



# Central & Eastern European Moot Competition

## CEEMC Moot Problem 2024

Tsitra Evitaerc (Applicant)

v.

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

### Tsitra Evitaerc

1. Tsitra Evitaerc is a professional photographer and a national of Melborp, an EU Member State. Tsitra completed a degree in fine arts at the University of Melborp in 1983. After graduation, she was employed for fifteen years as a press photographer at a major newspaper, during which time she won a number of awards for her work. However, Tsitra's artistic passion was for human and feline subjects, and in 1998 she left the newspaper to focus on her own projects.
2. Since then, Tsitra's work has become very well-known in Melborp. She has secured a reputation as one of Melborp's leading portrait photographers and enjoys a steady stream of commissions. She also produces and sells a popular line of merchandise featuring photographs of cats and kittens. The photographs have a very distinctive style: Tsitra dresses the animals in costumes and/or stages them with props, these costumes and props often being inspired by gardens and nature. For example, Tsitra has photographed cats wearing bee, lion and bat costumes. The clothes and accessories she uses are made to an extremely high quality by a team of costume makers and milliners commissioned by Tsitra. In terms of props, Tsitra has photographed cats sitting in or alongside wheelbarrows, flowerpots, pumpkins, and so forth. The photographs are taken in a studio, and the backdrop is usually quite plain, in order to focus attention on the feline subject. The merchandise produced by Tsitra comprises greeting cards, calendars and books. In 2018, she licensed a toy manufacturer to make a range of stuffed toys based on her photographs and bearing her name. She has also licensed her photographs to appear in books and magazines, and in promotional campaigns run by cat-related charities. She has turned down all requests for her photographs to be used in commercial advertising. She has never received a request to licence one of her photographs as an artist's reference.
3. More recently, Tsitra has also ventured into moving image by making a short film, 'Tsitra's Cats', featuring her three cats, Picatso, Purrsephone and Bill. The film was inspired by the question of what Tsitra's cats do during the day when she is out and at night while she is asleep. From July to November 2019, Tsitra regularly collected and reviewed footage from fifteen motion sensor cameras installed throughout her home. She retained any footage showing incidents that were particularly funny, surprising, heart-warming, destructive, and so forth. Once she had a sufficiently large collection of material, she made a final selection of the footage to be included in her film and developed a story arc to bring together the various incidents. Tsitra created the film on her computer by editing the footage, overlaying mood music and sound effects, adding credits, and so forth. The finished film was 29 minutes long. Not including Tsitra's time, it cost approximately €1,500 to make, this being the cost of the motion-sensor cameras and the use of royalty-free mood music and sound effects in the film. (NB. Royalty-free' means material that has been licensed for unlimited commercial use without any further money being payable.) The film has been broadcast by television station, Channel Six, in a deal in which Channel Six paid Tsitra €30,000 to have the exclusive broadcast rights in Melborp for five years. The film is also available to rent and purchase on a number of online video platforms.

