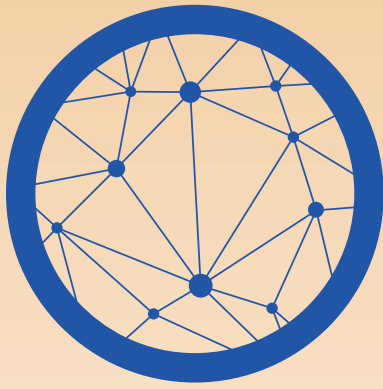




STOCKHOLM INTELLECTUAL PROPERTY LAW REVIEW



#1 | 2025

**The principle of unitary character of the EUTM:
A legal chimera?**

Alma Johansson

**Intertextuality and pastiche: the perfect recipe, or bland
mediocrity? The EU copyright exception of pastiche in
light of the Pelham II referral and AG Opinion**

Emmanouela Papadaki

**From Reproduction to Licensing: Applying Article 15
CDSMD to the Process of Generative AI Training**

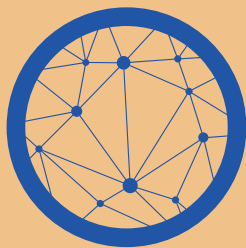
Klara Schinzler

**Standard essential patents (SEPs) in the EU – a way
forward from the withdrawn SEP Regulation proposal?**

Asko Metsola

**Slow Fashion, Fast Fashion and Intellectual
Property Rights**

Ragi Vyas



STOCKHOLM INTELLECTUAL PROPERTY LAW REVIEW

CONTACT US

Do you want to publish in the review?
For ordering, general comments and
questions please contact us at
inquiries@stockholmplawreview.com

CONTENT EDITORS

Frantzeska Papadopoulou Skarp
Branka Marušić

BOARD OF DIRECTORS

Professor Frantzeska Papadopoulou
Skarp, Department of Law, Stockholm
University

Associate Professor Åsa Hellstadius,
Vinge Law Firm

Jur. Dr. Richard Wessman,
Partner, Vinge Law Firm

Associate Professor
Marcus Holgersson, Chalmers
University of Technology

Mats Lundberg, Managing Partner
and Managing Director, Groth & Co

WEBPAGE

www.stockholmplawreview.com

LINKEDIN

[https://www.linkedin.com/company/
stockholmplawreview/](https://www.linkedin.com/company/stockholmplawreview/)

PRODUCTION

eddy.se ab

PRINT

The Faculty TF AB, Visby 2025

General note on copyright:
Stockholm IP Law Review has
obtained the consent from the
copyright owners of each work
submitted for and published in
this issue.

ISSN 2003-2382 (Online)
ISSN 2003-2390 (Print)

Content

The principle of unitary character of the EUTM:

A legal chimera?

[Alma Johansson](#)

Page 5

Intertextuality and pastiche: the perfect recipe, or bland mediocrity? The EU copyright exception of pastiche in light of the Pelham II referral and AG Opinion

[Emmanouela Papadaki](#)

Page 11

From Reproduction to Licensing: Applying Article 15 CDSMD to the Process of Generative AI Training

[Klara Schinzler](#)

Page 21

Standard essential patents (SEPs) in the EU – a way forward from the withdrawn SEP Regulation proposal?

[Asko Metsola](#)

Page 31

Slow Fashion, Fast Fashion and Intellectual Property Rights

[Ragi Vyas](#)

Page 43

Editorial

Copyrights, Designs, Patents, and Trademarks: Why Every Lawyer Needs IP Literacy

In today's knowledge-driven economy, intellectual property (IP) is central to progress, shaping societies and industries by protecting creativity and innovation. IP is not just an asset; it structures how markets function and rewards creators. For lawyers, regardless of specialisation, IP literacy is now an essential skill. Copyrights, designs, patents, and trademarks safeguard distinct elements of human ingenuity. Mastering these fundamentals enables lawyers to guide clients through an increasingly complex legal landscape. For this reason, the Stockholm LL.M. programme in European Intellectual Property Law has thrived for over 20 years, equipping legal professionals to meet the demands of modern IP.

Throughout the years that the programme has been running, both the students and the teachers faced several pressing challenges. These challenges stem from rapid technological change, globalisation, the need for practical skills, and the evolving role of IP in addressing broader social and ethical concerns. One of the biggest challenges that lawyers face, on both sides of the classroom, is the rapid pace of technological innovation. Emerging technologies such as artificial intelligence (AI), biotechnology, and digital platforms constantly generate new legal problems (and questions). Courts, policymakers, and lawmakers often struggle to keep up, and law schools face the same difficulty in updating their curricula. The rise of AI tools presents a further obstacle. AI challenges fundamental concepts of authorship, inventorship, and ownership in IP law. Moreover, the proliferation in the use of AI tools by students decreases critical thinking, dulls the research outputs (and often produces hallucinations and AI slop), and poses a serious ethical problem in academic honesty. There is also the underlying issue of specialisation. IP is a vast field encompassing patents, copyrights, designs, trademarks, trade secrets, geographical indications of origin, and more. The conundrum that educators face revolves on whether to provide broad exposure to all types of IP rights or deep specialisation in selected few.

Too much breadth can leave students with a superficial understanding, while too much specialisation risks narrowing their opportunities. The challenge here lies in striking the right balance that reflects the diverse career paths one can take with a degree in IP law.

A second challenge (in teaching and studying IP law) arises from globalisation and a push to harmonise laws within the IP field. IPRs are territorial in nature, yet commerce, innovation, and cultural exchange are increasingly global. This creates the need for students to understand international frameworks such as the World Trade Organization and the work of the World Intellectual Property Organization, the differences and levels of regulation within a regional system in Europe, as well as the differences between regional systems and the ways in which IP protection can differ in the US, EU, China, and beyond. Furthermore, legal education in IP must also confront ethical and policy dimensions. IP rights influence access to medicines, the regulation of digital culture, the protection of indigenous knowledge, and the preservation of the public domain. Therefore, there is a growing need to train future IP lawyers to appreciate how IP laws intersect with questions of social justice, cultural diversity, and human rights.

This is why the LL.M. programme in European Intellectual Property Law at Stockholm has undergone several changes throughout the years in order to prepare students for the real-world complexities of modern IP practice. As an alumna myself (academic year 2013/2014), the programme I attended was quite different than the one I started teaching in 2016, when I joined Stockholm as a doctoral student. A decade ago, problems facing IP law were linked to ethical bio patents, the legality of sharing songs and movies online, unfair commercial practices by competitors in creating similar trademarks, and falsified goods – to name a few. In 2016 onwards, the list of problems was enlarged by (for example) the rise of blockchain technologies, non-fungible tokens, the move from physi-

cal markets to digital markets, the Covid-19 pandemic and access to medicine, AI, shifting of consumer attitudes to sustainable products and the certified origin of food. This elongation of the list of problematic areas proliferated the impact of IPRs in the world around us – and more importantly, enlarged the need (and interest) in studying IP law.

Today, IP law is no longer confined to niche legal practice; it permeates virtually every area of law. Employment contracts must address ownership of employee-created works; commercial transactions often involve transfers of IP rights; litigation in many fields increasingly has an IP dimension; and even the use (and abuse) of import tariffs is linked with products that have IPRs embedded in them. Moreover, globalisation and the rise of digital technologies have made IP protection more complex and more critical than ever. Lawyers without IP literacy risk leaving clients vulnerable, overlooking key assets, or failing to recognise legal risks.

For this reason, legal education in IP is of immense importance in the modern world. It not only protects the rights of creators but also fuels economic growth, prevents disputes, and supports research and cultural preservation. By equipping individuals with the necessary knowledge, IP education ensures a balanced system that rewards innovation while safeguarding the public interest. As societies continue to evolve through creativity and technology, the need for strong legal literacy in IP becomes more pressing than ever.

This issue reflects the challenges that are faced in IP law, and I am happy to join Professor Frantzeska Papadopoulou Skarp as a content editor for SIPLR – a journal that allows me to read fresh perspectives on these challenges – and write this editorial. The authors in this issue are master students at Stockholm. In this issue, Alma

Johansson explores trademarks in the EU with her *The principle of unitary character of the EUTM: A legal chimera?*, while Emmanouela Papadaki sparks our interest with *Intertextuality and pastiche: the perfect recipe, or bland mediocrity?*. Klara Schinzler invites us to consider *From Reproduction to Licensing: Applying Article 15 CDSMD to the Process of Generative AI Training*, and Asko Metsola proposes how to balance innovation and competition through SEPs in his contribution *Standard essential patents (SEPs) in the EU – a way forward from the withdrawn SEP Regulation proposal*. Lastly, Ragi Vyas takes us on a journey through *Slow Fashion, Fast Fashion and Intellectual Property Rights*. We hope you will enjoy the r(ide)ad.

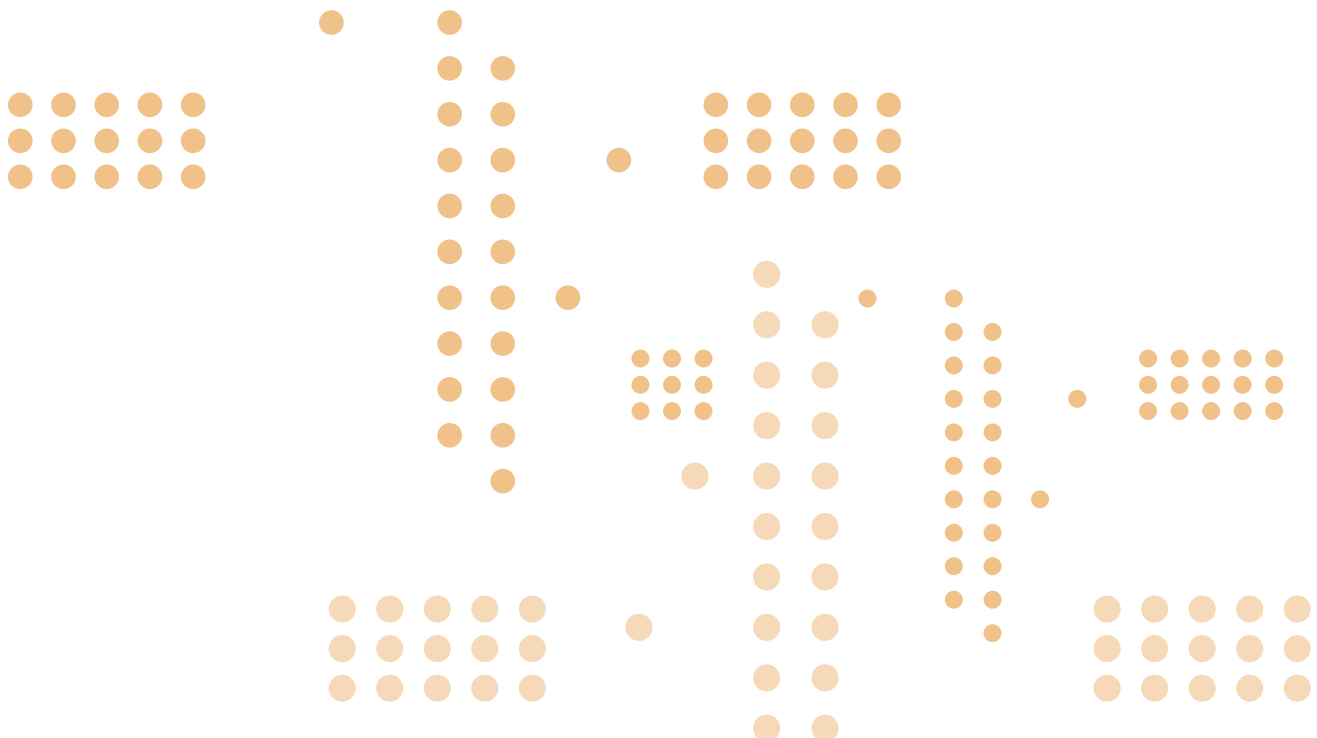
Branka Marušić



Branka Marušić

Associate senior lecturer in intellectual property law at Stockholm University and a qualified Croatian lawyer with diverse professional experience working as a practising lawyer, academic, and legal consultant in projects involving harmonisation and codification of laws in the EU. Her main research area is focused on creative industries and

how online realities, legislation as well as interpretation of that legislation influences them.



CONTENT EDITORS



SENIOR CONTENT EDITOR

Frantzeska Papadopoulou Skarp



CONTENT EDITOR

Branka Marušić

ASSISTANT CONTENT EDITOR



ASSISTANT CONTENT EDITOR

Leonidas Fotiatis

STUDENT EDITORIAL TEAM



EDITOR

Constantin Berlage



EDITOR

Rashad Mahammadzada



EDITOR

Melanie Lindgren



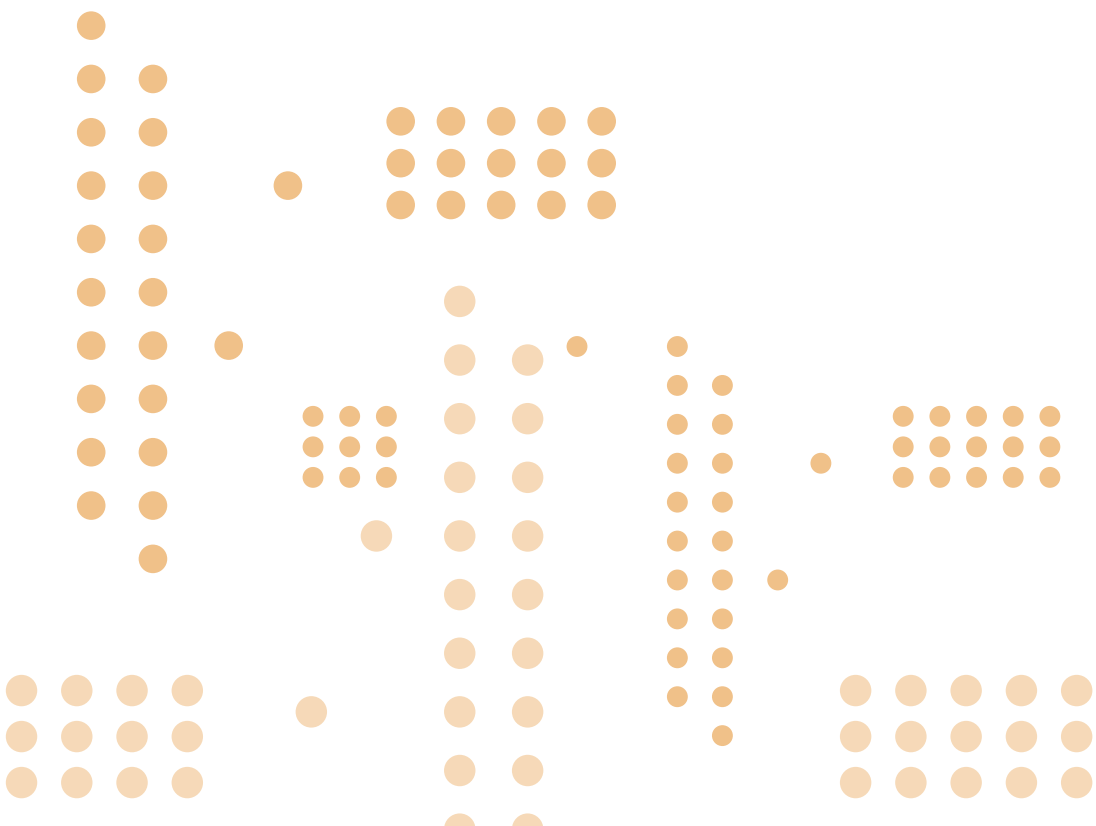
EDITOR

Sofía Sarmiento



EDITOR

Rahul Scharfenberg



The principle of unitary character of the EUTM: A legal chimera?

Alma Johansson

ABSTRACT

The article examines the relationship between the protection of reputation for the well-known European Union Trade Marks (EUTM) and the unitary character of the EUTM. The principle of unitary character plays an important role in enhancing the European union (EU) internal market. EUTM should therefore be given the same protection throughout the union. To obtain reputation protection, the earlier EUTM need to have a reputation in the EU and where use of that sign without due cause takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the EUTM. Legal application issues arise when the principle of unitary character is to be applied together with the aforementioned requirements.

The main research question addressed in the article is whether the EUTM maintains its unitary character when applying reputation protection.

Given the strong connection of the question to EU law, EU law is applied to the greatest extent. Since the issue has not been addressed previously, case law from the Court of Justice of the European Union serves as the primary legal source for interpreting the meaning of the conditions for protection of reputation in the absence of other guidance. Furthermore, the impact of the unitary character in the application of reputation protection is examined.

The article concludes that the unitary character of the EUTM losing its impact in the application of reputation protection.

1. INTRODUCTION

The European Union consists of 27 Member States,¹ encompassing 24 official languages and a rich cultural diversity.² One of the EU's fundamental principles is the free movement of goods and persons, where the market is conceived as a single internal market without borders.³ However, can the market truly be regarded as a unified entity when, in practice, it is defined by territorial borders, linguistic diversity, varying cultures, and distinct legal systems?

Within the EU's internal market, a vast number of goods and services circulate, and businesses distinguish themselves through trademarks and other distinctive signs.⁴ Given that trademark law has always carried an international dimension,⁵ there was a compelling ratio-

nale for pursuing harmonisation in this area within the EU. This led to the creation of the European Union Trade Mark (EUTM), which provides protection throughout the entire EU territory via a single registration.⁶ The EUTM is based on the principle of unitary character, as articulated in Article 1(2) of Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (codification) (EUTMR). This principle essentially means that an EUTM is to be granted uniform protection across the Union. Accordingly, the Union is viewed as a single market. Upon registration, the proprietor of an EUTM obtains the exclusive right to prevent the registration of confusingly similar marks.⁷ In cases where the trade mark has acquired a high degree of recognition and reputation, there is a need for extended protection—commonly referred to as reputation-based protection—in which case no likelihood of confusion is required.⁸

¹ Website of the European union, 'EU-countries', https://european-union.europa.eu/principles-countries-history/eu-countries_en (accessed 1 may 2025).

² Website of the European union, 'Facts and figures on the European Union', https://european-union.europa.eu/principles-countries-history/facts-and-figures-european-union_en (accessed 1 may 2025).

³ Article 26(2) of the Treaty on the Functioning of the European Union (TFEU), consolidated version, OJ C 326, 26.10.2012.

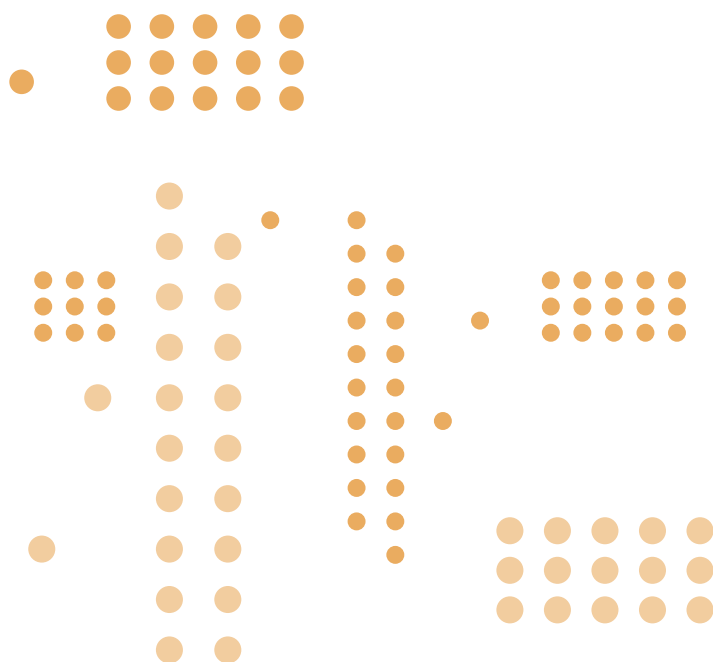
⁴ Marianne, Levin, Åsa, Hellstadius. *Lärobok i immaterialrätt*. 13. uppl., (Norstedts Juridik AB, Stockholm, 2023) p. 427.

⁵ Levin. *Lärobok i immaterialrätt*. p. 427.

⁶ Levin. *Lärobok i immaterialrätt*. p. 430.

⁷ Levin. *Lärobok i immaterialrätt*. p. 466.

⁸ *Sabel v Puma AG, Rudolf Dassler Sport* (C-251/95) EU:C:1997:528, [1997] ECR I-6191 [20].



According to Article 9(2)(c) EUTMR, a reputed trade mark is protected against the use, without due cause, of an identical or similar sign that takes unfair advantage of, or is detrimental to, the distinctive character or repute of the mark—provided that the earlier EUTM is known within the Union.

The conditions for obtaining protection based on reputation (*reputation-based protection*) have been examined on several occasions by the Court of Justice of the European Union (CJEU), including the territorial scope required for an EUTM to be regarded as “known within the Union”.

In its judgment of 14 September 1999, *General Motors Corp v Yplon SA* (C-375/97) EU:C:1999:408, the Court stated that it is only when a sign is sufficiently well known that the relevant public will establish a link between the two marks.⁹ This reasoning was further developed in the judgment of 27 November 2008, *Intel Corp Inc v CPM United Kingdom Ltd* (C-252/07) EU:C:2008:655, where the Court clarified that if the relevant public does not perceive a connection between the marks, neither unfair advantage nor detriment can arise.¹⁰

In the judgment of 6 October 2009, *Pago International GmbH v Tirolmilch registrierte Genossenschaft mbH* (C-301/07) EU:C:2009:611, the Court held that recognition in a single Member State—Austria in that case—may be sufficient to meet the requirement that a mark be “known within the Union”.¹¹ However, how does the statement in *Pago International* relate to earlier case law concerning the relevant public’s awareness of the earlier mark?

A particular difficulty arises when the earlier EUTM is unknown in the Member State where the application for

the later mark is filed. Although the trade mark protection is meant to apply throughout the Union, in accordance with the *Pago International* ruling, it may be questioned whether the later mark can actually harm an earlier mark that is unknown in the relevant market. This issue echoes the concerns raised in *General Motors* and *Intel*.¹²

The issue was illustrated in the judgment of 3 September 2015, *Iron & Smith kft v Unilever NV* (C-125/14) EU:C:2015:539, where the Court’s ruling resulted in the establishment of a new criterion for the application of reputation-based protection. Specifically, it held that “[...] even if the earlier community trade mark is not known to a significant part of the relevant public in the Member State in which registration of the later national mark had been applied for, it is conceivable that a commercially significant part of the latter may be familiar with it and make a connection between that mark and the later national mark”¹³ This criterion implies that the assessment of whether reputation-based protection may be granted will be conducted in the specific Member State, and where the criterion is met, protection will be granted in that Member State. However, the ruling provides no concrete guidance on how this assessment is to be carried out.

Several years prior to *Iron & Smith*, the CJEU held in its judgment of 12 April 2011, *DHL Express France SAS v Chronopost SA* (C-235/09) EU:C:2011:238, that the geographical scope of the protection cannot extend beyond the extent of the harm. Therefore, the territorial scope of the decision must be limited to where harm actually occurs.¹⁴ This is an aspect that has not been explicitly addressed in the assessment of the scope of reputation-based protection.

The relationship between these judgments is complex and merits further examination.

2. THE RELATIONSHIP BETWEEN REPUTATION-BASED PROTECTION AND THE UNITARY CHARACTER OF THE EUROPEAN UNION TRADE MARK:

2.1 A matter of Union-wide or territorial legal effect?

The EUTM was introduced by Council Regulation (EC) 40/94 of 20 December 1993 on the Community trade mark [1994] OJ L11/1 with the aim of promoting a common market without internal borders. A key element in advancing such a market is the unitary character of the EUTM, which means that the trade mark is afforded uniform protection throughout the entire Union.¹⁵ Even following the reform of the EU trade mark system, both the EUTM and its unitary character have been maintained.

⁹ *General Motors* [C-375/97] [23].

¹⁰ *Intel* [C-252/07] [31].

¹¹ *Pago* [C-301/07] [29–30].

¹² *General Motors* [C-375/97] [23]; *Intel* [C-252/07] [31].

¹³ *Iron & Smith* [C-125/14] [30].

¹⁴ *DHL* [235/09] [47–48].

¹⁵ Levin. *Lärobok i immaterialrätt*. p. 430.

In preparation for the legislative reform that led to Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (codification) [2017] OJ L154/1 and Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015, a study was commissioned by the European Commission and carried out by the Max Planck Institute for Intellectual Property and Competition Law in Munich. The purpose of the study was to identify and analyse practical issues in the application of the existing regulation and directive.¹⁶ Among the issues raised were questions related to the unitary character of the trade mark—specifically, how to determine the territorial scope of protection when there is no likelihood of confusion in all Member States, or when no reputational harm arises across the entire Union.¹⁷

The concerns raised in the Max Planck study can be illustrated in the ruling of 12 April 2011, DHL Express France SAS v Chronopost SA (C-235/09) EU:C:2011:238 (DHL). The interpretative question was whether Article 98(1) of Regulation No 40/94 (now Article 130 of the EUTMR) should be understood as meaning that an injunction issued by a court designated for EUTM matters has legal effect throughout the Union.¹⁸ The Court of Justice answered in the affirmative,¹⁹ referring to the unitary character that defines the EUTM—namely, that it produces the same legal effects across the entire Union. Accordingly, the use of an EUTM cannot be prohibited on a territorial basis unless the prohibition applies to the Union as a whole.²⁰ However, in the same judgment, the Court introduced a limitation on the territorial scope of such injunctions. It held that a national court's order may, in certain cases, be geographically restricted, based on the rationale that the purpose of granting exclusive rights is to protect the trade mark proprietor against harm caused by third parties. Thus, for the exclusive right to be invoked, actual harm or a risk of harm must be demonstrated.²¹ Accordingly, the territorial scope of the injunction cannot extend beyond the area where harm occurs. This in turn means that acts which do not cause harm to the trade mark cannot be subject to prohibition.²² The Court of Justice further held that where an infringement—or a potential infringement—is confined to a limited part of the Union, such as a single Member State, due either to a restriction in the claimant's request or to the defendant demonstrating that their use of the trade mark in a specific part of the Union does not cause harm to the propri-

etor's exclusive right, the court must limit the geographical extent of the injunction accordingly.²³

That part of the Court's judgment appears to be in some tension with earlier interpretations of the unitary character of the EUTM. When the legal effects of an infringement are divided across the Union, the Union is no longer treated as a single market. In such cases, the injunction does not apply in all Member States. The Court of Justice reasoned that the justification for such a division lies in the fact that the requirement of harm for establishing infringement of an EUTM cannot be considered fulfilled in those Member States where no actual harm occurs. The statement in DHL is consistent with what the Court had already held many years earlier, in the judgment of 12 November 2002, Arsenal Football Club (C-206/01) EU:C:2002:651 (Arsenal Football Club). The Court of Justice stated that the trade mark proprietor cannot prevent the use of a sign by a third party where such use does not adversely affect the proprietor's interests as a trade mark owner, nor impair any of the functions of the trade mark.²⁴ The Court's finding in Arsenal Football Club was subsequently confirmed in the judgment of 22 September 2011, Interflora (C-323/09) EU:C:2011:604 (Interflora),²⁵ and is supported by several previous rulings from the Court.²⁶ In Interflora, the Court further clarified that harm may be caused not only to the origin function, but also to other functions of the trade mark, such as the advertising function and the investment function, particularly in cases concerning reputation-based protection.²⁷ On the basis of settled case law, it is therefore established that a trade mark proprietor cannot prohibit third-party use unless such use negatively affects one or more of the trade mark's functions.

