available by reason of US residence.
32. As will be seen, the US Performers on whose behalf the Claimants seek to bring a representative action under CPR 19.8 are not limited to US nationals, citizens or residents. The term also includes persons, who are nationals, citizens or residents of any country, who have given a performance in the US which is captured in a phonogram. This gives rise to further and more complex routes to parallel entitlement. For example, a particular performer might be a resident of South Korea (a Rome Convention signatory) and have given a performance in the US that is fixed in a phonogram which is first published, or simultaneously published, in Canada (a Rome Convention signatory which has made no derogation from Article 12). The fact that the performance is given in the US makes it a “qualifying performance” attracting the limited entitlement to which I have referred. However, the performer’s South Korean residence and/or the simultaneous publication of the phonogram in Canada might confer a fuller entitlement under UK domestic law.
33. From this it can be seen that, at least in theory, PPL’s processes might only have credited a particular performer with a limited entitlement to equitable remuneration based on a connection with the US that AFM or SAG-AFTRA asserted in a “claim” made to PPL (see paragraph 26 above). However, in theory a US Performer might also have a parallel entitlement that affords it, under Section 182D, a right to higher equitable remuneration. In that regard at least the following possibilities arise:

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- i) The parallel entitlement was asserted in a “claim” to PPL made by AFM or SAG-AFTRA but PPL rejected that claim and was prepared only to accept a claim for limited entitlement.
 - ii) The parallel entitlement was never asserted, perhaps because neither AFM nor SAG-AFTRA was aware that the artist had any parallel entitlement that could be asserted. Since no parallel entitlement was asserted, PPL proceeded on the basis that the artist had limited entitlement only based on US connections.
34. The Claimants’ position is that even if a particular performer had a parallel entitlement that could have been, but was not, asserted, the SoS remains liable to pay *Francovich* damages to that performer based on the difference between the full entitlement and the limited entitlement. They reason that, if the UK had complied properly with its EU law obligations (i) Section 182D would have conferred full entitlement on US Performers, (ii) when PPL applied its processes, it would have recognised the full entitlement of US Performers and paid them accordingly so that (iii) a US Performer would never have needed to assert any parallel entitlement.
35. In its skeleton argument, the SoS said that the case above had not been pleaded. I do not agree. Paragraph 57.4 of the (unamended) POC pleads a case that, if Section 182D had been worded consistently with EU law, PPL would have followed Section 182D and paid more equitable remuneration to US Performers. That case is adequately pleaded. That said, I agree with the SoS that there is a perfectly triable counter to the Claimants’ position namely that, if a particular US Performer, or AFM/SAG-AFTRA on that performer’s behalf, has failed to pursue a parallel entitlement, any corresponding loss flows from that failure rather than the UK’s failure to legislate in accordance with its EU law obligations.

[B] MERITS TEST APPLICABLE TO SUMMARY JUDGMENT, STRIKE OUT AND AMENDMENT APPLICATIONS

Principles applicable to summary judgment/strike out

36. Various of the SoS’s applications invite me to conclude that aspects of the claim should be struck out or be the subject of summary judgment in the SoS’s favour. For their part, the Claimants seek permission to amend their POC, in some respects to meet objections that the SoS raises in the applications for strike-out or summary judgment. All of those applications involve the court applying a “merits test” asking, in different contexts, whether claims, or proposed amended claims, have sufficient prospects of success to proceed to trial.
37. The parties were agreed on the following matters regarding the application of that merits test:
- i) The same merits test applies to the applications to strike out, for summary judgment and to amend pleadings.
 - ii) The relevant threshold involves a consideration of whether the claim, part of a claim, or proposed amendment is “bound to fail”. The court should follow the

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approach that Lewison J set out at [15] of *Easyair Ltd v Opal* [2009] EWHC 339 (Ch) when considering whether that threshold is met.

38. The parties were also agreed that a summary judgment application can be made by reference to points of pure law. That is the nature of the C1-C8 Standing Application, the Post-Brexit Damages Application and the Audio-Visual Works Application. By those applications, it is argued that since particular points of law should be determined in favour of the SoS, the Claimants are bound to fail on a particular “claim or issue” so that the SoS is entitled to summary judgment (see CPR 24.1).
39. Where a summary judgment application is brought by reference to a relatively straightforward point of law, the court has before it all relevant material and a trial judge would be in no better position to decide it, then the court is entitled to approach the summary judgment application as involving a final determination of that point of law on a balance of probabilities and not merely on the basis of whether the respondent to the application has a case with realistic prospects of success (see [83] of the judgment of Fancourt J in *Anan Kasei Co Ltd v Neo Chemicals and Oxides (Europe) Ltd* [2021] EWHC 1035 (Ch)). The justification for that approach is that if the point truly is short and straightforward, and the court has all the material it needs to determine it at an interim stage, then it may be possible to conclude that a particular claim or part thereof has no real prospect of success because it is bad in law. That is why Lewison J spoke of a court “grasping the nettle” in such cases at [15(vii)] of *Easyair v Opal*.
40. However, it does not follow that, simply because a party can identify a self-contained point of law at an interim stage, that a court must necessarily “grasp the nettle” and determine it on a summary basis for at least three reasons:
 - i) The point might not actually be deployed in support of an application for summary determination of a “claim or issue”. A “claim or issue” would need, in the words of Fancourt J at [82] of *Anan Kasei*, to be a “severable part of the proceedings” as distinct from merely being “any factual or legal issue that is one among many that would need to be decided at trial to resolve such a claim or part of a claim”. In asking whether summary judgment is indeed being sought on a claim or issue, it is appropriate to ask what consequences there would be at trial if the matter is determined on a summary basis. If the answer is that there is just “one fewer issue for trial”, then it may not be suitable for summary determination so as to avoid an incentive for parties to choose isolated issues on which they thought their cases were strong and have those issues determined out of context before trial.
 - ii) The point might not be sufficiently straightforward for summary determination, or the court might consider it does not have all the material it needs to determine the point.
 - iii) Ultimately, the court has a discretion to decline to determine “straightforward” points of law even if full arguments have been made on that point.
41. The discretion set out in paragraph 40.iii) is important given the potential for applications for summary judgment on a pure question of law to have results similar to determination of a preliminary issue of law. A court will typically exercise a case-management control

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over requests that it determine points of law as preliminary issues. It will be concerned, in particular, with the risk that, having determined such a matter, any appeals take a long time to resolve and proceed without factual findings having been made. In such a case, the obvious risk with a preliminary issue is that, once appeals are resolved, some years after the fact-finding trial, a court is required to embark on fact-finding exercise that it did not undertake because of the determination of a preliminary issue. It is common ground that the court can take into account such considerations when deciding how to exercise its discretion. Moreover, in truly developing areas of the law, an appreciation of the facts can help superior courts to determine how the law should evolve, hence the statements of Coulson LJ at [22] to [24] of *Begum v Maran (UK) Ltd* [2021] EWCA Civ 326 on the undesirability of striking out claims in an area of developing jurisprudence on the basis of assumed facts.

[C] THE REPRESENTATIVE CLAIM APPLICATION

CPR 19.8 and applicable principles

42. CPR 19.8 provides, so far as material, as follows:

(1) Where more than one person has the same interest in a claim
—

(a) the claim may be begun; or

(b) the court may order that the claim be continued,

by or against one or more of the persons who have the same interest as representatives of any other persons who have that interest.

(2) The court may direct that a person may not act as a representative...

(4) Unless the court otherwise directs any judgment or order given in a claim in which a party is acting as a representative under this rule —

(a) is binding on all persons represented in the claim; but

(b) may only be enforced by or against a person who is not a party to the claim with the permission of the court.

43. One can debate whether the Claimants should have applied for an order under CPR 19.8(1)(b) permitting the claims to be “continued” in a representative capacity. However, no-one invites me to attach any significance to that point since the Representative Claim Application brings that question before the court with the SoS arguing that the court should prevent the claims going forward on the basis set out in CPR 19.8.

44. When deciding the Representative Claim Application, I will apply the guidance given by Lord Leggatt in his judgment in *Lloyd v Google LLC* [2022] AC 1217, particularly the

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passages from [67] to [83]. There is little point in me seeking to summarise those principles as that would simply involve me recasting Lord Leggatt’s judgment into my own words, with the inevitable risk of overlooking important points of detail when doing so. Rather, I will seek to apply particular aspects of that guidance to the various salient features of the proposed claims.

45. Clearly, that discussion must be grounded firmly in an analysis of the class for whom C9 to C12 seek to act in a representative capacity which I set out in full, using the wording set out in paragraph 15 of the Draft APOC by which those claimants seek to act on behalf of:

... (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 ~~been wrongfully denied~~ 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...

46. In the quote above, the deleted words “been wrongfully denied” appear in the Claimants’ unamended POC. The Claimants seek permission to amend these words to remove the concept of “wrongful” denial and replace it with a concept of non-receipt.
47. The relevant proposed class for the purposes of CPR 19.8 therefore consists of “US Performers” as defined above. (The definition also extends to the estates of deceased persons, but that is not relevant for the purposes of the present applications).

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The SoS's objections

Conflict of interest between class members

48. CPR 19.8 imposes a threshold requirement that C9 to C12 must have the “same interest” as the class they wish to represent. If that requirement is not satisfied, then I simply have no discretion to permit C9 to C12 to bring claims as representatives of that class and the SoS's Representative Claim Application must be allowed.
49. At [71] to [74] of his judgment in *Lloyd v Google*, Lord Leggatt explained both the reason for that rule and that it should be construed purposively having regard both to the overriding objective and the rationale for the CPR 19.8 representative procedure. CPR 19.8 permits claims to be brought on behalf of a class of persons without their express consent and can result in any judgment given being binding on the entire class. In those circumstances, it is important that the representative can be relied on to conduct the litigation in a way which will effectively promote and protect the interests of all the members of the represented class. That would not be possible where there is a conflict of interest between class members in that an argument which would advance the cause of some would prejudice the position of others. That said, at [72] of his judgment, Lord Leggatt explained the difference between “conflicting interests” of class members and “merely divergent interests”.
50. The SoS argues that there is a conflict of interest of the following kind:
 - i) Some US Performers could conceivably own the copyright in a sound recording.
 - ii) PPL's rules of allocation based on Section 182D will result in anything not allocated to other performers, on the basis that they are not “qualifying”, being reallocated to the US Performer in question (see paragraphs 29 and 30 above). That could result in a copyright-owning US Performer being a “net winner” under the current regime taking into account rights held as a producer.
 - iii) C9 to C12 are seeking a declaration that Section 182D did not comply with the UK's international law obligations. They can only be seeking that declaration with a view to persuading the UK Government to introduce legislation altering Section 182D so that US Performers have a full, rather than a limited, entitlement to equitable remuneration.
 - iv) Any such change in the law might result in a particular copyright-owning US Performer ceasing to be a “net winner”. Such a copyright-owning US Performer would have an incentive to disavow arguments that Section 182D should be amended which is precisely the kind of conflict that Lord Leggatt had in mind.
51. The SoS claimed to have identified copyright-owning US Performers in this category. The Claimants assert that the examples identified are flawed. However, I consider it appropriate to consider the alleged conflict as a matter of principle rather than engaging in a mini-trial to seek to ascertain which, if any, of over 30,000 US Performers might themselves own copyright in sound recordings of their performances.