### The Gallery and its activities

4. The Arty-Zen Gallery (the '**Arty-Zen**') is a commercial art gallery in Kamino, the capital of Melborp. It was opened in 1972 by a group of artists with the goal of promoting and showcasing Melborpian art. Its current director is Anson Johndrew. Anson is the husband of the Melborpian Minister for Justice, Louise Fonceca.
5. As a commercial art gallery, the Arty-Zen represents and supports a range of artists, including many emerging artists. Its premises include four large rooms that are used for exhibitions. Sometimes these exhibitions comprise the work of a single artist (a solo exhibition); at other times they are curated around an idea or theme and include the works of multiple artists (a group exhibition). Works in each exhibition are generally available for sale; for works which are sold, the Arty-Zen takes a commission. It does not, however, charge artists for its costs in running its exhibitions or in representing them – it makes its money almost exclusively from sales of artworks. An exhibition will typically be launched with an opening: an invitation-only party in which drinks and canapes are served, and which might include some speeches or words of welcome. Outside of these private events, members of the public are welcome to visit the Arty-Zen during its opening hours to view the artworks. The Arty-Zen runs a website where it promotes its exhibitions and its artists, including information about purchasing works. Copyright in all artworks remains with the artists; as part of its standard form contract with its artists, the Arty-Zen obtains a licence to reproduce images of the works on its website and as part of its catalogues and promotions, and (for any video works) to play those works on its premises.
6. In May 2022, a new exhibition was launched at the Arty-Zen: 'Feline Groovy: Catisfaction Guaranteed'. This cat-themed group exhibition included the following works: (i) a sculpture, 'Roar Energy', by Oleg Nalechim; and (ii) a short film, 'A Wild Day's Night', by Nevet Sbergspiel. The artists (both of whom were 26 years old at the time of the launch) were identified by the Arty-Zen as exciting up-and-coming artists in the Melborpian art scene: Oleg as a sculptor with strong pop art influences, and Nevet as a photographer and video artist. In addition to being exhibited on the Arty-Zen's premises, photographs of 'Roar Energy' also appeared on the Arty-Zen's website and in the exhibition catalogue. In contrast, 'A Wild Day's Night' was only screened to visitors in-person.

#### **The creation of the works**

7. The work 'Roar Energy' was created by Oleg in 2018 as a limited edition of four works and an AP (Artist Proof). 'Roar Energy' is made of polychromed wood. The sculpture is of a cat in a lion costume. The cat is seated on the floor with its hind legs bent underneath it and its front legs extended straight down, perpendicular to the floor, in front of its chest. Its head faces directly ahead. It is wearing a headpiece that encircles its face and emulates the mane and ears of a lion. The sculpture has a surreal colour palette: the cat is a vibrant orange with bright yellow stripes, while the lion's main and ears are hot pink.
8. It is not in dispute that 'Roar Energy' is based on a photograph taken by Tsitra. Oleg has indicated that he used one of Tsitra's greeting cards, 'Lion Cat', when creating the sculpture. The body position of Oleg's sculpture is the same as the cat in 'Lion Cat'; plus Oleg crafted the shape of the main and ears, and the expression on his cat's face, to follow closely that in the photograph. The most obvious point of departure was that Oleg decided to use an unrealistic colour palette to convey the dream-like idea of a cat that thinks it's as big and important as a lion. In contrast, 'Lion's Cat' was taken in black-and-white. Oleg has also indicated that he had to 'fill in the gaps' of what the back of the cat looked like from behind, as Tsitra's photograph gave only a single view of the front of the animal (capturing the cat's face, chest and tummy, front legs, back feet, and tail).
9. Oleg often uses photographs as a reference for his sculptures. For this work, he selected 'Lion Cat' not only because he liked the pose and expression on the cat's face, but because he wanted to capture the importance of cats in human culture. He hoped that, when viewing his sculpture, people would feel a familiarity with the subject matter, and in fact that his work might be understood as paying homage to Tsitra's work. The description of 'Roar Energy' in the Arty-Zen's catalogue and website did not include any mention of Tsitra, although Oleg referred to Tsitra's photograph in an interview in an art magazine in 2019. Oleg did not ask Tsitra for permission to use her photograph as an artist's reference.
10. Oleg's sculpture was available for sale at the Feline Groovy exhibition and sold for €10,000. This was the highest price Oleg had achieved for the sale of a single work. It meant that he was able to give up one of his three part-time jobs to focus greater energy on his art.

