

Central and Eastern European Moot Court Competition 2024

**2024 WRITTEN PLEADINGS FOR THE RESPONDENT**

[West University of Timișoara, Faculty of Law]

**Tsitra Evitaerc (Applicant)**

v.

**The Arty-Zen Gallery, Oleg Nalechim and Nevet Sbergspiel (Respondents)**

Reference for a Preliminary Ruling to the European Court of Justice



## List of abbreviations

· European Union	EU
· European Commission	Commission
· Treaty of the European Union	TEU
· Treaty on the functioning of the European Union	TFEU
· CEEMC Moot case 2024 edition.	Moot case
· Page(s)	pg(s).
· Paragraph(s)	para(s).
· Example given	e.g.
· Court of Justice of the European Union	Court
· The Arty-Zen Gallery	the Arty-Zen
· Directive 2001/29/EC	ISD
· Article	Art.

**Index of cases abbreviations  
CJEU case-law**

<ul style="list-style-type: none"> <li>Case C-210/06, Cartesio Oktató és Szolgáltató</li> </ul>	Case C-210/06, Cartesio
<ul style="list-style-type: none"> <li>Case C-192/18 European Commission v Republic of Poland</li> </ul>	Case C-192/18, European Commission v Republic of Poland
<ul style="list-style-type: none"> <li>Joined Case C-585/18, C-624/18, A.K. v Krajowa Rada Sadownictwa (C-585/18) and CP (C-624/18), DO (C 625/18)</li> </ul>	Joined Cases C-585/18, C-624/18 and C-625/18, A.K. and others
<ul style="list-style-type: none"> <li>Case C-55/20, Ministerstwo Sprawiedliwosci v Prokurator Krajowy: Opinion of AG Bobek</li> </ul>	Case C-55/20, AG Bobek Opinion in Ministerstwo Sprawiedliwosci
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- The Treaty on European Union as amended, hereinafter cited as *TEU*
- The Treaty on the Functioning of the European Union, hereinafter cited as *TFEU*
- Charter of Fundamental Rights of the European Union, hereinafter cited as *the Charter*
- Directive 2001/29/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, hereinafter cited as **ISD**

**Q1: Do Article 19 TEU, Article 47 of the Charter or any other provisions of EU law preclude a President of a court appointed in accordance with rules such as those in force in Melborp from sitting in a case in circumstances such as those of the present case?**

1. As a preliminary point, Respondent invites the Court to examine the admissibility of the first question in connection to the actual context of the problem at issue in the main proceeding.
2. According to this Court's settled case-law<sup>1</sup> and to various AG opinions<sup>2</sup>, the Court may refuse to rule on questions that are either hypothetical, general in nature or bear no relation to the procedure and the subject matter of the disputes in the main proceedings.
3. Question 1 raises a general matter on which the Court does not have to rule upon in the absence of sufficient factual and legal material that would enable it to do so. Against this background and given the circumstances of the case in the main proceedings, Respondent argues on the impossibility to establish whether there has been a breach of the Member State's obligation to guarantee the right to an effective remedy as the first subparagraph of article 19 TEU requires<sup>3</sup>.
4. As the Court has previously held in a variety of its decisions<sup>4</sup>, Article 19 TEU has a broad material scope and extends to all national courts entitled to make a reference for a preliminary ruling under Article 267 TFEU<sup>5</sup>. In a context such as that of doubts about the judicial independence, Art. 19 TEU targets structural breaches which may compromise the essence of the act of justice at the national level.
5. Respondent therefore underlines the inadmissibility of the first question, by also relying on the argument of Advocate General Tanchev in his Opinion in the *Miasto Lowicz* Case<sup>6</sup>. As expressly indicated in paragraphs 123 and 124 of the Opinion, 'the complexities of determining whether Member State measures are inconsistent with the guarantees of judicial independence under the second paragraph of article 19 (1) require rigorous adherence to the requirements set out in article 94 of the Court's Rules of Procedure'.
6. In order to prove that a particular national procedure infringes EU law provisions, a substantive amount of relevant information should therefore be provided, which the national court failed to do in the present case.
7. However, should this Court consider that the question referred to it is admissible, Respondent submits that in the present case there is no breach of the referred EU law provisions. Even if question 1 may pass the test of admissibility and relevance, it raises issues partaking to judicial independence, a concept that requires a detailed analysis.
8. First, the organisation of justice falls within the exclusive competence of the Member State, albeit that<sup>7</sup>, when exercising those competences, Member States are required to comply with their obligations deriving from EU law and, in particular, with the second subparagraph of the article 19 TEU, according to which it is for the Member States to establish a system of legal remedies and procedures ensuring for individuals compliance with their right to effective judicial protection in the fields covered by EU law. The principle of the effective judicial protection of individuals' rights is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms and is now reaffirmed in Article 47 of the Charter of Fundamental Rights of the European Union.
9. As long as the guarantees of impartiality and independence established by national law are fully compliant with the treaties of the European Union, neither legislative provisions, nor the former roles of the president

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<sup>1</sup> Case C-210/06 *Cartesio*, para. 67, pg. 113 of Bundle; Case C-525/06 *De Nationale Loterij*, para. 10, pg. 119 of Bundle; Case C-64/16 *ASJP*, para. 23, pg. 125 of Bundle; Joined Cases C-585/18, C-624/18 and C-625/18 *A.K. and others*, para. 70, pg. 185 of Bundle; Joined Cases C-748/19 to C-754/19 *Prokuratura Rejonowa*, para. 92, pg. 234 of Bundle; Case C-527/15 *Stichting Brein*, para. 56, pg. 412 of Bundle;