The background in DHL concerned an infringement based on likelihood of confusion.²⁸ It may be subject to discussion whether the ruling—and the Court's statement that the injunction should be limited to the part of the market where harm to the trade mark function occurs—should apply solely to such cases of infringement, or whether it also extends to infringements falling under the scope of reputation-based protection. The interpretative question concerned Article 98(1) of Regulation No 40/94, which does not distinguish between different types of infringement. The Court of Justice also referred more broadly to Article 9(1) of Regulation No 40/94 (now Article 9(2) EUTMR), a provision which encompasses all three types of infringement: double identity, likelihood

¹⁶ Max Planck Institute for Intellectual Property and Competition Law, *Study on the Overall Functioning of the European Trade Mark System*, 15 February 2011, <https://op.europa.eu/en/publication-detail/-/publication/5f878564-9b8d-4624-ba68-72531215967e> [22 april 2025].

¹⁷ Max Planck Institute, *Study on the Overall Functioning of the European Trade Mark System*, p. 48.

¹⁸ DHL (C-235/09) [32].

¹⁹ DHL (C-235/09) [50].

²⁰ DHL (C-235/09) [40].

²¹ DHL (C-235/09) [46].

²² DHL (C-235/09) [47].

²³ DHL (C-235/09) [48].

²⁴ Arsenal Football Club (C-206/01) [54].

²⁵ Interflora (C-323/09) [34].

²⁶ Judgment of 18 June 2009, L'Oréal and others, (C-487/07) EU:C:2009:378, [60].; Judgment of 23 March 2010, Google France & Google, (C-236/08)–(C-238/08) EU:C:2010:159, [79].; Judgment of 25 March 2010, BergSpechte, (C-278/08), EU:C:2010:163, [21].; Judgment of 8 July 2010, Portakabin, (C-558/08), EU:C:2010:416, [29].

²⁷ Interflora (C-323/09) [43].

²⁸ DHL (C-235/09) [20–22].

of confusion, and reputation-based protection.²⁹ Accordingly, the interpretation should be understood to mean that the reasoning set out in DHL may also be applicable in cases involving infringement under the reputation-based protection regime.

But how does this position—limiting the territorial scope of an injunction—relate to the EUTM and its unitary character in the context of applying reputation-based protection?

2.2 A formal harmonisation in the application of reputation-based protection

Reputation-based protection with respect to infringement is set out in Article 9(2)(c) EUTMR. A likelihood of confusion is not decisive for the infringement assessment, as confusion is not a requirement for obtaining protection under this provision. According to Article 9(2)(c) EUTMR, the conditions that must be fulfilled are that the earlier EUTM has a reputation and that the use of the later sign without due cause takes unfair advantage of, or is detrimental to, the distinctive character or repute of the EUTM.

Despite these conditions, and in light of the above-mentioned statements regarding harm to the functions of the trade mark, the Court of Justice held in the judgment of 6 October 2009, *Pago International GmbH v Tirolmilch registrierte Genossenschaft mbH* (C-301/07) EU:C:2009:611 (*Pago International*), that protection may be granted even where the mark has a reputation only in Austria.³⁰ The statement stands in direct contradiction to what the Court of Justice had previously held in judgments such as the judgment of 27 November 2008, *Intel Corp Inc v CPM United Kingdom Ltd* (C-252/07) EU:C:2008:655 (*Intel*), where the Court clarified that if the relevant public does not perceive a link between the marks, neither unfair advantage nor detriment can arise.³¹ Similarly, in Case C-375/97, *General Motors Corp v Yplon SA*, the Court stated that it is only when the earlier sign is sufficiently well known that the relevant public will establish a connection between the marks.³² This line of reasoning explains why reputation-based protection applies exclusively to marks with a reputation: without such recognition, the later sign cannot take unfair advantage of or be detrimental to the distinctive character or repute of the earlier mark. Since reputation-based protection requires harm in the form of either unfair advantage taken of or detriment caused to the distinctive character or repute of the EUTM, it follows—consistent with the Court of Justice’s abovementioned case law—that the earlier mark must be known. Otherwise, no such harm can arise.

In *Pago International*, the Court of Justice held that the territorial requirement was satisfied by the fact that the

EUTM was known within the territory of a single Member State—namely, Austria. This level of recognition was considered to amount to reputation in a substantial part of the Union.³³

However, the Court did not address how this conclusion relates to the other substantive conditions for granting reputation-based protection. This is particularly noteworthy in light of the Court’s earlier statement in *Intel* the previous year.³⁴ If the earlier mark is unknown in, for example, Sweden, then logically no harm can arise there. Nevertheless, the Court in *Pago International* established that reputation in a single Member State is sufficient for the mark to qualify for protection throughout the Union. In practice, this interpretation risks disregarding the substantive criteria required for granting protection under Article 9(2)(c) EUTMR—raising questions as to its compatibility with the principle that actual harm, or at least a likelihood of harm, must be demonstrated. It is difficult not to reflect on whether the outcome in *Pago International* might have been different had the DHL judgment been delivered beforehand. In DHL, the Court gave weight to fundamental principles concerning the functions of the trade mark.³⁵ Consideration of these functions formed the basis for the Court’s conclusion in DHL. The protection conferred on a trade mark cannot extend beyond the harm that has actually occurred or is likely to occur. This interpretation aligns well with Article 36 of the Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47 (TFEU), which sets limits on the extent of protection that may be afforded to commercial property rights—in this case, trade marks.

In DHL, the principle of trade mark functions was thus given precedence over the unitary character of the EUTM. By contrast, the statement in *Pago International* is fully consistent with the unitary character, as protection was granted at the Union level despite the fact that the trade mark was known only in a single Member State. However, in that case, no consideration was given to the additional requirement of harm set out in the relevant provision. *Pago International* thus illustrates the inherent tension that arises when the requirement to demonstrate harm or a likelihood thereof is weighed against the unitary character of the EUTM. It becomes apparent that these two principles cannot be easily reconciled in practice.

The Court’s position in *Pago International* was confirmed several years later in the judgment of 3 September 2015, *Iron & Smith* (C-125/14) EU:C:2015:539 (*Iron & Smith*), in which the Court explicitly referred back to its reasoning in *Pago International*.³⁶ The Court further held in the latter case that the criterion of being “known in a substantial part of the Union” may be satisfied by reputation in the territory of a single Member State, and that, in

²⁹ DHL [C-235/09] [43, 46–47].

³⁰ *Pago* [C-301/07] [29–30].

³¹ *Intel* [C-252/07] [31].

³² *General Motors* [C-375/97] [23].

³³ *Pago International* [C-301/07] [29–30].

³⁴ *Intel* [C-252/07] [31].

³⁵ DHL [C-235/09], DHL [47].

³⁶ *Iron & Smith* [C-125/14] [19].

such cases, the EUTM must be regarded as being known within the Union.³⁷ In *Iron & Smith*, the Court addressed how this solution relates to the other requirements concerning harm, and introduced a limitation to the scope of protection. Specifically, it held that where the earlier mark is entirely unknown to the relevant public, the later mark cannot, with reference to *Intel*, cause detriment to or take unfair advantage of the distinctive character or repute of the earlier mark.³⁸ In this context, the Court introduced a new criterion, holding that, notwithstanding the aforementioned considerations “[...]even if the earlier community trade mark is not known to a significant part of the relevant public in the Member State in which registration of the later national mark had been applied for, it is conceivable that a commercially significant part of the latter may be familiar with it and make a connection between that mark and the later national mark”.³⁹ The criterion in *Intel*, requires that the assessment now be carried out in each individual Member State where the later mark is to be registered or used—effectively resulting in a fragmentation of the internal market. This reasoning echoes the position taken by the Court in *DHL*.

Once again, the existing tension between the requirement of harm and the unitary character of the EUTM becomes apparent. *Iron & Smith* may thus be read as a limitation of the principle established in *Pago International*. At the time *Iron & Smith* was decided, *DHL* had already been delivered a few years earlier as a Grand Chamber judgment. It is therefore conceivable that the Court of Justice felt compelled to depart from its earlier approach to the criterion of being “known in the Union,” and instead to place greater emphasis on the requirement of harm to the functions of the trade mark in its assessment.

3. CONCLUSIONS

The various conditions for reputation-based protection may appear compatible and unproblematic in practice. However, upon closer examination, it becomes evident that the wording of the Regulation regarding the criterion “known in the Union”, when considered together with the additional requirements of unfair advantage or detriment to the distinctive character or repute, is not easily reconcilable. The situation becomes even more complex when the EUTM is required to possess a unitary character, meaning that it must be afforded the same protection throughout the entire Union. Case law from the Court of Justice suggests that the Court has attempted to strike a balance between maintaining the unitary character of the EUTM and ensuring that protection does not extend beyond actual or potential harm to the trade mark functions. The development of the Court’s jurisprudence indi-

cates a move away from a rigid application of the unitary character towards a more flexible approach. The balancing act—departing from the strict notion of unitary character in favour of giving precedence to the fulfilment of the substantive requirements for reputation-based protection—represents a justifiable compromise. It is a compromise the Court has likewise been compelled to make in cases of infringement based on likelihood of confusion.

A legal system cannot afford to grant protection where the requirements set out in the relevant provision or article are not properly fulfilled. In light of the arguments presented in this article, the unitary character appears to be no more than a chimera—lacking real effect in practice when applying reputation-based protection.



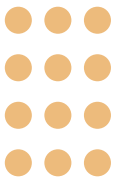
Alma Johansson

Alma is a graduate of the LL.M. programme in Law at Stockholm University, where she wrote her master’s thesis about the practical effect of the unitary character of the EUTM in the application of reputation-based protection, and the relationship between the two. While writing her thesis, she completed an internship at the Swedish Intellectual Property Office.

³⁷ *Iron & Smith* [C-125/14] [25].

³⁸ *Iron & Smith* [C-125/14] [28].

³⁹ *Iron & Smith* [C-125/14] [30].



Intertextuality and pastiche: the perfect recipe, or bland mediocrity?

The EU copyright exception of pastiche in light of the *Pelham II* referral and AG Opinion

Emmanouela Papadaki

ABSTRACT

Remixes, fan art, fan fiction, and sampling are longstanding methods of cultural expression that now flourish in online spaces. These derivative forms of creation raise pressing questions for copyright law, particularly within the European Union's closed catalogue of exceptions and limitations. Central among them is the little-explored *pastiche* exception, introduced by Article 5(3) (k) of the InfoSoc Directive, alongside parody and caricature. While the meaning of parody has been clarified by the CJEU, the contours of pastiche remain uncertain. With the implementation of the DSM Directive obliging all Member States to adopt this exception, and recent cases such as *Pelham II* bringing the question of interpretation before the CJEU, the scope and meaning of pastiche have gained new relevance. This article argues that pastiche should be understood as an autonomous legal concept of EU law, encompassing a broad range of transformative uses where recognisable elements of pre-existing works contribute to the creation of new and noticeably different ones. Rejecting limiting requirements such as humour, stylistic imitation, or tribute, the article proposes that pastiche can function as a flexible balancing tool between rightholders' economic interests and users' freedom of expression. Properly interpreted, it may offer the EU a viable alternative to fair use in safeguarding contemporary creativity

1. INTRODUCTION

– *I don't get it. What does this mean?*
– *Nobody tell them.*

This exact virtual conversation, and countless variations of it can be encountered all over the internet, in response to images, videos and texts alluding to previous works, sometimes multiple at the same time.¹ The understanding of the different layers of intertextuality creates, in many an internet user, sentiments of intellectual satisfaction, superiority and belonging. Fan art, art inspired by pre-existing works of art, is one of the most surefire ways any artist can achieve notoriety without even the need to self-promote actively. Countless songs remixing and sampling others are uploaded and mass consumed online. The author of this very article has had more than a hundred thousand people read her fictional stories without committing any effort other than to upload them to an internet platform, simply by virtue of the fact that they

incorporate characters of other authors' literary works, a practice also known as fan fiction.

With the internet having completely changed the way creative works are consumed, and users being able to create and make available their works more easily than ever, creative borrowing and derivation, practices as old as art itself, are more relevant than ever. In the contemporary digital environment, users play a dual role, as recipients of content and creators of content alike. Information society services base their design and business model on that dual role.²

But derivative creation does not only confine itself to internet spaces. Paintings that incorporate elements of previous visual works can be found in many museums, and their significance is all the richer for people that understand the reference(s) made. Rappers and other artists sample and quote melodies of their predecessors

¹ Colloquially known as *memes*.

² Report A8-0245/2018 of the Committee on Legal Affairs on the proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market (COM(2016)0593 – C8-0383/2016 – 2016/0280(COD)), 160.

in new music. This article itself is, in fact, a pastiche of the author's master thesis, which in turn is a synthesis of various different sources, combined with personal opinions. In this new reality where creative borrowing is more wide-spread and prominent than ever, it is necessary for copyright law to account for those uses and achieve a fair balance between overt punitiveness that would unduly stifle creativity, and excessive impunity that would jeopardize holders' economic rights and undermine copyright at large.

Enter *pastiche*.

The EU pastiche exception was first introduced in 2001, as part of the closed catalogue of exceptions introduced by Directive 2001/29/EC (Infosoc Directive)³. Said exceptions aimed to strike a *fair balance* between the interests of rightholders and those of users.⁴ Article 5(3) of said Directive granted Member States the discretionary power to implement any of the exceptions or limitations mentioned in said paragraph, to the economic rights of reproduction, distribution and communication to the public.⁵ Each Member State was (almost)⁶ free to choose the implementation of any exceptions they desired from the extensive catalogue, which was created taking *due account of the different legal traditions in Member States*.⁷

Pastiche is part of a 'three-pronged list' of exceptions listed in article 5(3)(k), the provision stating that Member States may provide for exceptions or limitations to the rights of reproduction, communication to the public and distribution in the cases of *use for the purpose of caricature, parody or pastiche*. Though the concept of parody has been clarified by the CJEU in *Deckmyn*,⁸ no such definition can be found for caricature or pastiche in the legal texts or the case-law of the court of justice as of yet.

Until the DSM Directive, few countries had implemented the pastiche exception into their national copyright law. the concept of pastiche was largely overlooked by national legislations and legal academia alike.⁹ For example, in his Opinion in *Deckmyn*, AG Cruz Villalón deemed it unnecessary to proceed with a further distinction of the three concepts of 5(3)(k) Infosoc, since *all those concepts have the same effect of derogating from the copyright of the author of the original work which, in one way or another, is present in the – so to speak – derived work*.¹⁰

Following the DSM Directive, all 27 Member States have implemented the pastiche exception in their national legislations.¹¹ Greece, Sweden Denmark, Cyprus, Poland, Italy, Austria, Czech Republic and Latvia limit the exception to user-generated content in OCSSPs.¹²

In his Opinion in *Pelham* (hereinafter referred to as *Pelham I*), AG Szpunar considered whether sampling might fall under article 5(3)(k) of the Infosoc Directive *with regard to the use of extracts from one phonogram in another phonogram*.¹³ This, combined with the effect the DSM Directive had in the introduction of the pastiche exception to Member State national copyright laws and followed by Germany's (at the time of writing) pending referral made by the Bundesgerichtshof to the CJEU regarding the interpretation of the legal meaning of pastiche,¹⁴ have created increased interest in the term.

To appropriately safeguard online user creative activities, there have been suggestions that the term could be used as a quasi-fair use clause, meaning a more flexible exception, that encompasses even creative borrowing not falling under other exceptions such as quotation, parody¹⁵ etc., either for non-commercial purposes,¹⁶ or with remuneration as suggested counterbalance.¹⁷

Since fair use clauses were deemed incompatible with EU copyright law,¹⁸ however, such an interpretation might not be accepted,¹⁹ though setting a broader scope for an already existing exception within the EU copyright *acquis* might not contradict the court's mandate.²⁰ German legislature envisioned a broad concept of pastiche, which, subject to a fair balance between the rights and interests of copyright holders and users of protected subject mat-

³ Directive 2001/29/EC of the European Parliament and the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (Infosoc), OJ L 167/10.

⁴ Infosoc, recital 31.

⁵ *Ibid.*, articles 2, 3 and 4.

⁶ Article 5(1) Infosoc introduces a mandatory exception for some temporary acts of reproduction.

⁷ *Ibid.*, recital 32.

⁸ Judgement in Case C-201/13, *Deckmyn and Vrijheidsfonds VZW v Vandersteen and Others* [2014] ECLI:EU:C:2014:2132.

⁹ Frédéric Döhl, *The Concept of "Pastiche" in Directive 2001/29/EC in the Light of the German Case Metall auf Metall*, [Media in Action 37, 2017], 48.

¹⁰ Opinion of Advocate General Cruz Villalón in Case C-201/13, *Deckmyn and Vrijheidsfonds*, ECLI:EU:C:2014:458, [46].

¹¹ Dr. Christina Angelopoulos, *Articles 15 & 17 of the Directive on Copyright in the Digital Single Market: Comparative National Implementation Report*, (2024), Centre for Intellectual Property and Information Law, <https://informationlabs.org/wp-content/uploads/2023/12/Full-DCDSM-Report-DrAngelopoulos.pdf>, Accessed 1 March 2025, 58.

¹² For a comprehensive overview of the implementation of the exception as of 2024 in 25 of the 27 Member States, see *ibid.* (n 11), 58.

¹³ Opinion of Advocate General Szpunar in Case C-476/17, *Pelham GmbH and Others v Hütter and Another*, ECLI:EU:C:2018:1002., [70].

¹⁴ Request for a preliminary ruling from the Bundesgerichtshof (Germany) lodged on 25 September 2023, *CG and YN v Pelham GmbH and Others*, C-590/23 (*Pelham II*).

¹⁵ For a creative artistic borrowing to fall under parody, it needs to constitute an expression of humour or mockery, as per *Deckmyn*. For it to fall under quotation, it needs, *inter alia*, to have an intention of entering into dialogue with the original work.

¹⁶ Bernd Justin Jütte, *The EU's Trouble with Mashups: From Disabling to Enabling a Digital Art Form* [Journal of Intellectual Property, Information Technology and Electronic Commerce Law 172, 2014], paras 82–84.

¹⁷ Communia, *Policy Recommendations*, (2022), Communia, <https://comunia-association.org/policy-recommendations/> Accessed 15 May 2025, policy recommendation 7; Martin Senftleben, *Institutionalized Algorithmic Enforcement—The Pros and Cons of the EU Approach to UGC Platform Liability*, (FIU Law Review 14, 2020) 313.

¹⁸ Judgement in Case C-476/17, *Pelham GmbH and Others v Hütter and Others*, ECLI:EU:C:2019:624, [63]–[65].

¹⁹ In the 18/1/2025 CJEU hearing for *Pelham II*, AG Emiliou asked Germany whether the new copyright pastiche exception was an *attempt to re-introduce free use through the back door*.

²⁰ See Péter Mezei, *Knock, Knock, Knockin' on Transformiveness' Doors*, [International Review of Intellectual Property and Competition Law 55(4), 2024].

ter, encompasses a variety of transformative uses, such as mashups, remixes, fan art and fan fiction.²¹

In his Opinion in *Pelham II*,²² released 17th of June, AG Emiliou already rejected such a broad interpretation,²³ as will be analysed further on.

This article will endeavor to suggested answers to the questions referred to the CJEU in *Pelham II*, as well as offer commentary on AG Emiliou's Opinion.

The questions referred to the CJEU by the German Federal Supreme Court (BGH) were:

1. *Is the provision limiting use for the purpose of pastiche within the meaning of Article 5(3)(k) of Directive 2001/29/EC (1) a catch-all clause at least for artistic engagement with a pre-existing work or other object of reference, including sampling? Is the concept of pastiche subject to limiting criteria, such as the requirement of humour, stylistic imitation or tribute?*

2. *Does use 'for the purpose of' pastiche within the meaning of Article 5(3)(k) of Directive 2001/29/EC require the determination of an intention on the part of the user to use copyright subject matter for the purpose of a pastiche, or is it sufficient for the pastiche character to be recognisable for a person familiar with the copyright subject matter who has the intellectual understanding required to perceive the pastiche?*

2. MEANING IN EVERYDAY LANGUAGE AND PURPOSE OF THE PASTICHE EXCEPTION

Since the Infosoc Directive does not contain a definition of pastiche, the meaning and scope of the terms for which EU law provides no definition must be determined by considering their usual meaning in everyday language, while also taking into account the context in which they occur and the purposes of the rules of which they are part, as the CJEU has consistently held.²⁴

It follows that the definition of pastiche in lay terms must serve as the starting point of this investigation.

Such an endeavor, however, is not easy. The term has been used in a variety of ways with a plethora of different meanings.²⁵ According to Dyer, the word *pastiche* has two primary definitions: a kind of combination of aesthetic elements or a kind of aesthetic imitation. He argues that, often, pastiche entails an element of intention, present in most dictionary definitions,²⁶ and that it means to

be understood as a pastiche by those who perceive the work.²⁷

Moreover, the term is in practice extremely elastic. Historically, it has initially been used with negative connotations as blank parody, or cheap imitation^{28, 29}. Originating as an Italian culinary dish containing a mix of various ingredients,³⁰ *pasticcio* gained a metaphorical meaning in the Renaissance as a genre of painting that mixed and matched different techniques, often with deceitful intent.³¹

In the field of music, *pasticcio* was used in 18th century Italy to signify the creation of a new opera that compiled favourite arias of the composers and singers from various previous ones, with the creation of a new, overarching plot.³² This practice was also adopted in the English ballad opera and the French *comédie en vaudevilles*.³³

From Italy, the term travelled to France and became *pastiche*. Brunot makes a distinction between *originaux*, paintings that opened a new path in art and deserve to be studied, or authentic paintings. On the other side of the spectrum there are *copies*, faithful reproductions. Somewhere in the middle lie the *pastiches*, paintings that are *neither originals, nor copies, but counterfeits*.³⁴ Like the various different elements of the food *pasticcio* compose one single taste, so do the elements of pastiche compose one single truth. In early 20th century France, the term branched over to literature.³⁵ Genette observes that a pastiche is not necessarily a stylistic affair in the usual sense of the term: there is no rule against imitating also the content, the actual theme, of the model. Even further, he observes that style is form in general and therefore encompasses both the form of the expression *and* the content.³⁶

Pastiche has, through time, been used as a synonym for many words:³⁷ adaptation, appropriation, collage, imitation, montage, parody, plagiarism.

In modern dictionaries, it is oft defined as stylistic imitation or collage: for example, the online version of the Oxford English Dictionary defines pastiche as *a novel*,

²¹ Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice, Case C-590/23 (*Pelham II*), [19].

²² Opinion of Advocate General Emiliou in case C-590/23, *CG, YN v Pelham GmbH and Others*, (*Pelham II*) [2025], ECLI:EU:C:2025:452.

²³ *Ibid.*, [71].

²⁴ See, *inter alia*, Judgement in Case C-549/07, *Friederike Wallentin-Hermann v Alitalia — Linee Aeree Italiane SpA*, [2008], ECLI:EU:C:2008:771, [17]; *Deckmyn*, [19].

²⁵ Richard Dyer, *Pastiche* (2007), Routledge, 7–8.

²⁶ *Ibid.*, 2.

²⁷ *Ibid.*, 3.

²⁸ Ingeborg Hoesterey, *Pastiche: cultural memory in art, film, literature*, (2001), Indiana University Press, 1.

²⁹ Ferdinand Brunot, *Histoire de la langue française des origines à 1900*, tome VI:1:II, (1966), Armand Colin, 718, footnote 3.

³⁰ If you ever find yourselves in Greece, try its traditional Hellenic counterpart, a delicious pie comprising of pasta, minced meat and béchamel sauce.

³¹ *Ibid.*, [n 28], 1.

³² Peter J Burkholder, *A Brief History and Typology of Musical Borrowing and Reworking* in Enrico Bonadio and Chen Wei Zhu (eds), *Music Borrowing and Copyright Law: A Genre-by Genre Analysis*, (2023), Bloomsbury Collections, 34.

³³ *Ibid.*

³⁴ *Ibid.*, [n 29], 717–718.

³⁵ A famous example is Marcel Proust's *Pastiches et Mélanges*, in the first part of which he relates the same story in the style of various famous authors.

³⁶ Gérard Genette, *Palimpsests: literature in the second degree*, (1997), University of Nebraska Press, 105.

³⁷ *Ibid.*, [n 28], 10.

*poem, painting, etc., incorporating several different styles, or made up of parts drawn from a variety of sources and a musical composition incorporating different styles; a medley.*³⁸ The online version of the Cambridge Dictionary offers a *piece of art, music, literature, etc. that intentionally copies the style of someone else's work or is intentionally in various styles, or the practice of making art in either of these ways* as a definition.³⁹ The Merriam-Webster dictionary defines it as a *literary, artistic, musical, or architectural work that imitates the style of previous work and a musical, literary, or artistic composition made up of selections from different works.*⁴⁰

It is apparent that pastiche is something more than a mere adaptation. The latter is an extensive transposition of a particular work of works.⁴¹ Essentially a transposition of a work to a different medium, a reinterpretation, a variation. It is the transformation of a work into another form of expression that is not tantamount to a simple reproduction⁴² and does not result in the creation of a new work, but, rather in the modification of the original one.⁴³ Pastiche, on the other hand results in the “birth” of a new work.

Continuing with the second requirement of the CJEU's settled case law, the purpose of the pastiche exception will be discussed.

The purpose of all copyright exceptions to the exclusive economic rights,⁴⁴ is to ensure that a balance is struck between the four fundamental freedoms of the internal market: the freedoms of law and especially of property, including intellectual property, the freedom of expression and the public interest.⁴⁵ Copyright is not an absolute, inviolable right.⁴⁶ A fair balance must be struck between the rights and interests of different categories of right-holders, as well as users of protected subject matter.⁴⁷

Article 5(3)(k) Infosoc is especially relevant to the freedom of expression, as laid out in article 11 CFEU, and the freedom of the arts and sciences, as laid out in article 13 CFEU.⁴⁸ In accordance with article 6(1) of the Treaty on the European Union, the CFEU holds equivalent status to the founding EU treaties.