11. The work 'A Wild Day's Night' is a montage film consisting of clips from over 150 different sources, including feature films, television programmes, advertisements and videos posted on social media. It was one of Nevet's long-term projects, taking several years to finish. The film was first shown publicly in Melborp in April 2022. The clips all feature cats and have been carefully edited to create a narrative of what cats do overnight – sleep, eat, play, meet up with other cats, and so forth. The shortest clip is three seconds and the longest is twenty-five seconds. The film is fifteen minutes in length. Given the volume and length of the clips used in the film, Nevet did not seek any copyright permissions. Although 'A Wild Day's Night' played at the Feline Groovy exhibition, it was not available for sale – instead, it was played alongside some of Nevet's still photography in order to help promote those works and develop Nevet's reputation. In fact, the only income that Nevet has made directly from 'A Wild Day's Night' was in February 2023, when he was paid €500 for a licence to play his film in a temporary exhibition at the Kamino Science Museum.
12. One extract in 'A Wild Day's Night' was taken from the film, 'Tsitra's Cats'. This footage was shot on a high, wall-mounted camera looking down a hallway containing a number of doors opening onto other rooms. The clip starts with an empty hall. A cat runs through the doorway at the end of the hall and heads down the hallway in the direction of the camera; it disappears out of view as it runs under the camera. Barely a second later, that cat reappears, running up the hall in the opposite direction, being chased by another cat. Both cats disappear through the same doorway that the first one appeared from. After a few seconds those two cats re-emerge, being chased by a third cat. The group stops abruptly in the centre of the hall, and after a brief melee, all run in different directions. The extract used by Nevet was 13 seconds long. He used it in 'A Wild Day's Night' without any of the original audio (being some mood music). Instead, Nevet added some different background music, in order to give continuity to the sequence of events at that point.

#### **The dispute**

13. Tsitra visited the Feline Groovy exhibition on 17 June 2022. When she saw 'Roar Energy' and 'A Wild Day's Night', she spoke immediately with Arty-Zen staff in relation to her concerns that those works copied, without permission, her own works. She was told that if she wanted to raise any complaints, she should put those in writing. Tsitra contacted her lawyer to explain her concerns. On 27 June 2022, her lawyer sent a letter to the Arty-Zen, Oleg and Nevet claiming that the making of 'Roar Energy' and 'A Wild Day's Night', and their onsite and (for 'Roar Energy') online public presentation by the Arty-Zen, infringed Tsitra's copyright. The letter set out various acts demands in order to settle Tsitra's claims, including the payment of retrospective licensing fees. The Arty-Zen obtained legal advice which suggested that neither itself nor its artists had infringed copyright. As such, the Arty-Zen responded through its lawyers on behalf of itself, Oleg and Nevet to deny any wrongdoing.
14. In early August 2022 – and after the exchange of further correspondence which failed to resolve the matter – Tsitra commenced proceedings against the Arty-Zen, Oleg and Nevet in the Copyright Court of Melborp. Her claims were all made under provisions of the Melborp's Act on Copyright and Related Rights ('**Copyright Act**'). Extracts from the Copyright Act are included in Appendix 1. The essence of Tsitra's claim was that–
  - a. Oleg infringed Tsitra's artistic copyright in 'Lion Cat' by copying the subject-matter of that photograph in his sculpture, 'Roar Energy'.
  - b. The Arty-Zen infringed Tsitra's copyright in 'Lion Cat' by each of:
    - i. including photographs of 'Roar Energy' in its exhibition catalogue, thus infringing the reproduction right;
    - ii. including photographs of 'Roar Energy' on its website, thus infringing the reproduction right and the right of communication to the public; and
    - iii. exhibiting 'Roar Energy' on its premises, thus infringing the right of communication to the public (applying *FAPL* (Joined Cases C-403/08 & C-429/08) [2012] ECDR 8 and *Phonographic Performance (Ireland) Limited v Ireland* (C-162/10) [2012] ECDR 15).
  - c. Nevet infringed Tsitra's cinematographic and film copyright in 'Tsitra's Cats' by copying a 13 second extract of 'Tsitra's Cats' in his video, 'A Wild Day's Night' (applying *Pelham GmbH v Hütter* (C-476/17) [2019] ECDR 26).

- d. The Arty-Zen infringed Tsitra's copyright in 'Tsitra's Cats' by playing the film on its premises, thus infringing the reproduction right, the public performance right and the right of communication to the public (applying *FAPL* (Joined Cases C-403/08 & C-429/08) [2012] ECDR 8).