<sup>2</sup> Joined Cases C-558/18 and C-563/18 *AG Tanchev Opinion in Miasto Lowicz*, para. 101, pg. 161 of Bundle; Joined Cases C-748/19 to C-754/19 *AG Bobek Opinion in Prokuratura Rejonowa*, para. 42, pg. 203 of Bundle; Case C-55/20 *AG Bobek Opinion in Ministerstwo Sprawiedliwosci*, para. 63, pg. 244 of Bundle;

<sup>3</sup> Joined Cases C-558/18 and C-563/18 *AG Tanchev Opinion in Miasto Lowicz*, para. 5, pg. 146 of Bundle;

<sup>4</sup> Joined Cases C-585/18, C-624/18 and C-625/18 *A.K. and others*, para. 167, pg. 195; Joined Cases C-558/18 and C-563/18 *Miasto Lowicz*, para. 125, pg. 163; Case C-55/20 *Ministerstwo Sprawiedliwosci*, para. 73, pg. 261 of Bundle;

<sup>5</sup> Joined Cases C-558/18 and C-563/18, *Miasto Lowicz*, para. 33, pg. 172 of Bundle;

<sup>6</sup> Case C-558/18 and C-563/18 *AG Tanchev Opinion in Miasto Lowicz*, paras. 123, 124, pg. 163 of Bundle;

<sup>7</sup> Case C-192/18 *European Commission v Republic of Poland*, para. 102, pg. 139 of Bundle;

or the existing connection between the Minister of Justice and the Respondent, could justify doubts about the effectiveness of the internal judicial proceedings

10. Independence is a specific concept that has two components: both an objective and a subjective one. It is settled case-law of the Court that the guarantees of independence and impartiality required under EU law presuppose rules that are such as to dispel any reasonable doubt, in the minds of individuals, as to the imperviousness of the body in question to external factors and its neutrality with respect to the interests before it. For example, as this Court previously held in the *A.K. and others* Case<sup>8</sup>, objective independence refers to the procedure of appointment of judges and their term of office and the existence of clear guarantees against outside pressures is compulsory. On the other hand, subjective independence relies on impartiality, as the judge's conduct should not interfere with any of the interests of the parties involved in the dispute. Hence, justice must be assured to be independent and also appear to be independent.
11. Second, the fact that the President of the court is appointed by the Minister of Justice relies on the legal prerogatives conferred by the national law to the latter and does not come in conflict with the EU law provisions<sup>9</sup>. A bond between a hypothetical breach of the Treaty and the presence, in the panel of judges, of the President of the referring court is hard to claim and it requires meaningful evidence to be established. The mere fact that the previous functions of the President connect him to other persons does not automatically throw a shadow over his impartiality or independence.
12. As the AG Bobek stated in his Opinion in the *Prokuratura Rejonowa* Case<sup>10</sup>, Article 19 TEU is an extraordinary remedy for extraordinary situations. Such particular EU law provision is not meant to cover all issues relating to the judicial organisation of the Member States, but rather those of certain gravity or of a systemic nature. Therefore, Article 19 is activated in case Member States fail to provide sufficient remedies so as to ensure effective legal protection. Nothing in the case at hand indicates that Melbop is a corrupt state or that it has a history of rule of law issues. Even if the Court finds that this particular case has led to some problematic issues, there is no indication of larger, structural disfunctions, which may lead to a breach of Article 19 TEU.
13. As it was stated by the Court<sup>11</sup>, an arrangement of case facts, taken in isolation, can not call into question the independence of a chamber. Furthermore, as the Court emphasised in the *A.K. and others* Case, the perspective of one party is not sufficient to determine the lack of independence and impartiality of a judge, but rather such a fear should be objectively justified<sup>12</sup>. In the case at issue the Applicant's doubts regarding the independence and impartiality of the judges are unfounded as the Respondent shall argue in the following paragraphs.
14. It should be borne in mind that the Melbopian law enables the Minister of Justice to appoint the President of the court and to renew their mandate based on satisfactory criteria<sup>13</sup>. The Court has found in the *European Commission v Republic of Poland* Case<sup>14</sup> that the Minister of Justice's power to extend a judge's activity period beyond the regular retirement age does not, by itself, lead to an undermining of judicial independence, in the absence of other relevant circumstances. Similarly, as in the current case the appointments are based on the criteria of satisfactory performance<sup>15</sup>, Respondent submits that the independence of the national court is not to be doubted.
15. Although maintaining the judges' independence and impartiality is of cardinal importance for the health of the Member State's judicial system, a complete absence of interaction between the executive and the judiciary is not possible. The current arrangement of state powers governed by the rule of law requires balance, transparency and equidistance. One does not preclude the other. As far as the President's position in the main proceedings of the present case is concerned, no breach of EU law provisions results from the factual and legal information provided.

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<sup>8</sup> Joined Cases C-585/18, C-624/18 and C-625/18 *A.K. and others*, para. 127, pg. 191 of Bundle;

<sup>9</sup> Moot case, para. 15, pg. 7;

<sup>10</sup> Cases C-748/19 to C-754/19 *AG Bobek Opinion in Prokuratura Rejonowa*, paras. 141, 142, 147, pg. 215 of the Bundle;

<sup>11</sup> Case C-192/18 *European Commission v Republic of Poland*, para. 127, pg. 142 of Bundle; Case C-55/20 *Ministerstwo Sprawiedliwości*, para. 74, pg. 261 of Bundle;

<sup>12</sup> Joined Cases C-585/18, C-624/18 and C-625/18 *A.K. and others*, para. 129, pg. 191 of Bundle;

<sup>13</sup> Moot Case, para. 15, pg. 7 of Bundle;

<sup>14</sup> Case C-192/18 *European Commission v Republic of Poland*, para. 119, pg. 141 of Bundle;

<sup>15</sup> Moot Case, para. 15, pg. 7 of Bundle;