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52. I do not consider that there is any sufficient conflict of interest of the kind the SoS alleges to prevent proceedings from being brought on behalf of the class. First, I agree with the Claimants that the declaration sought is simply a declaration of the position in the past. Of course, it is always open to Parliament to change the law. However, even if the High Court were to declare that the UK's laws were, historically, in breach of EU law, that certainly would not compel Parliament to change the law. Indeed, given that Parliament has legislated specifically to limit the effect of EU law in the UK's legal system, it is not even clear that such a declaration would be seen as an invitation to change the law.
53. More pedantically, the Claimants point out that, by the C1-C8 Standing Application, the SoS has applied only to strike out C1-C8's claim for *Francovich* damages and not their claim for declarations. Therefore, they argue that any conflict could be "drafted around" by C1-C8 continuing to seek declarations with C9-C12 seeking damages, but no declarations, in their representative capacity. That is true, but the point set out in paragraph 52 is of greater weight.
54. The SoS also argues that a conflict of interest is present in the sense that, because some US Performers could have a parallel entitlement they might have suffered no loss at all. I agree that the issue of parallel entitlement is significant and I will return to it when I consider objections set out in the section below. However, I do not regard it as the kind of conflict of interest that prevents the necessary conditions of CPR 19.8 being satisfied.
55. Ultimately the court will need to decide how to address the issue of causation referred to in paragraph 35. It may decide that a US Performer who (i) has not received full entitlement to equitable remuneration but (ii) had a parallel entitlement has not suffered loss that can be compensated in *Francovich* damages to the extent of that parallel entitlement. It may reach a similar conclusion in relation to copyright-owning US Performers who have benefited from a re-allocation of the shares of non-qualifying performers described in paragraphs 29 and 30 above. However, this would mean only that a particular US Performer in this position might obtain less by way of damages than they hoped. I do not consider that a US Performer in this position has interests that diverge from other members of the class. C9 to C12 could still advance arguments to the effect that the UK Government failed properly to implement EU directives or to comply with its international obligations without prejudicing the rights of US Performers with parallel entitlement.

Definition of and composition of class

56. The question whether the class is sufficiently clearly defined is not a hard-edged jurisdictional objection to the making of an order under CPR 19.8 by contrast with the "conflict of interest" objection referred to in the section above. However, it is a matter going to the court's discretion (see [78] of *Lloyd v Google*).
57. If the Claimants had not applied to amend their POC in the manner set out in paragraph 46, I might well have concluded that the definition of the class was objectionable on the basis that it depended on the outcome of the litigation. However, it is appropriate in my judgment to consider the adequacy or otherwise of the class definition in the light of the Claimants' proposed amendment.

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58. The SoS at points argued that the Claimants' class definition is vague and uncertain in its scope. Reference was made to a process involving PPL with which both the Claimants and the SoS have been involved that has sought to estimate the number and identity of US Performers who could have a claim for *Francovich* damages and the amount of damages to which they are entitled. Essentially that process involved PPL running a "counterfactual" analysis of the following kind:
- i) PPL shared with the Fund information on all tracks exploited in the UK between 1 January 2016 and 31 December 2022.
 - ii) The Fund checked that information against its own internal performer database and made "claims" in relation to those tracks of the kind set out in paragraph 26 above.
 - iii) PPL reviewed the claims that the Fund made and provided feedback on them in "feedback files". Those feedback files might simply indicate that PPL accepted that a performer is indeed owed equitable remuneration in relation to a particular track. Where PPL was not prepared immediately to accept a claim, it would provide a reason. A common example for not immediately accepting a claim was that a performer may be listed as "John S. Smith" in the Fund's records, but PPL may have that individual listed as "Jon Smith" in its records. Similar issues could arise if a performer appears under a stage name in the Fund's records, but under his or her legal name in PPL's records or vice versa. A rejection in a feedback file would not be final, but could be reversed if the Fund provided a satisfactory explanation or evidence to address PPL's concern.
 - iv) PPL performed a revised calculation on the counterfactual basis that the US Performers whom it accepted to be entitled to equitable remuneration had a full entitlement, rather than limited entitlement, to equitable remuneration.
59. This process means that there are various competing lists of US Performers:
- i) The Fund's list contains 33,277 performers.
 - ii) As matters stand, PPL has "accepted" claims in relation to 28,456 performers.
60. The SoS suggested that discrepancies between the PPL list and the Fund's list was indicative of a lack of certainty in the proposed class definition. I do not agree. I consider the class definition set out in paragraph 45 to set out an ascertainable class of individuals. There is no objectionable lack of clarity in the concept of whether a particular individual "has received" equitable remuneration in the UK. The limbs of the definition of "US Performer" invite an examination of objectively clear criteria.
61. I acknowledge difficulties in ascertaining whether an individual satisfies the definition. For example, establishing whether an individual is "resident" in the US in theory involves an examination of the personal situation of the individual concerned. Ascertaining whether that individual "has received" equitable remuneration could, in theory, require an examination of the individual's financial records. However, these difficulties are of evidence and proof and are not indicative of any lack of clarity in the definitions used.

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62. The waters were somewhat muddled by an exercise that Mr David Burns, Head of Music Copyright Policy at the Intellectual Property Office, performed. He compared the names on the Fund's list of performers with those on PPL's list. Initially, he concluded that there were 8,654 names that were on the Fund's list, but did not appear on PPL's list. However, as he acknowledged in his Third Witness Statement, that determination proceeded by reference to a rigid "names for names" comparison under which a "John M. Smith" in the Fund's list would be treated as not included in the PPL list if the corresponding entry in the PPL list read "J Smith". In his Third Witness Statement, Mr Burns set out the results of a more sophisticated comparison which he considered reduced the discrepancy to 6,781 names.
63. I do not consider Mr Burns's analysis to reveal any deficiencies in C9-C12's proposed class definition. I see little utility in a "names for names" comparison between the two lists. That there is some discrepancy is not itself surprising since, as the example in paragraph 58.iii) shows, it is a known fact that PPL and the Fund on occasions use different names to describe the same performer. Measuring the scale of that discrepancy does not cast any doubt on the viability of the proposed class definition. Nor am I satisfied that the fact that there are 4,821 performers on the Fund's list for whom PPL has not yet accepted "claims" indicates a problem with the proposed class definition. As Ms Sanchez explained in her witness statement on behalf of the Fund, the process of agreeing claims is time consuming. Her evidence is that PPL ultimately accepts 99% of the Fund's claims. There is reason to believe that the ongoing dialogue between the Fund and PPL will reduce the discrepancy.
64. I conclude that there is no objectionable lack of clarity in the class definition set out in the Draft APOC. Nor do I consider that the class definition involves the Fund bringing proceedings on behalf of a class consisting of a significant number of individuals who have suffered no loss. After all, only individuals who have not received equitable remuneration are capable of being members of the class as defined. The fact that there is, currently, a discrepancy between the Fund's list and PPL's list does not indicate differently since those discrepancies can be expected to be resolved in due course.
65. The SoS made a related point arguing that the practical difficulties in working out who is a member of the class should weigh heavily in the balance given that these claims would require an individual assessment of damages. I consider that argument in the section that follows.

Individual assessment of damages

66. At [80] to [84] of *Lloyd v Google*, Lord Leggatt explains tensions that arise where the CPR 19.8 procedure is used in claims that require an individual assessment of damages. At [81], he explained that, where an individual assessment of damages is necessary, it may be appropriate for the court to adopt a "bifurcated process" under which common issues of law and fact are decided in the representative claim itself, with individual assessment of damages, if necessary, taking place at a later stage of the proceedings. There is a suggestion at [81] that, if necessary, individual members of the class could be substituted for the representative claimants at the second stage without it being said that the individual members had brought their (individual) proceedings after expiry of any

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limitation period in reliance on the judgment of the Court of Appeal in *Moon v Atherton* [1972] 2 QB 435.

67. In my judgment, this is a case in which an individual assessment of damages would be required. If the SoS is liable, then any US Performer's loss would have to be calculated by considering the equitable remuneration that would have been received if UK domestic law had been worded differently. The most obvious way of performing that calculation is in the way that PPL are currently performing it, by considering each US Performer's entitlement to equitable remuneration separately.
68. The Claimants are right that many common issues of fact and law could be decided in the representative claim. To give just one example, the causation issue summarised in paragraphs 33 to 35 above might, at least in part, be dealt with as a question of pure principle, namely whether the SoS had any liability for loss occasioned by a particular US Performer's failure to pursue parallel entitlement. However, if a court were to conclude that the SoS had no liability in these circumstances an individual assessment would be required not least since it would be necessary to identify which US Performers had parallel entitlements which they did not pursue.
69. The SoS's points about difficulties posed by the need for an individual assessment of damages have real force. In my judgment, the Claimants have not sufficiently grappled with those difficulties and as a result there is, as matters stand, no proposal properly before me as to how damages would be assessed following a bifurcated process.
70. Until the commencement of the hearing, the Claimants appeared to be proceeding on the basis that the process with PPL alone would enable both (i) the members of the class to be determined and (ii) a calculation to be performed of the amount that would be owed to each such member if the claims succeeded without the need for any engagement with individual US Performers. However, there are at least the following difficulties with that approach:
 - i) C9 to C12 are not bringing their claims on behalf of 33,277 individuals specified in the Fund's list. They are bringing their claims on behalf of a class of individuals identified by description. Even though I consider that class to be objectively ascertainable, at some point the members of it need to be identified as individuals so that the assessment of damages can be performed by reference to those individuals. C9 to C12 have not identified any process by which the class could be ascertained in this sense. In the absence of such proposals, I have nothing against which to test the submissions of Mr West KC to the effect that a class closing exercise would be novel and potentially at odds with the philosophy behind CPR 19.8.
 - ii) A bifurcated process might assume that claims can be pursued by individual US Performers at the "damages stage" without a limitation problem (see paragraph 66 above). How secure is that assumption in circumstances where limitation issues do not just arise under the Limitation Act 1980, but also under the statutory provisions considered in connection with the Post-Brexit Damages Application (see paragraphs 97 to 107 below)?