All three concepts mentioned in the Infosoc article are transformative uses of pre-existing works, and thus artistic expressions that can be classified as manifestations of the freedom of expression.⁴⁹ As already mentioned, AG Cruz Villalón stated that *those concepts have the same effect of derogating from the copyright of the author of the original work which, in one way or another, is present in the — so to speak derived work.*⁵⁰ In the words of AG Szpunar, exceptions such as parody, caricature, and pastiche constitute an expression of the freedom of the arts because they *facilitate dialogue and artistic confrontation through references to pre-existing works.*⁵¹

The three concepts, while not tautological in their meaning, are grouped together due to the similarity of their legal *ratio*. Thus, the purpose of article 5(3)(k) specifically is to strike a fair balance between the interests and rights of persons referred to in Articles 2, 3 and 4 of Infosoc, and the freedom of expression, which includes the freedom of artistic expression,⁵² of the users relying on the exception.⁵³ Whether said balance is achieved is for the national courts to determine on a case-by-case basis.⁵⁴ The application of all exceptions must safeguard their effectiveness as well as observe their purpose,⁵⁵ fully adhering to the fundamental rights enshrined in the CFEU.⁵⁶

AG Szpunar, in his Opinion in *Pelham I*, argued that *fundamental rights [...] (are) a sort of ultima ratio which cannot justify departing from the wording of the relevant provisions except in cases of gross violation of the essence of a fundamental right.*⁵⁷ Although it is not unreasonable to view an expansive interpretation as potentially threatening for the protection of copyright and the EU *acquis*,⁵⁸ the adoption of a restrictive view on copyright exceptions would compromise necessary flexibility in Union copyright law and limit adjustment potential to new circumstances and technological advances.⁵⁹

³⁸ *pastiche* in Oxford University Press, 2024.

³⁹ *pastiche* in Cambridge University Press, 2024.

⁴⁰ *pastiche* in Merriam-Webster, 2024.

⁴¹ Linda Hutcheon, *A Theory of Adaptation* (2013), 2nd edn, Routledge, 7.

⁴² Silke von Lewinski, *International Copyright Law and Policy*, (2008), Oxford University Press, 143.

⁴³ Although according to article 12 of the Berne Convention, authors enjoy the exclusive right of authorizing adaptations of their works, the right of adaptation is not harmonised at an EU level. While some Member States (e.g. Italy, Germany) have established a right of adaptation, others consider it a reproduction. For more on this see Eleonora Rosati, *Copyright in the EU: In Search of (In)Flexibilities* (Journal of Intellectual Property Law & Practice 9(7), 2014), 20.

⁴⁴ Infosoc, 2–4.

⁴⁵ *Ibid.*, recital 3.

⁴⁶ Judgment in C-516/17, *Spiegel Online v Volker Beck*, ECLI:EU:C:2019:625, [56]; *Pelham I*, [33].

⁴⁷ Infosoc, recital 31; *Pelham I*, [32].

⁴⁸ DSM, recital 70.

⁴⁹ *Deckmyn*, [27] as well as AG Opinion in *Deckmyn*, [70], for parody specifically.

⁵⁰ AG Opinion in *Deckmyn*, [46].

⁵¹ AG Opinion in *Pelham I*, [95].

⁵² *Ibid.*, [91]; *Pelham I*, [34].

⁵³ *Deckmyn*, [34].

⁵⁴ *Ibid.*, [35].

⁵⁵ *Spiegel Online*, [55].

⁵⁶ Judgment in Case C-469/17, *Funko Medien NRW GmbH v Bundesrepublik Deutschland*, ECLI:EU:C:2019:623, [76].

⁵⁷ AG Opinion in *Pelham I*, [98].

⁵⁸ Jonathan Griffiths, *Fair dealing after Deckmyn: the United Kingdom's defence for caricature, parody and pastiche*, in Megan Richardson, Sam Ricketson, Research Handbook on Intellectual Property in Media and Entertainment (2017), Edward Elgar Publishing Limited, 85.

⁵⁹ Lionel Bently and others, *Sound Sampling, a Permitted Use Under EU Copyright Law? Opinion of the European Copyright Society in Relation to the Pending Reference before the CJEU in Case C-476/17, Pelham GmbH v. Hütter*, (International Review of Intellectual Property and Competition Law 50, 2019), 5.

3. SUGGESTED ANSWERS TO THE PELHAM II QUESTIONS

3.1 Preliminary observations

As CJEU jurisprudence dictates, if a provision of EU law makes no specific reference to national legislation, the relevant concept is an autonomous concept of EU law, meaning that it must not be defined at a national level, but, rather, be given an independent and uniform interpretation throughout the EU.⁶⁰ This has been repeatedly stated by the CJEU, which has explicitly identified various terms as autonomous concepts of EU law.⁶¹ The goal through their establishment is to achieve greater harmonisation,⁶² a higher level of protection,⁶³ uniform legal interpretation, and establish the autonomy of EU law over the national laws of the Member States.

Nowhere in the provisions concerning pastiche is Member State legislation mentioned. Furthermore, parody, stated as an exception in the same letter of article 5(3) Infosoc, has already been explicitly declared an autonomous concept of EU law.⁶⁴

It follows that pastiche, also, is an autonomous concept of EU law whose meaning is to be interpreted by the CJEU, and Member States cannot each give their own interpretation to it. Consequently, there is no concept of pastiche specific to each country or even for each artistic genre.⁶⁵ Just like parody (and all other copyright exceptions) holds the same meaning regardless of the medium of its expression, there is only one definition of pastiche that is to be applied to each specific case.

3.2 Pastiche as a catch-all clause

The German BGH asks if pastiche should be a *catch-all clause at least for artistic engagement with a pre-existing work or other object of reference*.

There is nothing suggesting that pastiche should be limited to one, or a handful of sectors of the arts only. Furthermore, the historically diverse definition of the concept in everyday language refers to various art sectors, such as painting, music, literature, architecture etc. A broad use of the term would enhance the freedom of

expression and freedom of information of the beneficiaries.^{66, 67}

This view is not without its dissenters. AG Szpunar expressed the opinion that the requirement of a copyright license of original works *not for purposes of interaction, but rather in the creation of new works bearing no relation to the pre-existing works* does not contradict the freedom of the arts, which *cannot guarantee the possibility of free use of whatever is wanted for creative purposes*.⁶⁸ It has also been argued elsewhere that such a reading is too broad,⁶⁹ contradicting the dogma of strict interpretation of copyright exceptions,⁷⁰ as well as the three-step test of 5(5) Infosoc, mostly the first requirement of *certain special cases*. Indeed, a pastiche exception encompassing any and all creative borrowing without making any further distinctions would be incompatible with the three-step test and the fair balance doctrine between copyright and other rights listed in the CFEU.

The three-step test dictates that all copyright exceptions should only be applied in accordance with three cumulative requirements: in certain special cases which do not conflict with a normal exploitation of the work or other subject matter and do not unreasonably prejudice the legitimate interests of the rightholders. This is to be considered both by legislators, while drafting the letter of the law, and, according to the most accepted opinion, by courts,⁷¹ while deciding if a specific use fulfills the conditions of the exception. The purpose of the three-step test is to contribute to the fair balance between exclusive rights and exceptions and limitations.⁷² Furthermore, the Court has increasingly started referring to the exceptions and limitations as *user rights*.⁷³

The perceived disproportionately broad scope of the exception could be circumscribed with the aid of the test on a case-by-case basis.⁷⁴ If its conditions are not cumulatively satisfied, then the exception of pastiche cannot be applied.

In this regard, a proposed solution is that while the artistic engagement falling under pastiche can in principle be of any kind and relate to any type of pre-existing work, the derivative creation will need to be examined in order to differ noticeably from the original work.

In accordance with the definitions of pastiche in everyday language, this artistic engagement is specifically sug-

⁶⁰ E.g.: Judgement in Case C-467/08 *Padawan SL v Sociedad General de Autores y Editores de España (SGAE)* [2010] ECLI:EU:C:1984:11[32].

⁶¹ For a comprehensive catalogue, see Eleonora Rosati, *Copyright and the Court of Justice of the European Union* (2023), 2nd edn, Oxford University Press. 62–63.

⁶² Infosoc, recital 4.

⁶³ *Ibid.*, recital 6.

⁶⁴ *Deckmyn*, [14]–[17].

⁶⁵ *Contra*: article 122-5 4o of the French CPI that which states that parody, caricature and pastiche should be judged *taking into account the rules of each artistic genre*.

⁶⁶ Emily Hudson, *The Pastiche Exception in Copyright Law: A Case of Mashed-Up Drafting?* (2017) Intellectual Property Quarterly 2017(4), 2017, 4.

⁶⁷ Péter Mezei and others, *Opinion of the European Copyright Society on CG and YN v Pelham GmbH and Others, Case C-590/23 (Pelham II)* (European Copyright Society, 2024), para 2.4.

⁶⁸ AG Opinion in *Pelham I*, [96].

⁶⁹ *Ibid.*, [n 58], 85.

⁷⁰ *Ibid.*, [n 67], para 4.2.5.

⁷¹ *Ibid.*, [n 61], 228.

⁷² *Funke Medien*, [61]; *Pelham I*, [62].

⁷³ E.g. *Funke Medien*, [70]; *Spiegel Online*, [54].

⁷⁴ Of course, this presupposes that the three-step test can indeed be applied directly by courts.

gested to be the utilisation of original⁷⁵ elements of a pre-existing work in the making of a new creation.⁷⁶

Therefore, the proposed answer is that pastiche is a catch-all clause at least for artistic engagement with a pre-existing work or other object of reference. This engagement includes sampling.

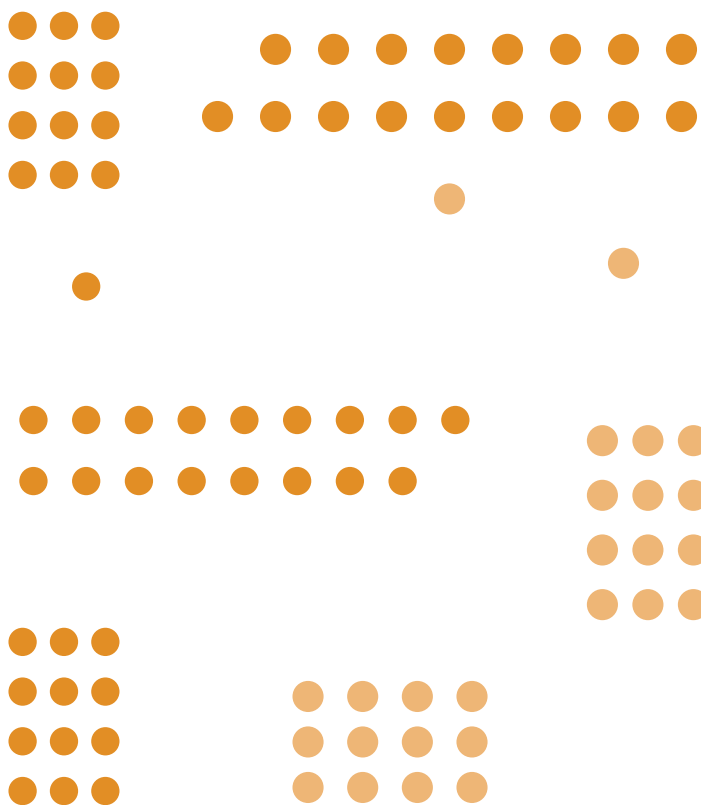
3.3 Requirement of humour

Next, the BGH inquires if the pastiche exception is *subject to limiting criteria*. The first criterion listed is a requirement of humour. In its judgement in *Deckmyn*, where a definition was given by the CJEU for parody as an autonomous concept of EU law, the essential characteristics were *first, to evoke an existing work, while being noticeably different from it, and secondly, to constitute an expression of humour or mockery*.⁷⁷ In some legal traditions, such as France and Belgium, parody and pastiche are considered tautological or synonymous, with the result that pastiche is thought to also require humorous intent on the part of the pasticheur.⁷⁸

Such an interpretation stems from the French definition of pastiche. The term is used synonymously to parody and caricature, according to one popular interpretation with only a difference in genre: parody refers specifically to music, pastiche to literature, and caricature to drawing.⁷⁹ This definition results in a large intersection of the three terms, leading to their grouping under the umbrella of parody.⁸⁰ On a similar vein, in his opinion in *Deckmyn*, AG Cruz Villalón also considered that parody, as a concept, also encompassed caricature and pastiche, and that further distinction between the three terms was not necessary.⁸¹

However, as has been pointed out elsewhere,⁸² parody, caricature and pastiche are not situated within the letter of the same provision because they are tautological in meaning or synonyms with slight differences in nuance.⁸³ Rather, they are listed together because they are artistic expressions that derive from an original work. The grouping of the three terms is, therefore, taxonomical, and not indicative of three alternate words for the same broader concept.

A broader interpretation of the meaning of the term appears appropriate. The French interpretation, apart from potentially restricting pastiche to the literary genre, does not take into account contemporary artistic expres-



sions, such as audiovisual works.⁸⁴ Besides, not all definitions of pastiche in everyday language include a component of humorous intent.

Therefore, the proposed answer is that the concept of pastiche is not subject to the requirement of humour.

3.4 Requirement of stylistic imitation

Next, the BGH asks if pastiche is subject to the criterion of stylistic imitation. One of the most often encountered definitions of pastiche, perhaps the most common, is, indeed, an imitation of a style.⁸⁵ AG Szpunar was also in accordance with this interpretation. In his Opinion in *Pelham I*, he stated that *pastiche[...] consists in the imitation of the style of a work or an author without necessarily taking any elements of that work*.⁸⁶

While this might be one of the many correct interpretations of pastiche in everyday language, it does not appear to be useful from a legal standpoint. As already established, for an exception to be applied, there needs to be a *prima facie* copyright infringement: without the rule, there is no need for the exception. According to the fundamental idea-expression dichotomy, copyright law does not protect ideas, only their concrete expressions.⁸⁷ Style

⁷⁵ The utilisation of non-original elements is irrelevant to copyright.

⁷⁶ *Ibid.*, [n 66], 2; *Ibid.*, [n 67], 4.

⁷⁷ *Deckmyn*, [33].

⁷⁸ Julien Cabay and Maxime Lambrecht, *Remix Prohibited: How Rigid EU Copyright Laws Inhibit Creativity*, [Journal of Intellectual Property Law & Practice 10, 2015].

⁷⁹ Henri Desbois, *Le droit d'auteur en France*, (1978), 3rd edn, Dalloz, § 254.

⁸⁰ Carine Bernault, André Lucas, Agnès Lucas-Schloetter, *Traité de la propriété littéraire et artistique* (2017), 5th edn, LexisNexis, para 480.

⁸¹ AG Opinion in *Deckmyn*, [46].

⁸² *Ibid.*, [n 67], para 2, question 1.

⁸³ *Ibid.*, [n 61], 3.

⁸⁴ Péter Mezei and others, *Oops, I Sampled Again ... the Meaning of "Pastiche" as an Autonomous Concept Under EU Copyright Law*, [International Review of Intellectual Property and Competition Law 55(8), 2024], para 3.2.2.

⁸⁵ *Ibid.*

⁸⁶ AG Opinion in *Pelham I*, footnote 30.

⁸⁷ The TRIPS agreement states in article 9(2) that *copyright protection shall extend to expressions and not to ideas*. Similarly, article 2 of the WCT also states that *copyright protection extends to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such*.



is most commonly defined as *a way of doing something*,⁸⁸ or *manner/fashion*.⁸⁹ For a creation to be considered a work meriting copyright protection, it needs to be identifiable with sufficient precision and objectivity⁹⁰ and be original, in the sense that it is the author's own intellectual creation.⁹¹ This means that the author has to make free and creative choices that reflect their personality.⁹²

It follows that styles are outside the scope of copyright protection. In the opposing scenario, common techniques of each artistic sector, so-called *tools of the trade*, would perhaps falsely be attributed to and safeguarded by one specific rightholder, thus paralysing artistic freedom.

As already established and supported by legal scholars,⁹³ stylistic imitation is not the only meaning of the term pastiche, and there is no reason to limit it to this restrictive and not useful for copyright law definition.

Therefore, the proposed answer is that the concept of pastiche is not subject to the requirement of stylistic imitation.

3.5 Requirement of tribute.

A pastiche rendering tribute to a pre-existing work is synonymously described as a homage: A homage is defined

as *a work of art or entertainment which incorporates elements of style or content characteristic of another work, artist, or genre, as a means of paying affectionate tribute*.⁹⁴

There is no definition of homage/tribute in the EU copyright *acquis*. Tribute, as AG Szpunar mentioned in his Opinion in *Pelham I*,⁹⁵ is a form of interaction between the original and the subsequent creation, a dialogue with the original work. Thus, tribute, in the legal sense, could be defined as a dialogue/interaction of a subsequent creation with the original work that is carried out with laudatory intention. Drawing analogy from quotation, that dialogue/interaction would need to be identifiable, otherwise the tribute could not exist.⁹⁶

It is, in my opinion, doubtful if it is a needed requirement. Unlike parody, whose meaning in everyday language is uncontestably connected to humour/mockery, it is not so for pastiche. The plethora of different meanings of the word through time does not permit such a uniformly accepted and certain definition.

Consequently, this requirement, as all the rest, needs to be interpreted purposively, in a way that assures a high level of protection for rightholders' right to property, which includes intellectual property, while simultaneously safeguarding users' freedom of expression and freedom of the arts.⁹⁷ It appears more appropriate to leave the interpretation of pastiche more 'neutral' (without requiring humour/mockery, or, at the other end of the spectrum, homage), so as to include a broader amount

⁸⁸ Style, in Cambridge University Press, 2024.

⁸⁹ Style, in Oxford University Press, 2024.

⁹⁰ Judgement in Case C-310/17, *Levola Hengelo BV v Smilde Foods BV*, [2018] ECLI:EU:C:2018:899, [40].

⁹¹ Judgement in Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] ECLI:EU:C:2009:465, [37].

⁹² Judgement in Case C-145/10, *Eva-Maria Painer v. Standard VerlagsGmbH*, [2011] ECLI:EU:C:2011:798, [89]–[90].

⁹³ *Ibid.*, [n 66], 2; *Ibid.*, [n 67], 3.

⁹⁴ Homage in Oxford University Press, 2024.

⁹⁵ AG Opinion in *Pelham I*, [64].

⁹⁶ *Pelham I*, [73]–[74].

⁹⁷ DSM, recital 70.

of artistic practices and safeguard artistic expression, and allow it to be, as supported above, a catch-all clause.⁹⁸

While a homage can certainly fall under the definition of pastiche and is a good indicator for its existence, not all instances of pastiche are homage, and not all homages are pastiches.

Therefore, the proposed answer is that the concept of pastiche is not subject to the requirement of tribute.

3.6 Requirement of intention...

Moving on to the second question, the court asks if an intention of pastiche is necessary for pastiche to subsist. It is assumed that said intention does not lie in the user's awareness that what they are doing is called *pastiche*, but rather in the awareness that they are using protected elements of someone else's work and incorporating them into theirs.

A criterion of intention exists for the quotation exception,⁹⁹ as determined in the *Pelham I* judgement. The court agreed with AG Szpunar that a quotation must have the intention of *entering into dialogue with the original work*.¹⁰⁰

No such requirement was explicitly presented in *Deckmyn* for parody. Nevertheless, the expression of humour or mockery that the CJEU set as a prerequisite, is implied in the judgement to lie in the intention of the parodist, rather than the effect of the parody. For parodies, if there is no intention of humour/mockery, even if the end result happens to be humorous, there is no parody to speak of. For pastiche, on the other hand, if no requirement of tribute is present, there is no need for the creative borrowing to have been an intentional, conscious choice for it to be defined as a pastiche. The absence of any subjective requirement (intention), would render the concept of pastiche more neutral, and by consequence, broader, able to encompass more art forms objectively, without having to rely on any assessment of the creators' psyches.¹⁰¹

Therefore, the proposed answer is that the concept of pastiche does not require the determination of an intention on the part of the user to use copyright subject matter for the purpose of a pastiche.

3.7 ...or recognisability for a person familiar with the protected subject matter?

The alternative the BGH offers is the criterion of recognisability by a person for a person familiar with the copyright subject matter who has the intellectual understanding required to perceive the pastiche.¹⁰²

The CJEU held in *Pelham I*, regarding quotation, that there is no quotation if it is not possible to identify the

original work from the quotation in question.¹⁰³ The evocation of a pre-existing work for parody in *Deckmyn* also implies a recognisability requirement. If the original work is not recognisable within the parody, it is essentially devoid of function.

The same could reasonably apply for pastiche. After all, for an infringement claim to be sought, someone will, in most cases, recognise that elements of a work were taken (unless the fact of the pastiche is stated by the pasticheur themselves). In addition, enforcing copyright in a case where the artistic borrowing is not even perceptible might prove disproportionate to fundamental rights, such as the freedom of expression.¹⁰⁴

Therefore, the proposed answer is that it is sufficient for the pastiche character to be recognisable for a person familiar with the copyright subject matter who has the intellectual understanding required to perceive the pastiche.

3.8 Additional criteria

As analysed before, a crucial parameter that must be taken into consideration for the drafting and implementation of copyright exceptions is the three-step test of article 5(5) Infosoc. The inclusion of any and all creative borrowing in the scope of the pastiche exception, without making any further distinction, would clearly contradict it.

Once again, the same criterion used in *Deckmyn* can find application here: namely, that the subsequent creation must noticeably differ from the one it derives from.¹⁰⁵ As pastiche belongs in the same three-pronged exception as parody, it is reasonable that the same degree of 'distance' from the original work should be required for it. If there is no creative distance, the use would perhaps qualify more as a quotation. For it to be considered a pastiche, the new work should be genuinely new and independent from the original one and have its own intellectual/aesthetic effect.

Again, drawing analogy from *Deckmyn*, there is no need for the new creation to fulfill the condition of originality, be reasonably attributed to a person other than the author or make specific reference to the original work.¹⁰⁶ It is evident that a case-by-case assessment of the effect produced is necessary to determine whether pastiche applies.

3.9. In sum: a proposed definition of pastiche.

Pastiche is the utilisation of original elements of a pre-existing work or other object of reference, in the making of a new, noticeably different creation, wherein the utilisation is recognisable by a person familiar with the copyright subject matter who has the intellectual understand-

⁹⁸ Till Kreutzer, *The Pastiche in Copyright Law*, (Gesellschaft für Freiheitsrechte e.V., 2022), para 2.4.

⁹⁹ Infosoc, 5(3)(d).

¹⁰⁰ *Pelham I*, [71].

¹⁰¹ *Ibid.*, (n 84), 21; *Ibid.*, (n 67), para 3.

¹⁰² A concept reminiscent of the *person skilled in the art* of patent law.

¹⁰³ *Pelham I*, [74].

¹⁰⁴ In Germany, for example, this type of use falls outside the scope of copyright via article 23(1) UrhG.

¹⁰⁵ *Deckmyn*, [33].

¹⁰⁶ *Ibid.*, (n 98), 17.

ing required to perceive the pastiche. Said creation is not subject to the requirement of humour, stylistic imitation, tribute, originality, or intention on the part of the user to create a pastiche.

4. AG OPINION ON PELHAM II

In his opinion on *Pelham II*, delivered on June 17th, AG Emiliou suggested an interpretation of the pastiche exception while also weighing in on the fair balance mandate between the CFEU and the Infosoc Directive.

After an interesting analysis of the history of creative borrowing, as well as of its cultural significance in the digital age,¹⁰⁷ pastiche was deemed an autonomous concept of EU law, to be interpreted according to its meaning in everyday language while also taking into account the context in which it occurs and the purposes of the rules of which it forms part.¹⁰⁸ The AG also suggested that the derivative creation differ noticeably from the original work, as per *Deckmyn* regarding parody.¹⁰⁹

However, after deeming that stylistic imitation is *at the heart of that conception of 'pastiche'*¹¹⁰ and assessing that the alternate definition of combination of pre-existing original elements must not have played a very significant role in the implementation of pastiche in the Infosoc Directive,¹¹¹ he supported a definition of pastiche as stylistic imitation,¹¹² arguing that this was never the intention of the legislator when implementing pastiche,¹¹³ and that a purposive interpretation of it to this effect would extend the provision to the point of distortion.¹¹⁴

The AG also rejected a definition of pastiche synonymous to parody and argued in favour of the distinct meaning of the three concepts of article 5(3)(k) Infosoc.¹¹⁵

Regarding the argument, also supported by the author, that stylistic imitation would not be useful from a legal standpoint, AG Emiliou held that *the line between the borrowing of unprotected elements and the reproduction of protected material is tenuous* and that *the elements borrowed, while 'stylistic', could still be regarded as original, especially when combined*.¹¹⁶ Deeming recognisability an essential element of pastiche (otherwise the use would constitute, in his view, deceitful plagiarism),¹¹⁷ he supported that an overt stylistic imitation of an original work *would allow for some leeway to reuse protected elements*

from works or subject matter (in a 'recognisable' way) in their creation, so long as those elements serve an overt imitation of something else.¹¹⁸ In the alternative, parody and caricature would become mere sub-categories of pastiche.¹¹⁹

This looser interpretation of stylistic imitation to bypass the idea-expression dichotomy "hurdle" and render pastiche practically relevant appears interesting and appropriate. The limiting of pastiche to overt, textually signified imitations is also logically sound and sensible.

The AG concluded that pastiche is an artistic creation which (i) *evokes an existing work, by adopting its distinctive 'aesthetic language' while (ii) being noticeably different from the source imitated, and (iii) is intended to be recognised as an imitation*.¹²⁰

In section C of his opinion, the AG weighed on the compatibility of the InfoSoc Directive with freedom of the arts. He acknowledged the inability of the current copyright regime to distinguish between extensive plagiarism and minimal usage of protected material that does not conflict with the normal exploitation of the work, punishing both equally.¹²¹ The AG concluded in favour of the establishment of a more open-ended clause by the legislature, to remedy the current system's inflexibility and rigidity vis à vis derivative creations.¹²²

While, on the one hand, AG Emiliou argued in favour of a free-use type clause, he concluded that pastiche, specifically, cannot be interpreted in a way that fulfills this function. He favoured a historical rather than a purposive interpretation of the provision, arguing that the legislators of Infosoc did not envision it in this way.

While this is undoubtedly so, the evolution of a term's interpretation to better accommodate new cultural practices is not, in the author's opinion, undesirable. This might better fulfill the purposes of the rules of which the provision forms part, compared to an interpretation in accordance with the purposes of the legislators of twenty-five years ago, when the internet was still in diapers.