16. In order to be capable of giving rise to legitimate doubts in the minds of the subjects of law, as to the imperviousness of the President Rouge, a strong link must be established between his actual appointment as member (President) of the Copyright Court and the interest of the Minister of Justice (the agent appointed him) in the outcome of the present case.
17. Third, the first subparagraph of article 19 TEU gives concrete expression to the value of the rule of law and has a broad scope which may be linked to multiple situations.
18. A conjunction of actual facts should be well established in order to determine that the judicial independence of the judges is endangered. As stated in the *European Commission vs Republic of Poland* Case, 'the fact that an organ such as the Minister of Justice is entrusted with the power to appoint judges as presidents of courts is not sufficient in itself to conclude that the principle of judicial independence has been undermined<sup>16</sup>'.
19. The Melborpian national provisions do not represent a particular case, but they rather belong to a common tradition of the continental legal systems in which members of the executive power may appoint judges as representatives of the judiciary. From that moment on, judges are bound to exercise their functions wholly autonomously, apart from any form of hierarchical constraint or subordination to any other body. Since the Minister of Justice is, according to the law in force in Melbop, entitled only to appoint the presidents of courts and renew their mandate, no serious doubts of bias may arise.
20. Furthermore, the Court's opinion stated in the *A.K. and others* Case is relevant for the present case as well: the mere fact that judges (also members of the Disciplinary Chamber) were appointed by the President of the Republic was not considered by the Court as giving rise to a relationship of subordination of the former to the latter or to doubts as to the former's impartiality. Suspiciousness as such expressed by the referring court must break the barriers of the factual context and raise serious issues of judicial constraint of judges in relation to the executive authorities<sup>17</sup>.
21. To conclude, by taking account of the arguments already presented, the fact that the President of a court is appointed by the Minister of Justice is not capable of giving rise to serious doubts that could lead to the infringement of either Article 19 TEU or Article 47 of the Charter.

**Q2: Does Article 267 TFEU preclude a national rule permitting the President of a court, who is not himself a part of the judgement formation for the purposes of a particular decision, to veto a request for a preliminary ruling which the members of the judgement formation consider necessary to resolve the issue pending in front of them?**

22. By its second question, the referring court asks, in essence, whether the effectiveness of article 267 TFEU would be jeopardised by a national law rule enabling the President of a court to veto the request for a preliminary ruling taken by the adjudicating panel.
23. As a preliminary remark, the Court should take into account the question's theoretical nature, as far as the request has been successfully formulated in the present case. Equally, the issue should be correlated to the factual context of the dispute, including the events that took place in the Copyright Court. Noteworthy, during the first attempt to refer the question to the Court, the four judges of the panel expressed doubts regarding the president's refusal and were *evenly split* on whether or not to make the order for reference. The President of the court considered the request unnecessary.
24. First, it should be borne in mind that no conflictual relation exists between the national rule permitting the President of a court to veto a decision taken by another judge adjudicating in a certain proceeding over which the former presides and the guarantees of article 267 TFEU. One does not preclude the other. The court President's right to veto is an internal instrument of the judiciary procedures by nature<sup>18</sup>. It is related to the proper functioning and organisation of courts in the Melbop and relies on the principle of Member States' procedural autonomy. As such, while it does not trigger the ineffectiveness of EU law, it also treats it in an equivalent way as compared to the relevant national law.

<sup>16</sup> Case C-192/18 *European Commission v Republic of Poland*, para. 123, pg. 163 of Bundle;

<sup>17</sup> Joined Cases C-585/18, C-624/18 and C-625/18 *A.K. and others*, para. 133, pg. 192 of Bundle;

<sup>18</sup> Moot Case, para. 15, pg. 7 of Bundle;



25. The ‘power’ to veto the decisions taken by the other judges fulfils the aim of maintaining the judicial procedures within a reasonable term and to avoid unnecessary delay<sup>19</sup>. The President of any court or tribunal must, given their role within that jurisdiction, ensure the resolution of disputes in an optimal and predictable time. In this particular case, due to the court being evenly split, the president had the obligation to intervene, by accepting or denying the reference, to avoid the risk of delaying the adjudication of the case for an undetermined period of time.
26. The aforementioned obligation is incumbent on national judges who may not extend the process of adjudication by means of procedure. The Respondent wishes to emphasise that the veto right applies to any procedural measure not only to requests for preliminary rulings<sup>20</sup>.
27. Substantially, article 267 TFEU is implementing the legal framework that enables the national courts to enter a dialogue with this Court. Therefore, if there are still legal remedies against the national court’s decisions, that court is not obliged to refer a question for a preliminary ruling. In the present case, the Applicant’s requests are heard by the Copyright Court of Melbop<sup>21</sup>. As it rules at first instance, the Copyright Court has the opportunity and not the obligation to bring in front of the Court of Justice the subject matter of the main disputes.
28. Given the fact that the referring court is a court of first instance, the President’s right to veto a reference is hardly capable of paralysing the possibility for the referred questions to be addressed to the Court, given the fact that Applicant has the right to appeal the decision on points of law at the Supreme Court of Melbop<sup>22</sup>.
29. In the *Cartesio* Case, the referring court seeks guidance on whether a national measure which confers a right to bring an appeal against an order making a reference for a preliminary ruling limits the power of that court under Article 267 TFEU<sup>23</sup>. The judgement in that case is pointing towards the idea that Article 267 TFEU does not preclude decisions of the national courts by which questions are referred to the Court for a preliminary ruling from remaining subject to the remedies normally available under national law<sup>24</sup>. From this point of view, the veto right of the Copyright Court’s President is comparable to the appeal that could be brought against the order for reference in the abovementioned.
30. In the light of the foregoing considerations, the Court shall find that Article 267 TFEU must be interpreted as not precluding the internal prerogative of a President of a Court, that is not himself part of the judgement formation, to exercise a right to veto the decision to make a referral for a preliminary ruling of a panel.