### **Events in the Copyright Court**

- 15. In order to ensure that justice is rendered swiftly and reliably, in Melborp, all Presidents of court are appointed by the Minister of Justice for two-year terms which are renewable at the discretion of the Minister based on satisfactory performance. The Presidents allocate cases to chambers and have the power to veto any procedural measures proposed by individual judges where they think that they would lead to undue delay. To compensate them for their significant administrative work and increased responsibilities, Presidents receive double the salary of ordinary judges, and are provided with an official car and a personal assistant by the Ministry of Justice. Presidents are also given a lavish entertainment budget and enjoy free access to the catering services of the Ministry for any functions they organise at their homes.
- 16. All copyright disputes in Melborp are decided at first instance by the Copyright Court, an independent specialist jurisdiction. It is for this reason that Tsitra issued proceedings in this Court. Appeals from the Copyright Court may be made to the Supreme Court of Melborp, but only in relation to points of law.
- 17. As noted above in para. 4 above, the Arty-Zen Gallery is owned by the husband of the Minister of Justice. The Minister for Justice appointed the President of the Copyright Court, President Rouge, in October 2021 (some 10 months before Tsitra filed her claim). Prior to appointment, Justice Rouge had been the Minister's personal lawyer and was a member of the same political party as the Minister. He resigned from both functions on taking office as President of the Copyright Court. President Rouge's daughter, who has just finished her law degree, works as a personal advisor to the Minister of Justice.
- 18. When Tsitra's case was filed at the Copyright Court, President Rouge allocated the case to a chamber of five judges over which he presides (being the Third Chamber). Tsitra's lawyers sought to challenge the President's independence and impartiality because of (i) his past functions, (ii) his daughter's employment and (iii) the fact that his re-appointment depends on the goodwill and support of the Minister for Justice. Tsitra's lawyers requested that the President be recused, relying on, amongst other things, Article 19 TEU and Article 47 of the Charter of Fundamental Rights. They questioned the compatibility with EU law of the national legal framework concerning the appointment of Presidents of courts in Melborp.
- 19. The question of the President's recusal was considered as a preliminary issue by the four other members of the Third Chamber. Under Melborpian law, past functions may not be taken into account when deciding whether a judge should be recused. A majority of the chamber also considered that the employment of the President's daughter in the office of the Minister of Justice was insufficient to give rise to a conflict requiring recusal. However, the four judges were evenly split on whether a Chamber composition including the President was contrary to EU law. They therefore decided to refer the following question to the Court of Justice of the European Union pursuant to Article 267 TFEU:

*"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?"*
- 20. As soon as the order for reference came to the attention of President Rouge, he exercised his right of veto, on the basis that the answer to the question was obvious and that a reference to the CJEU would cause unnecessary delay in hearing the case. President Rouge therefore ordered the case to proceed, overruling the objections of his colleagues.
- 21. In preliminary submissions to the Copyright Court on the merits of the case, a number of points were not in dispute between the parties:
  - a. 'Lion Cat' is an original photographic work under Article 2 of the Copyright Act. Tsitra made free and creative choices and stamped her personal touch on the work through staging the subject matter and making

choices in how the photograph was taken: *Painer v Standard Verlags GmbH* (C-145/10) [2012] ECDR 6. Tsitra, as photographer, is the sole author of 'Lion Cat'.

- b. 'Tsitra's Cats' is an original cinematographic work under Article 2 of the Copyright Act. It is a cinematographic work as it is not just raw footage; rather, the footage has been assembled and edited to create a story arc with action and dramatic elements. It is original because of the creative choices Tsitra made in relation to which incidents to include, the storyline linking those incidents, the inclusion of music and other audio aspects, and so forth. Tsitra is the principal director of 'Tsitra's Cats' and, in the absence of any other contributors, is its sole author.
- c. The recording of 'Tsitra's Cats' is separately and additionally protected as a film under Article 78 of the Copyright Act. The definition of film as a related right is broad and includes not just recordings of cinematographic works but audiovisual works and moving image more generally. Tsitra is the producer of 'Tsitra's Cats'.