The second argument as to why pastiche cannot serve such a purpose, namely, that the secondary meaning of pastiche in everyday language as a combination of original elements is secondary and not prominent at all, does not appear correct, as this interpretation of pastiche is present in many modern dictionaries, and has been used historically.¹²³

It is true that, through such an interpretation, the exceptions of parody and caricature would be rendered redundant, but so would all of article 5(3)(k) upon the introduction of a fair-use clause, as was suggested.

¹⁰⁷ AG Opinion in *Pelham II*, section A.

¹⁰⁸ *Ibid.*, [44]–[45].

¹⁰⁹ *Ibid.*, [53].

¹¹⁰ *Ibid.*, [54].

¹¹¹ *Ibid.*, [56].

¹¹² *Ibid.*, [59].

¹¹³ *Ibid.*, [74].

¹¹⁴ *Ibid.*, [78].

¹¹⁵ *Ibid.*, [53], [62].

¹¹⁶ *Ibid.*, [65]–[66].

¹¹⁷ *Ibid.*, [61].

¹¹⁸ *Ibid.*, [67].

¹¹⁹ *Ibid.*, [69].

¹²⁰ *Ibid.*, [81].

¹²¹ *Ibid.*, [106]–[108].

¹²² *Ibid.*, [131]–[132].

¹²³ For example, as he, himself concedes in paragraph 55, in the Italian *pasticcio* opera.

The CJEU has held that free-use clauses are incompatible with the EU copyright legislative system, due to the closed-catalogue nature of copyright exceptions. It appears improbable that EU legislature will change its course and implement a free use clause any time soon. Thus, if AG Emiliou's interpretation is to be accepted, while some creative borrowing uses (the obvious, recognisable ones) will fall under pastiche, minimal creative borrowing such as the Kraftwerk sample used in *Nur Mir* will remain unprotected, although they impact the right-holders' interests minimally, if at all.

5. CONCLUSION

In the dawn of the information society, while the European Union strives to not fall behind with the times, when gigantic amounts of copyright protected material are more accessible than ever and user interaction with already existing works is at an all-time high, it is imperative for EU copyright law to take account of and acclimate to this new reality. This path the Union is called to follow is a dangerous one that must be trodden carefully. If copyright law is too strict and limiting on derivative creations, it runs the risk of becoming rigid and obsolete. On the other hand, if it is too lax, it runs the risk of undermining itself.

One must therefore proceed with caution. But in what direction?

The touchstone of copyright is originality. A work only deserves protection if it is the author's own intellectual creation. But what if this creation has used another as a stepping stone, an inspiration, and in the process borrowed original elements? It is true that there is no parthenogenesis in art, but how much borrowing is too much? Is any creative borrowing tantamount to a theft,¹²⁴ so that it all requires a license?

Such an assumption appears too harsh and disproportionate. To use the example of the *Metall auf Metall* case, the requirement of licensing for any kind of sampling or other form of musical borrowing will undoubtedly end up stifling creativity and disturbing the fair balance between copyright, neighbouring rights and artistic expression. If such is the direction of copyright laws, only the upper echelons of the music industry (and any other artistic industry) will have the financial ability to exercise true artistic freedom.

Even though a fair use clause is (rightly) deemed incompatible with the dogma and structure of EU copyright, this does not exclude the possibility of a more flexible interpretation of already existing copyright exceptions.

The perfect tool for EU copyright to safeguard and promote artistic freedom, while maintaining a fair balance

between copyright and user rights, may have been resting on the Union's hands, unnoticed, this entire time.

As all EU Member States have, as of now, implemented the pastiche exception in one form or another, and its definition is only now tentatively being shaped by (as of now not many) national courts, it might present the perfect vehicle for those purposes: that will depend on how the Court will reason in *Pelham II*.

The definition of the pastiche exception as an autonomous concept of EU law, proposed in this article, is one that encompasses a plethora of creative uses, allowing for the exercise of artistic freedom. It is argued to not be a sub-category of parody but rather hold its own, independent meaning. Lest it becomes impermissibly broad, it is circumscribed with the aid of the *noticeable difference* criterion of the derivative work from the original one, set by the CJEU for parody in *Deckmyn*. In addition, the three-step test is proposed to be applied by national courts on a case-by-case basis. The broad interpretation of an already existing exception (even in ways the original legislator could not have possibly envisioned) is, in the author's opinion, more realistic than AG Emiliou's suggestion that EU legislature adopts a different, flexible, open-ended clause.

In the (admittedly likely) event that a definition such as the one proposed in this thesis is deemed too broad by the CJEU, the one offered by AG Emiliou, while more conservative and exclusionary of minimal creative usage, appears appropriate and compliant with the three-step test.

Even though the legislators in the dawning of the new millennium surely did not envision for pastiche to be interpreted in such a manner, the once overlooked exception that was deemed unimportant and useless is now on the verge of transforming from an outcast ugly duckling to a beautiful swan. Its first rite of passage was realised with article 17(7) DSM. The final nudge in this direction, or, in the alternative, its hindering and return to irrelevance, rests in the hands of the CJEU. Let us hope that whatever the direction the Court decides to take, the result will be a happily ever after for rightholders and users alike.



Emmanouela Papadaki

Emmanouela Papadaki is an Athens-based lawyer qualified in the Athens Bar Association. She is the holder of an LLM in European Intellectual Property Law from Stockholm University. She has written her thesis on the EU copyright pastiche exception and its application from the perspective of musical borrowing. She is especially interested in copyright in the field of music, and in her free time she ponders on the copyright protection of her favourite art.

¹²⁴ In the landmark US sampling case *Grand Upright Music v. Warner Bros. Records, Inc.* [1991], the judge famously began his mandate by quoting the biblical commandment *Thou shalt not steal*.

From Reproduction to Licensing: Applying Article 15 CDSMD to the Process of Generative AI Training

Klara Schinzler

ABSTRACT

As Generative AI becomes central to the digital landscape, its reliance on vast datasets – often sourced from publicly available press publications – raises pressing legal questions concerning intellectual property (IP) rights. This article examines whether the use of such content for training AI systems may infringe Article 15 of the Copyright in the Digital Single Market Directive (CDSMD), a provision originally intended to regulate unlicensed uses by news aggregators and search engines.¹ It explores the legal implications of using press content at scale for training purposes – typically without attribution, remuneration, or a clear legal basis – and identifies the specific stages of the training process where reproduction rights may be implicated. A central issue is the scope of the press publishers' right (PPR), particularly the distinction between protected editorial content and unprotected "mere facts". To support this analysis, the article develops a test for assessing whether a given use constitutes infringing reproduction under Article 15 CDSMD. It further argues that, where training uses qualify as infringing, collective licensing could offer a pragmatic solution – ensuring legal certainty for developers, fair compensation for publishers, and fostering a sustainable and pluralistic digital information ecosystem.

1. INTRODUCTION

Since the public emergence of Generative AI in late 2022, the technology has been described as an "earthquake in the creative sectors and in the field of copyright, of a magnitude not experienced since the emergence of the Internet".² These models rely on vast datasets – much of it scraped from publicly available sources without authorisation. Press content plays a central role in these datasets. Key LLM training datasets are disproportionately composed of high-quality content owned by commercial publishers of news and media websites.³ This places press publishers in a paradoxical position: their content is indispensable for AI development, yet their rights are frequently ignored. As *Francesco Marconi* notes, media companies hold "some of the most valuable assets for AI

development: text data for training models and ethical principles for creating reliable and trustworthy systems."⁴ Unlike news aggregators, Generative AI does not link to or summarise content – it processes and internalises it in new forms, often bypassing attribution and user engagement entirely. As a recent *TollBit* report indicates, referral rates from AI chatbots to publishers' sites are 95.7% lower than from traditional search engines, with only 0.37% of users clicking through.⁵

In this context, Article 15 CDSMD emerges as a potentially significant legal tool. It was designed to grant press publishers control over certain uses of their content online. Yet its applicability to Generative AI training remains uncertain. The exclusion of "mere facts" and the absence of a clear threshold for protection create interpretative difficulties, especially in a sector where factual

¹ Recitals 54 & 55 CDSMD; E., Treppoz., "The Past and Present of Press Publishers' Rights in the EU", [2023], 46 (3) Colum. J.L. & Arts, 276 <<https://doi.org/10.52214/jla.v46i3.11228>> last accessed 13.05.2025.

² P. B., Hugenoltz, "Copyright and the Expression Engine: Idea and Expression in AI-Assisted Creations", (2024), Chicago-Kent Law Review, 3 <<https://www.ivir.nl/publicaties/download/chicagokentlawreview2024.pdf>> last accessed 13.05.2025.

³ G., Wukoson & J., Fortuna, "The Predominant Use of High-Authority Commercial Web Publisher Content to Train Leading LLM's", (2024), 1 referring to publishers in the United States, <<https://www.ziffdavis.com/wp-content/uploads/2024/11/The-Predominant-Use-of-High-Authority-Commercial-Web-Publisher-Content-to-Train-Leading-LLMs.pdf>> last accessed 13.05.2025.

⁴ M., Adami, "Is ChatGPT a threat or an opportunity for journalism? Five AI experts weigh in", (Reuters Institute 2023) <<https://reutersinstitute.politics.ox.ac.uk/news/chatgpt-threat-or-opportunity-journalism-five-ai-experts-weigh>> last accessed 13.05.2025.

⁵ EPC, "AI chatbots are killing publishers traffic – everyone loses out", (2025) <<https://www.epceurope.eu/post/ai-chat-bots-are-killing-publishers-traffic-everyone-loses-out>> last accessed 13.05.2025 citing TOLLBIT, "AI Scraping Is On The Rise. TollBit State of the Bots – Q42024", (2025) <<https://tollbit.com/bots/24q4/>> accessed last on 13.05.2025.

reporting is central. Meanwhile, growing concerns about IP infringement in AI development – now rated a top risk by McKinsey’s 2024 Global AI Survey⁶ – underscore the urgency of resolving these issues. In response, press publishers are exploring parallel strategies: suing and signing.⁷ So, some are initiating lawsuits, while others advocate for agreements.

This article examines whether and how the PPR applies to AI training on press content and explores how lawful reuse could be enabled through licensing mechanisms. This analysis unfolds across three principal sections: defining the substantive scope of the right (including the exclusion of “mere facts”), applying this framework to the technical architecture of Generative AI training processes and evaluating licensing mechanisms – particularly collective licensing – as a mechanism to reconcile legal protection with innovation.

2. THE SUBSTANTIVE SCOPE OF ARTICLE 15 CDSMD AND WHEN INFRINGEMENT OCCURS

To determine whether Article 15 can be applied to the context of Generative AI training, it is essential to first clarify the general scope of the right and establish when acts of infringement arise.

2.1 Scope of Protection

The PPR grants press publishers protection for the online use of their publications by ISSP’s (Information Society Service Providers). It creates a standalone related right – similar to those granted to other investors like broadcasters or phonogram and film producers.⁸

“Press publication” is defined in Article 2 (4) CDSMD as a collection primarily composed of literary works of a journalistic nature, which may also include other works or subject matter, and which cumulatively fulfil three conditions: (a) Constituting an individual item within a periodical or regularly updated publication under a single title, such as a newspaper or a general or special interest

magazine; (b) having the purpose of providing the general public with information related to news or other topics; and (c) is published in any media under the initiative, editorial responsibility and control of a service provider. Periodicals with scientific or academic aims are expressly excluded. Recital 56 of the CDSMD further clarifies that the concept covers media such as newspapers, subscription-based magazines, and news websites, but not blogs or non-editorial platforms. While other content types such as videos or photos are not excluded per se, the publication must still be primarily journalistic in nature. As with other provisions in EU Directives that do not refer to Member States’ laws, the concept of “press publication” is an autonomous notion of EU law requiring uniform application across the Union,⁹ while its application to specific facts must be conducted on a case-by-case basis within the fixed legal framework, so taking into account all the cumulative requirements.¹⁰

Article 2 (5) CDSMD defines ISSPs in line with Article 1 (1) (b) Directive 2015/1535:¹¹ services must be remunerated, provided at a distance, by electronic means, and on individual request.¹² CJEU case law and Recital 18 of the Ecommerce Directive 2000/31 confirm that this definition covers a broad range of online economic activities.¹³ ISSPs do not need to be established within the EU, but targeting EU users appears to be necessary, according to *Rosati* mere accessibility seems to be insufficient.¹⁴

The rights conferred in Article 15(1) mirror those in Articles 2 and 3(2) of the InfoSoc-Directive,¹⁵ namely reproduction and communication to the public, including making available to the public. Article 2 defines reproduction broadly, including direct and indirect copying, temporary or permanent, whole or partial, leading to a high level of protection.¹⁶ Though Article 15 does not clar-

⁶ R., Levy, “Navigating Copyright in the Age of Generative AI: Responsible AI Starts with Licensing”, [2024] <<https://www.copyright.com/blog/navigating-copyright-Generative-ai-responsible-ai-starts-with-licensing/>> last accessed 13.05.2025 citing A., Singla and Others, “The state of AI in early 2024: Gen AI adoption spikes and starts to generate value”, [2024], Exhibit 7 <<https://www.mckinsey.com/capabilities/quantumblack/our-insights/the-state-of-ai-2024>> last accessed 13.05.2025; for a newer version of the study s. A., Singla and Others, “The state of AI: How organisations are rewiring to capture value”, [2025] <<https://www.mckinsey.com/capabilities/quantumblack/our-insights/the-state-of-ai/#/>> last accessed 13.05.2025.

⁷ C., Tobitt, “Who’s suing AI and who’s signing: Ziff Davis sues OpenAI after Washington Post signs deal. 14 major publishers sue AI start-up Cohere Inc.”, [2025] <<https://pressgazette.co.uk/platforms/news-publisher-ai-deals-lawsuits-openai-google/>> last accessed 13.05.2025.

⁸ Which was the original idea of the proposal; s. L., Bently and Others, “Strengthening the Position of Press Publishers and Authors and Performers in the Copyright Directive”, [European Parliament, Policy Department for Citizens’ Rights and Constitutional Affairs 2017], Study for the JURI Committee, 15 <[https://www.europarl.europa.eu/Reg-DATA/etudes/STUD/2017/596810/IPOL_STU\(2017\)596810_EN.pdf](https://www.europarl.europa.eu/Reg-DATA/etudes/STUD/2017/596810/IPOL_STU(2017)596810_EN.pdf)> last accessed 13.05.2025.

⁹ E., Rosati, “Copyright in the Digital Single Market: Article-by-Article Commentary on the Provisions of Directive 2019/790”, [OUP 2021], 260, for general cases in the field of copyright and related rights s. *inter alia* – Case C-5/08 *Infopaq International* ECLI:EU:C:2009:465 para 27–29 and C-128/11 *UsedSoft* ECLI:EU:C:2012:407 para 40 cited *Ibid*.

¹⁰ E., Rosati, “Copyright in the Digital Single Market: Article-by-Article Commentary on the Provisions of Directive 2019/790”, [OUP 2021], 262.

¹¹ Directive (EU) 2015/ 1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services, OJ L 241, 17.9.2015, pp. 1–15.

¹² E., Rosati, “Copyright in the Digital Single Market: Article-by-Article Commentary on the Provisions of Directive 2019/790”, [OUP 2021], 262.

¹³ E., Rosati, “Copyright in the Digital Single Market: Article-by-Article Commentary on the Provisions of Directive 2019/790”, [OUP 2021], 262 citing Case C-649/18 A (*Advertising and sale of medicinal products online*) EU:C:2020:764 para 31.

¹⁴ E., Rosati, “Copyright in the Digital Single Market: Article-by-Article Commentary on the Provisions of Directive 2019/790”, [OUP 2021], 263. Deriving this statement from the fact that the CJEU, while no decision has been made yet in relation to the right of communication to the public, it has established this approach in relation to the right of distribution, the SGDR and in the trade mark field.

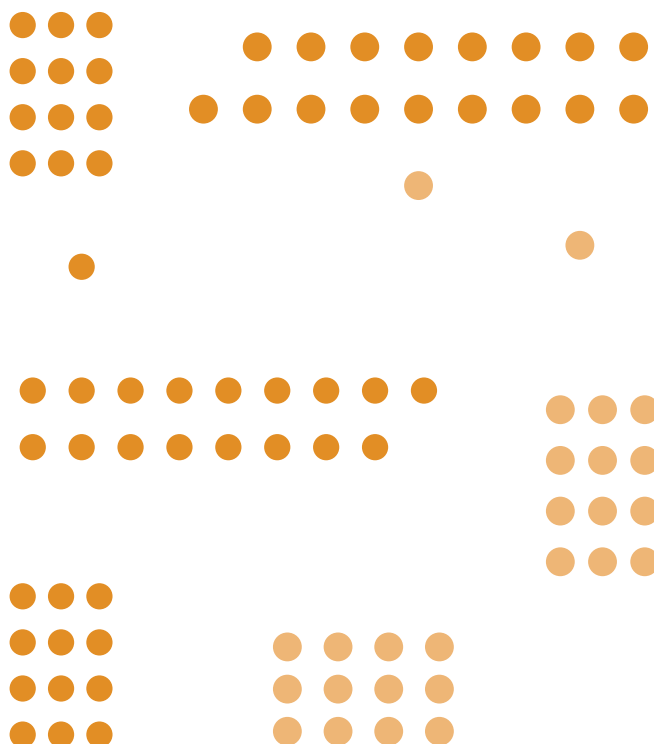
¹⁵ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167/10, herein InfoSoc-Directive.

¹⁶ Case C-5/08 *Infopaq International* ECLI:EU:C:2009:465 para 42–42 & Case C-476/17 *Pelham* ECLI:EU:C:2019:624 para 30 cited in E., Rosati, “Copyright in the Digital Single Market: Article-by-Article Commentary on the Provisions of Directive 2019/790”, [OUP 2021], 264.

ify whether the PPR follows Article 2(a) (authors) or 2(b) – (e) (related rights holders) InfoSoc-Directive, Recitals 54–55 clarify that the protection is based on investment, aligning it with the latter.¹⁷ However, the right does not apply to private or non-commercial use.¹⁸ Article 15 (1) CDSMD also excludes hyperlinking, individual words, and “very short extracts”, though they remain undefined,¹⁹ leading to fragmentation in national implementation.²⁰

A further exclusion – of “mere facts” – appears in Recital 57 CDSMD. It is *prima facie* based on a foundational principle of copyright, the ideas/expression dichotomy – which holds that protection is only granted to the expression of ideas rather than ideas themselves.²¹ “Copyright protection may be granted to expressions, but not to ideas, procedures, methods of operation or mathematical concepts as such.”²² In the light of this premise, the notion of facts shall be intended to encompass ideas, procedures, methods of operation, or mathematical concepts as such²³ and “mere” refers to “nothing more than”.²⁴ However, the PPR differs from copyright in that it does not require originality; it protects not the intellectual creation, but the organisational and financial investment made by the press publisher in producing press publications.²⁵

Despite the centrality of this exclusion, it is noteworthy that it does not appear in the operative provision itself. This raises the question about its legal function. Recitals cannot create new rights or restrictions; however, they may clarify the meaning of provisions where consistent with the legislative text.²⁶ In this context, the “mere facts” exclusion is best understood not as an autonomous norm-setting device, but as a clarification that does not extend beyond the scope already implied by Article 15



(1) CDSMD. Facts, by nature, are discovered rather than created; they are the raw materials of journalism, not its protected product. The investment protected by Article 15 must go beyond the mere collection of factual content and reflect organisational or editorial effort.²⁷ This understanding finds further support in the *Sui Generis Database Right* (SGDR) under Directive 96/9/EC,²⁸ which protects substantial investment in obtaining or verifying data, but not in its creation.²⁹ Analogously, under Article 15 CDSMD, the mere effort of uncovering or recording facts does not suffice to trigger protection, unless those facts are presented in a way that reflects editorial or organisational input.

Unlike the SGDR,³⁰ Article 15 CDSMD does not require substantiality of investment.³¹ Consequently, any demon-

¹⁷ E., Rosati, “Copyright in the Digital Single Market: Article-by-Article Commentary on the Provisions of Directive 2019/790”, [OUP 2021], 267.

¹⁸ Those remain subject of already existing copyright rules, s. Recital 55 CDSMD.

¹⁹ E., Rosati, “Copyright in the Digital Single Market: Article-by-Article Commentary on the Provisions of Directive 2019/790”, [OUP 2021], 274.

²⁰ S. i. e. E., Rosati, “Is Harmonization Good if the End Result is Even More Fragmentation? The Case of Article 15 CDSMD Directive and the Exclusion of ‘Very Short Extracts’”, (2023), forthcoming in M., Senftleben and Others (eds), *The Cambridge Handbook on Media Law and Policy in Europe* (CUP), Stockholm Faculty of Law Research Paper Series, no. 129 <<https://ssrn.com/abstract=4519834>> last accessed 13.05.2025.

²¹ E., Rosati, “Copyright in the Digital Single Market: Article-by-Article Commentary on the Provisions of Directive 2019/790”, [OUP 2021], 286; Case C-310/07 *Levola Hengelo* EU:C:2018:899 para 39 referring to Case C-406/10 *SAS Institute* EU:C:2012:259 para 33.

²² Case C-310/07 *Levola Hengelo* EU:C:2018:899 para 39 referring to Case C-406/10 *SAS Institute* EU:C:2012:259 para 33.

²³ E., Rosati, “Copyright in the Digital Single Market: Article-by-Article Commentary on the Provisions of Directive 2019/790”, [OUP 2021], 286.

²⁴ “mere” <<https://dictionary.cambridge.org/dictionary/english/mere>> last accessed 13.05.2025.

²⁵ E., Rosati, “Copyright in the Digital Single Market: Article-by-Article Commentary on the Provisions of Directive 2019/790”, [OUP 2021], 286.

²⁶ T., Klimas & J. Vaičiukaitė, “The Law Of Recitals in European Community Legislation”, (2009), 15(1) *ILSA* 63 <<https://nsuworks.nova.edu/ilsajournal/vol15/iss1/6>> last accessed 13.05.2025; Case C-173/99 *BECTU* ECLI:EU:C:2001:356 para 37–39 cited in M., Den Heijer, T. v. O. v. den Abeelen, & A., Maslyka, “On the Use and Misuse of Recitals in European Union Law”, (2019), Amsterdam Law School Research Paper No. 2019-31, Amsterdam Center for International Law No. 2019-15, 5 <<https://dx.doi.org/10.2139/ssrn.3445372>> last accessed 13.05.2025.

²⁷ E., Rosati, “Copyright in the Digital Single Market: Article-by-Article Commentary on the Provisions of Directive 2019/790”, [OUP 2021], 286., Axel Springer SE, Written Comments in Response to the US Office’s Publishers’ Protection Study, [2021], 25 <<https://www.copyright.gov/policy/publishersprotections/initial-comments/Axel%20Springer%20SE%20-%20Initial%20Comment.pdf>> last accessed 13.05.2025.

²⁸ Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the protection of databases [1996] OJ L77/20.

²⁹ For the so-called creation/obtaining dichotomy s. Case C-762/19 *CV-Online Latvia* ECLI:EU:C:2021:434; Case C-338/02 *Fixtures-Svenska* ECLI:EU:C:2004:696; Case C-203/02 *British Horseracing* ECLI:EU:C:2004:695; Case C-46/02 *Fixtures-Oy* ECLI:EU:C:2004:694; Case C-444/02 *Fixtures-OPAP* ECLI:EU:C:2004:697 all as cited in P., Burdese, “AI-generated databases. Do the creation/obtaining Dichotomy and the Substantial Investment Requirement Exclude the *Sui Generis* Right Provided for under the EU Database Directive? Reflection and proposals.”, (2020), WIPO academy, University of Turin and ITC-ILLO, Master of Laws in IP, Research Papers Collection – 2019–2020, 5 <<https://dx.doi.org/10.2139/ssrn.3850662>> last accessed 13.05.2025.

³⁰ Recitals 7, 39 and 40 of the Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the protection of databases [1996] OJ L77/20.

³¹ In a *a contrario* reading of the Directives, comparable to Case C-476/17 *Pelham* ECLI:EU:C:2019:624, Opinion AG Szpunar ECLI:EU:C:2018:1002 para 37, 38.

strable investment, however minimal, may attract protection – unless the content qualifies as “mere facts.” As such, the exclusion of mere factual content becomes the primary threshold delimiting the scope of the PPR. Mirroring the copyrights idea/expression dichotomy, which requires originality from creative freedom to trigger protection,³² analogies can be drawn from copyright case-law. According to the CJEU, content entirely determined by facts – where expression and information are indissociable – lacks originality.³³ *AG Szpunar in Funke Medien NRW* stressed that copyright must not be used to restrict access to information vital for democratic discourse and mechanisms like the idea/expression dichotomy must be given full effect in light of freedom of expression.³⁴ Analogously, under the PPR, when press content is wholly shaped by facts – i.e. simple headlines or statistical reports – protection does not arise unless distinct editorial investment is evident.

Concluding, this limitation ensures that the PPR does not devolve into a mechanism for monopolising public domain content but remains focused on its stated objective: securing a sustainable press sector by protecting investment in the editorial process. In the specific context of the news sector, the exclusion of “mere facts” is particularly significant. Information works are often constrained by limited expressive means, raising concerns under the idea/expression dichotomy.³⁵ Applying this argument to related rights requires caution, as the PPR protects press publications regardless of originality. While facts may be expressed in limited ways—and thus investment in presenting them is also limited—this does not unduly restrict the PPR’s scope, especially since the exclusion of facts is the only explicit threshold under Article 15 CDSMD and serves to balance IP protection with fundamental rights under Article 17(2) ECFR.³⁶

2.2 Determining Infringement: Towards a functional test

Having clarified the scope of Article 15 CDSMD through the “mere facts” exclusion, the next step is to assess when a specific use of protected content constitutes infringing reproduction (in part). This inquiry is central to determining whether acts such as Generative AI training may infringe the Press Publishers’ Right (PPR). While con-

tent lacking financial or organisational investment falls outside the right’s scope, use of protected content still requires assessment as to whether it triggers the reproduction right – especially in cases involving partial reuse.