**Q3: Is there an infringement of the film producer’s exclusive right under article 2(d) of the Information Society Directive if a very short extract is taken from a film and used in the creation of another film?**

31. Respondent’s submission is that there is no breach of the film producer’s exclusive right under Article 2(d) of the ISD if a very short extract is taken from a film and used in the creation of another film.
32. Article 2(d) of the ISD grants the producers of the first fixations of films the exclusive right to authorise or prohibit reproduction of their work by any means and in any form, in whole or in part. Since the referring court indicates the use of a short extract of a film, the court asks, in essence, whether a reproduction in part takes place when a short extract is taken from a film and used in the creation of another film.
33. It has been a constant position of this Court and its AG’s that in cases where provisions of EU law make no express reference to the law of Member States for the purpose of determining their meaning and scope, they must be given an autonomous and uniform interpretation through the EU<sup>25</sup>. In relation to the concept of copyright within Article 2(a) of the ISD, the Court and its AG’s have stated in the past that it applies only in relation to a subject-matter that is ‘original in the sense that it is its author’s own intellectual creation<sup>26</sup>’.

<sup>19</sup> Moot Case, para. 15, pg. 7 of Bundle;

<sup>20</sup> Moot Case, para. 15, pg. 7 of Bundle;

<sup>21</sup> Moot Case, paras. 16, 17, pg. 8 of Bundle;

<sup>22</sup> Moot Case, para. 16, pg. 8 of Bundle;

<sup>23</sup> Case C-210/06 *Cartesio*, para. 40, pg. 111 of Bundle;

<sup>24</sup> Case C-210/06 *Cartesio*, para. 89, pg. 110 of Bundle;

<sup>25</sup> Case C-306/05 *AG Sharpston Opinion in SGAE*, para. 42, pgs. 270, 271 of Bundle; Case C-306/05 *SGAE*, para. 31, pg. 282 of Bundle; Case C-5/08 *Infopaq*, para. 27, pg. 290 of Bundle; Case C-201/13 *AG Cruz Villalón Opinion in Deckmyn*, para. 35, pg. 352 of Bundle; Case C-201/13 *Deckmyn*, para. 14, pg. 363 of Bundle;

<sup>26</sup> Case C-5/08 *Infopaq*, para. 37, pg. 291 of Bundle; Joined Cases C-403/08 and C-429/08 *FAPL*, para. 97, pg. 311 of Bundle; Case C-145/10 *Painer*, para. 87, pg. 330 of Bundle; Case C-476/17 *AG Szpunar Opinion in Pelham*, para. 28, pg. 378 of Bundle;

The Intellectual Property Enterprise Court of England and Wales has set up the same test<sup>27</sup>. Since the only difference between Articles 2(a) and 2(d) of the Directive is that the former refers to authors, while the latter refers to producers of the first fixations of films, Respondent submits that the aforementioned standard shall apply to both.

34. Respondent submits that there is no such breach of copyright in the referred case due to the fact that the extract used does not fulfil the condition of being the producer's own intellectual creation.
35. Firstly, in the *FAPL* Case, the Court argued that football matches cannot be regarded as intellectual creations classifiable as works under the ISD since they are bound by the rules of the game, 'leaving no room for creative freedom for the purposes of copyright<sup>28</sup>'. As such, under EU Law, they cannot be protected under copyright or under any other basis in the field of intellectual property<sup>29</sup>. In the referred case, the footage extracted captured three cats running around a hallway, without having received any indication regarding what to do and not having to respect any sort of rule<sup>30</sup>. As such, the input received was even lower than that in the case of a football match, since the game at least has a set of rules. In these circumstances, since the former does not meet the requirements for being regarded as their author's own intellectual creation, Respondent submits that neither does the latter.
36. On the same issue, while it is true that the original video had background music, which might have led to the conclusion that protection should have been granted, that music was removed and replaced in the extracted video<sup>31</sup>. In the *FAPL* Case, the Court only granted protection to elements that fit the required criteria, specifically 'the opening video sequence, the Premier League anthem, pre-recorded films showing highlights of recent Premier League matches, or various graphics<sup>32</sup>'. Since the original music in the footage from the referred case was removed, no similar elements remain which might have required protection. Furthermore, it has been stated in doctrine that the concept of reproduction in part 'only provides exclusivity over the unmodified use of samples<sup>33</sup>'. Respondent submits that a similar standard to the one under Article 2(c) of the ISD should be applied to Article 2(d). As such, only unmodified footage should be granted protection.
37. Finally, on this issue, Respondent points out to the Court's findings in the *Infopaq* Case, where it has been stated that words, taken in isolation, are not an intellectual creation, and only through their combination can that situation be achieved<sup>34</sup>. As such, in a circumstance where the author of the work has more input than in the referred case, it is not a certainty that a work should be worthy of protection. Furthermore, in the aforementioned case, where 11 words from newspapers were reproduced for a large number of times in an automated process, the Court found that there was only an increase in likelihood for a reproduction in part to take place, and not a certainty<sup>35</sup>. In the end, the determination was left to the national court<sup>36</sup>.
38. In the alternative, should the Court find that an extract such as the one used from 'Tsitra's Cats' fulfils the condition of being the producer's own intellectual creation, Respondent still submits that it does not represent a reproduction in part, based upon the required balance between the rights involved.
39. It has been stated in the preamble of the ISD that 'A fair balance of rights and interests between the different categories of rightsholders, as well as between the different categories of rightsholders and users of protected subject-matter must be safeguarded', especially 'in the light of the new electronic environment<sup>37</sup>'.

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<sup>27</sup> [2022] EWHC 1379 *Shazam Productions LTD*, para. 125, pg. 420 of Bundle;

<sup>28</sup> Joined Cases C-403/08 and C-429/08 *FAPL*, para. 98, pg. 311 of Bundle.