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- iii) The causation issue referred to in paragraph 35 might require an exercise to identify which US Performers might have parallel entitlement. Any parallel entitlement might depend on US Performers' own circumstances, such as their residence or citizenship which they have not disclosed to AFM or SAG-AFTRA. It might well involve an analysis of parallel entitlements that US Performers could have claimed, but did not. The suggestion by Mr Howe KC that it might be possible to send out questionnaires to members after judgment is given on common issues of fact or law is lacking in specifics. Many of the US Performers would obtain relatively small sums even if the claims succeeded. What should the court do if they simply decline to fill in questionnaires? Moreover, US Performers might have an incentive to downplay their parallel entitlements. It is not obvious how a questionnaire exercise would deal with that risk.
- iv) Any need for engagement with members of AFM or SAG-AFTRA raises issues that are familiar in the Competition Appeal Tribunal in the context of "opt-in" collective proceedings. Put simply, experience suggests that people do not "opt in" in large numbers to collective proceedings that involve relatively small individual claims. If few people choose to engage with the process post-judgment, would there be any real utility to proceedings being continued under CPR 19.8?
- v) More pragmatically, suppose that there are bifurcated proceedings and C9 to C12 are unsuccessful at the trial of common or related issues of fact or law, for example because the court concludes that there was no "sufficiently serious" breach of EU law. Then there would be no subsequent stage to the proceedings. In that case, to whom should the Secretary of State look to for its costs? When this point was raised, Mr Howe KC observed that the applications before the court are not for security for costs. That is correct, but is still relevant to consider the situation with costs as part of the court's overall assessment of whether the proceedings should be allowed to continue under CPR 19.8.
- vi) As noted in paragraph 164 below, the Claimants' proposed amendments relating to audio-visual works raise the prospect that a particular US Performer's entitlement to damages might depend on fine points of interpretation as to whether a particular broadcast has the requisite "level of originality" to amount an "audiovisual work". There must be a question as to whether PPL's data will be able to address highly nuanced questions like that.

Conclusion

71. In my judgment, of the SoS's various objections to the CPR 19.8 procedure, only the need for an individual assessment of damages has significant force. However, there are significant practical issues that have to be worked through in order to decide whether the CPR 19.8 procedure is workable. As matters stand, the SoS is correct to observe that there is no proposal before the court to deal with those issues. He urges me therefore to determine that the claims should not be allowed to go ahead under CPR 19.8. That course of action might well mean that arguable claims of some 30,000 performers other than C9-C12 themselves might not be capable of being advanced since it is at least possible that it is now too late for US Performers to bring action in their own names (see paragraph 70.ii) above).

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72. On balance, I have concluded that the Claimants should be given an opportunity to deal with the complexities arising from the potential need for an individualised assessment of damages at a further CMC. I stress that those difficulties are not limited to those set out in paragraph 70. 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.

[D] – THE C1-C8 STANDING APPLICATION

The issue

73. C1-C8 are not themselves US Performers. Nevertheless, they seek to bring proceedings, including claims for *Francovich* damages ostensibly in their own names. In his oral submissions, Mr Howe KC stressed that this approach is “belt and braces” and functions as an alternative to the claims brought by C9 to C12, expressly as representatives of US Performers pursuant to CPR 19.8. Therefore, C1-C8 confirm that they do not seek double recovery: to the extent that C9 to C12 succeed with their claims brought in a representative capacity under CPR 19.8, C1-C8 do not seek recovery as well. Moreover, while C1-C8 assert that they are entitled to bring claims in their own names, without invoking the CPR 19.8 procedure, they acknowledge that those claims are ultimately for the benefit of US Performers as they will not retain any *Francovich* damages that the court awards and rather they will account to the US Performers for sums recovered, net of the costs of recovery.
74. Prior to the hearing, the C1-C8 Standing Application was complicated by the fact that, by paragraph 57.8 of the POC, C1-C8 also sought to bring claims for their own losses said to have been suffered by reasons of the UK’s breach of its EU law obligations. However, Mr Howe KC confirmed in his oral submissions that C1-C8 no longer pursue any claim for their own losses.
75. The C1-C8 Standing Application therefore involves a self-contained question namely whether the court should determine now, on a summary basis, that there is no realistic prospect of C1-C8 establishing that they can bring claims for *Francovich* damages in their own names, but for the benefit of US Performers in the sense set out in paragraph 73. The parties’ respective positions are as follows:
- i) The Claimants assert that there is at the very least a realistic prospect of establishing (i) that under federal US law they have “associational standing” consisting of a right to sue on behalf of their members and (ii) an English court would recognise and give effect to that associational standing so as to permit them to bring these proceedings in their own name. They seek permission to rely on the expert report of Dr Olivia Singer on the US federal law concept of “associational standing” both in connection with the C1-C8 Standing Application and at trial. They also seek permission to amend their POC to plead their “associational standing”.
 - ii) The SoS asserts that there is no realistic prospect of C1-C8 establishing they can bring a claim for *Francovich* damages even if their POC is amended to reflect Dr Singer’s evidence. He argues that C1-C8’s claims should be struck out, C1-C8

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should be refused permission to amend and Dr Singer's report should not be admitted as evidence.

Is the point determined conclusively by EU law?

76. I take it to be common ground, now that C1-C8 have abandoned any claim for their own losses (see paragraph 74 above) that, for the purposes of the first condition for *Francovich* damages set out in paragraph 24.i) above, I should proceed on the basis that relevant provisions of EU law confer rights on the US Performers. The Claimants do not assert that EU law, including the provisions of the Directive, confer any rights on C1-C8.
77. From that starting point, the SoS argues that the very nature of the right to *Francovich* damages is inconsistent with C1-C8, as distinct from the US Performers themselves, having any right to claim those damages, whether for the benefit of the US Performers or otherwise. He points to the rationale for the entitlement to *Francovich* damages as set out at [20] to [22] of the judgment of the CJEU *Brasserie du Pêcheur SA v Federal Republic of Germany* (ECLI:EU:C:1996:79) [1996] Q.B. 404. Those paragraphs emphasise variously that (i) without the ability to claim *Francovich* damages individuals who are the intended beneficiaries of EU directives would have no redress should member states breach their obligations to implement them, (ii) that would breach the principle that EU law should be effective so that (iii) the right to reparation is a necessary corollary of the direct effect of an EU directive. That reasoning, the SoS submits requires a close examination of who are the intended beneficiaries of a directive, with only those beneficiaries having the standing to bring a claim.
78. Conscious that I should not be engaging in a mini-trial, I do not consider that I need to determine this point one way or the other. There is certainly something in the SoS's analysis. However, the Claimants have articulated a case with a realistic prospect of success to the effect that their standing or otherwise is not conclusively determined by principles of EU law. As the Claimants point out in *Rosalba Palmisani v INPS*, C-261/95, EU:C:1997:351 [1997] 3 CMLR 1356 the CJEU stated at [27] and [40] of its judgment that it is on the basis of member states' individual national laws on liability that they must make reparation for the consequences of the loss or damage caused by breaches of EU law subject to the proviso that those procedural requirements are no less favourable than for domestic claims. Accordingly, if procedural rules in the High Court, or principles of private international law, would permit C1-C8 to bring *Francovich* damages claims in their own names, but for the benefit of US Performers, I consider that there is a realistic prospect of establishing that EU law as explained in *Brasserie du Pêcheur* would not mandate a different result.
79. The SoS relies on the judgment of the High Court and Court of Appeal in *Poole v HM Treasury* [2007] 1 All ER (Comm) 255 and [2008] 1 All ER (Comm) 1132. I do not, however, consider that this authority is a complete answer to the Claimants' argument based on *Rosalba Palmisani*. *Poole* concerned a situation where a group of Lloyd's names who lost money on insurance policies that they had written sought to claim *Francovich* damages for the UK's failure properly to implement a particular directive. However, the directive in question was found to confer no rights on the Lloyd's names in question. The argument before the Court of Appeal was that this was not an obstacle to the Lloyd's names making a claim for damages. However this was not a case dealing

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with the entitlement of one person (A) to make a claim in A's own name, but for the benefit of B, in respect of loss suffered by B. Rather, the Lloyd's names were seeking to bring actions in their own names and entirely for their own benefit. Therefore, while *Poole* does indicate that C1-C8 would have real difficulties in making *Francovich* claims for the kind of loss asserted, but now abandoned, in paragraph 57.8 of the POC, I do not consider it to be determinative of the procedural question of whether they can rely on "associational standing" to bring a claim for the benefit of US Performers.

Whether C1-C8 have "associational standing" under US federal law and what that means

80. I will admit Dr Singer's expert report as evidence for the purposes of the C1-C8 Standing Application. Salient parts of her conclusions are as follows:

- i) On becoming members of AFM or SAG-AFTRA, US Performers designate those bodies as their representatives for the purposes of claiming royalties. They also agree to be bound by the constitutional documents of AFM and SAG-AFTRA.
- ii) US federal law recognises policy reasons why organisations like AFM and SAG-AFTRA, including labour unions, should be entitled bring legal actions in their own names on behalf of their members. That is referred to in US federal law as a concept of "associational standing".
- iii) In order to establish "associational standing", an organisation must show: (a) its members would otherwise have standing to sue in their own right; (b) the interests the organisation seeks to protect are germane to its purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit (*Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)).
- iv) Dr Singer describes conditions (a) and (b) as "constitutional standing requirements" that are hard-edged and ultimately derived from the US constitution. She concludes that they are satisfied since individual US Performers would have standing to sue for *Francovich* damages and the constitutional documents of AFM and SAG-AFTRA, and the authorisations given by US Performers, demonstrate that such actions would be germane to their purposes.
- v) Dr Singer describes condition (c) as a prudential standing requirement, derived from limits created judicially on the exercise of federal court jurisdiction, with the result that US federal courts possess a degree of discretion in applying it. Dr Singer's instructions are that "the evidence needed to determine the amount of damages for loss of equitable remuneration due to each US Performer is solely in the control of ...[PPL]." On that basis, she concludes that requirement (c) is satisfied.
- vi) Therefore, Dr Singer concludes that if the claims for *Francovich* damages were brought in a US court applying US law, that court would conclude that C1-C8 have associational standing to bring those claims.