Drawing from *Pelham*,³⁷ infringement occurs where reproduction interferes with the rightholder’s ability to recoup investment. Although *Pelham* concerned phonogram producers, the CJEU’s reasoning is applicable to Article 2(b)–(e) InfoSoc rights more broadly.³⁸ Given that Article 15 CDSMD shares this investment-based rationale, applying this interpretation and the underlying balancing approach is both appropriate and coherent. Article 17(2) of the Charter of Fundamental Rights of the European Union (ECFR) does not confer absolute IP protection; it must be balanced against competing rights, including freedom of expression under Article 11 ECFR. Therefore, the relevant question becomes whether the reproduction interferes with the economic return on investment, not merely whether a portion of content is taken.³⁹ This is the case when what has been reproduced, indirectly or directly, in whole or in part, reflects the investment made by the concerned publisher.⁴⁰

To make this determination, the concept of “investment” must be understood. The meaning and scope of reproduction (in part) must be determined by considering their usual meaning in everyday language, while also taking into account the context in which they occur and the purpose of the rules of which they are part.⁴¹ As this is tied to the concept of investment, the same goes for that determination. According to the *Cambridge English Dictionary* an investment is the act of putting money or effort into something to make a profit or achieve a result.⁴² Financially, it refers to using capital in the present to increase an assets value over time.⁴³ Legally, the nature of protected investment is inherently dependent on the subject matter of the related right in question.⁴⁴

Investment, as relevant to press publishers and taken from the definition of “press publication”, stems from editorial initiative, responsibility, and control. These functions encompass content initiation, editing, and publication oversight.⁴⁵ Any demonstrable investment is

³² S. i.e. Case C-469/17 *Funke Medien NRW* ECLI:EU:C:2019:623 para 19; Case C-5/08 *Infopaq International* ECLI:EU:C:2009:465 para 49; Case C-145/10 *Painer* ECLI:EU:C:2011:798 para 89, 92.

³³ Case C-469/17 *Funke Medien NRW* ECLI:EU:C:2019:623, Opinion AG Szpunar ECLI:EU:C:2018:870 para 19.

³⁴ Case C-469/17 *Funke Medien NRW* ECLI:EU:C:2019:623, Opinion AG Szpunar ECLI:EU:C:2018:870 para 37 cited in C., Geiger & E. Izyumenko, “Freedom of Expression as an External Limitation to Copyright Law in the EU: The Advocate General of the CJEU Shows the Way”, [2019], 41(3) E.I.P.R., 133.

³⁵ U., Furgal, “Rights on News: expanding copyright on the internet”, [2020], Florence: European University Institute, EUI, LAW, PhD Thesis, 150–152 <<https://doi.org/10.2870/82845>> last accessed 13.05.2025.

³⁶ Intellectual Property rights are not protected as absolute rights, s. i.e. Case C-469/17 *Funke Medien NRW* ECLI:EU:C:2019:623 para 72.

³⁷ Case C-476/17 *Pelham* ECLI:EU:C:2019:624.

³⁸ E., Rosati, “Copyright in the Digital Single Market: Article-by-Article Commentary on the Provisions of Directive 2019/790”, [IUP 2021], 266.

³⁹ E., Rosati, “Copyright in the Digital Single Market: Article-by-Article Commentary on the Provisions of Directive 2019/790”, [IUP 2021], 266 citing Case C-476/17 *Pelham* ECLI:EU:C:2019:624 para 33, 34.

⁴⁰ E., Rosati, “Copyright in the Digital Single Market: Article-by-Article Commentary on the Provisions of Directive 2019/790”, [IUP 2021], 266.

⁴¹ Case C-476/17 *Pelham* ECLI:EU:C:2019:624 para 28., Case C-201/13 *Deckmyn and Vrijheidsfonds* ECLI:EU:C:2014:2132 para 19 and the case-law cited.

⁴² “investment” <<https://dictionary.cambridge.org/dictionary/english/investment>> last accessed 13.05.2025.

⁴³ A., Hayes, “Investment: How and Where to Invest” <<https://www.investopedia.com/terms/i/investment.asp>> last accessed 13.05.2025.

⁴⁴ WIPO, Understanding Copyright and Related Rights, [2016], 27 <<https://doi.org/10.34667/tind.28946>> last accessed 13.05.2025.

⁴⁵ M. C., Caron, “Legal Analysis with focus on Article 11 of the proposed Directive on copyright in the Digital Market”, [European Parliament, Policy Department for Citizens’ Rights and Constitutional

sufficient to trigger protection. However, not every minor or insubstantial use will interfere with the opportunity to recoup such investment.

The *Pelham* decision recognised that phonograms are protected as indivisible wholes due to the fixation requirement.⁴⁶ By contrast, press publications are not defined by fixation, and may consist of both protected and unprotected elements. Thus, a recognisability test alone is inadequate for the PPR.

Examining the explicit exclusions in Article 15 CDSMD could help clarify where investment is typically absent and, by contrast, where it may be inferred. However, these exclusions do not imply an absence of investment per se; rather, each use must be assessed individually. If the reused material reflects investment, it may still fall within the right's scope, subject to applicable exceptions.⁴⁷ Thus, the exclusions inform – but do not fix – the boundaries of protection, underscoring the need for a flexible, context-sensitive standard.

To this end, a three-step functional test is proposed:

- I. **Recognisability of editorial elements:** Recognisability, though not a standalone test under the PPR, serves as a meaningful entry point for assessing infringement due to the right's inherently vague and non-fixed subject matter. Unlike the phonogram producers' right, where the object of protection is concretely fixed,⁴⁸ the PPR protects investment without a fixation requirement. It can therefore be subtle and difficult to isolate. This makes the presence of recognisable elements – such as distinct editorial structure, wording, or formatting – especially significant. If reused material is identifiable despite the lack of fixation and the diffuse nature of the subject matter, this strongly suggests that protected investment has been appropriated.
- II. **Value contribution:** The part used must contribute to the economic value of the original publication. The idea for added value as a tool for assessing infringement stems from the concept of financial investment, which implies an expectation of return and value enhancement.⁴⁹ Since added value is more tangible and measurable – i.e. through user engagement or licensing demand – it serves as a practical proxy for determining whether a use interferes with the publisher's ability to recoup that investment. This is easier than assessing the precise location

of editorial investment, which is often diffuse and intangible.

- III. **Substitution potential:** The idea of substitution potential as the last indicator arises from the original rationale behind the right – namely, to counteract losses caused by news aggregators diverting users away from original sources.⁵⁰ While actual substitution is rare, the potential to fulfil the same user need as the original can interfere with investment recoupment. This step introduces a subjective but necessary inquiry into market dynamics and content function.

These steps should be cumulatively applied to establish infringement. However, each may also serve as an indicator on its own. Most importantly, the exclusion of “mere facts” remains a mandatory limiting principle and must be considered throughout.

In conclusion, Article 15 CDSMD creates a low-threshold, investment-based related right aimed at press sector sustainability. The proposed test offers legal clarity in assessing infringement without undermining fundamental rights. Ultimately, judicial interpretation – particularly by the CJEU – will be necessary to define its boundaries and ensure a fair balance between rightholders and users in the digital environment.

3. IS AI TRAINING INFRINGING ARTICLE 15 CDSMD?

While AI lacks a universally accepted definition,⁵¹ the EU AI-Act⁵² describes it as a system capable of inferring outputs from inputs.⁵³ This article will focus on Generative AI, a special branch of AI dedicated to drafting new content,⁵⁴ and specifically on Large Language Models (LLMs), as a particular form of Generative AI.⁵⁵ These produce new textual content by recognizing patterns

Affairs 2017], 2 <[https://www.europarl.europa.eu/RegData/etudes/BRIE/2017/596834/IPOL_BRI\(2017\)596834_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2017/596834/IPOL_BRI(2017)596834_EN.pdf)> last accessed 13.05.2025.

⁴⁶ Case C-476/17 *Pelham* ECLI:EU:C:2019:624, Opinion AG Szpunar ECLI:EU:C:2018:1002 para 30.

⁴⁷ E., Rosati, “Copyright in the Digital Single Market: Article-by-Article Commentary on the Provisions of Directive 2019/790”, [OUP 2021], 277, 278.

⁴⁸ Case C-476/17 *Pelham* ECLI:EU:C:2019:624, Opinion AG Szpunar ECLI:EU:C:2018:1002 para 30.

⁴⁹ A., Hayes, “Investment: How and Where to Invest”, [08 May 2025] <<https://www.investopedia.com/terms/i/investment.asp>> last accessed 13.05.2025.

⁵⁰ Recitals 54 & 55 CDSMD; E., Treppoz., “The Past and Present of Press Publishers' Rights in the EU”, [2023], 46 [3] Colum. J.L. & Arts, 276.

⁵¹ M. U., Scherer, “Regulating Artificial Intelligence Systems: Risks, Challenges, Competencies, and Strategies, [2016], 29[2] JOLT, 359, for a detailed discussions <<https://jolt.law.harvard.edu/Articles/pdf/v29/29HarvJLTech353.pdf>> last accessed 14.05.2025.

⁵² Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, [EU] No 167/2013, [EU] No 168/2013, [EU] 2018/858, [EU] 2018/1139 and [EU] 2019/2144 and Directives 2014/90/EU, [EU] 2016/797 and [EU] 2020/1828 [Artificial Intelligence Act] (Text with EEA relevance). OJ L, 2024/1689, 12.7.2024.

⁵³ S. Art. 3 [1] AI-Act.

⁵⁴ J. L., Gillotte, “Copyright Infringement in AI-generated Artworks”, [2020], 53[5] U.C. Davis L. Rev., 2661 <<https://lawreview.law.ucdavis.edu/archives/53/5/copyright-infringement-ai-generated-artworks>> last accessed 14.05.2025.

⁵⁵ S., Warudkar & R., Jalit, “Unlocking the Potential of Generative AI in Large Language Models” in proceedings of the 2024 Parul International Conference on Engineering and Technology (PICET), 2 <<https://doi.org/10.1109/PICET60765.2024.10716156>> last accessed 14.05.2025.

in massive text datasets.⁵⁶ The technological disruption these models pose was not anticipated by the PPR. Unlike traditional aggregators, LLMs can ingest vast quantities of press content, distil its substance, and return user-specific outputs – thus eliminating referral traffic and undermining the economic sustainability of quality journalism.⁵⁷ Given the Directive's objective to safeguard the sustainability of quality journalism,⁵⁸ it is imperative that the PPR be interpreted dynamically to accommodate technological developments. Article 2 of the InfoSoc Directive, incorporated into Article 15 CDSMD, adopts a technologically neutral definition of reproduction that includes reproduction "by any means and in any form".⁵⁹ This formulation supports the adaptability of reproduction rights to new processes such as AI training.

3.1 Understanding AI Systems and Their Training Processes

Generative AI, particularly LLMs, function through natural language processing to predict textual sequences based on previously observed patterns.⁶⁰ These models are trained on vast corpora⁶¹ using machine learning architectures – especially transformers – that convert text into numerical representations (tokens) and encode semantic relationships through layers of weighted nodes known as neural networks.⁶² The core stages involve data collection, pre-processing, which relates to preparing

inputs by removing irrelevant data and segmenting text into tokens,⁶³ followed by the model training itself.⁶⁴ A useful pedagogical analogy likens this process to the education of a law student who, by analysing diverse case law, internalises legal principles to apply them to new factual scenarios.⁶⁵ Similarly, LLMs iteratively adjust internal parameters to better predict textual outcomes, based on exposure to large volumes of structured training data.

3.2 Is AI Reproducing?

To determine whether Generative AI Training infringes the reproduction right under Article 15 CDSMD, it is essential to assess the discrete stages of the training process where reproduction may occur. Scholarly analyses increasingly converge on the conclusion that reproduction in the light of copyright takes place at several levels, particularly during the initial acquisition.⁶⁶ Whether this can be transferred to the related right of press publishers will be analysed in the following.

3.2.1 Dataset Compilation

The first stage – dataset compilation – typically involves the use of automated web scraping tools to extract content, often in HTML format,⁶⁷ from online sources.⁶⁸ Although HTML structures text using technical tags, it still captures and reproduces the original editorial content, including headlines and introductory paragraphs⁶⁹ – elements that exemplify embody the publisher's investment through phrasing and structure. Applying the tripartite test for infringement under Article 15 CDSMD – recognisability, contribution to value, and substitution potential – the web scraping of news websites readily satisfies all three criteria. The editorial structure and substantive content remain recognisable in HTML, as the underlying text is typically reproduced verbatim and the fundamental structural elements are preserved through

⁵⁶ i.e. N., Lucchi, "ChatGPT: A Case Study on Copyright Challenges for Generative Artificial Intelligence Systems", (2024), 15(3) EURJRR, 603 <<https://doi.org/10.1017/err.2023.59>> last accessed 13.05.2025.

⁵⁷ Gartner Inc, Gartner Predicts Search Engine Volume Will Drop 25% by 2026, Due to AI Chatbots and Other Virtual Agents, (Press Release, 2024) <<https://www.gartner.com/en/newsroom/press-releases/2024-02-19-gartner-predicts-search-engine-volume-will-drop-25-percent-by-2026-due-to-ai-chatbots-and-other-virtual-agents>> last accessed 14.05.2025; A., Schiffrin & H. Mateen, "Startup Aims To Help Publishers Collect Fees from AI Companies", (2024) <<https://www.techpolicy.press/startup-aims-to-help-publishers-collect-fees-from-ai-companies/>> last accessed 13.05.2025 & G., De Vynck & C., Zakrzewski, "Web publishers brace for carnage as Google adds AI answers", (2024) <<https://www.washingtonpost.com/technology/2024/05/13/google-ai-search-io-sge/>> last accessed 14.05.2025.

⁵⁸ Recital 53 CDSMD.

⁵⁹ R. Ducato & A., Strowel, "Ensuring text and data mining: remaining issues with the EU copyright exceptions and possible ways out", (2021), 43(5) E.I.P.R., 338 footnotes 79, 80 mentioning that there are other ways of defining technological neutrality.

⁶⁰ M., Senftleben, "Remuneration for AI Training – A New Source of Income for Journalists?", (2024), 4 forthcoming in M., Senftleben and Others (eds), *The Cambridge Handbook of Media Law and Policy in Europe*, Cambridge University Press; N., Lucchi, "ChatGPT: A Case Study on Copyright Challenges for Generative Artificial Intelligence Systems", (2024), 15(3) EURJRR, 603.

⁶¹ M., Iglesias Portela, S., Shamulia & A., Anderberg, "Intellectual Property And Artificial Intelligence. A literature review", (Publications Office of the European Union 2019), 10 <<https://op.europa.eu/sv/publication-detail/-/publication/912bc3f8-7d67-11eb-9ac9-01aa75ed71a1/language-en>> last accessed 13.05.2025.

⁶² M., Senftleben, "Remuneration for AI Training – A New Source of Income for Journalists?", (2024), 4 forthcoming in M., Senftleben and Others (eds), *The Cambridge Handbook of Media Law and Policy in Europe*, Cambridge University Press; A., Zewe, "Explained: Generative AI", (2023); J. L., Gilotte, "Copyright Infringement in AI-generated Artworks", (2020), 53(5) U.C.Davis L. Rev., 2661; EUIPO, "The Development of Generative Artificial Intelligence from a Copyright Perspective", (2025), 26 <<https://www.euipo.europa.eu/sv/publications/genai-from-a-copyright-perspective-2025>> last accessed 13.05.2025.

⁶³ EUIPO, "The Development of Generative Artificial Intelligence from a Copyright Perspective", (2025), 30.

⁶⁴ See all stages W., Huang & X., Chen, "Does Generative AI copy? Rethinking the right to copy under copyright law", (2025), 56 CLSR, 2 <<https://doi.org/10.1016/j.clsr.2024.106100>> last accessed 14.05.2025 confirmed by the EUIPO, "The Development of Generative Artificial Intelligence from a Copyright Perspective", (2025), 30, 128.

⁶⁵ Analogy derived from V., Lindberg, "Building and Using Generative Models under US Copyright Law", (2023), 18(2) Rutgers Bus. L.R., 6, 7 <<https://ssrn.com/abstract=4464001>> last accessed 14.05.2025.

⁶⁶ W., Huang & X., Chen, "Does Generative AI copy? Rethinking the right to copy under copyright law", (2025), 56 CLSR, 2.

⁶⁷ I., Vistorskyte, "News Scraping: Everything You Need to Know", (2021) <<https://oxylabs.io/blog/news-scraping>> last accessed 14.05.2025.

⁶⁸ I., Cohen, "From Headlines to AI: Narrowing the Bargaining Gap between News and AI companies", (2024), 1, 6, 7 <<https://dx.doi.org/10.2139/ssrn.4878254>> last accessed 14.05.2025.

⁶⁹ A., Sellers, "Twenty Years of Web Scraping and the Computer Fraud and Abuse Act", (2018), 24 Boston Journal of Science & Technology Law, 384, 386 <https://scholarship.law.bu.edu/faculty_scholarship/465/?utm_source=scholarship.law.bu.edu%2Ffaculty_scholarship%2F465&utm_medium=PDF&utm_campaign=PDFCoverPages> last accessed 14.05.2025; A., Sharma, "Introduction to HTML (Hyper Text Markup Language) – A Review Paper", (2018), 7(5) IJSR, 1337 <<https://www.ijsr.net/getabstract.php?paperid=ART20182355>> last accessed 14.05.2025.



HTML mark-up.⁷⁰ This technical representation maintains the investment inherent in both the linguistic formulation and the organisational layout of the original publication. The components extracted – most notably headlines, lead paragraphs, and introductory summaries – are of particular economic relevance, given their role in capturing user attention, enhancing search engine visibility, and driving traffic. Increased user engagement directly correlates with advertising revenue, thereby evidencing a clear contribution to the publication's economic value. Lastly, the systematic aggregation and ingestion of such content by Generative AI systems facilitates the generation of outputs that may serve as functional substitutes for original press content. While complete market substitution has not yet materialised, the legal criterion of substitution under the developed test does not require actual displacement, but merely the potential for such an effect. Accordingly, the indirect but substantial substitution potential affirms the legal relevance of this early-stage act of reproduction.

3.2.2 Pre-Processing Stage

Following dataset compilation, raw text undergoes pre-processing, so data cleaning and tokenisation. During tokenisation, the text is fragmented into units, singular words, word parts, numbers and punctuations, that get assigned a numerical value. These so-called tokens can

be algorithmically analysed.⁷¹ Whether this process constitutes reproduction under Article 15 CDSMD is less clear. At this point the meaning of “recognisability”⁷² would be challenged. While traditional interpretations of “recognisability” would rely on perceptibility to human users, a broader, technologically informed view might encompass algorithmic recognisability, particularly if tokens retain structural or semantic traces of the original content. Nonetheless, the fragmented and abstracted nature of tokens challenges their economic and communicative value. Furthermore, the exclusion of “individual words”, while not judicially defined yet, strengthens the implication that tokens – often smaller than words – are unlikely to meet the threshold for reproduction. Therefore, although arguable under a non-exhaustive test, tokenisation alone appears to be insufficient to establish infringement in most cases.

3.2.3 The Model Itself

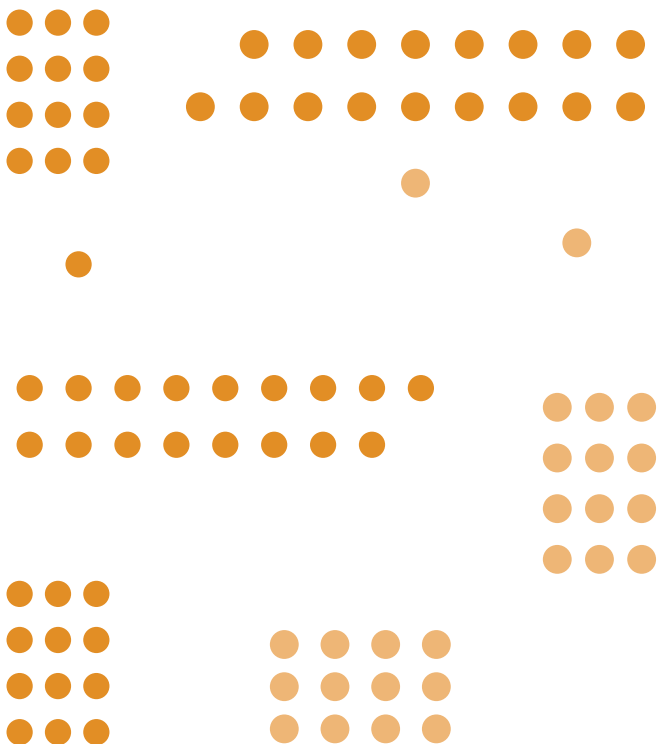
The final consideration is whether reproduction occurs within the trained model itself. LLMs encode knowledge through adjustments in neural weights and statistical correlations rather than by storing literal content.⁷³ These

⁷⁰ A., Sellers, “Twenty Years of Web Scraping and the Computer Fraud and Abuse Act”, (2018), 24 Boston Journal of Science & Technology Law, 384, A., Sharma, “Introduction to HTML (Hyper Text Markup Language) – A Review Paper”, (2018), 7(5) IJSR, 1337.

⁷¹ EUIPO, “The Development of Generative artificial Intelligence from a Copyright Perspective”, (2025), 145–149, inter alia with the example of ChatGPT.

⁷² For recognisability in *Pelham* see E., Rosati, “Of tables and other furniture: AG Szpunar advises CJEU on originality (but also proposes adoption of recognisability test for infringement)”, (2025) < <https://ipkit-ten.blogspot.com/2025/05/of-tables-and-other-furniture-ag.html> > last accessed 14.05.2025; J., Kiiski, “Recognising music samples – whose ear to trust in IP?”, (2024), 46(10) E.I.P.R., 676–683.

⁷³ EUIPO, “The Development of Generative Artificial Intelligence from a Copyright Perspective”, (2025), 151.



distributed representations lack perceptibility and do not enable direct retrieval of protected material. Accordingly, recognisability and value contribution are virtually non-existent at this stage. Furthermore, the CDSMD's recitals suggest that relevant acts of copying occur during data preparation, not within the internal structure of the trained model. Thus, reproduction in the legal sense is not sustained at this level.

3.2.4 Interim Conclusion

Generative AI Training implicates the reproduction right under Article 15 CDSMD primarily during the data acquisition phase, where web scraping results in the capture and storage of protected content. While later stages such as tokenisation and model training involve substantial transformation, they present a weaker case for infringement due to diminished recognisability and commercial relevance of the singular parts. Accordingly, legal enforcement of the PPR in the context of AI training should focus on the early-stage act of web scraping, which most directly interferes with the press publishers' ability to recoup their investment.

4. EXCEPTIONS, LICENSING AND FUTURE IMPLICATIONS

Assuming, as this article has argued, that the training of Generative AI models constitutes acts of infringing reproduction under Article 15 CDSMD, it becomes necessary to examine the potential applicability of relevant exceptions. In the absence of such exceptions, licensing remains the necessary legal mechanism to authorise such use.

4.1 Exceptions

While the applicability of the Text and Data Mining (TDM) exceptions under Articles 3 and 4 CDSMD is acknowledged, their analysis is excluded due to the commercial nature of most AI training, thereby rendering Article 3 CDSMD inapplicable, and the unresolved legal uncertainty surrounding the opt-out mechanism under Article 4 (3) CDSMD.⁷⁴ The only remaining potentially applicable provision is the exception for temporary acts of reproduction under Article 5(1) of the InfoSoc-Directive. The temporary reproduction exception requires five cumulative conditions to be fulfilled: the act must be (1) temporary; (2) transient or incidental; (3) an integral part of a technological process; (4) serve either lawful use or transmission between third parties; and (5) lack independent economic relevance.⁷⁵ These criteria were originally designed to ensure the technical operability of the internet, balancing broad reproduction rights with the need for technological innovation. Whether these conditions apply to AI training processes remains contested.⁷⁶ In *LAION*, the Hamburg Regional Court held that the reproduction of photographs for an AI training dataset did not meet the necessary requirements, particularly because the copies were not deleted automatically and because their function was preparatory rather than incidental.⁷⁷ While this national ruling is instructive, it is not binding at the EU level, and the Court of Justice of the European Union (CJEU) has not yet addressed the issue. In the absence of authoritative clarification, licensing emerges as the more secure legal avenue for both rightholders and AI developers.

4.2 Licensing

Where no exception applies and the PPR is infringed, licensing becomes essential. Furthermore, licensing offers not only greater legal certainty – particularly in contrast to the unresolved requirements of exceptions such as the opt-out mechanism under Article 4 (3) CDSMD – but also serves to address broader ethical and societal considerations. Generative AI systems depend on human-created journalistic content – often accessed without authorisation or compensation.⁷⁸ Licensing ensures fairness, supports new revenue streams for press publishers,⁷⁹ and helps sustain professional journalism,

⁷⁴ i.e. N., Lucchi, "ChatGPT: A Case Study on Copyright Challenges for Generative Artificial Intelligence Systems", (2024), 15(3) EURJRR, 616.

⁷⁵ EUIPO, "The Development of Generative Artificial Intelligence from a Copyright Perspective", (2025), 50,51.

⁷⁶ EUIPO, "The Development of Generative Artificial Intelligence from a Copyright Perspective", (2025), 51.

⁷⁷ *Kneschke v LAION*, LG Hamburg, Judgement of 27 September 2024 para 62, 66.

⁷⁸ Initiative Urheberrecht, "Authors and Performers Call for Safeguards Around Generative AI in the European AI Act", (2023), 2 <<https://urheber.info/diskurs/call-for-safeguards-around-Generative-ai>> last accessed 14.05.2025.

⁷⁹ Maverick Publishing Specialists, "Licensing content to Generative AI platforms: a publisher's perspective", (2025) <<https://www.maverick-os.com/news-events/news/licensing-content-to-Generative-ai-platforms->

which plays a critical role in democratic discourse.⁸⁰ These concerns are reflected in the legislative history of the AI-Act. Recital 105 affirms that the use of protected content requires prior authorisation, unless a statutory exception applies.⁸¹ Author and performer organisations have repeatedly stressed the need for consent, remuneration, and human-centric AI development.⁸² Such advocacy has shaped industry practices: some rightholders have turned to litigation while others have signed licensing deals with AI developers.⁸³ Although these agreements are often confidential,⁸⁴ a *Reuters* institutes survey found that a majority of publishers favour collective licensing frameworks benefiting the sector as a whole over individual negotiations.⁸⁵

However, the appropriate structure of such licensing frameworks remains debated. Individual licensing offers flexibility⁸⁶ but is often impractical due to the volume of content and number of rightholders involved.⁸⁷ In the press publishing sector, this situation is somewhat simplified by the fact that publishers frequently control bundled rights, having acquired author rights contractually.⁸⁸ Still, high transaction costs and imbalanced negotiating power make one-to-one licensing unsustainable – particularly for smaller or regional publishers with limited market leverage.⁸⁹

Collective licensing, administered by Collective Management Organisations (CMOs),⁹⁰ provides a more viable solution.⁹¹ It allows for the aggregation of rights, simplifies negotiating processes, and can be tailored to the need of specific sectors.⁹² Recent developments, such as the Copyright Clearance Centre's (CCC) introduction of AI-specific licensing tools,⁹³ indicate the growing feasibility of such schemes.⁹⁴ Nonetheless, collective licenses face challenges, including limited representativeness of CMOs and difficulties allocating revenue – especially given the opacity of AI training processes.⁹⁵

More far-reaching is the proposal for statutory⁹⁶ or extended collective licensing (ECL), such as that in Spain's draft Royal Decree.⁹⁷ ECL allows licenses granted by CMOs to apply to non-members, provided opt-out options are available.⁹⁸ While this addresses the scale issue, it risks overriding rightholder autonomy and raises practical difficulties, such as the effectiveness of post-training opt-outs.⁹⁹ Although Article 12 CDSMD allows for ECL in situations where individual licensing is impractical,¹⁰⁰ its use remains controversial. It may offer legal coverage, but its automatic inclusion of non-con-

a-publishers-perspective/> last accessed 14.05.2025; M., Senftleben, "Remuneration for AI Training – A New Source of Income for Journalists?", (2024), 4 forthcoming in M., Senftleben and Others (eds), *The Cambridge Handbook of Media Law and Policy in Europe*, Cambridge University Press; N., Newman & Cherubini, F., "Journalism, media, and technology trends and predictions 2025", (Reuters Institute 2025) <<https://doi.org/10.60625/risj-vte1-x706>> last accessed 14.05.2025.