<sup>29</sup> Joined Cases C-403/08 and C-429/08 *FAPL*, para. 99, pg. 311 of Bundle;

<sup>30</sup> Moot Case, para. 12, pg. 7 of Bundle;

<sup>31</sup> Moot Case, para. 12, pg. 7 of Bundle;

<sup>32</sup> Joined Cases C-403/08 and C-429/08 *FAPL*, para. 149, pg. 316 of Bundle;

<sup>33</sup> *James Parish, Sampling and copyright – did the CJEU make the right noises?*, pg. 466 of Bundle;

<sup>34</sup> Case C-5/08 *Infopaq*, para. 45, pg. 291 of Bundle;

<sup>35</sup> Case C-5/08 *Infopaq*, para. 50, pg. 292 of Bundle;

<sup>36</sup> Case C-5/08 *Infopaq*, para. 48, pg. 292 of Bundle;

<sup>37</sup> Information Society Directive, Recital (31), pg. 72 of Bundle;

40. This principle has been reaffirmed by this Court<sup>38</sup>, by AG Szpunar in the *Pelham* Case, who stated that neither the freedom of expression, nor the freedom of the arts, is superior to the other<sup>39</sup>, as well as by AG Villalón in the *Deckmyn* Case<sup>40</sup>.
41. In the *Pelham* Case, after weighting the rights that had to be balanced, the Court concluded that sampling a phonogram in a way that makes it unrecognisable to the ear does not meet the threshold for constituting a ‘reproduction in part’<sup>41</sup>. However, the Court has not expressed a view on what threshold should be used in the case of video footage. In this context, it should be pointed out that AG Szpunar has stated that ‘the balancing of different rights and interests is a particularly complex exercise and there is rarely a ‘one size fits all’ solution’<sup>42</sup>. As such, Respondent requests the Court to set such a standard in the case of film too, and to find that the extract used from the referred case does not meet the required threshold to be regarded as a ‘reproduction in part’. The extract consists of only 13 seconds, taken from 29 minutes long film<sup>43</sup>. Furthermore, the music from the extract was replaced<sup>44</sup>, as previously stated, which shows the originality that was put in the work, an act which, as argued in the first argument, should lead to lack of protection for the extracted work.
42. To conclude, Applicant submits that a very short extract such as the one in the referred case being taken and used in the creation of another film does not lead to an infringement of the film producer’s exclusive right under article 2(d) of the ISD due to it not being its author’s own intellectual creation. Alternatively, Applicant submits that there is no infringement of the film producer’s exclusive right, since the extract taken is insignificant.

**Q4: Does the concept of a communication to the public in Article 3 of the Directive extend to the situation in which (i) a video is played in a publicly-accessible exhibition space and/or (ii) a sculpture is exhibited in a publicly-accessible exhibition space?**

43. Respondent submits that the concept of a communication to the public in Article 3 of the Directive does not extend to the situation in which (i) a video is played in a publicly-accessible exhibition space and/or (ii) a sculpture is exhibited in a publicly-accessible exhibition space.
44. As a preliminary point, it should be noted that Article 3 of the ISD provides that Member States should confer authors the right to authorise or prohibit the communication of their works.
45. Moreover, it is hardly necessary to point out that, within the meaning of the abovementioned Directive, the concept of ‘communication to the public’ regards ‘all communication to the public not present at the place where the communication originates’<sup>45</sup>. Therefore, it excludes from its scope any direct public performance and representation<sup>46</sup>, as the latter refers to the ‘public that is in direct physical contact with the actor or performer of the works’<sup>47</sup>.
46. As this Court established in its case-law<sup>48</sup>, the concept of ‘communication to the public’, has to be interpreted broadly. To that end, in the *Football Association* Case it was found that the act of broadcasting football matches in public bars represented communication to the public. However, it is necessary to point out that the abovementioned case was concerning the broadcast of live football matches. Therefore, ‘the public was not present at the place where the communication originates’<sup>49</sup>.
47. In this context, it is worth mentioning that in the circumstances at hand, the works were presented during a cat-themed group exhibition<sup>50</sup>. Respectively, the sculpture was physically exhibited on the Arty-Zen premises and the montage film, in turn, was only screened to the visitors who were present, the latter not

<sup>38</sup> Case C-160/15 *GS Media BV*, para. 31, pg. 370 of Bundle; Case C-476/17 *Pelham*, paras. 32, 59, pgs. 398, 400 of Bundle;

<sup>39</sup> Case C-476/17 *AG Szpunar Opinion in Pelham*, para. 90, pg. 386 of Bundle;

<sup>40</sup> Case C-201/13 *AG Cruz Villalón Opinion in Deckmyn*, para. 75, pg. 356 of Bundle;

<sup>41</sup> Case C-476/17 *Pelham*, para. 39, pg. 399 of Bundle;

<sup>42</sup> Case C-476/17 *AG Szpunar Opinion in Pelham*, para. 94, pg. 387 of Bundle;

<sup>43</sup> Moot Case, paras. 3, 12, pgs. 5, 7 of Bundle;

<sup>44</sup> Moot Case, para. 12, pg. 7 of Bundle;

<sup>45</sup> Information Society Directive, Recital (23), pg. 72 of Bundle; Case C-306/05 *AG Sharpston Opinion in SGAE*, para. 33, pg. 270 of Bundle;

<sup>46</sup> Joined Cases C-403/08 and C-429/08 *FAPL*, para. 202, pg. 320 of Bundle;

<sup>47</sup> Joined Cases C-403/08 and C-429/08 *FAPL*, para. 201, pg. 320 of Bundle.

<sup>48</sup> Joined Cases C-403/08 and C-429/08 *FAPL*, para. 186, pg. 319 of Bundle;

<sup>49</sup> Joined Cases C-403/08 and C-429/08 *FAPL*, para. 203, pg. 320 of Bundle;

<sup>50</sup> Moot Case, para. 6, pg. 7 of Bundle;

even being available for sale<sup>51</sup>. Accordingly, the Arty-Zen's actions are equivalent to direct public performance and representation, as they were focused only to the public who was physically present on the Gallery's premises.