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81. I comment that there may be room for debate on whether condition (c) set out in paragraph 80.iii) is satisfied given some of the points I make in connection with the Representative Claim Application. However, since the SoS does not challenge Dr Singer’s conclusions I will treat it as established that C1-C8 have associational standing in the sense summarised in paragraph 80.vi).

Would an English court give effect to that associational standing?

82. C1-C8 accept that, but for their associational standing, they would have no right in English law to bring claims for *Francovich* damages in their own names. They do not contradict the SoS’s assertion in his skeleton argument (by reference to *Bowstead and Reynolds on Agency*, 23rd ed., Sweet & Maxwell, at [9-010]) that even to the extent that C1-C8 are the agents of US Performers, they would not have the right in English law to issue proceedings in their own names but on behalf of US Performers.
83. The parties agree on the following proposition that is set out at the beginning of Chapter 4 of the 16th Edition of *Dicey, Morris and Collins on Conflict of Laws (Dicey)*:

RULE 3 – All matters of procedure are governed by the domestic law of the country to which the court wherein any legal proceedings are taken belongs (*lex fori*)

84. They also agree on the proposition in paragraph [4-003] of *Dicey* to the effect that there is a distinction between matters of “substance” which are governed by the law to which the court is directed by its choice of law rule (referred to as the *lex causae*) and matters of “procedure” which are governed by the *lex fori* as stated in Rule 3.
85. The SoS argues that C1-C8 are skewered on the horns of a dilemma. Either the question of whether they can bring *Francovich* claims in their own names is one of substance, or it is one of procedure. If it is a matter of substance, it is governed by the *lex causae*. Whether that *lex causae* is EU law or English law, since *Francovich* claims take effect as claims for breach of statutory duty, C1-C8 are not the proper claimants (see paragraphs 76 and 82 above). If the matter is one of procedure, then the *lex fori* governs, also leading to the conclusion that C1-C8 cannot bring the claim.
86. C1-C8 assert that there is no dilemma. They rely on the following statement at [4-019] of *Dicey* (with footnotes omitted). Moreover, they argue that this statement refers to a controversy in a developing area of law that is not suitable for summary determination:

In some cases, the claimant claims to be entitled to sue in England in a representative capacity, relying on an appointment made under foreign law. As Parker J observed in *Kamouh v Associated Electrical Industries International Limited* [[1980] QB 199, 206] two conflicting principles can be found, “first that [the English] courts should as a matter of comity give effect to the curator’s or tuteur’s right under foreign law to sue in his own name; second that the municipal procedure should be applied.

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87. The reference to the “curator” or “tuteur” in the passage quoted above comes from the facts of *Thiery v Chalmers, Guthrie & Co* [1900] 1 Ch 80 in which a French court had made orders pursuant to which a “tuteur” was appointed to manage the affairs of a person subject to a mental disability.
88. C1-C8’s argument proceeds on the basis that considerations of comity should incline this court to conclude that the question of whether they can bring claims for *Francovich* damages should be decided by reference to US federal law, rather than by the *lex fori* or the *lex causae*. In *Kamouh* itself, Lebanese law provided a procedure for a “judicial administrator” to be appointed to pursue claims made by the plaintiff who could not be found. The Lebanese court had made an order appointing a person as such a judicial administrator and the question was whether the English court would permit that judicial administrator to bring proceedings in his own name. Considerations of comity were engaged because, if the English court refused to do so, it would not be giving effect to the appointment made by the Lebanese court. Similar questions of comity were engaged in *Thiery v Chalmers*: if the “tuteur” could not sue in his own name in the English courts, the appointment made pursuant to orders of the French court would not be given full effect.
89. However, I agree with the SoS that considerations of comity are not engaged in this case. C1-C8 have not been appointed by any order of a foreign court to which this court is asked to give effect. The overall conclusion expressed in Dr Singer’s expert report is simply that, if this case were being heard in the US federal courts, C1-C8 would be able to pursue it in their own names. However, the fact that US federal law would permit that does not set up any presumption or expectation that English law would do the same.
90. Moreover, CPR does not contain any procedure for C1-C8 to sue in their own names. As noted above, English law does not permit agents to sue in the names of their principals. This points away from any suggestion that this court should “give effect to” C1-C8’s associational standing, which exists only in US federal law, and suggests that this court should instead apply CPR, and ordinary principles of English law. Indeed, as Mr Mehta submitted, if the English court chose to give effect to the C1-C8’s associational standing, CPR 19.8 could be subverted. Litigants who do not wish to subject themselves to the CPR 19.8 regime could effectively opt out of those requirements by choosing to bring their claims through entities that, under some foreign law, are considered able to bring claims on behalf of others. In my judgment, the court should not countenance that prospect in connection with claims that are subject to CPR.
91. To counter this analysis, C1-C8 suggest that their “associational standing” is an aspect of their “status as entities” and argue that paragraph [30-010] of Dicey, as approved by Lord Hodge at [83] of *Investec Trust (Guernsey) Ltd v Glenalla Properties* [2018] UKPC 7 means that the substantive law of the US “will determine the legal nature of the entity so created, e.g. whether the entity is a corporation or partnership, and, if the latter, the legal incidents which attach to it”.
92. The “status” referred to at [83] to [85] of *Investec* is concerned with inherent attributes of an entity, such as whether it has legal personality, whether the members of that entity have joint and several liability and what are the limits of that liability. Dr Singer’s evidence does not address inherent attributes such as this. Rather she concludes that,

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whatever the inherent attributes of C1-C8, because of the aims they pursue and because they have secured the contractual consent of US Performers, they are able to take action in their own names, but for the benefit of US Performers, in US federal courts in connection with disputes of this kind. That is a statement as to the effect of US federal law on these entities given the particular circumstances in which they operate, rather than a statement about the status of the entities themselves.

93. Nor do I accept C1-C8's argument that a failure to give effect to their associational standing would result in a breach of the EU law principle of effectiveness which requires that member states must not impose procedural conditions that make it "impossible or excessively difficult" to obtain reparation for breach of EU law rights. (It is common ground that the "principle of effectiveness" remains a relevant principle for the purposes of this claim despite the UK's departure from the EU for reasons similar to those set out in paragraph 101 below.)
94. As the SoS correctly submits there are various ways in which US Performers can bring these proceedings. They could all make claims and be named in the claim form or a schedule thereto, perhaps applying for a group litigation order under CPR 19. Alternatively, they could seek to invoke the procedure in CPR 19.8. I certainly accept that these alternatives are not straightforward. I have explained above the difficulties that face the CPR 19.8 procedure. Group litigation orders are most obviously appropriate in cases where individual claims are of high value (see [25] of *Lloyd v Google*) whereas most claims by US Performers in this case are of low value. However, these difficulties arise not because of obstacles that UK or English law has placed in the way of asserting EU law rights. Rather those difficulties are inherent in the fact that the Claimants wish to bring a very large number of low value claims which potentially involve the need for an individualised assessment of damages. I do not consider that the principle of effectiveness requires this court to permit C1-C8 to bring claims in their own name, but on behalf of US Performers.
95. The Claimants' assertion that this is a novel or developing area of law was based largely on the analogy with the *Investec* case which I have rejected. I consider that the C1-C8 Standing Application involves a relatively straightforward issue of law that is susceptible to summary determination. I refuse C1-C8 permission to make the amendments set out in paragraphs 16A to 16C that go to its arguments on "associational standing" and, having concluded that C1-C8 have no standing to bring claims for *Francovich* damages in their own names, I strike out those claims.

[E] THE POST-BREXIT DAMAGES APPLICATION

The issue

96. By their *Francovich* claim, the Claimants seek damages extending beyond 31 December 2020. The SoS argues that the combined effect of various statutory provisions governing the UK's withdrawal from the European Union precludes any claim being made for damages that accrued after 31 December 2020. The SoS invites me to determine this question of law on a summary basis, on the basis of the principle set out in paragraph 39 and, having done so, (i) strike out relevant parts of the claims (or grant the SoS summary judgment on those parts) and (ii) refuse the Claimants permission to amend their POC

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insofar as those amendments relate to claims for loss said to be suffered after 31 December 2020.

The applicable statutory provisions and the parties’ competing positions

97. I understand the parties to agree that a claim for *Francovich* damages brought before 31 December 2020 for the UK’s alleged failure to comply with EU law was, as a matter of UK jurisprudence, a claim for breach of statutory duty founded on s2(1) of the European Communities Act 1972 (**ECA 1972**) (see [11], [12] and [23] of the judgment of Sir Andrew Morritt V-C in *Phonographic Performance Ltd v Department of Trade and Industry & anr* [2004] EWHC 1795 (Ch) (**PPL HC**)).
98. Section 2(1) of ECA 1972 was repealed by s1 of the European Union (Withdrawal) Act 2018 (**EUWA 2018**) with effect from “exit day” being 31 December 2020. On the face of it, this repeal removed what the Supreme Court described as the “conduit pipe” through which EU rights and obligations took effect in domestic law at [65] of *R (Miller) v Secretary of State for Exiting the European Union* [2018] A.C. 61.
99. However, removal of this “conduit pipe” did not bring to an end all provisions of UK law that were derived from EU law. Sections 2 to 4 of EUWA 2018 preserved certain rights and obligations that derived from EU law by converting them into “assimilated law” (previously known as “retained EU law”). In particular, as it was in force on 31 December 2020, s4 of EUWA 2018 provided as follows:

4 Saving for rights etc. under section 2(1) of the ECA

(1) Any rights, powers, liabilities, obligations, restrictions, remedies and procedures which, immediately before IP completion day —

(a) are recognised and available in domestic law by virtue of section 2(1) of the European Communities Act 1972, and

(b) are enforced, allowed and followed accordingly,

continue on and after IP completion day to be recognised and available in domestic law (and to be enforced, allowed and followed accordingly...