22. Instead, the three defendants focused their arguments on infringement and exceptions. The essence of their arguments was as follows:

- a. Oleg argued that, in EU copyright law, the right of reproduction 'in part' applies only to literal copying of discrete parts, as seen in cases such as *Infopaq International v Danske Dagblades Forening* (C-5/08) [2009] ECDR 16. It does not extend to non-literal copying, for instance where a three-dimensional work is said to copy a work in two-dimensional form, or vice versa. As such, there was no infringement of 'Lion Cat' by his creation of 'Roar Energy'.

Oleg raised two alternative arguments if this one was rejected: first, that protection must only be given to original elements of the photograph, and that there was no copying of any such elements; and second, if there was infringement, the creation of 'Roar Energy' was permitted under the pastiche exception in Article 40 of the Copyright Act.

- b. The Arty-Zen argued that, if Oleg's arguments were successful under any of the grounds, above, it meant that its acts with 'Roar Energy' were also non-infringing. In this regard, it argued that it could also take the benefit of the pastiche defence.

The Arty-Zen also argued that, even if 'Roar Energy' infringed copyright in 'Lion Cat', there was no infringement by exhibiting the work on its premises as physical exhibition is outside the communication right and there is no exhibition right in Melborian law.

- c. Nevet argued that the 13 second extract used in 'A Wild Day's Night' did not 'copy in part' either (i) 'Tsitra's Cats' as an authorial work (i.e. a cinematographic work) or (ii) 'Tsitra's Cats' as a related right (i.e. a film fixation).

In relation to authorial copyright, Nevet argued that the part copied must itself be original, i.e. be the author's own intellectual creation: *Infopaq International v Danske Dagblades Forening* (C-5/08) [2009] ECDR 16. There was nothing original about the aspect copied – it was an isolated sequence without any of the dramatic context or selection that conferred originality on 'Tsitra's Cats'.

In relation to the film fixation, Nevet argued that the amount taken was quantitatively minuscule and was therefore too short to be a reproduction 'in part' for the purposes of Article 78.

Nevet also presented an alternative argument that, if there was *prima facie* infringement of either authorial or film copyright, the pastiche exception in Articles 40 and 80(b) applied.

- d. The Arty-Zen argued that, if 'A Wild Day's Night' did not infringe copyright in 'Tsitra's Cats', neither would its conduct in playing the film on its premises. It also argued that if Tsitra was able to take the benefit of the pastiche defence, so could it.

Separately, it resisted the argument that there was any 'communication to the public' by playing the film on its premises. It said that these facts were very different to those in *FAPL*, as that case involved the broadcast of football matches, thus permitting the argument that the 'origin' of the communication was at the football grounds.

23. As a member of the EU, Melborp has an obligation to implement a number of copyright-related directives into its domestic law. Relevantly for this dispute, these include:

- a. 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 ('**Information Society Directive**');
- b. Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property ('**Rental and Lending Directive**'); and
- c. Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights ('**Term Directive**').

24. As they were hearing preliminary submissions, the Chamber – including President Rouge – identified some questions they wanted to refer to the CJEU pursuant to Article 267 TFEU, in order to assess whether the Melborpian Copyright Act conforms with EU copyright law.