48. Consequently, an act of public performance and representation made to a public which is present at the place where the communication originates cannot be qualified as being an 'act of communication'.
49. Second, it should be borne in mind that the preamble of the ISD specifies also that '[t]he mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Directive<sup>52</sup>'.
50. In this context, the actions of an art gallery such as the Arty-Zen, whose scope is to promote and showcast Melborean art<sup>53</sup>, do not amount to the concept of 'communication to the public'. As such, it is important to recall that it is in view of supporting the artists that the Arty-Zen launched the 'Feline Groovy' exhibition<sup>54</sup>. During this event, it played on its premises the 'A Wild Day's Night' montage film, made by Nevet Sbergspiel and exhibited the sculpture 'Roar Energy', created by Oleg Nalechim<sup>55</sup>.
51. Moreover, it should be noted that those works had already been made public. The 'Roar Energy' was created in 2018 and Oleg talked about his work in some interviews<sup>56</sup>, while the montage film 'A Wild Day's Night' was previously shown publicly in Melbore in April 2022<sup>57</sup>. Consequently, although the gallery promoted these works, the public was not conditioned to visit its exhibition to learn about them.
52. Therefore, in a case such as that at issue, it cannot be assumed that the concept of a 'communication to the public' extends to the acts made by a third-party which has only the role of an intermediary.
53. Third, it is settled case law<sup>58</sup> that the concept of communication to the public implies an individual assessment. For that reason, in order to determine whether there is an act of communication to the public, it is important to take into account some complementary criteria, which are not autonomous and are interdependent<sup>59</sup>. Consequently, there must be retained an indispensable role played by the user<sup>60</sup>, specifically by giving access to a protected work. Furthermore, the public must be characterised by an indeterminate number of potential listeners and a fairly large number of people<sup>61</sup>. Lastly, the act must reveal a profit-making nature<sup>62</sup>.
54. On the one hand, it should be considered the role which is played by the user. In order to be an act of communication, the user should intervene 'in full knowledge of the consequences of its action, to give access to a broadcast containing the protected work to its customers<sup>63</sup>'. Therefore, the customers' access to broadcast work is conditioned by the user's intervention. However, the Arty-Zen only provided the artists with the necessary physical facilities in order to present their works. As such, it cannot be considered a user.
55. On the other hand, as it is mentioned above, the public should be of an indeterminate nature and characterised by a large number of people. Nevertheless, in the main proceedings, although the public was welcome to view the artworks during the opening hours, the Arty-Zen was also organising private events<sup>64</sup>. Regarding the latter, the indefinite or large character of the public cannot be retained as private events are invitations based.

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<sup>51</sup> Moot Case, para. 11, pg. 6 of Bundle;

<sup>52</sup> Information Society Directive, Recital (27), pg. 72 of Bundle;

<sup>53</sup> Moot Case, para. 4, pg. 5 of Bundle;

<sup>54</sup> Moot Case, para. 6, pg. 6 of Bundle;

<sup>55</sup> Moot Case, para. 6, pg. 6 of Bundle;

<sup>56</sup> Moot Case, para. 9, pg. 6 of Bundle;

<sup>57</sup> Moot Case, para. 11, pg. 7 of Bundle;

<sup>58</sup> Case C-162/10 *Phonographic Performance (Ireland) Limited v Ireland*, para. 29, pg. 342 of Bundle;

<sup>59</sup> Case C-162/10 *Phonographic Performance (Ireland) Limited v Ireland*, para. 30, pg. 342 of Bundle.

<sup>60</sup> Case C-162/10 *Phonographic Performance (Ireland) Limited v Ireland*, para. 31, pg. 342 of Bundle;

<sup>61</sup> Case C-162/10 *Phonographic Performance (Ireland) Limited v Ireland*, para. 33, pg. 342 of Bundle;

<sup>62</sup> Case C-162/10 *Phonographic Performance (Ireland) Limited v Ireland*, para. 36, pg. 342 of Bundle;

<sup>63</sup> Case C-162/10 *Phonographic Performance (Ireland) Limited v Ireland*, para. 31, pg. 342 of Bundle;

<sup>64</sup> Moot Case, para. 5, pg. 6 of Bundle;

56. Additionally, it should be analysed if the communication has a profit-making nature<sup>65</sup>. In this view, it should be recalled that the main goal pursued by the Arty-Zen was the promotion of art<sup>66</sup> and by no means making a profit, as it did not charge the artists for supporting them<sup>67</sup>. Although it received a commission from the sale of the works<sup>68</sup>, the possibility of receiving such remuneration is generally not guaranteed as it is conditioned by the public's decision to buy any of the exhibited artworks. Moreover, since during its opening hours the Arty-Zen could be visited by anyone<sup>69</sup>, it cannot be affirmed that the public was targeted.
57. Furthermore, a parallel can be made with the *GS Media* Case, which has a logic similar to the circumstances discussed above. In its judgement, this Court examined the situation in which the person who posts a hyperlink to a work which is freely available on a website is not pursuing any profit. In such circumstances, the Court established that it must be taken into consideration that the respective person 'does not know and cannot reasonably know' that the copyright holder did not give his consent in view of the publication of his work on the Internet<sup>70</sup>. Consequently, even if there could be retained an infringement committed by the artists, it can not be held that the Arty-Zen knew or could reasonably know about such a violation.
58. Moreover, in a case such as that at issue, extending the concept of a 'communication to the public' to the situations in which a video is played and a sculpture is exhibited in a publicly-accessible exhibition space would be equivalent to restricting freedom of expression and information. By imposing excessive conditions on bodies that pursue the promotion of art, there is a risk to disregard the will of the EU legislature<sup>71</sup>.
59. Consequently, it can not be admitted that the concept of a communication to the public in Article 3 of the Directive extend to the situation in which (i) a video is played in a publicly-accessible exhibition space and/or (ii) a sculpture is exhibited in a publicly-accessible exhibition space.