⁸⁰ M., Senftleben, "Remuneration for AI Training – A New Source of Income for Journalists?", (2024), 4 forthcoming in M., Senftleben and Others (eds), *The Cambridge Handbook of Media Law and Policy in Europe*, Cambridge University Press.

⁸¹ Recital 105, AI-Act.

⁸² Authors', Performers' and Other Creative Workers' Organisations, "Joint Statement on Artificial Intelligence and the Draft AI Act", (2023), 1 <<https://screendirectors.eu/joint-statement-on-artificial-intelligence-and-the-draft-eu-ai-act/>> last accessed 14.05.2025.

⁸³ C., Tobitt, "Who's suing AI and who's signing: Ziff Davis sues OpenAI after Washington Post signs deal. 14 major publishers sue AI start-up Cohere Inc.", (2025).

⁸⁴ G., Kahn, "How AI is reshaping copyright law and what it means for the news industry", (Reuters Institute 2025) <<https://reutersinstitute.politics.ox.ac.uk/news/how-ai-reshaping-copyright-law-and-what-it-means-news-industry>> last accessed 14.05.2025.

⁸⁵ N., Newman & Cherubini, F., "Journalism, media, and technology trends and predictions 2025", (Reuters Institute 2025).

⁸⁶ D., Gervais and Others, "The Heart of the Matter: Copyright, AI Training, And LLM's" (2024), 71 *Journal of the Copyright Society*, 27 <https://copyrightsociety.org/wp-content/uploads/2025/04/713_The-Heart-of-the-Matter.pdf> last accessed 14.05.2025.

⁸⁷ R., Matulionyte, "Generative AI and Copyright: Exception, Compensation or Both?", (2023), 134 *IPF*, 5 <<https://dx.doi.org/10.2139/ssrn.4652314>> last accessed 14.05.2025.

⁸⁸ S., Karapapa, "The Press Publishers Right under EU Law – Rewarding Investment through Intellectual Property" in E., Bonadio & P., Goidl (eds), *The Cambridge Handbook of Investment-Driven Intellectual Property*, (CUP 2023), 164; M., Stratton, "Market-Based Licensing for Publishers' Works is Feasible. Big Tech Agrees.", (forthcoming 2025), 48 *Colum. J.L. & Arts*, 7 <<https://dx.doi.org/10.2139/ssrn.5072814>> last accessed 14.05.2025.

⁸⁹ C., Geiger & V., Iaia, "The forgotten creator: Towards a statutory remuneration right for machine learning of Generative AI", (2024), 52 *CLSR*, 12 <<https://doi.org/10.1016/j.clsr.2023.105925>> last accessed 14.05.2025; M., Stratton, "Market-Based Licensing for Publishers'

Works is Feasible. Big Tech Agrees.", (forthcoming 2025), 48 *Colum. J.L. & Arts*, 7 citing Andreessen Horowitz, Comments on the US Copyright Office's Notice of Inquiry on Artificial Intelligence and Copyright (2023), 8 <<https://www.regulations.gov/comment/COLC-2023-0006-9057>> last accessed 14.05.2025; I., Cohen, "From Headlines to AI: Narrowing the Bargaining Gap between News and AI companies", (2024), 13.

⁹⁰ R., Matulionyte, "Generative AI and Copyright: Exception, Compensation or Both?", (2023), 134 *IPF*, 5.

⁹¹ D., Gervais and Others, "The Heart of the Matter: Copyright, AI Training, And LLM's" (2024), 71 *Journal of the Copyright Society*, 27.

⁹² D., Gervais and Others, "The Heart of the Matter: Copyright, AI Training, And LLM's" (2024), 71 *Journal of the Copyright Society*, 27.

⁹³ Copyright Clearance Centre, "CCC announces AI Systems Training License for the External Use of Copyrighted Works coming soon", (2025) <<https://www.copyright.com/media-press-releases/cc-announces-ai-systems-training-license-for-the-external-use-of-copyrighted-works-coming-soon/>> last accessed 14.05.2025; for more information about this new type of licence s. Copyright Clearance Centre, "Responsible AI Starts with Licensing" <<https://www.copyright.com/solutions-annual-copyright-license/business/>> last accessed 14.05.2025.

⁹⁴ R., Levy, "Navigating Copyright in the Age of Generative AI: Responsible AI Starts with Licensing", (2024); now also in Japan according to Copyright Clearance Centre, "Japan Academic Association for Copyright Clearance and RightsDirect Japan Announce the Availability of AI Re-Use Rights for Digital Copyright License" (2025) <<https://www.copyright.com/media-press-releases/japan-academic-association-for-copyright-clearance-and-rightsdirect-japan-announce-the-availability-of-ai-re-use-rights-for-digital-copyright-license/>> last accessed 14.05.2025.

⁹⁵ R., Matulionyte, "Generative AI and Copyright: Exception, Compensation or Both?", (2023), 134 *IPF*, 5, 6.

⁹⁶ S. inter alia C., Geiger & V., Iaia, "The forgotten creator: Towards a statutory remuneration right for machine learning of Generative AI", (2024), 52 *CLSR*, 12f.

⁹⁷ T., Nobre, "A first look at the Spanish proposal to introduce ECL for AI training", (2024), <<https://copyrightblog.kluweriplaw.com/2024/12/11/a-first-look-at-the-spanish-proposal-to-introduce-ecl-for-ai-training/>> last accessed 14.05.2025.

⁹⁸ Article 12 (1) CDSMD.

⁹⁹ US Copyright Office, Copyright and Artificial Intelligence, Part 3: Generative AI Training (Pre-Publication Version), (2025), 101 <<https://www.copyright.gov/ai/Copyright-and-Artificial-Intelligence-Part-3-Generative-AI-Training-Report-Pre-Publication-Version.pdf>> last accessed 14.05.2025.

¹⁰⁰ Article 12 CDSMD as described and cited in T., Nobre, "A first look at the Spanish proposal to introduce ECL for AI training", (2024).

senting rightholders raises concerns about the erosion of exclusive rights.¹⁰¹ This concern remains even more pronounced with statutory licensing. If we legally require a high level of protection for right holders¹⁰², then forcing creators and publishers/other related right holders into statutory licensing without even the option to opt-out undermines that principle. It treats their works as public infrastructure – not protected expressions.

4.3 Interim Conclusion

Generative AI is reshaping how society produces and consumes information. While many remain sceptical of AI-generated news,¹⁰³ especially in politically sensitive contexts,¹⁰⁴ younger demographics show more openness.¹⁰⁵ As trust becomes a core concern,¹⁰⁶ access to high-quality, verifiable training data is essential – precisely what licensing enables. The relationship between AI developers and press publishers is interdependent: the former require high quality journalistic content, while the latter depend on fair compensation to continue producing it. Licensing is thus not merely a legal formality but a structural necessity. While ECL may offer broad coverage, it risks overreach. Individual licensing, though principled, lacks the scale of an industry solution. Collective licensing via CMOs offers the most balanced solution: it preserves rightholder autonomy, allows for coordinated rights management, and facilitates lawful AI training practices without compromising democratic values.

5. CONCLUSION

This article has analysed whether the training of Generative AI systems infringes the reproduction right granted under Article 15 CDSMD and, if so, what form of licensing is most appropriate in response. Applying a functional three-part test – assessing recognisability, value contribution, and substitution potential – it was shown that the most legally relevant act of reproduction occurs during dataset compilation via web scraping. Later stages, such

as tokenisation and what is represented within the model itself, are less clearly infringing on their own. Given the absence of applicable (or practical) exceptions, licensing emerges as the necessary legal response. While individual licensing is burdensome and ECL potentially overreaching, collective licensing through CMOs offers a proportionate and workable middle ground. For press publishers who often control a coherent bundle of rights, CMOs are structurally well-positioned to facilitate such licensing efficiently. Ultimately, the viability of both Generative AI and the independent press sector depends on creating a legal and economic framework in which both can coexist. Licensing is not a barrier to innovation but a foundation for a sustainable digital ecosystem – one in which rights, quality journalism, and democratic values are respected and preserved.



Klara Schinzler

Klara is a recent graduate of the LL.M. program in European Intellectual Property Law at Stockholm University. Her thesis focused on the Press Publishers' Right under Article 15 of the Copyright in the Digital Single Market Directive (CDSMD) and its relevance to the training of generative AI models. Prior to her studies in Stockholm, she earned her first State Examination in Law at the University of Leipzig (Germany) in May 2024. Klara is now looking to build on her experience in Stockholm through an internship before returning to Germany to complete her legal clerkship and continue on the path to becoming a qualified lawyer.

¹⁰¹ US Copyright Office, Copyright and Artificial Intelligence, Part 3: Generative AI Training (Pre-Publication Version), (2025), 100.

¹⁰² i.e. Case C-5/08 *Infopaq International* ECLI:EU:C:2009:465 para 42–42 & Case C-476/17 *Pelham* ECLI:EU:C:2019:624 para 30 cited in E., Rosati, "Copyright in the Digital Single Market: Article-by-Article Commentary on the Provisions of Directive 2019/790", (IUP 2021), 264.

¹⁰³ F., Simon, "Neither humans-in-the-loop nor transparency labels will save the news media when it comes to AI", Figure 17, (Reuters Institute 2024) <<https://reutersinstitute.politics.ox.ac.uk/news/neither-humans-loop-nor-transparency-labels-will-save-news-media-when-it-comes-ai>> last accessed 14.05.2025.

¹⁰⁴ F., Simon, "Neither humans-in-the-loop nor transparency labels will save the news media when it comes to AI", Figure 18, (Reuters Institute 2024).

¹⁰⁵ F., Simon, "Neither humans-in-the-loop nor transparency labels will save the news media when it comes to AI", Figure 17, (Reuters Institute 2024).

¹⁰⁶ F., Simon, "Neither humans-in-the-loop nor transparency labels will save the news media when it comes to AI", Figure 19, (Reuters Institute 2024).

Standard essential patents (SEPs) in the EU – a way forward from the withdrawn SEP Regulation proposal?

Asko Metsola

ABSTRACT

Standard essential patents (SEPs) are squarely placed at the intersection of intellectual property, standardisation, and competition law. They are vital for the development and deployment of technologies such as 5G, 6G, and the Internet of Things. In April 2023, the European Commission proposed an SEP Regulation aimed at increasing transparency, ensuring fair licensing on FRAND terms, and reducing disputes. However, the proposal faced criticism for potential burdens, limited institutional capacity, and risks to EU competitiveness. In late 2024, the incoming Commission announced the withdrawal of the initiative, leaving open whether a new proposal or alternative approach will follow. This article explores the legal, economic, and policy implications of SEPs in the EU after the withdrawal. It reviews the existing EU competition law framework, key case law such as *Huawei v. ZTE*, and enforcement practice against Samsung and Motorola. It also assesses expert group recommendations and recent reports by Letta and Draghi, which highlight the importance of connectivity, digital sovereignty, and innovation. The article argues that future EU policy should favour market-based solutions – such as patent pools, voluntary dispute resolution, and greater transparency – over heavy-handed regulation. Strengthening FRAND enforcement, supporting SMEs, and investing in R&D are proposed as more balanced ways forward.

1. BACKGROUND

On 27 April 2023, the European Commission introduced a proposal for a Regulation of the European Parliament and of the Council on standard essential patents and amending Regulation (EU) 2017/1001 (COM(2023) 232 final, the SEP Regulation). The overall objectives of the proposed initiative were to 1) ensure that end users, including small businesses and EU consumers benefit from products based on the latest standardised technologies; 2) make the EU attractive for standards innovation; and 3) encourage both SEP holders and implementers to innovate in the EU, make and sell products in the EU and be competitive in non-EU markets. According to the proposal, it also aimed to incentivise participation by European firms in the standard development process and the broad implementation of such standardised technologies, particularly in Internet of Things (IoT) industries. It sought to 1) make available detailed information on SEPs and existing fair, reasonable, and non-discriminatory (FRAND) terms and conditions to facilitate licensing negotiations; 2) raise awareness of SEP licensing in the value chain; and 3) pro-

vide for an alternative dispute resolution mechanism for setting FRAND terms and conditions.¹

The current Commission for 2024–2029, which started its work on 1 December 2024, decided however to withdraw the proposal in its 2025 work programme, because it did not anticipate an agreement among the legislators. Following the withdrawal, the Commission announced it will evaluate whether to present a new proposal or select a different approach.²

Commission's Executive Vice-President for Tech Sovereignty, Security and Democracy, *Henna Virkkunen*, had warned during her European Parliament plenary hearing that the proposed regulation could harm Europe's competitiveness – especially in developing 5G and 6G technologies, where standard essential patents play a crucial

¹ Commission, 'Proposal for a regulation of the European Parliament and of the Council on standard essential patents and amending Regulation (EU) 2017/1001' COM(2023) 232 final, 27 April 2023.

² European Commission, 'Annexes to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions: Commission work programme 2025 – Moving forward together: A Bolder, Simpler, Faster Union' COM(2025) 45 final, 11 February 2025. See also Commission, 'Von der Leyen Commission 2024–2029' <https://commission.europa.eu/about/commission-2024-2029_en> accessed 23.6.2025.

role.³ According to President of the Commission *Ursula von der Leyen's* Mission letter to *Virkkunen*, Europe must exploit its strengths to maintain or attain leadership in strategic technologies, to establish essential assets for technological sovereignty and resilience, and to foster commercialisation of deep tech innovation.⁴

On von der Leyen's Mission letter to Commission's Executive Vice-President for Prosperity and Industrial Strategy, *Stéphane Séjourné*, the President of Commission urges the Commissioner to ensure that Commission's intellectual property policy continues to reward innovation and creativity and step up enforcement of the current rules.⁵ In answer to a question from the European Parliament Committee on Legal Affairs asking clarification on that Mission letter sentence, *Séjourné* argued that a reliable and transparent framework for SEP licensing would make the EU a more attractive destination for licensors and licensees. He emphasized the need to address licensing frictions in markets critical to the Union's competitiveness, particularly as the IoT era emerges and the global balance of SEP ownership shifts.⁶

Recent policy initiatives from the European Commission and prominent figures have also highlighted the urgent need to safeguard European competitiveness and attract investments. The EU member states are immensely different when it comes to technological capabilities and competencies, including telecommunication and digitalisation, and fragmented internal market might disincentivise innovation.

Former Prime Minister of Italy *Enrico Letta* was tasked to elaborate a High-Level Report on the future of the Single Market in September 2023. In his report, Letta emphasized that Europe should support digital innovation to reduce reliance on third-country digital services and better meet European citizens' preferences. He mentioned that technologies like 5G, future 6G, IoT, web 3.0, edge-cloud computing, and artificial intelligence would create new economic opportunities. In the next 5 to 10 years, trends like electrification, the green transition, resilient supply chains, and automation efficiency will grow and according to *Letta*, key to these changes are 5G/6G connectivity, artificial intelligence, and cloud solutions. *Letta*

stated that Europe should utilise the advantages of a unified telecommunications market and focus on promoting investments to address its connectivity investment gap. *Letta* also emphasised the importance of coherent policy decisions at the European level, particularly regarding the regulatory framework underpinning the 5G development. The European Union stands at a pivotal moment regarding the regulation and advancement of technologies that are fundamental to the digital and telecommunications landscape. He argued that Europe's strategic interest lies in maintaining its leadership in 5G development and standardisation.⁷

Mario Draghi, former European Central Bank President, was also asked by the European Commission to draft a report on his vision for Europe's future competitiveness. In his report, *Draghi* underscored that Europe lags behind its 5G deployment targets and invests significantly less per capita in telecommunications networks than operators in the United States.⁸ He also proposed that the EU should deregulate new investments in fiber, 5G standalone, and IoT, while ensuring competition is maintained to allow customers a choice at the retail level.⁹

But how legal and regulatory frameworks affect competition, innovation, and market dynamics in the EU?

2. SEP FRAMEWORK

SEPs emerge from patent law and economics of standardisation. Patents grant exclusive rights to inventors, while standardisation ensures interoperability and compatibility across different technologies. This intersection creates both opportunities and challenges in terms of innovation incentives and competitive market dynamics

Patent protection aims to promote innovation by providing inventors with temporary monopolies to their inventions. However, in the context of technical standards, these monopolies can become bottlenecks that limit market competition and technological development. Consequently, competition authorities and standard-setting organisations (SSOs) have established FRAND licensing frameworks. These frameworks are important for balancing the interests of patent holders and the need for broad use of standardised technologies. The licensing of SEPs under FRAND terms aims to prevent anticompetitive practices such as patent hold-up,

³ Florian Mueller, 'Mission letters, parliamentary speech suggest new EU Commission may withdraw or overhaul SEP Regulation proposal' (ip fray, 17 September 2024) <<https://ipfray.com/mission-letters-parliamentary-speech-suggest-new-eu-commission-may-withdraw-or-overhaul-sep-regulation-proposal/>> accessed 23.6.2025.

⁴ Commission, 'Mission letter – Henna Virkkunen, Executive Vice-President-designate for Tech Sovereignty, Security and Democracy' 6 <https://commission.europa.eu/document/3b537594-9264-4249-a912-5b102b7b49a3_en> accessed 23.6.2025.

⁵ Commission, 'Mission letter – Stéphane Séjourné, Executive Vice-President-designate for Prosperity and Industrial Strategy' 7 <https://commission.europa.eu/document/6ef52679-19b9-4a8d-b7b2-cb979e-b384eca_en> accessed 23.6.2025. See also Inbar Preiss, 'Comment: Séjourné, Virkkunen to tackle patent and copyright enforcement as IP policy ranks high in next EU Commission' (MLex, 19 September 2024) <<https://www.mlex.com/mlex/articles/2112625>> accessed 23.6.2025.

⁶ Parliament, 'Questionnaire to the Commissioner-Designate Stéphane Séjourné, Executive Vice-President for Prosperity and Industrial Strategy' 21–22 <https://hearings.elections.europa.eu/documents/sejourne/sejourne_writtenquestionsandanswers_en.pdf> accessed 23.6.2025.

⁷ Enrico Letta, 'Much more than a Market. Speed, security, solidarity – Empowering the Single Market to deliver a sustainable future and prosperity for all EU Citizens' (European Union, April 2024) 57 <<https://www.consilium.europa.eu/media/ny3j24sm/much-more-than-a-market-report-by-enrico-letta.pdf>> accessed 23.6.2025.

⁸ Mario Draghi, 'The future of European competitiveness – A competitiveness strategy for Europe (Part A)' (Commission, 9 September 2024) 31 <https://commission.europa.eu/topics/strengthening-european-competitiveness/eu-competitiveness-looking-ahead_en> accessed 23.6.2025.

⁹ Mario Draghi, 'The future of European competitiveness – In-depth analysis and recommendations (Part B)' (Commission, 9 September 2024) 76 <https://commission.europa.eu/topics/strengthening-european-competitiveness/eu-competitiveness-looking-ahead_en> accessed 23.6.2025.

where SEP holders request excessive royalties, and patent holdout, where implementers fail to engage in good faith negotiations.

Competition law, particularly within the EU, aims to prevent the abuse of dominant market positions. This involves limiting SEP holders' use of injunctions to gain leverage in licensing negotiations and ensuring that licensing terms are fair and transparent. The landmark case C-170/13, EU:C:2015:477, *Huawei v. ZTE* provided guidelines for negotiating FRAND licenses and emphasised the responsibilities of both SEP holders and implementers.¹⁰

2.1 The European Commission and SEPs

The European Commission published its Strategy on Standardisation in 2022.¹¹ Standards are seen as fundamental to the EU single market and according to the Strategy, Europe's competitiveness, technological sovereignty, reduction of dependencies, and protection of EU values will rely on the success of European stakeholders in international standardisation. However, the strategic importance of standards has not been fully acknowledged, affecting the EU's role in standards-setting. European standardisation faces global competition, requiring agility and strategic focus to maintain EU leadership. Therefore, the Strategy requires EU to promote a more strategic approach to international standardisation activities.¹² A High-Level Forum will be established to set priorities and coordinate European interests in standardisation. Additionally, the Commission will review existing standards and set up an EU excellence hub on standards to coordinate expertise and monitor international activities. The revision of the Standardisation Regulation also included in the Strategy.¹³

The Commission also plays a crucial role in enforcing competition law in the EU. Formerly known as Article 81 of the EC Treaty (TEC), Article 101(1) of the Treaty on the Functioning of the European Union (TFEU) prohibits all agreements, decisions and practices between undertakings and concerted practices which may affect trade between EU member states, and which have as their object or effect the prevention, restriction or distortion of competition within the internal market. Article 101(3) TFEU provides an exception that allows undertakings to defend against a violation of Article 101(1). Anti-competitive agreements under Article 101(1) are valid and

enforceable if they meet the conditions of Article 101(3).¹⁴ Article 102 TFEU, formerly Article 82 TEC, states that any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between member states.¹⁵

Competition law and in particular 101 TFEU may apply to the terms of standardisation agreements, whereas 102 TFEU deals also with issues such as access to proprietary standard and refusal to license IPRs related to standards.¹⁶ Enforcement in the EU has focused on determining whether, and under what circumstances, seeking an injunction for a SEP against an alleged patent infringer constitutes an abuse of dominant position under Article 102 TFEU.¹⁷

2.2 Commission on Samsung and Motorola Mobility

During the so-called smartphone patent wars in the first half of the 2010s,¹⁸ the Commission initiated investigations against Samsung¹⁹ and Motorola Mobility²⁰. Both cases involved a dispute over SEPs related to mobile technology and the inquiries examined whether seeking injunctive relief for FRAND-encumbered SEPs constituted an abuse of a dominant market position, especially in cases where the alleged infringer (in both cases, Apple) was a willing potential licensee.²¹

Samsung had started to seek injunctions against Apple based on its SEPs related to European Telecommunications Standards Institute's (ETSI) UMTS standard, a key industry standard for 3G mobile and wireless communications at the time.²² Similarly, Motorola sought injunc-

¹⁰ C-170/13, *Huawei Technologies Co. Ltd v ZTE Corp. and ZTE Deutschland GmbH*.

¹¹ Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – An EU Strategy on Standardisation: Setting global standards in support of a resilient, green and digital EU single market' COM(2022) 31 final.

¹² Giuseppe Colangelo, 'The politicization of IP protection: the case of standard essential patents' (SSRN, 6 December 2024) 15–17 <<https://ssrn.com/abstract=5046250>> accessed 23.6.2025.

¹³ COM(2022) 31 final (n 50) 4.

¹⁴ Pierre Arhel, 'Enforcement of Competition Law in Relation to Intellectual Property in the European Union' in Robert D. Anderson, Nuno Pires de Carvalho, and Antony Taubman (eds) *Competition Policy and Intellectual Property in Today's Global Economy* (Cambridge University Press, 2023) 754.

¹⁵ Treaty on the Functioning of the European Union (TFEU) [2012] OJ C 326/4.

¹⁶ Eliza G. Petritsi, 'The Case of Unilateral Patent Ambush Under EC Competition Rules' [2005] *World Competition* 28(1) 25–29–35.

¹⁷ Dieter Paemen, 'Spotlight: standard-essential patents in European Union' [Lexology, 12 July 2023] <<https://www.lexology.com/library/detail.aspx?g=663af740-78d9-4573-94ca-e2fafd98b650>> accessed 23.6.2025.

¹⁸ Michael Fröhlich, 'The smartphone patent wars saga: availability of injunctive relief for standard essential patents' [2014] *Journal of Intellectual Property Law & Practice*, Volume 9, Issue 2 156. See also Claudia Tapia and Spyros Makris, 'Negotiating SEP licenses in Europe after Huawei v ZTE: guidance from national courts' [4iP Council 2018] <<https://www.4ipcouncil.com/research/negotiating-sep-licenses-europe-after-huawei-v-zte-guidance>> accessed 23.6.2025.

¹⁹ Samsung (Case AT.39939) Commission decision C(2014) 2891 final.

²⁰ Motorola (Case AT.39985) Commission decision C(2014) 2892 final.

²¹ Stefano Barazza, 'Standard Essential Patents and FRAND Licensing: The Evolution of the European Approach' in Hayleigh Boshier and Eleonora Rosati (eds), *Developments and Directions in Intellectual Property Law: 20 Years of The IPKat* (Oxford Academic 2023) 505.