(3) This section is subject to section 5 and Schedule 1 (exceptions to savings and incorporation)...

100. Thus, pausing there, as at 11pm on 31 December 2020 (which was defined as “IP completion day”), s4 of EUWA 2018 envisaged that a right to claim *Francovich* damages, which existed by virtue of s2(1) of ECA 1972 could continue to be recognised and available in UK domestic law. However, that treatment was made subject to s5 and Schedule 1 of EUWA 2018.
101. Section 4 of EUWA 2018 was itself repealed by s2(1) of the Retained EU Law (Revocation and Reform) Act 2023 (**REULA 2023**) with effect from 1 January 2024.

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However, that revocation was prospective only. By s22(5) of REULA 2023, the repeal does not apply “in relation to anything occurring before the end of 2023”. The Claimants brought their proceedings on 22 December 2022, before the repeal of s4 of EUWA 2018 and it is common ground between the parties that the repeal of s4 of EUWA 2018 with effect from 1 January 2024 has no bearing on the Post-Brexit Damages Application which I should determine on the footing that s4 of EUWA 2018 was still applicable at material times.

102. As noted, s4 of EUWA 2018 was expressly made subject to Schedule 1 of that Act. Paragraph 4 of Schedule 1 provided:

There is no right in domestic law on or after IP completion day to damages in accordance with the rule in *Francovich*.

103. Schedule 8 of EUWA 2018 was headed “Consequential, transitional, transitory and saving provision”. Paragraph 39(1) of Schedule 8 provided as follows:

(1) Subject as follows and subject to ... any provision made by regulations ... paragraphs 1 and 4 of Schedule 1 apply in relation to anything occurring before IP completion day (as well as anything occurring on or after IP completion day):

104. Without more, that provision would mean that paragraph 4 of Schedule 1 removed all rights to *Francovich* damages both prospectively and retrospectively (in the sense that any claims that had already crystallised would be removed).

105. However, that stark effect was tempered by paragraphs 39(3) and 39(7) of Schedule 8 which provide as follows:

(3) Section 5(4) and paragraph 4 of Schedule 1 do not apply in relation to any proceedings begun, but not finally decided, before a court or tribunal in the United Kingdom before IP completion day...

(7) Paragraph 4 of Schedule 1 does not apply in relation to any proceedings begun within the period of two years beginning with IP completion day so far as the proceedings relate to anything which occurred before IP completion day.

The parties’ arguments on the substantive issue

106. The SoS’s analysis is as follows:

- i) The UK’s obligation to implement an EU Directive into domestic law is in the nature of a continuing obligation.
- ii) In order for US Performers to have any right to *Francovich* damages, they must have suffered loss which was directly caused by the UK’s breach of EU law (see paragraph 24 above).

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- iii) Since loss is of the essence of a claim for *Francovich* damages, this means that a separate cause of action accrued on each occasion on which (i) a US Performer's performance was exploited in the UK without full entitlement to equitable remuneration and (ii) UK domestic law did not reflect the UK's EU law obligations (see *PPL HC*).
 - iv) Therefore, any claim that US Performers bring for *Francovich* damages in respect of losses suffered after 31 December 2020 is necessarily brought by way of a cause of action that accrued only after 31 December 2020, when loss was suffered. Such a claim cannot "relate to anything which occurred before IP completion day" for the purposes of paragraph 39(7) of Schedule 8 to EUWA 2018. Accordingly, paragraph 39(7) does not disapply paragraph 39(1) of Schedule 8 with the result that paragraph 4 of Schedule 1 to EUWA 2018 applies unmodified and there is "no right to" *Francovich* damages in respect of loss accruing after IP completion day.
107. The Claimants argue that paragraph 39(7) of Schedule 8 to EUWA 2018 is obscure. They submit that determining its correct interpretation is far from the relatively straightforward point of law that is susceptible to determination on a summary basis. They argue that the SoS's analysis proceeds from an incorrect starting point since paragraph 39(7) of Schedule 8 to EUWA 2018 is not concerned with when causes of action might be said to accrue, but rather with "proceedings" and what they "relate to". Moreover, paragraph 39(7) casts the net wide by disapplying paragraph 4 of Schedule 1 to EUWA 2018 if "proceedings" are brought (i) no later than 2 years after IP completion day (which is the case with the present proceedings) and (ii) those proceedings "relate to" anything done before IP completion day.
108. Once those points are appreciated, the Claimants argue that they have realistic prospects of establishing an entitlement to *Francovich* damages for losses suffered after 31 December 2020 since their proposed claim relates to at least something that occurred before IP completion day, namely the UK's failure to implement the Directive prior to that date. In paragraph 61 of the (unamended) POC, they characterise that as a continuing breach of duty.
109. To address the possibility that they must plead a cause of action that accrued entirely before 31 December 2020, they seek permission to introduce paragraph 57.10 of the Draft APOC to the effect that the making of the 2016 Order on 14 December 2016 (or the coming into force of that order on 6 April 2017) was a positive act that crystallised a cause of action, albeit a cause of action which resulted in some loss being suffered after 31 December 2020.

Should I determine that question of law summarily?

110. I could, of course, express a view on the debate between the parties that I have summarised in the section above. Both parties have articulated their positions. In principle, I could decide between those competing views on the basis of the material before me. However, in my judgment, the fact that it is possible to express a view, based on the material and arguments before the court, does not mean that is the appropriate course.

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111. I do not consider the point to be a “relatively straightforward” point of law that is susceptible to summary determination. On the basis of the arguments that I have heard, I consider that the Claimants have a realistic prospect of establishing that the “proceedings” that they have brought “relate to anything that occurred prior to IP completion day” in circumstances where they assert a continuing failure on the part of the UK to implement the Directives prior to IP completion date. On that literal interpretation of the word “anything”, paragraph 39(7) of Schedule 8 of EUWA 2018 would be engaged with the result that paragraph 4 of Schedule 1 is disapplied and it would be realistic prospects of establishing that a claim for *Francovich* damages could be made for loss suffered after IP completion day.
112. I see force in the SoS’s argument that this interpretation is unduly literal. It might well strike an observer as counter-intuitive that Parliament should have decided that there should be a right to *Francovich* damages to compensate for loss accruing after 31 December 2020 for an asserted failure to implement the Directive, when EUWA 2018 and the political discourse that accompanied was redolent of a wish for EU law to play a much reduced role in the law of the United Kingdom. The SoS may well be right, therefore, to argue that the concept of “anything that occurred prior to IP completion day” needs to be construed in a more purposive fashion that draws on the analysis of the nature of a *Francovich* claim set out in *PPL HC*.
113. The need for, and scope of, any such purposive interpretation will necessarily have to take into account the wider context including, but not limited to, the entire statutory scheme governing the UK’s departure from the EU. I have been shown particular provisions and have been invited to express a conclusion on them. I see little utility in setting out in detail the various arguments and counter-arguments that were advanced in support of the parties’ respective interpretations. It is sufficient to record my conclusion that there was force in many of the arguments on both sides and both sides articulated difficulties with the other’s analysis. For example on the SoS’s analysis, a claimant could issue proceedings on 30 December 2020, before IP completion day, seeking *Francovich* damages for a prior failure to implement a directive and paragraph 39(3) of Schedule 8 to EUWA 2018 would impose no restriction on the period for which damages could be sought. Yet identical proceedings issued on 2 January 2021 could only recover damages suffered up to 31 December 2020. By the same token, the SoS’s analysis revealed real questions as to what the “anything” referred to in the tailpiece to paragraph 39(7) was intended to embrace
114. The UK’s departure from the EU resulted in a seismic shift in this country’s legal landscape. A summary determination of this difficult issue by reference to the provisions that I have been shown risks overlooking wider considerations of policy and context that could answer the difficult questions to which I have alluded above.
115. In oral submissions on behalf of the SoS, Mr West KC was dismissive of the suggestion that a judge at trial might benefit from more material than I have been shown, in the form of additional material on the policy of the statute, or decided authorities. He described this as “complete Micawberism” on the basis that we are not on the verge of a momentous decision such as that of the Supreme Court in *Lipton v BA Cityflyer* [2024] UKSC 24. I am sure that if a judgment of the Supreme Court or Court of Appeal on the ability to claim for *Francovich* damages post IP completion day were imminent, the parties would

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know and would have informed me. However, that does not establish Mr West KC's proposition. The UK's departure from the EU involves such a significant change to its laws that it can be expected that the understanding of its implications will develop incrementally. The "familiar tale of frustration and annoyance" that arose when Mr and Mrs Lipton's flight was cancelled led various courts, culminating with the Supreme Court, to examine the very difficult statutory regime associated with the UK's departure from the EU in a landmark judgment. It strikes me as entirely possible that other cases might be proceeding through the courts that can contribute to a development of legal thinking on the extent of *Francovich* damages claims following Brexit.

116. I also consider that the benefits of a summary determination at this stage are relatively slender. If I were to conclude that the SoS's construction of the statutory provisions is correct, and that conclusion were upheld on appeal, the parties would not need to perform any calculations of the quantum of the claim relating to the period after IP completion day. However, while I have indicated concerns about the need for an individualised assessment of damages in Section C above, those difficulties do not relate to the period for which any *Francovich* damages are calculated. Rather, they relate to the individual positions of US Performers, including whether they have a parallel entitlement or not. If ultimately a process can be found that deals with the complexities of assessing damages, in my judgment there would be little incremental difficulty in applying that process for the period after IP completion day if necessary as part of a single process of estimating damages.
117. Against that, if I determine the matter now and strike out the claim for damages accruing after IP completion day, it may be a few years before the outcome of any appeal is known. Superior courts would need to determine the appeal without findings as to the precise nature and magnitude of damage said to have been suffered following IP completion day. If any decision to this effect were ultimately reversed the parties might need, if the Claimants succeed at trial, to perform a second individualised assessment of damages as part of a separate process revived a few years after the main process.
118. Overall, I consider this to be a situation like that confronting Joanna Smith J in *Getty Images (US) Inc v Stability AI Ltd* [2023] EWHC 3090 (Ch). I conclude that the merits of the Post-Brexit Damages Application are not suitable for summary determination. It follows that I will not conclude either (i) that the claims as currently pleaded in the POC insofar as they relate to damages accruing after IP completion day fail the merits test or (ii) that the proposed amendments set out in paragraphs 57.9, 57.10, 57.11, 62 and 63 of the Draft APOC fail the merits test.