**Q5: Is the concept of 'pastiche' an autonomous concept of EU law? If so, must a pastiche satisfy the following conditions or conform to the following characteristics:**

- **imitates the style of another work or comprises an assemblage (medley) of a number of pre-existing works;**
- **is an evident recombination, in terms of both (i) the author having the subjective intention to create a pastiche and (ii) the pastiche being perceptible to those viewing or listening to the work; and**
- **cannot reasonably be ascribed to the author of the original work.**

**Must a work satisfy any other conditions or conform to other characteristics in order to be capable of being labelled as a pastiche?**

60. It is Respondent's submission that, according to the findings of the Court regarding the concept of parody<sup>72</sup>, the term 'pastiche' should be given a broad interpretation, consistent with the usual meaning of it. Respondent finds it undisputable that, very much like parody<sup>73</sup>, pastiche is an autonomous concept of EU law.
61. As such, considering the lack of guidance provided for in the case of pastiche<sup>74</sup>, Respondent suggests that solution by means of purposive semantic assessment<sup>75</sup>. The scope of such assessment is to aid in determining the conditions and characteristics of the application of the pastiche exception as provided for in Article 5(3)(k) of the ISD.
62. Considering that the concept of pastiche appears autonomous under EU law, it is important to note that the conditions proposed by the referring court should be analysed in order to determine whether or not they should apply.

<sup>65</sup> Case C-160/15 *GS Media BV*, para. 38, pg. 371 of Bundle;

<sup>66</sup> Moot Case, para. 4, pg. 5 of Bundle;

<sup>67</sup> Moot Case, para. 5, pg. 6 of Bundle;

<sup>68</sup> Moot Case, para. 5, pg. 6 of Bundle;

<sup>69</sup> Moot Case, para. 5, pg. 6 of Bundle;

<sup>70</sup> Case C-160/15 *GS Media BV*, para. 47, pg. 372 of Bundle;

<sup>71</sup> Joined Cases C-403/08 and C-429/08 *FAPL*, para. 179, pg. 318 of Bundle;

<sup>72</sup> Case C-201/13 *Deckmyn*, para. 15, pg. 363 of Bundle; Case C-201/13 *AG Cruz Villalón Opinion in Deckmyn*, paras. 44, 45, pg. 353 of Bundle;

<sup>73</sup> Case C-201/13 *Deckmyn*, para. 17, pg. 363 of Bundle; Case C-201/13 *AG Cruz Villalón Opinion in Deckmyn*, para. 35, pg. 352 of Bundle; *The Pastiche Exception In Copyright Law: A Case Of Mashed-Up Drafting?*, pg. 444 of Bundle;

<sup>74</sup> *The Pastiche Exception In Copyright Law: A Case Of Mashed-Up Drafting?*, pg. 439 of Bundle;

<sup>75</sup> *The Pastiche Exception In Copyright Law: A Case Of Mashed-Up Drafting?*, pg. 444 of Bundle;

63. First, the outcome of conducting the purposive semantic assessment suggested above demonstrates that the first condition proposed by the referring court should be accepted. In accordance with both its usual meaning<sup>76</sup> and the role of exceptions in copyright law<sup>77</sup>, it can be concluded that the copyright meaning of pastiche should cover, first, the case of imitating the style of another work, and, second, the mixing of a number of pre-existing works into a new, standalone creation.
64. Second, by incorporating the condition referring to the new work being an evident recombination, it would impose evaluation into subjective matters<sup>78</sup>, making the fair balance test assessed to the national courts more likely to lead to defective results. Such results would be to the detriment of the rights of implicated users<sup>79</sup>, which would bring inefficiency to the fair balance test between the interests of rightsholders and the freedom of expression of such users, an important consideration provided for by the case-law of the Court<sup>80</sup>. Moreover, it becomes significant to note that it has been considered that the scope of pastiche is to emphasise ‘the similarities between expressions rather than attempting to transform a creative expression<sup>81</sup>’ meaning that endorsing a condition related to intention would not lead to favourable results.
65. Third, based on previous case-law of this Court<sup>82</sup>, Respondent submits that the condition regarding reasonable attribution of the pastiche work to the author of the original work should not be taken into consideration, as it was found that such characteristic holds no significance in determining the application of the ISD exceptions.
66. Apart from the conditions proposed by the referring court, one important aspect to consider is the eventuality of implementing a fair dealing condition as embraced by English case-law<sup>83</sup>. Looking at the contemporary context in which the law has to change to accommodate new artistic currents<sup>84</sup>, given the advanced level of digital creation that is present in these modern times, it is accurate to state that most new creations are made by use of imitation.
67. Although hard to define<sup>85</sup>, fair dealing pursues the idea of justifying a brief use of a copyrighted work, which corresponds both with the usual meaning of pastiche, being a ‘combination of aesthetic elements<sup>86</sup>’ and with Article 5(5) of the ISD which provides that an exception like pastiche should apply inasmuch as it does not prejudice the exploitation of the work of a rightsholder<sup>87</sup>.
68. As was found by the IPO, this change in the system of law allows for the application of the exceptions under the condition of fair dealing, which essentially permits users to make use of a ‘limited, moderate amount of someone else’s work<sup>88</sup>’. It is worth noting in this view that the scope of the exceptions provided for in the ISD is to facilitate dialogue and artistic confrontation through the use of pre-existing works<sup>89</sup>.
69. Dialogue, as it is understood in doctrine, is not intended to restrict either the right of users, or that of the authors of an original work<sup>90</sup>. This belief has been applied in the case of sound sampling, mentioning quotation which is another exception provided for by the ISD<sup>91</sup>. Inasmuch as caricature, parody and pastiche involve some degree of imitation<sup>92</sup>, encouraging such dialogue to take place, the fair dealing condition should be deemed upholding in the applicability of the pastiche exception.
70. To conclude, considering the aforementioned, in order to be labelled as pastiche, a work must either imitate the style of another work or constitute an assemblage of a number of pre-existing works. At the same time,