²² Commission, 'Antitrust: Commission accepts legally binding commitments by Samsung Electronics on standard essential patent injunctions' <https://ec.europa.eu/commission/presscorner/detail/en/ip_14_490> accessed 23.6.2025.

tion against Apple based on its SEP relating to ETSI's GPRS standard, part of the GSM standard relating to 2G.²³

In both cases, the Commission affirmed that the standard-setting process and the FRAND commitment could be considered exceptional circumstances, which characterise the exercise of an exclusive right as abusive conduct. The Commission clarified that "the mere fact of holding IPR does not constitute an objective justification for the seeking and enforcement of an injunction by a SEP holder against a potential licensee that is not unwilling to enter into a licence agreement on FRAND terms and conditions".²⁴

The Commission initially found that Samsung's use of injunctions against Apple based on its UMTS SEPs constituted an abuse of its dominant position, aligning with the Union's international obligations under the TRIPS Agreement²⁵. Similarly, Motorola's use of injunctions against Apple in Germany based on its Cudak GPRS SEP also constituted an abuse of its dominant position.²⁶

The Commission also concluded that its finding would, whilst taking into account the public interest in maintaining effective competition, fully respect the requirement that a fair balance must be struck between the fundamental rights and freedoms at stake, namely the rights linked to intellectual property enshrined in Article 17(2) of the Charter, the right of access to a tribunal enshrined in Article 47 of the Charter; and the freedom to conduct a business, enshrined in Article 16 of the Charter.²⁷ Same balance was also struck in the Motorola finding.²⁸

To address the Commission's concerns, Samsung committed to refrain from seeking any injunctions within the European Economic Area (EEA) for a period of five years based on any of its SEPs, both current and future, pertaining to technologies utilised in smartphones and tablets. This commitment applied to any company that agreed to adhere to a specified framework for licensing these SEPs, including a twelve-month negotiation period, and if no agreement is reached, allowing for the determination of FRAND terms by a court at the request of either party, or by an arbitrator if both parties consent.²⁹

Regarding Motorola, a prohibition decision was taken. No fines were imposed on either company for their anti-competitive behaviour.³⁰

2.3 Huawei v. ZTE (C-170/13) and its surge waves

Inevitably, similar questions and conflicts between the right holder seeking injunctive relief to enforce their exclusive rights, and the potential licensee and user of the technology needing access, were brought before the Court of Justice of the European Union (CJEU) for examination. The groundbreaking decision in the *Huawei v. ZTE* (C-170/13) reaffirmed that seeking an injunction for SEPs subject to a FRAND commitment may constitute an abuse of a dominant position if the proceedings are brought without notice or prior consultation with the alleged infringer.³¹

Request for preliminary ruling from Düsseldorf District Court was prompted by differences in approaches between the Commission in Samsung and Motorola Mobility and the German courts based on an older *Orange-Book-Standard* case from the Federal Court of Justice³² to the use of antitrust to curtail SEP holder's recourse to injunctive relief.³³

In this case, Huawei had a patent that was notified to ETSI as essential to the Long Term Evolution (LTE) standard. Concurrently with the notification, Huawei undertook to grant licences to third parties on FRAND terms.³⁴ ZTE utilised the patented technology and when license negotiations were unsuccessful, Huawei sought to apply for an injunction.³⁵ Düsseldorf District Court noted that different approaches exist to determine whether Huawei's request for a prohibitory injunction against ZTE is an abuse of dominance, ending up asking the CJEU for preliminary ruling on 1) whether the mere willingness of the infringer to negotiate is enough to presume abuse of a dominant position, or if the infringer must submit an acceptable, unconditional offer to conclude a licensing agreement; 2) if willingness to negotiate is sufficient, what specific qualitative and time requirements does Article 102 TFEU impose on this willingness; 3) if an acceptable offer is required, what specific qualitative and time requirements does Article 102 TFEU impose on this offer and can the offer be conditional on the use or validity of the SEP; 4) if the infringer must fulfil obligations arising from the anticipated licensing agreement, what specific requirements does Article 102 TFEU impose on these acts of fulfilment and must the infringer account for past use and pay royalties, and can these be secured by a deposit; and finally 5) whether the conditions for presuming abuse of a dominant position also apply to other claims arising from patent infringement, such as rendering of accounts, recall of products, or damages.³⁶

²³ Commission, 'Antitrust: Commission finds that Motorola Mobility infringed EU competition rules by misusing standard essential patents' <https://ec.europa.eu/commission/presscorner/detail/en/ip_14_489> accessed 23.6.2025.

²⁴ Samsung [n 19] [66] and Motorola [n 78] [423].

²⁵ Samsung [n 19] [71].

²⁶ Motorola [n 20] [499].

²⁷ Samsung [n 19] [72].

²⁸ Motorola [n 20] [500].

²⁹ Samsung [n 19] [76–78].

³⁰ Barazza [n 21] 506.

³¹ EU:C:2015:477 [n 10] [60].

³² Orange-Book-Standard [2009] Bundesgerichtshof KZR 39/06.

³³ Miranda Cole, 'Article 102 TFEU and Standard-Essential Patents Licensing' [Global Competition Law Centre at College of Europe, 2 February 2016] 5 <https://www.coleurope.eu/sites/default/files/uploads/page/slides_cole.pdf> accessed 23.6.2025.

³⁴ EU:C:2015:477 [n 10] [22].

³⁵ Ibid. [26, 27].

³⁶ Ibid. [28–39].



The CJEU stated that it must strike a balance between maintaining free competition and the requirement to safeguard IPR and right to effective judicial protection. As the questions posed by the Düsseldorf District Court related only to the existence of an abuse, and the existence of a dominant position had not been contested, the analysis had to be confined to the former. The CJEU ruled that to avoid an injunction or product recall being seen as abusive, the SEP owner must meet conditions ensuring a fair balance of interests.³⁷

According to the decision, the SEP holder does not abuse its dominant position as long as, prior to bringing an action for infringement seeking an injunction prohibiting the infringement of its patent or seeking the recall of products for the manufacture of which that patent has been used, the patent holder has, first, alerted the alleged infringer of the infringement complained about by designating that patent and specifying the way in which it has been infringed, and, secondly, after the alleged infringer has expressed its willingness to conclude a licensing agreement on FRAND terms, presented to that infringer a specific, written offer for a licence on such terms, specifying, in particular, the royalty and the way in which it is to be calculated. This also required that the alleged infringer has continued to use the patent in question or has not diligently responded to the right holder's offer. According to the CJEU, Article 102 TFEU does not prohibit bringing an action for infringement against the alleged infringer or seeking damages.³⁸

Advocate-General *Wathelet* examined the questions more thoroughly in his opinion.³⁹ In his conclusion, he addressed the different perspectives in a balanced manner. He acknowledged that the patent owner's position is weakened by the FRAND license obligation. Therefore, he emphasised the importance of the right holder retaining the right to seek injunctive relief and access to courts.⁴⁰ On the other hand, the potential licensee needs to use the patent to compete. According to the Advocate-General, the potential licensee can begin using the patent and later seek a license.⁴¹ The speed and complexity of the telecoms market support this point in this case. The right holder should notify the potential licensee about the alleged infringement, unless the potential infringer is already aware of the patent and the infringement, and make a licensing offer that includes all terms.⁴² The potential licensee is not required to accept the proposal but must respond in a detailed and serious manner and make a counterproposal. A response aimed merely at delaying would avoid concluding that seeking injunctive relief constitutes an abuse of a dominant position.⁴³

If no negotiations are started or if they are not completed successfully, the potential licensee can request that a court or an arbitral tribunal establish FRAND conditions. The right holder can then ask for a bank guarantee

³⁷ EU:C:2015:477 (n 10) [42–43, 55].

³⁸ *Ibid.* [77].

³⁹ Opinion of Advocate General Wathelet in C-170/13, *Huawei Technologies Co. Ltd v ZTE Corp. and ZTE Deutschland GmbH* EU:C:2014:2391.

⁴⁰ *Ibid.* [77].

⁴¹ *Ibid.* [82].

⁴² *Ibid.* [84–85].

⁴³ *Ibid.* [88].

to cover the ongoing alleged infringement.⁴⁴ The potential licensee retains the right to later challenge the validity of the patent or argue that the patent is not essential for the standard.⁴⁵ Conversely, the right holder can seek access to the books of the potential licensee without abusing its dominant position and can also institute a claim for damages regarding past infringing activities without this constituting an abuse of its dominant position.⁴⁶

The approach aims to facilitate the conclusion of a FRAND license while reserving the right to seek injunctive relief when infringement is evident, such as when the alleged infringer is aware of the issue and does not attempt to obtain a license or makes no serious effort to agree on a FRAND license.⁴⁷ Determining when the latter situation occurs may however present a challenge.⁴⁸

In summary, when evaluating the validity of a request for an injunction due to infringement of a SEP or the corresponding defence, national courts must consider the following actions taken by the parties; 1) whether the SEP holder notified the implementer of the infringement, including details of the infringed patents; 2) whether the implementer has demonstrated diligence in expressing its willingness to conclude a FRAND licence; 3) whether the SEP holder subsequently made a written FRAND offer for a licence, specifying the royalty rate and the method of its calculation; 4) whether the implementer responded diligently, either accepting the offer or making a prompt written FRAND counter-offer; and 5) if the SEP holder rejected the counter-offer, whether the implementer provided appropriate security and rendered accounts. While the CJEU clarified European legislation and established a general framework for good faith negotiations, it refrained from detailing the scope of every obligation imposed on the parties. The CJEU thus enabled national courts in EU member states to apply the *Huawei v. ZTE* framework according to the specific facts presented in each case.⁴⁹

Following the *Huawei v. ZTE* case, SEP holders have adjusted their strategy in patent litigation against alleged infringers. They are now more likely to file claims for damages and render accounts instead of immediately seeking injunctive relief.⁵⁰

There have however also been some German cases with injunction⁵¹. For example, in applying the *Huawei v. ZTE* test, the Regional Court in Düsseldorf issued an injunction in the case of *St Lawrence Communications v. Voda-*

fone.⁵² The court determined that the infringer's counteroffers did not meet the requirements for the defense established in *Huawei v. ZTE* because some lacked a specific royalty rate, some were submitted late, some were set too low, some had undue territorial restrictions, and they did not comply with accounting and security provision requirements.⁵³

3. BALANCING INNOVATION AND COMPETITION

Patents enable inventors to recoup the fixed costs of their research investments by providing them with a temporary period of market power.⁵⁴ Strong patent protection is essential for incentivising innovation, as patents lower transaction costs and support subsequent innovations.⁵⁵ However, excessive royalty rates or unfair licensing terms can deter innovation by increasing costs for implementers.⁵⁶

The primary objectives of competition law are to promote welfare and ensure efficiency by maintaining a free and fair competition.⁵⁷ As there are no specific EU or national rules on SEPs, EU competition law plays a crucial role in addressing these issues. The 2023 Guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements⁵⁸, *Huawei v. ZTE* ruling⁵⁹, and the IPRED Directive⁶⁰ provide guidance on how to balance innovation incentives with competition.

The Commission has emphasised the importance of balancing patent protection with the need for widespread technology dissemination already in its 2017 approach to SEPs. It highlighted the economic potential of digital technologies and the IoT, stressing the need for clear and efficient SEP licensing to foster innovation and economic growth in the EU.⁶¹ The European Union must bal-

⁴⁴ EU:C:2014:2391 [n 39] [93, 98].

⁴⁵ Ibid. [94, 96].

⁴⁶ Ibid. [101–102]. See also Paul Torremans, *Holyoak and Torremans Intellectual Property Law* (9th edn, OUP 2019) 133–134.

⁴⁷ EU:C:2014:2391 [n 39] [103].

⁴⁸ Torremans (n 46) 133–134.

⁴⁹ Tapia and Makris (n 18).

⁵⁰ Cole (n 33) 11.

⁵¹ Chrysoula Pentheroudakis and Justus A. Baron, 'Licensing Terms of Standard Essential Patents: A Comprehensive Analysis of Cases' (2017) JRC Science for Policy Report EUR 28302 EN 68–72.

⁵² *Saint Lawrence v. Vodafone* [2016] Landgericht Düsseldorf, No. 4a O 73/14.

⁵³ Willard K. Tom and J. Clayton Everett, 'Competition Policy, Intellectual Property and Network Industries: Post-1995 Enforcement Experience in the US and EU' in Robert D. Anderson, Nuno Pires de Carvalho, and Antony Taubman (eds) *Competition Policy and Intellectual Property in Today's Global Economy* (Cambridge University Press, 2023).

⁵⁴ Heidi L. Williams, 'How Do Patents Affect Research Investments?' (2017) *Annual Review of Economics* 9(1).

⁵⁵ Justus Baron, Tim Pohlmann, and Knut Blind 'Essential patents and standard dynamics' (2016) *Research Policy* 45(9) 1769.

⁵⁶ Mark A. Lemley and Carl Shapiro, 'Reply: Patent Holdup and Royalty Stacking' (2007) 85 *Texas Law Review* 2163, Stanford Law and Economics Olin Working Paper No. 345.

⁵⁷ Cassey Lee, 'The Objectives of Competition Law' (2015) ERIA Discussion Paper Series 54.

⁵⁸ Commission, 'Communication from the Commission – Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements' [2023] OJ C 259/1.

⁵⁹ EU:C:2015:477 (n 10).

⁶⁰ Directive 2004/48/EC of 29.4.2004 on the enforcement of intellectual property rights [2004] OJ L 195/16.

⁶¹ Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee

ance the need to incentivise innovation with the need to ensure fair competition in the context of SEPs.

FRAND licensing commitments are important in balancing the interests of SEP holders and implementers. They aim to license SEPs on fair and reasonable terms, preventing SEP holders from setting excessive royalties or unfair licensing terms. This also prevents market distortions and reduced consumer welfare. Additionally, FRAND commitments ensure non-discriminatory access to SEPs, promoting competition and market entry by preventing SEP holders from preferring certain implementers over others.⁶²

The enforcement of FRAND commitments is crucial for maintaining the balance between innovation incentives and competition. Courts and regulatory bodies play a key role in ensuring that SEP holders adhere to their FRAND commitments.

Each SSO establishes its own terms for a FRAND commitment, which may be expressed as an offer to negotiate a license on fair and reasonable terms. It is not a commitment to negotiate a contract at a fixed rate. For example, Section 6.1 of ETSI's IPR policy states that when essential IPR is disclosed, ETSI will request – but not require – the IPR owner to commit in writing that it is willing to grant irrevocable licenses on FRAND terms and conditions, thus waiving its right to refuse to offer a license to those seeking one.⁶³

Epstein et al. highlight that bilateral licensing, with its inherent flexibility under FRAND obligations, allows parties to negotiate outcomes efficiently based on their interests, priorities, and resources.⁶⁴ *Geradin* views the abstract – and thus flexible – notions of fairness and reasonableness strength rather than a weakness. The vague FRAND terms in most SSOs' IPR policies are a beneficial feature, enabling contracts without addressing all future contingencies, which would be impractical or too costly.⁶⁵

Most FRAND cases in European courts involve SEP holders seeking injunctive relief under Article 102 TFEU while patent infringement and validity proceedings are ongoing, either together or separately due to systems like Germany's bifurcation. Because FRAND and patent disputes may run concurrently, damage claims in European

FRAND cases are rare, and courts often defer judgment while validity is challenged.⁶⁶

The CJEU ruling in *Huawei v. ZTE* has promoted greater alignment among European national jurisdictions by stressing the importance of good faith in negotiations towards an actual result beyond the initial offer of the licensee. As a result, injunctions are no longer granted automatically without further consideration of the parties' conduct and their relevant bargaining power. The economic analysis of FRAND licensing underscores the crucial role of injunctions in mitigating potential harm arising from bargaining failures and patent hold-ups. Concurrently, the jurisprudence of the CJEU and national courts across Europe increasingly employ the award of injunctive relief against unwilling licensees to reinforce bilateral negotiations as the primary forum for determining FRAND licensing terms.⁶⁷

4. A WAY FORWARD?

In response to concerns regarding inefficiencies in SEP licensing potentially negatively impacting the development of emerging 5G and IoT markets, the European Commission established an Expert Group on Licensing and Valuation of Standards Essential Patents (SEP Expert Group). Expert Group members such as *Justus Baron*, *Damien Geradin*, *Bowman Heiden*, *Fabian Hoffmann*, *Jorge Padilla*, and *Ruud Peters* have also written individually on the subject. The members were tasked to seek a balanced strategy that enhances Europe's industrial standing in the development of new standardised technologies, including 5G and 6G, as well as the deployment of the IoT across its numerous applications in various sectors. The group produced a report containing 79 proposals aimed at improving the SEP licensing market.⁶⁸ I will introduce some of these with my personal policy recommendations.

4.1 Strengthen enforcement mechanisms

Europe might need to strengthen the enforcement mechanisms for FRAND commitments to ensure that SEP holders adhere to fair and reasonable licensing terms. Commission's Executive Vice-President for Prosperity and Industrial Strategy, *Stéphane Séjourné* has already been tasked to step up enforcement of the current rules.⁶⁹

Colangelo has also emphasised the need for a balanced approach to SEP enforcement that supports innovation

and the Committee of the Regions – Setting out the EU approach to Standard Essential Patents' COM(2017) 712 final.

⁶² Chrysoula Pentheroudakis and Justus A. Baron, 'Licensing Terms of Standard Essential Patents: A Comprehensive Analysis of Cases' (2017) JRC Science for Policy Report EUR 28302 EN 68–72.

⁶³ ETSI, 'Rules of Procedure Annex 6: ETSI Intellectual Property Rights Policy' [ETSI, 29–30 November 2022] <<https://www.etsi.org/images/files/IPR/etsi-ipr-policy.pdf>> accessed 23.6.2025.

⁶⁴ Richard A. Epstein, F. Scott Kieff, and Daniel F. Spulber, 'The FTC, IP, and SSOs: Government Hold-Up Replacing Private Coordination' (2011) *Journal of Competition Law & Economics*, March 2012, Stanford Law and Economics Olin Working Paper No. 414, GWU Legal Studies Research Paper No. 578, GWU Law School Public Law Research Paper No. 578, NYU Law and Economics Research Paper No. 11-26, U of Chicago Law & Economics, Olin Working Paper No. 568, Northwestern Law & Econ Research Paper No. 11-23 12–13.

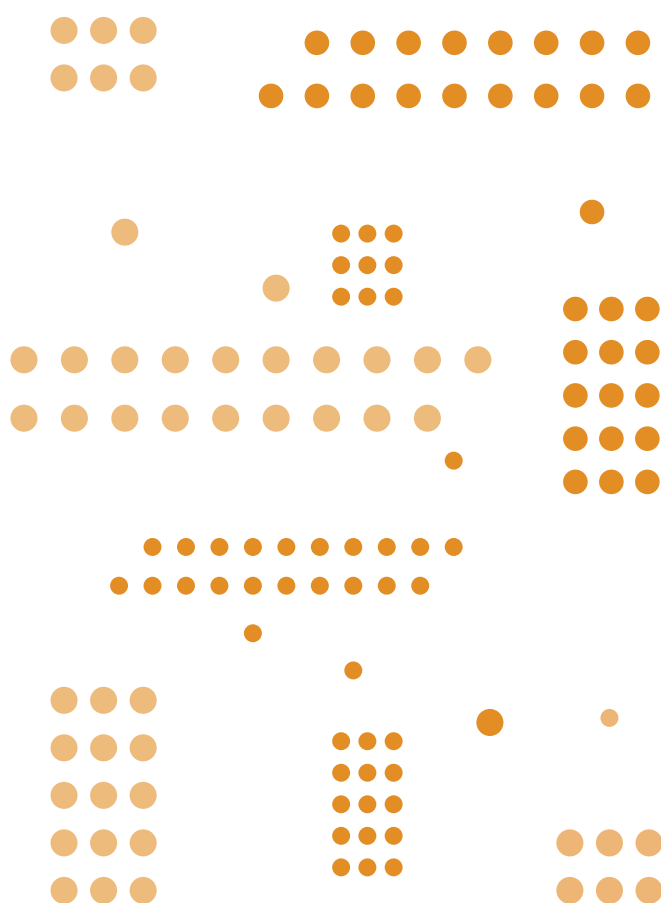
⁶⁵ Damien Geradin, 'The Meaning of "Fair and Reasonable" in the Context of Third-Party Determination of FRAND Terms' (2014) *George Mason Law Review* 21:4 11–12.

⁶⁶ JRC Science for Policy Report EUR 28302 EN (n 51) 155.

⁶⁷ JRC Science for Policy Report EUR 28302 EN (n 51) 123.

⁶⁸ Commission, 'Group of Experts on Licensing and Valuation of Standard Essential Patents 'SEPs Expert Group' – full contribution' E03600.

⁶⁹ Commission, 'Mission letter – Stéphane Séjourné, Executive Vice-President-designate for Prosperity and Industrial Strategy' (n 5) 7.



and technological leadership while addressing geopolitical challenges.⁷⁰

The SEPs Expert Group proposed creating independent expert boards to assess FRAND offers or determine a FRAND royalty when requested by a court or negotiating parties.⁷¹ As the Commission's proposal for SEP Regulation failed with its approach, a more balanced and voluntary dispute resolution mechanism could work better.⁷² This could be achieved through the establishment of arbitration panels or mediation services, there is no need for a robust regulatory oversight. There should however be some evaluation mechanisms in place as well.

4.2 Develop guidelines

Another recommendation is to develop clear and comprehensive guidelines on FRAND licensing to provide clarity to both SEP holders and implementers. These guidelines should outline the principles of fair and reasonable licensing terms and the conditions under which SEP holders can seek injunctions.

Example of clear guidelines would be the guidelines for the horizontal and vertical coordination meetings the SEPs Expert Group has proposed EU to formulate in similar way that the Commission and the US Department of Justice have already formulated for patent pools.⁷³

There has even been demands for SSOs to provide guidelines on the factors for determining FRAND, specifically regarding *ex ante* patent and licence values. SSOs could also archive and publish such information.⁷⁴

Farrell, Hayes, Shapiro, and Sullivan suggested that SSOs could limit patent hold-up by requiring participants to disclose patents during the standard-setting process, but even if hold-up or royalty stacking isn't seen as a real issue, more transparency is still needed.⁷⁵ According to Erixon and Bauer, improving market transparency and reducing non-transparent practices are essential for minimising legal risks and transaction costs.⁷⁶

As *Huawei v. ZTE* left some ambiguity to the FRAND licensing disputes, the importance of transparency and information has grown. First, transparency should be increased in standardisation procedures by requiring right holders to demonstrate the essentiality and validity of their rights from the beginning. Additionally, patent owners should be required to disclose the conditions of pre-existing licensing agreements.⁷⁷

The SEPs Expert Group proposed a confidential repository for SEP licensing agreements to be used by courts, competition authorities, public arbitration boards, or trusted persons to enhance transparency. Additionally, EU could improve SEP databases, introduce independent essentiality checks, and incentivise SEP holders to provide detailed information.⁷⁸ SSOs could also offer platforms for additional information regarding declared SEPs.⁷⁹

4.3 Promote collaboration

According to the JRC Science for Policy Report, the development of 5G requires SSOs to collaborate closely. Global standard setting and market-driven policies will be key to driving innovation. The involvement of societal groups and vertical industry players, such as transportation and energy, will challenge standard-setting governance and enhance 5G infrastructure for vertical markets.⁸⁰

Ruud Peters has written on SEP licensing both with Fabian Hoffmann and Nikolaus Thumm and with Igor Nikolic and Bowman Heiden. In their article on smoother SEP licensing ecosystem for IoT, Peters, Hoffman, and Thumm argue that if current licensing practices in the telecom sector are replicated in the various IoT verticals, the number of SEP litigations will increase. In the end-to-end licensing process, they identify the following five

⁷⁰ Colangelo [n 12] 1, 11, 22.

⁷¹ Commission, E03600 [n 68] 145.

⁷² COM(2023) 232 final [n 1].

⁷³ Commission, E03600 [n 68] 89.

⁷⁴ Tim W Dornis, 'Standard-Essential Patents and FRAND Licensing – At the Crossroads of Economic Theory and Legal Practice' (2020) *Journal of European Competition Law & Practice* 11(10) 30.

⁷⁵ Joseph Farrell and others 'Standard Setting, Patents, and Hold-Up' (2007) 74 *Antitrust Law Journal* No. 3 608 624.

⁷⁶ Fredrik Erixon and Matthias Bauer, 'Standard Essential Patents and the Quest for Faster Diffusion of Technology' *ECIPE Policy Brief* No. 2/2017 4.

⁷⁷ Dornis [n 74] 30.

⁷⁸ Commission, E03600 [n 68] 10.

⁷⁹ *Ibid.* 129.

⁸⁰ JRC Science for Policy Report EUR 28302 EN [n 51] 166.

elements as primary reasons for disputes and litigation in SEP licensing negotiations; 1) insufficient SEP transparency; 2) low confidence in the validity of SEPs; 3) difficulty in assessing a reasonable aggregate royalty; 4) lack of incentives to seek licenses; and 5) concerns about an uneven playing field. They also propose solutions for each of them.⁸¹

Studies suggest that only 20–47% of patents declared essential to the 2G, 3G, and 4G standards are necessary for practicing the standard.⁸² According to Peters, Hoffman, and Thumm, only an estimated 25–40% of the patents in ETSI database of declared SEPs are actually essential, creating insufficient SEP transparency.⁸³ To combat this, they propose independent essentiality checks to improve transparency and reduce litigation. They also point out that 5G standard comprises a baseline component (New Radio/Network Core-NR/NC) and additional components for the different use cases related to different IoT verticals, which would spread out essentiality checks over time.⁸⁴

It is recommended to assess SEP validity before licensing negotiations, so out-of-court challenge procedures could expedite validity assessments. Additionally, essentiality checks, comparable licenses, and market transparency could be used to estimate aggregate royalties. They also proposed to analyse and publish aggregate royalty rates to address the fears of unequal royalty rates among competitors and ensure fairness.⁸⁵

Regarding the lack of incentives to seek licenses, the steps outlined in *Huawei v. ZTE* motivate both the SEP licensors with genuine SEPs to publicly disclose their licensing terms and conditions before, or as soon as possible after, the market for relevant standard-compliant products begins to develop, and the implementers to actively pursue licenses from such licensors prior to commercialisation. Additionally, publishing terms could encourage proactive licensing by implementers.⁸⁶

To conclude, these practical solutions could promote a more efficient SEP licensing ecosystem, where SEP licensors and implementers would have greater incentives to negotiate license agreements, rather than to litigate over their differences.⁸⁷

In another paper on SEP licensing negotiation groups (LNGs), *Peters*, along with *Igor Nikolic* and *Bowman*

Heiden, proposed that utilising a combination of legal, economic, and managerial tools could enable LNGs to achieve various objectives. These tools include 1) establishing proper guidelines to create a safe harbour, allowing LNGs to function without breaching antitrust laws; 2) implementing appropriate governance for internal operations; and 3) adhering to the *Huawei v. ZTE* negotiation framework for SEP licensing. Consequently, through deliberate institutional design, LNGs could generate the necessary incentives to enhance SEP licensing efficiencies by reducing transaction costs for both licensees and licensors. Additionally, LNGs could ensure a fair competitive environment among similarly situated implementers who, as direct competitors, are logically reluctant to obtain a license until all parties are licensed.⁸⁸

4.4 Promote innovation and R&D investment

Innovation and research and development (R&D) investment are essential for the development of new technologies. Incentives for firms to invest in R&D, such as research grants, could help sustain innovation while promoting competition.