The applications to amend in paragraphs 57.9, 57.10, 57.11, 62 and 63 of the Draft APOC - "limitation"

119. It is common ground that the applicable period of limitation under the Limitation Act 1980 for the proposed *Francovich* damages claim is 6 years after the cause of action accrued. As I have noted, the parties offer various formulations of the date on which the cause of action accrued:

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- i) The SoS's case is that a separate cause of action accrued on each date on which a US Performer's work was exploited in the UK with the US Performer having a right only to limited equitable remuneration (see paragraph 106) above.
- ii) The Claimants' case in parts of its unamended POC is that the cause of action accrued by reason of the UK's (continuing) failure to comply with its EU law obligations prior to 31 December 2020 with loss being suffered before that date and continuing afterwards.
- iii) In paragraph 57.10 of the Draft APOC the Claimants seek to advance a case to the effect that the making of the 2016 Order (on 14 December 2016) crystallised a cause of action with loss being suffered both before and after 31 December 2020.

120. That raises complicated questions of "limitation" as follows:

- i) If paragraph 39(7) of Schedule 8 to EUWA 2018 is the kind of enactment specified by CPR 17.4(1)(b)(iii), then any amendment made now would unquestionably be after the expiry of that "period of limitation" since it is made after the applicable deadline of 31 December 2022. In that case, I would need to apply the mandatory requirements of CPR 17.4 when considering whether to permit these amendments.
- ii) Even if paragraph 39(7) is not the kind of provision to which CPR 17.4(1)(b)(iii) applies, in considering whether to permit the proposed amendment under CPR 17.2, I must consider the merits test. When considering that test, it is relevant to consider whether the amendments involve new "proceedings", brought after 31 December 2022. If they are new "proceedings" then the amendments would fail the merits test because paragraph 39(7) would not apply. Paragraph 4 of Schedule 1 to EUWA 2018 would apply and the result would be that amendments could not form the basis of any entitlement to *Francovich* damages.
- iii) On the Claimants' proposed formulation of their cause of action set out in paragraph 119.ii), the limitation period specified in the Limitation Act 1980 for *Francovich* damages would not yet have expired.
- iv) However, on their proposed formulation set out in paragraph 57.10 of the Draft APOC, the period of limitation would have expired since that paragraph specifies 14 December 2016 as the date on which a cause of action accrued.

Is paragraph 39(7) of Schedule 8 to EUWA 2018 a provision falling within CPR 17.4(1)(b)(iii)?

121. CPR 17.4 provides, so far as material as follows:

17.4— Amendments to statements of case after the end of a relevant limitation period

17.4 (1) This rule applies where—

- (a) a party applies to amend their statement of case in one of the ways mentioned in this rule; and

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(b) a period of limitation has expired under—

(i) the Limitation Act 1980; or

(ii) the Foreign Limitation Periods Act 1984 or;

(iii) any other enactment which allows such an amendment, or under which such an amendment is allowed.

(2) The court may allow an amendment whose effect will be to add or substitute a new claim, but only if the new claim arises out of the same facts or substantially the same facts as are already in issue on a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings.

122. By virtue of CPR 17.4(1)(b)(iii) the essential question is whether paragraph 39(7) to Schedule 8 of EUWA 2018 is an enactment which allows an amendment to a statement of case after the specified deadline of 31 December 2022 or is a provision “under which such an amendment is allowed”.

123. In my judgment, paragraph 39(7) is not such a provision. Although the precise meaning of paragraph 39(7) is debatable, the overall statutory scheme is clear. As I have noted, the starting point is that paragraph 4 to Schedule 1 of EUWA 2018 removed all rights to *Francovich* damages after IP completion day (see paragraph 104 above). Paragraph 39(7) to Schedule 8 is an exception to that rule. It is concerned with the existence of rights rather than procedural matters. As such it falls outside Beatson LJ’s formulation of the scope of CPR 17.4 at [36] of *San Vicente v Communities and Local Government Secretary* [2014] 1 WLR:

[36] ... rule 17.4 is concerned with periods of limitation such as those specified in the Limitation Act 1980. Such limitation periods are regarded as imposing a procedural rather than a substantive restriction...

124. The Claimants’ arguments to the contrary revolved around the judgment of Dyson LJ in *Parsons v George* [2004] EWCA Civ 1912. That was a case concerning the substitution of parties after a limitation period had expired. It was therefore concerned with a situation potentially falling within CPR 19.5 rather than a situation potentially falling within CPR 17.4. However, in *San Vicente* the Court of Appeal had regard to Dyson LJ’s approach in the context of CPR 19.5 when considering the proper application of CPR 17.4 (see [32] of their Lordships’ judgment) and I will do the same. The essence of Dyson LJ’s approach is that what is now CPR 17.4(1)(b)(iii) can apply to a statutory provision which either (i) positively permits an amendment or (ii) does not prohibit the amendment. In case (ii), the statute must be construed by reference to its context and purpose in order to decide whether something that is not positively prohibited truly is “allowed” in the requisite sense.

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125. Applying that approach, I do not consider that paragraph 39(7) of Schedule 8 to EUWA 2018 can be said to “allow” or “not prohibit” amendments to a statement of case. Paragraph 39(7) is not concerned with statements of case, or amendments thereto. It is concerned with “proceedings” and when they are “begun”. It is concerned with those questions as part of an enquiry as to whether there is any right to *Francovich* damages. If a claimant proposes amendments to a statement of case in order to bring what are in substance new “proceedings” for *Francovich* damages after 31 December 2022, I am unable to accept the Claimants’ submission that paragraph 39(7) does not “prohibit” such an amendment. Paragraph 39(7) does not need to address the question of whether such an amendment would be prohibited or not because the question is sterile: there is no right to *Francovich* damages if the relevant “proceedings” are brought after 31 December 2022.
126. Nor do I accept Mr Howe KC’s submission made orally that, if a claimant sought in substance to bring new “proceedings” for *Francovich* damages by amending an existing statement of case after 31 December 2022, the defendant to those proceedings could, by conferring consent, permit the claim to be brought. Of course, there is no question of the SoS consenting to any such course in this case. However, even if he did, I do not consider that would prevent paragraph 4 of Schedule 1 to EUWA 2018 from applying. As I have noted, whether “consent” is given or not, there is no right to *Francovich* damages where the relevant proceedings are brought after 31 December 2022. The SoS could not by consent confer a right to *Francovich* damages that Parliament has taken away.

Do the proposed amendments to 57.9, 57.10, 57.11, 62 and 63 of the Draft APOC involve new “proceedings” that are “begun” after 31 December 2022?

127. Paragraph 57.9 of the Draft APOC contains new particulars of how PPL could have been expected to act had the UK not breached its EU law obligations. There is a realistic prospect of establishing that those new particulars involve no new “proceedings” begun after 31 December 2022. The same is true of paragraph 57.11 of the APOC, and consequential changes in paragraph 63 of the Draft APOC that pleads that, whatever the correct interpretation of paragraph 4 to Schedule 1 of EUWA 2018, US Performers are at least entitled to damages for the period up to and including 31 December 2022.
128. Paragraph 57.10 of the Draft APOC (which I consider together with the related change in paragraph 62) is slightly different. It pleads a positive case that the making of the 2016 Order (or the 2016 Order coming into effect) was itself a breach of EU law. In his oral submissions on CPR 17.4, Mr Howe KC accepted that paragraph 57.10 involved a new “cause of action”. That would have been a relevant consideration if CPR 17.4 governed the question whether these amendments should be permitted. For the reasons I have given in the previous section, I do not consider that CPR 17.4 is applicable. However, it is still right that I should reflect on Mr Howe KC’s acceptance that there was some element of “newness” in paragraph 57.10 when considering the time limit set out in paragraph 39(7) of Schedule 8 to EUWA 2018.
129. Despite that acceptance, I consider that there is a realistic prospect of establishing that paragraph 57.10 of the Draft APOC involve no new “proceedings” begun after 31 December 2022. The unamended POC made it clear that the Claimants considered that the very making of the 2016 Order constituted an aspect of the UK’s breach of its EU

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obligations (see paragraph 54.7 and paragraph 70.7 of the Draft APOC). Moreover, the 2016 Order informed how Section 182D fell to be applied and the assertion that UK statute law failed to comply with EU law obligations is right at the heart of the claims. The contention that the 2016 Order was made in breach of EU law is at the heart of the current proceedings. I do not consider that the “proceedings” as they stand if paragraph 57.10 of the Draft APOC is included are materially different from the proceedings as they stood prior to that amendment.

130. I conclude that the amendments are not “bound to fail” on the basis that they embody new proceedings commenced after 31 December 2022.

CPR 17.4 in relation to paragraph 57.10 of the Draft APOC

131. Despite my conclusion in paragraph 123 above, CPR 17.4 is relevant to the amendment in paragraph 57.10 of the Draft APOC. That is because Mr Howe KC accepts that it adds a new cause of action and, at least on the SoS’s interpretation of the law, it is realistically arguable that the limitation period for that cause of action has expired.
132. However, given the points that I make in paragraph 129, I conclude that any new cause of action arises out of the same facts as the Claimants’ existing claims.