<sup>76</sup> *The Pastiche Exception In Copyright Law: A Case Of Mashed-Up Drafting?*, pg. 448 of Bundle; [2022] EWHC 1379 *Shazam Productions LTD*, para. 186, pg. 432 of Bundle;

<sup>77</sup> Information Society Directive, Recital (44), pg. 74 of Bundle;

<sup>78</sup> *The Pastiche Exception In Copyright Law: A Case Of Mashed-Up Drafting?*, pg. 449 of Bundle;

<sup>79</sup> *Comment of the European Copyright Society on Selected Aspects of Implementing Article 17 of the Directive on Copyright in the Digital Single Market Into National law* - extracts only, pg. 464 of Bundle;

<sup>80</sup> Case C-201/13 *Deckmyn*, para. 27, pg. 364 of Bundle;

<sup>81</sup> *The Parody Exception: Revisiting the case for a Distinct Pastiche Exception*, pg. 469 of Bundle;

<sup>82</sup> Case C-201/13 *Deckmyn*, para. 21, pg. 364 of Bundle;

<sup>83</sup> [2022] EWHC 1379 *Shazam Productions LTD*, para. 152, pg. 426 of Bundle;

<sup>84</sup> Information Society Directive, Recital (5), pg. 70 of Bundle;

<sup>85</sup> [2022] EWHC 1379 *Shazam Productions LTD*, para. 15, pg. 433 of Bundle;

<sup>86</sup> *The Pastiche Exception In Copyright Law: A Case Of Mashed-Up Drafting?*, pg. 440 of Bundle;

<sup>87</sup> [2022] EWHC 1379 *Shazam Productions LTD*, para. 145, pg. 424 of Bundle;

<sup>88</sup> [2022] EWHC 1379 *Shazam Productions LTD*, para. 159, pg. 427 of Bundle;

<sup>89</sup> Case C-476/17 *AG Szpunar Opinion in Pelham*, para. 53, pg. 382 of Bundle;

<sup>90</sup> *Sampling and copyright - did the CJEU make the right noises?*, pg. 467 of Bundle;

<sup>91</sup> Case-476/17 *Pelham*, para. 72, pg. 402 of Bundle; *Sampling and copyright - did the CJEU make the right noises?*, pg. 467 of Bundle;

<sup>92</sup> *The Parody Exception: Revisiting the case for a Distinct Pastiche Exception*, pg. 469 of Bundle;

the work should satisfy the fair dealing condition thus passing the threshold contained within Article 5(5) of the ISD.

**Q6 - What is meant by a ‘use for the purpose of ... pastiche’ in Article 5(3)(k) of the Directive? Can the pastiche exception extend to acts by a third party with works that were created ‘for the purpose of pastiche’, if the third party does not itself have an artistic purpose?**

71. Respondent’s submission is that, under Article 5(3) of the ISD, the pastiche exception extends to acts by a third party, even if the third party does not itself have an artistic purpose.
72. Respondent highlights that if the Court, in its response to the prior question, sets criteria deeming the works in question not to be pastiches, then discussing the pastiche exception's applicability becomes moot.
73. However, should the works be found as capable of representing pastiche, Respondent wishes to point out to the *Deckmyn* Case for finding an answer to the question. In that case, the defendants were Mr Deckmyn, a politician that handed out calendars containing a disputed work<sup>93</sup>, and Vrijheidfonds<sup>94</sup>. Even though the latter is just an association whose purpose is to offer material and financial support to Mr Deckmyn’s party<sup>95</sup>, thus without any artistic purpose, the Court never pointed out that it shall not be able to take advantage of the parody exception. Due to the close relation between parody and pastiche, Respondent submits that the same line of reasoning should be applied in the current case.
74. Moreover, in the *GS Media* Case, this Court argued that it may be difficult for individuals who post links on their websites to ascertain whether those links lead to websites containing copyright protected material posted without the rightsholder’s consent<sup>96</sup>. Respondent submits that the situation in the referred case is similar. It would be unreasonable to expect that the art gallery should check whether the work of every artist whose works are displayed represents a case of pastiche, or of any other exception or breach of copyright, as they are presented in the ISD.
75. Furthermore, despite finding that intention and motive are highly relevant for the determination of pastiche<sup>97</sup>, the Intellectual Property Enterprise Court of England and Wales also argued in the *Shazam* Case that the question of the use of copyright material is ‘for the purpose of’ pastiche is to be judged objectively<sup>98</sup>. Respondent submits that this should be interpreted as meaning that since the work was created for the purpose of pastiche, a further communication of the same work by a third party would not lead to the work no longer representing pastiche.
76. In conclusion, the Respondent contends that the interpretation of the term ‘use for the purpose of... pastiche’ allows third parties to benefit from the exception provided for pastiche.

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<sup>93</sup> Case C-201/13 *Deckmyn*, para. 8, pg. 362 of Bundle;

<sup>94</sup> Case C-201/13 *Deckmyn*, para. 10, pg. 362 of Bundle;

<sup>95</sup> Case C-201/13 *Deckmyn*, para. 7, pg. 362 of Bundle;

<sup>96</sup> Case C-160/15 *GS Media BV*, para. 46, pg. 372 of Bundle;

<sup>97</sup> [2022] EWHC 1379 *Shazam Productions LTD*, para. 157, pg. 427 of Bundle;

<sup>98</sup> [2022] EWHC 1379 *Shazam Productions LTD*, para. 157, pg. 427 of Bundle.