25. One copyright-related question related to whether the thirteen second extract included in 'A Wild Day's Night' was a reproduction 'in part' for the purpose of Article 2(d) of the Information Society Directive. Tsitra directed the Copyright Court to *Pelham GmbH v Hüttner* (C-476/17) [2019] ECDR 26, in which the CJEU indicated that a sound sample from a phonogram, even if very short, was in principle a reproduction 'in part' for the meaning of Article 2(c) of that Directive. The defendants countered that *Pelham*, which related to phonograph rather than film copyright, involved a two-second sample being taken from a song, whereas this case involved a thirteen-second extract from a film that was 29 minutes long. The defendants argued that there had to be some quantitative threshold below which there was no copying 'in part', otherwise the Information Society Directive would over-protect copyright holders. They argued that a fair balance had to be struck between the interests of copyright holders, on the one hand, and the interests of the users (including freedom of the arts) on the other. They argued that the approach in *Pelham* (in which there was no reproduction in part if a sound sample was included in the second work 'in a modified form unrecognisable to the ear') was not exhaustive of the circumstances in which that balance would result in the conclusion that there was no copying in part.

26. The second question related to the scope of the right of communication to the public. Tsitra argued that it was unambiguously the case that playing 'A Wild Day's Night' in the exhibition space communicated to the public part of his work, 'Tsitra's Cats', given the former included an extract from his film. He pointed to *FAPL* (Joined Cases C-403/08 & C-429/08) [2012] ECDR 8, where the CJEU indicated that broadcasts and films of football matches were communicated to the public, for the purposes of Article 3 of the Information Society Directive, through the act of turning on a television in a public bar. Tsitra also argued that exhibiting Roar Energy was also an infringement of the communication right, given the broad definition of an 'intervention to give access' seen in cases such as *Phonographic Performance (Ireland) Limited v Ireland* (C-162/10) [2012] ECDR 15. Initially, the judges of the Copyright Court were strongly persuaded by Tsitra's first submission. However, they became less convinced of its application following the submissions of the defendant that *FAPL* concerned the *broadcast* of *live* football matches, such that the viewers at the public bar 'were not present at the place where the communication originates': *FAPL*, para [203]. In contrast, although the judges were initially resistant to the suggestion that an exhibition of a physical artwork can constitute a 'communication to the public', they formed the view that some of Tsitra's arguments in relation to the trajectory of CJEU case law had merit and warranted further guidance from that Court.

27. The final set of questions related to the scope and application of the *pastiche* defence in Article 40 the Melborpian Copyright Act, as permitted by Article 5(3)(k) of the Information Society Directive. The defendants observed that although the CJEU had not provided any guidance on the meaning of '*pastiche*' or the circumstances in which the *pastiche* exception may be applied, some general indications could be taken from the CJEU's judgment in *Deckmyn*

*v Vandersteen* (C-201/13) [2014] ECDR 21 in relation to parody. The defendants argued that it was consistent with *Deckmyn* for pastiche to be given a broad definition, consistent with the term's everyday use, which covered two distinct types of use: (1) imitating the style of another work or genre; and (2) creating an assemblage (or medley) of a number of pre-existing works. In this regard, the defendants referred to the authority of the Intellectual Property Enterprise Court of England and Wales in *Shazam Productions Ltd v Only Fools The Dining Experience Ltd* [2022] EWHC 1379 (IPEC). They argued that it was not necessary for the work to be noticeably different from the source work or to be an expression of humour or mockery (as is the case for parody). They also identified a number of matters that they said should be relevant to (i) the need to strike a fair balance between the rights of those mentioned in Articles 2 and 3 of the Information Society Directive and the freedom of expression of the user of a protected work (see *Deckmyn*, para [27]) and (ii) the need for application of exceptions in Article 5 to satisfy the limbs of Article 5(5). This included that, when it comes to art, there can be a high degree of copying without any possibility of market substitution or harm to licensing markets. Having heard these submissions, the judges of the Copyright Court formed the view that a reference to the CJEU was essential to determine whether pastiche was an autonomous European concept, and if so, the meaning of the term, the circumstances in which a defence of pastiche would apply, and whether an entity such as the Arty-Zen could rely on the pastiche exception for a work created by an artist. One of the arguments presented by Tsitra was that the Arty-Zen's purpose was not pastiche; it was hosting an exhibition from which it hoped to sell artworks. Even if the artists could be said to have created their works for the purpose of pastiche (which Tsitra disputed), the Arty-Zen clearly had no such purpose.