Conclusion on the amendments in paragraphs 57.9, 57.10, 57.11, 62 and 63 of the Draft APOC

133. I give permission for these amendments to be made.

[F] THE AUDIO-VISUAL WORKS APPLICATION

The issues

134. It is common for sound performances to be incorporated into audiovisual works. At a high level of generality, and without expressing any view on the scope of the phrase “phonogram” or “audiovisual work”, one can think of previously recorded songs played as part of a movie soundtrack as an example of this phenomenon.
135. In its POC, the Claimants did not expressly claim equitable remuneration where their sound performances were incorporated into audiovisual works. However, on analysing the Claimants’ proposed quantum of their claims, the Defendants formed the view that the Claimants were indeed seeking equitable remuneration by reference to revenues from the exploitation of audiovisual fixations incorporating phonograms (to which the SoS refers as **AFIPs**).
136. The SoS contends that any claim for *Francovich* damages referable to AFIPs is bound to fail because of the judgment of the CJEU in Case C-147/19 *Atresmedia Corporacion de Medios de Comunicacion SA v Asociacion de Gestion de Derechos Intelectuales* (ECLI:EU:C:2020:935) [2020] E.C.D.R. 21 (*Atresmedia*). The SoS argues that this aspect of the Claimants’ claims should be struck out for this reason alone.
137. The Claimants resist strike out for the following broad reasons:

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- i) They acknowledge that, in determining their claim, the High Court will be bound by *Atresmedia* by virtue of s6 of EUWA 2018. However, the Claimants would wish, on appeal against an application of *Atresmedia* by the High Court, to persuade the Court of Appeal to depart from *Atresmedia* as permitted by s6 of EUWA 2018.
 - ii) Moreover, they argue that, even if the High Court applies *Atresmedia*, once that judgment is properly understood, it still leaves some room for US Performers to obtain some *Francovich* damages by reference to AFIPs.
138. As well as resisting strike out, the Claimants propose amendments (set out in paragraph 57.7A of their Draft APOC and paragraph 33 of their draft amended Reply) to plead an amended case on causation. The following amendments take as their starting point a proposition that, properly construed, Section 182D and other provisions of UK domestic law “gold plated” (in Mr West KC’s phrase) the entitlement to equitable remuneration by providing that it extended to AFIPs even though the Directive, as interpreted in *Atresmedia*, did not require it to do so. The SoS does not accept that to be the correct interpretation of Section 182D and other relevant provisions of UK law. However, strictly without prejudice to that contention, the SoS is prepared to proceed on the basis that, for the purposes of the present applications only, and without tying his hands for the future, Section 182D does indeed confer a “gold plated entitlement”. I will proceed on the same basis:
- i) Article 4(1) of the WPPT obliged the UK to offer gold plated treatment to US Performers because it was being offered to UK artists. Because the EU was a signatory to the WPPT, that meant that the UK was, as a matter of EU law, obliged to offer that gold plated treatment to US Performers. Therefore, if the UK had legislated in accordance with its EU law obligations, even assuming *Atresmedia* was correctly decided, the UK would in practice have legislated to confer on US Performers the same gold plated entitlement that UK artists enjoyed (the **National Treatment Amendments**).
 - ii) Even if the UK had no obligation pursuant to the WPPT (and so EU law) to offer gold plated treatment to US Performers, in practice it would have done so had it properly transposed the Directive into UK law. Alternatively, in practice PPL distributed equitable remuneration to UK artists in respect of AFIPs. If the UK had not impermissibly provided for US Performers to have only a limited entitlement to equitable remuneration, PPL would have applied the same approach to US Performers as it did to UK performers with the result that in practice US Performers would have received equitable remuneration in respect of AFIPs (the **Indirect Causation Amendments**).
139. In addition, the Claimants assert that, even if the UK had legislated entirely in accordance with the judgment in *Atresmedia*, equitable remuneration would remain payable in respect of certain sound recordings that are exploited in audiovisual works (the **Scope of Atresmedia Amendments**). These amendments do not rely on the proposition that Section 182D set out any gold plated treatment.

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Strike out/application to amend – the merits test

140. The issue facing the CJEU in *Atresmedia* was that the Directive contained no comprehensive definition of “phonogram”. The CJEU held that the concept of a “phonogram” in the Directive should be construed consistently with the following definition in Article 2(1) of the WPPT:

“phonogram” means the fixation of the sounds of a performance or of other sounds, or of a representation of sounds, other than in the form of a fixation incorporated in a cinematographic or other audiovisual work.

141. The CJEU also concluded that the meaning of the term “phonogram” in the Directive was also elucidated by the way that term was used in the Rome Convention which refers to an “exclusively aural” fixation of sounds of a performance or other sounds and that an audiovisual work, which involves a fixation of both images and sounds, could not satisfy that definition.

142. The CJEU’s conclusion, therefore, was that, as a matter of construction of the Directive:

52. In those circumstances, it must be held that an audiovisual recording containing the fixation of an audiovisual work cannot be classified as a “phonogram” or “reproduction of that phonogram” within the meaning of art.8(2) of Directive 92/100 or art.8(2) of Directive 2006/115.

53 It follows that the communication to the public of such a recording does not give rise to the right to remuneration provided for in those provision.

143. That is a conclusion about the construction of the Directive. Although the Claimants make it clear that they disagree with the CJEU’s conclusion, it remains binding on the High Court. I agree with the SoS that, if the Claimants were pleading a claim that depended entirely on establishing that *Atresmedia* was wrongly decided, I should strike out that claim. As Lightman J explained at [16] of his judgment in *Mandrake Holdings Ltd v Countrywide Assured Group plc* [2005] EWHC 311 (Ch), my duty when considering the SoS’s application to strike out is to apply the law that is binding on me.
144. However, the Claimants are not pleading a case that depends entirely on showing that *Atresmedia* was wrongly decided. Indeed, all three categories of amendment summarised in paragraph 138 above seek to establish that US Performers are entitled to equitable remuneration when their performances are exploited in audio-visual works even if, as the High Court must assume, *Atresmedia* is correctly decided.
145. I do not therefore consider it would be correct to strike out any aspect of the Claimants’ case, or grant summary judgment on it, simply on the basis that the Claimants clearly consider *Atresmedia* is wrongly decided. Rather, I propose to consider the amendments that are put forward and consider whether they satisfy the merits test on the basis that *Atresmedia* is correctly decided and binding on this court. Having considered the merits

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test in relation to these amendments, I will then consider “limitation” issues that are analogous to those dealt with in paragraphs 119 to 130 above.

The National Treatment Amendments

146. Article 4 of the WPPT provides as follows:

Article 4 - National Treatment

(1) Each Contracting Party shall accord to nationals of other Contracting Parties, as defined in Article 3(2), the treatment it accords to its own nationals with regard to the exclusive rights specifically granted in this Treaty, and to the right to equitable remuneration provided for in Article 15 of this Treaty.

(2) The obligation provided for in paragraph (1) does not apply to the extent that another Contracting Party makes use of the reservations permitted by Article 15(3) of this Treaty.

147. The SoS argues that the National Treatment Amendments are bound to fail for the following reasons:

- i) Article 4(1) only requires the UK to grant US nationals the treatment it accords to its own nationals “with regard to the right to equitable remuneration provided for in Article 15 of this Treaty”. Article 15 deals only with “phonograms” as defined with the definition of that term specifically excluding a fixation incorporated in a cinematographic or audio-visual work. As a matter of simple construction, therefore, Article 4 can confer no rights in relation to performances incorporated into a cinematographic or audio-visual work.
- ii) In any event, Article 4(2) “switches off” any obligation that the UK would otherwise have had because the US has made a derogation pursuant to Article 15(3) of the Treaty.

148. The Claimants, however, advance a contrary analysis as follows:

- i) Academic commentary in paragraphs 8.4.2 and 8.4.9 of *Reinbothe and von Lewinski The WIPO Treaties on Copyright 2nd Edition* (2015) shows that the wording of Article 4(1) of the WPPT represented something of a compromise between the competing views of different constituencies. The formula of expressing the “national treatment” obligation by reference to the “minimum standards” embodied in Article 15 can be understood as ensuring that the national treatment obligation applied only to matters that were within the general purview of the WPPT (such as equitable remuneration) as distinct from matters outside its purview, such as collective administration of rights. Given the compromise that Article 4(1) represented, it should not be read as providing that the national treatment obligation applies only to “phonograms” as defined for the purposes of the WPPT.

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- ii) The SoS's interpretation would deprive the national treatment obligation of much of its effect. Article 15 already provides a right to equitable remuneration when "phonograms" (as defined) are exploited. If Article 4(1) were similarly limited to such "phonograms", it would make no additional provision beyond that set out in Article 15. However, that would make no sense since Article 4(1) must be intended to say something different from Article 15.
 - iii) The judgment of the CJEU in *RAAP* precludes the SoS from relying on the US derogation under Article 15(3) as qualifying the "national treatment" obligation.
149. I do not consider the Claimants' analysis to be incontrovertible. The SoS's arguments to the contrary had force. However, I consider that the Claimants' analysis has sufficiently realistic prospects of success to satisfy the merits test applicable to applications to amend.
150. I also consider that this is not the kind of relatively straightforward point of law that I should determine on a summary basis. The interpretation of international treaty obligations requires a very particular approach that has due regard to matters of both context and purpose. The academic commentary in *Reinbothe and von Lewinski* indicates to me that there may well be additional material bearing on these matters that is not presently before the court and which I have not had an opportunity to consider. I entertain concerns about approaching the merits of the National Treatment Amendments simply as an exercise in the interpretation of a few words in Article 4 and Article 15.
151. The SoS also argues that the National Treatment Amendments are bound to fail because they do not plead an essential ingredient of a claim to *Francovich* damages, namely why the UK's asserted failure to comply with Article 4(1) was "sufficiently serious".
152. However, this is to misunderstand the nature of the National Treatment Amendments, at least as Mr Howe KC explained them in his oral submissions. In their skeleton argument the Claimants did appear to be presenting the National Treatment Amendments as involving a "further and freestanding answer to the Audio-Visual Works Application because it means that the failure to treat the US Performers equally with British performers is itself a breach of EU law which gives rise to *Francovich* damages". However, in his oral submissions, Mr Howe KC rowed back from this saying that none of the "audio-visual" amendments involved an allegation of "any additional breach, any additional infractions".
153. As explained in Mr Howe KC's oral submissions, I therefore proceed on the basis that the Claimants are not asserting that US Performers are entitled to claim *Francovich* damages for the UK's asserted failure to comply with Article 4(1) of the WPPT. Rather, I take the National Treatment Amendments to address a question of causation (noting that the amendments appear in a section of the Draft APOC headed "Particulars of Causation"). I therefore take the Claimants' case in the National Treatment Amendments to be that, in a counterfactual world in which the UK legislated to give effect to the Directives (as interpreted by *Atresmedia*), it would have been obliged to give effect to Article 4(1) by conferring the same entitlement on US Performers as enjoyed by UK artists. Since US Performers did not obtain the same entitlement as UK artists under Section 182D, but would have obtained that entitlement in the counterfactual world, I take the argument to be that loss has been caused by the breach. Approaching the

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amendments in that way, I agree with the Claimants that no additional pleading of a case on “seriousness” is necessary.

154. That also deals with the SoS’s argument, based on the judgment of the CJEU in *SCF v Del Corso* (EU:C:2012:140) to the effect that US Performers are not entitled to rely on the provisions of the WPPT against the UK because the WPPT does not confer directly effective rights in the EU legal order. The Claimants are not, as I understand the National Treatment Amendments, asserting any such direct effect. Rather they are saying that the Article 4(1) would have informed the way in which the UK would have enacted EU-compliant legislation that goes to their argument on causation.
155. I conclude that the National Treatment Amendments satisfy the merits test necessary to obtain permission to amend.

The Indirect Causation Amendments

156. The damage pleaded by the Indirect Causation Amendments involves (i) US Performers’ inability to obtain a benefit that, it is asserted, would have been available to domestic performers in a counterfactual situation where the UK legislated in accordance with its EU law obligations or (ii) US Performers’ inability to benefit from what, it is asserted, would have been PPL’s practice in that counterfactual scenario. The SoS argues that a claim for such damages is bound to fail because the necessary direct causal link between the UK’s asserted breach of its EU law obligations and US Performers’ loss is not present.
157. For the reasons that follow, I have concluded that the Claimants’ case on the Indirect Causation Amendments satisfies the merits test.
158. As noted in paragraph 97 above, the claim for *Francovich* damages is, in legal form, a claim against the UK Government for breach of statutory duty. In determining whether loss suffered is recoverable, it will be necessary to consider the purpose for which the relevant statutory duty is imposed (see for example *Gorris v Scott* (1873-4) LR 9 Ex 125). The Claimants argue that the purpose of the statutory duty in this case must be understood by reference to the purpose of the Directive. Some of those purposes are set out in Recitals (5) and (6) to the Directive namely the need for artists and performers to be able to earn an adequate living and the need for harmonised rights, recognising that many artists and performers are self-employed.
159. I recognise that the Indirect Causation Amendments are not straightforward. There is scope for legitimate disagreement as to whether the loss that the Claimants seek to recover pursuant to them truly is recoverable. However, the parties’ competing submissions at the hearing give me little basis for a conclusion that one side’s position is substantially better than the other. Much of the debate that I heard on this issue was simply an articulation of two plausible points of view, with the SoS arguing that damage of the sort claimed fell outside the scope of the UK’s duty and the Claimants arguing that there were cogent reasons why it fell within the UK’s duty. In my judgment, concluding on that debate will require a fuller analysis of the purposes of the Directive than is possible with just a few references to a couple of recitals.

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160. Moreover, I am conscious that at least some of the debate took place in something of an evidential vacuum as the court does not have a full picture of all the factors that drive PPL's decision, in practice, to collect equitable remuneration connected with certain types of exploitation of sound recordings in the UK but not for others.
161. For all those reasons, I will not conclude at this early stage that the Indirect Causation Amendments are bound to fail.

Scope of *Atresmedia* Amendments

162. By paragraph 57.7(f) of the Draft APOC, the Claimants plead a case to the effect that, even if the UK had complied with its minimum EU law obligations and implemented the Directive consistently with *Atresmedia*, US Performers would still have obtained a right to equitable remuneration when sound recordings were exploited in a "television broadcast that was not in the form of a fixation incorporated in an audiovisual work". The Claimants no longer pursue an amendment relating to "live performances delivered to camera". The SoS objects to that amendment on the basis that, if a sound recording is incorporated into a television broadcast that is necessarily a "fixation" of a phonogram that is incorporated into an audiovisual work that (i) did not trigger a right to equitable remuneration pursuant to the Directive and so (ii) would not have given rise to equitable remuneration under hypothetical UK statute law that gave full effect to the Directive.
163. As noted in paragraphs 140 and 141 above, the CJEU in *Atresmedia* concluded, by reference to the WPPT, that a "fixation incorporated in a cinematographic or other audiovisual work" was not a "phonogram" for the purposes of the Directive. That therefore raises the question of what the term "cinematographic or other audiovisual work" means. The SoS's application for strike-out proceeds on the basis that a "television broadcast" that contains a sound recording is necessarily a "cinematographic or other audio-visual work".
164. That submission has a certain intuitive force to it. However, Mr Howe KC has persuaded me, by reference to academic commentary, that there is a realistic prospect of establishing that the SoS's conclusion does not necessarily follow. For example, paragraphs 8.2.46 and 8.2.47 of *Reinbothe and von Lewinski* suggests that a "cinematographic work" is one that is supposed to be exploited in a cinema with the term "audiovisual work" being a generic one that covers any kind of film works including cinema films in video format and television films. Moreover, these passages suggest that there is a certain "originality standard" that must be overcome before a collection of moving images can be said to be an "audiovisual work". The authors posit a situation where a festival, concert or theatre play is simply filmed and suggest that if the activity does not overcome the "originality standard", the outcome may not be an "audiovisual work" even though it clearly contains both sound and images.
165. Given that academic commentary, I do not consider I should conclude summarily that the proposed amendments are bound to fail. There may be some types of work that can, as a general matter be described as "audiovisual" but which nevertheless trigger a right to equitable remuneration once the term "audiovisual work" is properly construed. I therefore consider that the Scope of *Atresmedia* Amendments satisfy the merits test necessary to secure permission to amend.

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“Limitation” issues and conclusion

166. I use the term “limitation” in the same general sense as is set out in Section E above as embracing both the 31 December 2022 deadline set out in paragraph 39(7) to Schedule 8 of EUWA 2018 and the limitation period specified in the Limitation Act 1980.
167. I did not understand the SoS to argue that the period specified in the Limitation Act 1980 for claiming *Francovich* damages has expired. Therefore, I do not consider that I need to consider the provisions of CPR 17.4 in relation to the three categories of amendment set out in paragraph 138 and 139 above. In case that is wrong, I conclude (for reasons that are essentially similar to those set out in paragraphs 169 and 170 below) that none of those amendments plead a new cause of action.
168. However, the amendments are made after 31 December 2022 and therefore, I have considered whether those amendments involve new “proceedings” after 31 December 2022 for the purposes of paragraph 39(7) of Schedule 8 to EUWA 2018, a similar issue to that considered in paragraphs 127 to 130 above.
169. The SoS’s arguments in this regard were focused on the National Treatment Amendments. I consider that focus was appropriate as it is difficult to see how the Indirect Causation Amendments or the Scope of *Atresmedia* Amendments could realistically be seen as involving new “proceedings”. The Indirect Causation Arguments seek to explain a further basis for the conclusion that the “causation” requirement for the Claimants to obtain *Francovich* damages is met. Similarly, the Scope of *Atresmedia* Amendments go to the quantum of the claims made in the existing “proceedings” with the Claimants seeking to demonstrate that they have some claims in relation to a category of visual works despite the judgment in *Atresmedia*.
170. At first sight, it might be thought that the National Treatment Amendments are in a different category. However, once it is appreciated that, by these amendments, the Claimants are relying on no further breaches of EU law, and that the amendments simply plead an alternative case on causation in connection with the breaches of EU law that are asserted in the unamended POC (see paragraph 152 above) it becomes clear that there is no such difference.
171. In my judgment, there are realistic prospects of establishing that none of the three categories of amendment summarised in paragraph 138 and 139 above involve any new “proceedings” being brought for the purposes of paragraph 39(7) to Schedule 8 of EUWA 2018. They are not, therefore, bound to fail by reference to paragraph 39(7).
172. My overall conclusion is that those three categories of amendment should be permitted.

[G] THE APPLICATION TO AMEND THE DEFENCE

173. The SoS’s application to amend his defence comes about in this way:
- i) Paragraph 30 of the POC sets out the Claimants’ summary of certain aspects of the WPPT. The essence of that pleading is that, although the benefit of the WPPT is expressed to be available to “nationals of other Contracting Parties”, that expression has an extended meaning which can include performers (irrespective of

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nationality) if their performances attract protection under Article 4(b) of the Rome Convention.

- ii) In paragraph 16 of his Defence, the SoS admitted paragraph 30 of the POC.
 - iii) However, the SoS now wishes to include paragraphs 16A to C in an Amended Defence to assert (i) that the Claimants' summary in paragraph 30 of the POC does not show the full picture and (ii) that "performers or producers who are not nationals of a contracting party to the WPPT are not eligible for the right to equitable remuneration in WPPT even in cases where they would otherwise meet the eligibility criteria pursuant to the Rome Convention".
 - iv) Since that amendment seeks to dispute the central conclusion that the Claimants drew in paragraph 30 of their POC, the Claimants characterise the SoS's amendments as withdrawing an admission and ask the court to refuse permission to do so.
174. I understand that correspondence between the parties on this issue has been ongoing for several months. For some of that time the Claimants have been asking whether the SoS's references to "nationals of a WPPT contracting party" in paragraphs 16B and 16C means "actual nationals" (which could be ascertained by, for example, looking at the individuals' passports) or "extended nationals" (in the sense of the extended meaning summarised in paragraph 173.i)). I understand that the SoS has confirmed that the reference is to "actual nationals".
175. Provided that clarification is reflected in the SoS's Amended Defence, I consider that the SoS should be granted permission to amend. That is demonstrated by considering what the position would be if I refused permission. In that case, the SoS would be shut out from putting before the court legal arguments as to the true construction of an international treaty to which the UK is party. Moreover, he would be so precluded several months before the trial of this action is due to take place in circumstances where there is little, if any, prejudice to the Claimants in having to meet the argument at trial.
176. Put another way, even if this is a case of the SoS withdrawing an admission (on which I express no view), the considerations in CPR 14.5 point firmly in favour of the SoS being given that permission. Most significantly:
- i) As regards CPR 14.5(a), the grounds relied on consist of a wish to ensure that the court hears full and informed argument on the meaning of the WPPT.
 - ii) As regards CPR 14.5(d), there is no prejudice to the Claimants if the point is advanced.
 - iii) As regards CPR 14.5(e) and (g), the amendments are made well in advance of trial.
177. The Claimants urge me to find that there are no realistic prospects of success (CPR 14.5(f)), but I will not reach that conclusion on the basis of the brief argument I have heard on the issue. There are sufficient prospects of success for the matter to be considered at trial.

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178. The SoS's application to amend is allowed.