28. Once the decision to make the copyright-related reference was taken, the other members of the Third Chamber again pressed the question they previously wanted to refer to the CJEU, concerning Article 19 TEU and Article 47 of the Charter: see para [19] above. They also questioned whether it is compatible with Article 267 TFEU for the President of a court, who is not himself a part of the judgment formation for the purposes of a particular decision, to veto a request for a preliminary ruling which the members of the judgment formation consider necessary to resolve the issue pending in front of them. The President was furious at the suggestion and again vetoed the addition of any further questions to the list to be referred to the CJEU. Not long after, Present Rouge went on holiday.
29. In the President's absence, the four remaining judges decided to add their original question concerning Article 19 TEU and Article 47 of the Charter to the reference to the CJEU, as well as the following question:

*"Does Article 267 TFEU preclude a national rule permitting the President of a court, who is not himself a part of the judgment formation for the purposes of a particular decision, to veto a request for a preliminary ruling which the members of the judgment formation consider necessary to resolve the issue pending in front of them?"*
30. The order for reference is dispatched with the addition of those questions to the CJEU.

## **Questions**

1. 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?
2. Does Article 267 TFEU preclude a national rule permitting the President of a court, who is not himself a part of the judgment formation for the purposes of a particular decision, to veto a request for a preliminary ruling which the members of the judgment formation consider necessary to resolve the issue pending in front of them?
3. 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?
4. 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?
5. 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?

6. 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?

## **Appendix 1: Extracts from Melborp's Act on Copyright and Related Rights**

### **Article 2 Protected works**

(1) The works protected by copyright include, in particular:

...

(d) artistic works, including fine art, works of architecture, and applied art;

(e) photographic works, including works produced by processes similar to photography;

(f) cinematographic works, including works produced by processes similar to cinematography; and

...

(2) Only works that are original, in the sense of being the author's own intellectual creation, are protected under paragraph (1), above.

### **Article 16 General**

(1) The author of a work has the exclusive right to do the following acts in Melborp in relation to his or her work:

(a) reproduce the work (see Article 17)

(b) perform the work in public (see Article 18)

(c) communicate the work to the public (see Article 19)

...

### **Article 17 Right of reproduction**

(1) The author has the exclusive right to copy the work, in whole or part, whether on a temporary or permanent basis, and regardless of by which means of procedure, or in which quantity, they are made.

### **Article 18 Public performance**

(1) The author has the exclusive right to perform in public a literary, dramatic, choreographic, cinematographic or musical work. This includes performance using an apparatus.

### **Article 19 Right of communication to the public**

(1) The author has the exclusive right to communicate his or her work to the public. The right of communication to the public includes:

(a) making the work available to the public; and

(b) broadcasting the work.

(2) 'Making the work available to the public' means the right to make the work available to the public, either by wire or wireless means, in such a manner that members of the public may access it from a place and at a time individually chosen by them.

...

(4) The communication of a work is deemed public if it is intended for a plurality of members of the public. Anyone who is not connected by a personal relationship with the person exploiting the work or with the other persons to whom the work is made perceptible or made available in non-material form is deemed to be a member of

the public.

#### **Article 40 Caricature, parody or pastiche**

Once a work has been lawfully made available to the public, there shall be no infringement by a use for the purpose of caricature, parody or pastiche, observing fair practice.

#### **Article 78 Protections for first fixations of films**

(1) The producer of the first fixation of a film has the exclusive right to do the following acts in Melborp in relation to the whole or part of his or her film:

- (a) reproduce the film;
- (b) plays the film in public;
- (c) make the film available to the public; and
- (d) broadcast the film.

#### **Article 80 Limitations on rights of film producers**

Article 78 shall not apply where the acts referred to in that section are carried out for one of the following purposes:

...

(b) caricature, parody or pastiche, observing fair practice;

...