The well-established method for licensing patents is through negotiation between licensor and licensee, with most licenses being agreed upon in this manner. To enhance this approach and support global value chains based on technology standards, the EU could invest in R&D, education, and upskilling in business, digitalisation, and intellectual property. Rather than introducing regulation that may affect EU innovation, the Commission could encourage public and private investment in innovation and expand initiatives like IP4SME, which assists SMEs in understanding intellectual property.⁸⁹

Both large organisations and SMEs in the EU face challenges concerning skills shortages and administrative burdens. Other jurisdictions, including major EU trading partners like the United States and the United Kingdom, have conducted comprehensive government reviews and based on the evidence, they determined that exceptional regulation of SEPs or price setting is unnecessary, as it may impact innovation. Instead, they focused on investing in key areas of innovation and targeted upskilling initiatives.⁹⁰

⁸¹ Ruud Peters, Fabian Hoffmann, and Nikolaus Thumm, 'How to Create a Smoother SEP Licensing Eco-system for IoT' in Jonathan M. Barnett and Sean M. O'Connor (eds), *5G and Beyond: Intellectual Property and Competition Policy in the Internet of Things* (Cambridge University Press, 2023).

⁸² Tim Pohlmann, 'AI may be the solution to skyrocketing numbers of SEP declarations' (IAM, 21 July 2021) <<https://www.iam-media.com/article/ai-may-be-the-solution-skyrocketing-numbers-of-sep-declarations>> accessed 23.6.2025. Essentiality samplings in *Unwired Planet v. Huawei* [2017] EWHC 711 and *TCL v. Ericsson* [2019] 943 F.3d 1360.

⁸³ Peters, Hoffmann, and Thumm (n 81). See also SEPs Expert Group (E03600) (n 68) 35.

⁸⁴ Peters, Hoffmann, and Thumm (n 81).

⁸⁵ Ibid.

⁸⁶ Ibid.

⁸⁷ Ibid.

⁸⁸ Ruud Peters, Igor Nikolic, and Bowman Heiden, 'Designing SEP Licensing Negotiation Groups to Reduce Patent Holdout in 5G/IoT Markets' in Jonathan M. Barnett and Sean M. O'Connor (eds), *5G and Beyond: Intellectual Property and Competition Policy in the Internet of Things* (Cambridge University Press, 2023).

⁸⁹ Peters, Nikolic, and Heiden (n 88).

⁹⁰ Elisabeth Opie and Keith Mallinson, 'To boost the EU's global competitiveness, we must change course on industrial and innovation policy' (The Parliament Magazine 25 September 2024) <<https://www.theparliamentmagazine.eu/partner/article/to-boost-the-eus-global-competitiveness-we-must-change-course-on-industrial-and-innovation-policy>> accessed 23.6.2025.

4.5 Encourage market entry and competition

Market entry and competition are crucial for promoting innovation and preventing market distortions. Lower barriers for entry ensure new competitors and opportunities for SMEs.

Patent pools can lower transaction costs for both licensors and implementers and may also decrease the overall royalty rate for the total number of SEPs used in products licensed by the pool.⁹¹ Because of this, the SEP Expert group have proposed SSOs to stimulate the formation patent pools already during the standardisation process.⁹² This would obviously require that SSOs do not become involved in the pool setting process themselves, but fostering the formation of pools during the process would expedite the patent pools becoming operational as quickly as possible.⁹³

Before patent pools become operational, it could be also possible to establish collective licensing mechanisms or agencies to, upon request by an implementer, grant licenses under all European SEPs for a standard, for which at least two SEP holders have been identified.⁹⁴

Forming patent pools encompassing a large number of standards may be beneficial for products that utilise numerous standards, such as IoT. SEP holders could create these pools of pools for clusters of standards related to similar technologies or functionalities used in a product.⁹⁵

As SMEs may lack experience with the complexities of FRAND licensing and have limited resources to manage these challenges effectively, providing support for SMEs should also encourage market entry and competition.⁹⁶ This could be achieved through targeted funding, regulatory support, and access to SSOs.

5. A NEW SEP PROPOSAL OR A DIFFERENT APPROACH?

The SEP Regulation proposal Commission eventually withdrew was originally applauded by so called big tech companies, such as Apple, Google, Meta, Cisco, Intel, and other SEP implementers, such as automotive industry. At the same time SEP holders such as Nokia and Ericsson, were hoping for it to fail. The proposed SEP Regulation would have brought uncertainty to the sector and there were several practical challenges, such as sufficient expertise for the new Competence Centre at the EUIPO.

European Parliament President Roberta Metsola stated that the Parliament's Conference of Presidents would support the Commission's 2025 work programme, including the withdrawal. The Commission is anticipated to adopt

its final 2025 work programme by August, following the positions provided by EU member states.⁹⁷ After that, the Commission needs to decide whether to present a new proposal or select a different approach.

SEP implementers often have concerns about wireless standards due to litigation over the past 20 years. However, litigation is less common in other standardised areas with lower financial stakes and the use of collective licensing solutions like patent pools. The risks of hold-up emphasised by SEP implementers have been addressed, though imperfectly, in *Huawei v. ZTE*. Remaining issues are mainly in Germany, and less burdensome solutions are more proportionate than complete revision of the EU SEP framework.

The European Patent Office published a study on standard essential patents (SEPs) in May 2025 that questions some of the key assumptions behind the withdrawn SEP Regulation proposal.⁹⁸ First of all, the EPO states that although there are challenges in SEP licensing, they do not appear severe enough to systematically discourage potential contributors from engaging in standard development or deter implementers from developing products based on standards involving potential SEPs.⁹⁹ This undermines the rationale for regulatory intervention premised on a market failure. Additionally, EPO summarizes that SEP licensing negotiations can be complex because, among other things, views may diverge on technical issues such as the determination of essentiality, validity or infringement of asserted SEPs, or because the parties may disagree on what constitute FRAND terms and conditions.¹⁰⁰ This suggests that disputes arise primarily from the technical and legal complexity of SEPs, not necessarily from allegedly abusive behaviour by patent holders, which the Commission's proposal targeted. EPO also highlights multiple overlapping governance tools (e.g. court precedents, SSO policies, EU communications) that already provide guidance for the licensing of SEPs, raising questions about the need for a central regulator.¹⁰¹ Moreover, the Unified Patent Court has rapidly established itself as a key forum for resolving SEP-related patent disputes in the EU, already delivering on goals such as legal certainty and harmonisation that the Commission's proposal aimed to achieve.¹⁰² And finally, the positive correlation between citations of SSO documents and SEP declarations suggest that the new linkage between patents and SSO

⁹¹ Commission, E03600 (n 68) 15.

⁹² Ibid.

⁹³ Ibid.

⁹⁴ Commission, E03600 (n 68) 15.

⁹⁵ Ibid. 16.

⁹⁶ Ibid. 42.

⁹⁷ Anupriya Datta, 'Top MEPs torn on shelving new laws as Metsola sends conflicting letters to Commission' (Euractiv, 17 June 2025) <<https://www.euractiv.com/section/politics/news/top-meps-torn-on-shelving-new-laws-as-metsola-sends-conflicting-letters-to-commission/>> accessed 23.6.2025.

⁹⁸ European Patent Office, 'Standards and the European patent system – Insights from a new EPO dataset linking patents and standards, with early perspectives into SEP litigation under the Unified Patent Court' (EPO, May 2025) <<https://link.epo.org/web/publications/studies/en-epo-study-standards-and-the-european-patent-system.pdf>> accessed 23.6.2025.

⁹⁹ EPO (n 97) 19.

¹⁰⁰ Ibid. 9.

¹⁰¹ Ibid. 18.

¹⁰² Ibid. 15.

documents could serve as a useful indicator for assessing potential essentiality.¹⁰³ This directly challenges the need for a centralised essentiality-checking body. Data-driven methods and empirical evidence may offer more scalable, objective, and decentralised alternatives.

The EU should focus on promoting innovation within standardised industries and licensing arrangements that facilitate the implementation of standardised technologies across various sectors. It is essential to maintain a fair balance between the interests of SEP holders and implementers, as both are crucial and complementary components of the standardisation ecosystem. Achieving these priorities is best accomplished through market-based solutions such as patent pools and other collective licensing mechanisms.

Other policy recommendations include strengthening the enforcement mechanisms for FRAND commitments, introducing balanced and voluntary dispute resolution mechanisms, developing clear and comprehensive guidelines on FRAND licensing, promoting transparency, encouraging public and private investment in innovation, and investing in key areas of innovation and targeted upskilling initiatives. This would also serve the Commission goal to simplify the EU's regulatory landscape.¹⁰⁴



Asko Metsola

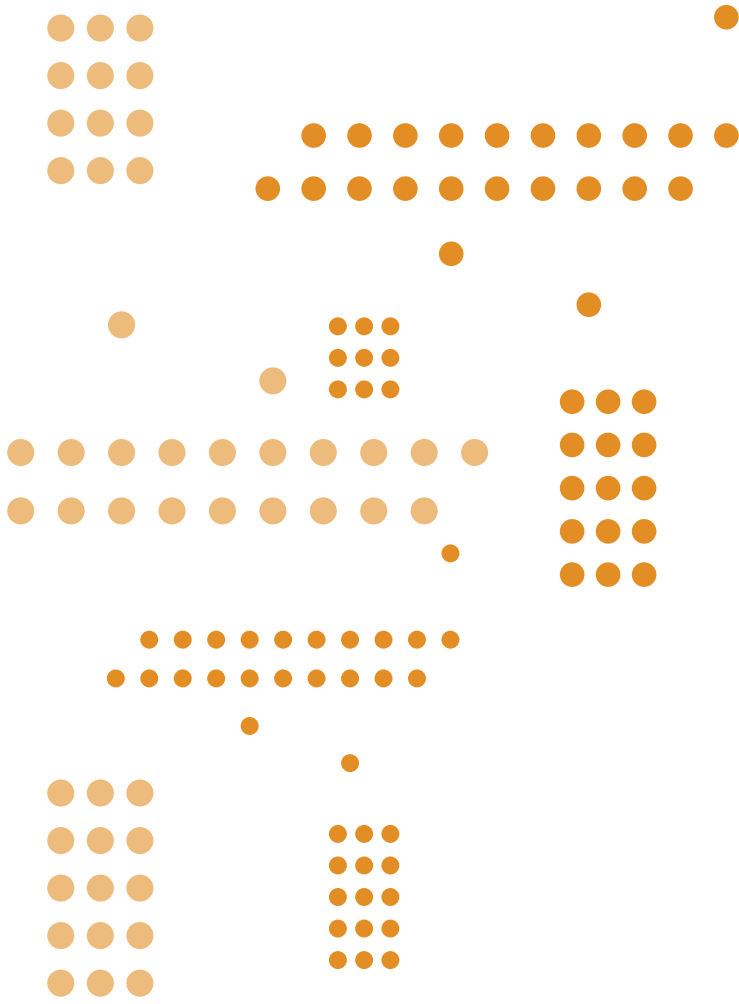
Asko Metsola is a recent graduate from the LL.M. in European Intellectual Property Law programme at Stockholm University, where he wrote his thesis on the interplay of standard essential patents (SEPs) and EU competition law in the 5G era. He also holds a Master of Laws from University of Turku and Master of Science in Economics and

Business Administration from Hanken School of Economics. Currently he works as Senior Legal Advisor at Confederation of Finnish Industries' Corporate Law team, focusing on IPR, internal market legislation, and consumer protection regulation.



¹⁰³ Ibid. 14.

¹⁰⁴ COM(2025) 45 final (n 2).



Slow Fashion, Fast Fashion and Intellectual Property Rights

Ragi Vyas

ABSTRACT

This work explores how intellectual property protection interacts with the realities of the modern fashion industry, especially considering the fast fashion industry. It begins by outlining the sociological mechanisms that shape fashion to illustrate why the protection of fashion might be different from the protection of other works. The piracy paradox, a theory that suggests that copying and imitation within the fashion industry is beneficial for designers, is introduced as a central analytical lens. Following this, the alternative forms of Intellectual Property protection for fashion are presented to examine how well these are aligned with the realities of fashion.

1. INTRODUCTION

In 1992, Christian Louboutin made fashion history. While working in his studio, contemplating on how to enhance a clunky, black-soled shoe, he noticed his assistant applying a vibrant, red nail polish. Inspired, he applied the nail polish to the shoe's sole, and just like that, the iconic red sole was born.¹ This seemingly small design decision quickly became synonymous with the Louboutin brand. Recognising its value, Louboutin chose to protect the red sole through Intellectual Property (IP) on a worldwide scale.²

Following this, Louboutin was involved in legal battles across multiple jurisdictions, seeking to protect their iconic design. From the United States, to France, China, Japan and the EU, the red sole has been the subject of legal battle.³

The extensive litigation, costs, time and mental strain associated with fashion-related IP disputes, such as those involving Louboutin, underscore both the importance and the complexity of protecting creative assets in the

fashion industry. After all, the fashion industry is a \$1.7 trillion global market that continues to grow at a rapid pace. The industry's primary assets are its creative outputs, or fashion pieces, which are central to brand identity, market value, and consumer appeal.⁴ To maintain a good standing in the industry, it is essential that the fashion industry can effectively protect these assets. IP law provides one of the key legal frameworks through which such protection is secured.

Against this background, the following work discusses the mechanisms of IP protection and their suitability for fashion as a work and how they relate to the reality of the current fashion industry, especially considering fast fashion. By placing these legal questions in the cultural, social, and economic context of fashion, the aim of this paper is to provide a more nuanced understanding of both the possibilities and limitations of EU IP law in the fashion world.

2. UNDERSTANDING "FASHION"

To understand the IP protection of fashion, it is first important to understand the concept of "fashion".

Evolving from something that was primarily used to protect our bodies, clothes and accessories have become much more. For some, it may be a way to express themselves, for some it may be a way to identify themselves with a certain group, and for some it may still be a way

¹ La vie en red (sole)' [Christian Louboutin] <https://us.christianlouboutin.com/us_en/red-sole> accessed 1 May 2025.

² Sarah Friedman, 'From Louboutin to Pink Insulation: How Can a Company Trademark a Color?' (Library of Congress Blogs, 9 February 2024) <<https://blogs.loc.gov/law/2024/02/from-louboutin-to-pink-insulation-how-can-a-company-trademark-a-color/#:~:text=After%20two%20failed%20attempts%20in,registered%20on%20January%201%2C%202008>> accessed 1 May 2025.

³ Judgement of the Court (Grand Chamber) of 12th June 2018, C-163/16, EU:C:2018:423, *Louboutin and Christian Louboutin*; Christian Louboutin S.A. v Yves Saint Laurent America Inc, 696 F3d 206 (2nd Cir 2012); Cassidy Aranda, 'The Worldwide Trademark Battle over the Iconic Red Bottom Shoe' [Chicago-Kent Journal of Intellectual property, 23 January 2023] <<https://studentorgs.kentlaw.iit.edu/ckjip/the-worldwide-trademark-battle-over-the-iconic-red-bottom-shoe/>> accessed 14 April 2025; Micah Kindred, 'Red Bottom Heels: The Trademark Dispute' [2023] 91 University of Cincinnati Law Review <<https://uclawreview.org/2023/03/07/red-bottom-heels-the-trademark-dispute/>> accessed 17 April 2025.

⁴ 'Global Fashion Industry Statistics' (Fashion United) <<https://fashion-united.com/statistics/global-fashion-industry-statistics>> accessed 6 February 2025.

to protect their bodies.⁵ Clothes and accessories have not only evolved from the wearer's perspective, but also from the creator's perspective. Today, the way clothes are designed is often considered an artform, where the designer is the artist.⁶

While fashion is closely related to clothes and accessories, the terms are not interchangeable. *Clothing* and *accessories* refer to tangible items worn by individuals (fashion in dress), whereas *fashion* refers to an intangible value attributed to these items (fashion in change).⁷ These intangible values are shaped and mirrored by shifts in cultural, social, economic and technological (CSET) values, and certain societal mechanisms.⁸

In terms of this work, fashion refers to the popularity of certain clothing and accessory trends as shaped by ongoing shifts in CSET values and societal mechanisms, and how these values are reflected in what we wear. The term "fashion pieces" will be used as an umbrella term for clothing, accessories and shoes.

2.1 The Mechanisms of Fashion: An Individualistic Perspective

Fashion is sustained by three core societal mechanisms: social distinction, the trickle-down effect, and imitation. These mechanisms explain *how* fashion operates within society. They form the structural basis of fashion's cyclical nature and its function as a marker of identity and status.⁹ Alongside these mechanisms, shifts in CSET values shape *what* fashion looks like at any given time. While the mechanisms remain relatively stable, CSET values are dynamic over time, continuously influencing the specific forms and meanings that fashion takes.

One of the core mechanisms of fashion is the cycle of renewal. The cycle of renewal refers to the phenomenon in which, once a particular style becomes widely adopted, those who first embraced it often move on to new trends. This behaviour is rooted in the mechanism of *social distinction*, where clothing becomes a means through which individuals express identity, status, and belonging.¹⁰ As early adopters identify new styles to signal taste or cul-

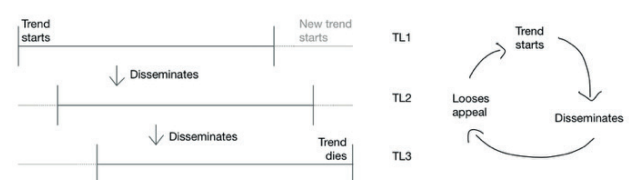
tural capital, these styles often become desirable to others, who in turn imitate them in pursuit of recognition.¹¹

Imitation, in this context, is not a consequence of fashion but a precondition for it. It functions in a social structure where individuals observe and respond to the choices of others.¹² Two forms of imitation can be identified: reverential imitation, driven by admiration, and competitive imitation, motivated by a desire to align oneself with aspirational reference groups.¹³

Finally, the *trickle-down theory* explains how fashion disseminates through society. According to this theory, trends typically begin among early adopters, often those with cultural or economic influence, and gradually spread outward and downward through imitation.¹⁴ This is the mechanism that explains why the need for social distinction sooner or later leads to a need for *newness*.¹⁵

Fashion functions as a symbolic reflection of *cultural* identity, representing aspects such as nationality, ethnicity, class, gender, sexuality, and societal attitudes toward the body.¹⁶ *Social* movements and shifts in societal attitudes also play a crucial role in shaping fashion trends. Broad social movements advocating gender equality, racial justice, and body positivity have challenged established fashion norms, expanding the boundaries of acceptability and aspiration.¹⁷ *Economic* factors, including shifts in production and consumption practices, profoundly influence fashion's accessibility and popularity. The rise of fast fashion has significantly altered the industry's economic landscape by increasing accessibility through lower pricing and faster production cycles.¹⁸ *Technological* advancements are furthermore crucial for shaping fashion trends at a broad scale, affecting how fashion is produced, distributed, and consumed globally.¹⁹

Figure 1 The Dissemination of Fashion and The Circle of Fashion



⁵ Evelin Van Keymeulen 'Copyrighting couture or counterfeit chic? Fashion Design: a comparative EU – US perspective' [2020] 7(10) Journal of Intellectual Property Law & Practice <<https://academic.oup.com/jiplp/article-abstract/7/10/728/831070?redirectedFrom=fulltext>> accessed 24 April. p. 728.

⁶ Ibid.

⁷ Yuniya Kawamura, *Fashion-ology: An Introduction to Fashion Studies* (Berg Publishers, 2005). p. 3–4.

⁸ See more in Chapter 2.1 and 2.2.

⁹ Kal Raustiala & Christopher Sprigman, 'The Piracy Paradox: Innovation and Intellectual Property in Fashion Design' [2006] 92(8) Virginia Law Review <<http://www.jstor.org/stable/4144970>> accessed 4 April 2025, p. 1717.

¹⁰ Fredric Godart & Patrik Aspers, 'Sociology of Fashion: Order and Change' [2013] 39:171–192 Annual Review of Sociology <https://www.researchgate.net/publication/234146860_Sociology_of_Fashion_Order_and_Change#fullTextFileContent> accessed 20 February 2025, p. 176.

¹¹ Kawamura (n 8), p. 5.

¹² Kawamura (n 8), p. 20.

¹³ Godart & Aspers (n 11), p. 176.

¹⁴ Godart & Aspers (n 11), p. 179.

¹⁵ Fashion Timeline' [Vintage Fashion Guild] <'The Evolution of Fashion Design: Past to Present' [Fibre2Fashion, October 2008] <<https://www.fibre2fashion.com/industry-article/3730/fashion-designing-the-then-and-now>> accessed 4 April 2025.

¹⁶ Kawamura (n 8), p. 32.

¹⁷ Emma Crasnitchi, 'The Economic Implications of Fast Fashion for the Developed and Developing World' [2024] Modern Diplomacy <<https://moderndiplomacy.eu/2024/01/26/the-economic-implications-of-fast-fashion-for-the-developed-and-developing-world/>> accessed 23 March 2025.

¹⁸ Godart & Aspers (n 11), p. 176.

¹⁹ Cf. 'Design Reform' [European Union Office of Intellectual Property] <<https://www.euipo.europa.eu/en/designs/design-reform-hub>>, accessed 10 May 2025.

2.2 The Fashion Pyramid and Seasonal Cycles: An Industry Perspective

Fashion can be divided into five main categories in terms of the market and can be illustrated as a pyramid: mass market, bridge, diffusion, prêt-à-porter, and haute couture.²⁰

Figure 2 The Fashion Pyramid



Haute couture represents the most exclusive and luxurious tier of the fashion industry. Haute couture pieces often serve as the creative and visual identity of a brand, typically showcased at fashion shows and worn by celebrities on red carpets. Importantly, it is rarely the primary source of revenue for fashion houses.²¹

The primary revenue stream for many luxury fashion brands comes from prêt-à-porter (ready-to-wear) collections. While these garments still maintain a high level of quality, they are produced in standardised sizes and manufactured in larger quantities, making them more accessible to a broader audience. Prêt-à-porter occupies a space of “wearable luxury,” combining high design with practicality.²²

Beneath prêt-à-porter in the fashion hierarchy is diffusion fashion, which includes secondary lines produced by major designers under separate labels. These collections are more affordable and easier to produce, aiming to reach a wider consumer base while still carrying the aesthetic of the main brand.²³

Bridge lines follow, offering designer-inspired clothing at even lower price points. These collections serve as a middle ground between high-end fashion and mass-market apparel. At the base of the fashion pyramid lies the mass market, which consists of everyday clothing produced in large quantities. These garments prioritise func-

tionality and affordability, and they cater to the general public’s basic wardrobe needs.²⁴

One way that the industry controls the market is by dividing releases of fashion into seasons. By doing this, fashion houses ensure that there is always something new for the consumers to buy.²⁵

2.3 Applying the Social Mechanisms of Fashion to the Fashion Pyramid and Seasonal Cycles

The social mechanisms of fashion not only help explain how fashion trends emerge, circulate, and fade, but also provide a theoretical foundation for understanding the structure of the fashion pyramid. The pyramid itself can be seen as a material manifestation of these underlying social dynamics.

At its core, social distinction helps explain the existence of a hierarchy within fashion. Haute couture and luxury prêt-à-porter represent exclusivity, craftsmanship, and cultural capital. These upper tiers offer consumers the means to signal status, taste, and identity. The appeal of these tiers lies not only in their material quality but in their symbolic value. Their inaccessibility to the masses is precisely what renders them desirable. The pyramid thus mirrors the logic of distinction: those who can afford to “signal up” through rare or custom garments sit at the top, while those with fewer resources occupy lower tiers, where access to exclusivity is more limited or symbolic.

The ability of fashion to function socially and commercially depends on imitation. This mechanism enables styles and aesthetics from the top of the pyramid to filter downward and be adapted by broader audiences. Through processes of both reverential and competitive imitation, individuals in lower tiers adopt elements of higher-tier fashion to align themselves with aspirational groups. This adoption fuels the trickle-down effect, through which trends travel from elite circles to the mainstream. As trends become widely adopted, their perceived uniqueness erodes, prompting those at the top to seek out new styles and restarting the cycle.

2.4 Theories on the IP landscape of Fashion: The Piracy Paradox

The Piracy Paradox is a concept that was introduced by two American scholars, Kal Raustiala and Christopher Sprigman in their paper, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*. The paradox challenges the prevailing assumption within IP theory that legal protection is necessary to encourage innovation. It aims to explain why fashion designers may not actively pursue or rely upon available IP protections,

²⁰ ‘The Fashion Pyramid of Brands (2024 Edition)’ (Retailboss, 18 April 2024) <<https://retailboss.co/the-fashion-pyramid-of-brands/>> accessed 1 May 2025.

²¹ Divya Bala, ‘Everything You Need to Know About The Inner Workings Of Haute Couture’ (British Vogue, 6 July 2020) <<https://www.vogue.co.uk/fashion/article/behind-the-scenes-at-haute-couture>> accessed 1 May 2025.

²² Thomas Bernandt-Lanier, ‘#7 What is the fashion pyramid?’ (Medium, 21 November 2024) <https://medium.com/@thomas_bl/7-what-is-the-fashion-pyramid-09a4e6a166a3> accessed 1 May 2025.

²³ Ibid.

²⁴ Ibid.

²⁵ Esme Blazer, ‘The fashion system: The fashion seasons explained’ (Fashion United, 22 January 2022) <<https://fashionunited.com/news/background/the-fashion-system-the-fashion-seasons-explained/2024012257967>> accessed 1 May 2025.

despite the widespread occurrence of design copying and the theoretical availability of legal remedies.²⁶

The Piracy Paradox primarily addresses the copying of fashion trends which are inherent to the functioning of the industry. Contrary to the normative view that piracy, or copying, undermines creativity, Raustiala and Sprigman argue that copying plays a crucial and even generative role in the fashion ecosystem. They propose that innovation and imitation coexist in a form of equilibrium, sustained by two principal mechanisms: (1) Induced obsolescence, and (2) Anchoring.²⁷

Induced obsolescence is grounded in social distinction, the trickle-down theory and imitation. It refers to a phenomenon whereby the free appropriation of fashion designs accelerates the diffusion, or “the trickle-down”, of fashion, meaning that designs have a shorter life cycle which in its turn means that designers can get more business because they design new fashion that the social elite then adapt. As designs are copied and made accessible to a broader public, they lose their exclusivity, prompting higher-status consumers to adopt new styles to maintain social differentiation. The legal implications of this behaviour may be that designers choose not to protect their designs, as they still profit of them without protection.²⁸

Anchoring, on the other hand, refers to the social function of imitation as explained above. For the non-industry experts to recognize what is and what isn't fashion they often look to what others are wearing. For fashion trends to emerge and gain traction, they must be recognized as such. Copying designates certain styles as salient, signalling to consumers that a particular look is “on trend.” By anchoring specific styles as worthy, copying transforms them into dominant fashion narratives. This in its turn also drives business to the designers.²⁹

The legal implications, with background in induced obsolescence and anchoring, is that designers are less likely to seek protection because they don't need it. If robust IP protections were enforced, the diffusion of styles might be markedly slower, which would mean less business. The paradox doesn't in a satisfying way consider smaller, non-established creators. For these, appropriation of their designs may just mean no business as they are not recognized enough to get the recognition a big fashion house would because fashion houses and big designers are established on the market.

Although the Piracy Paradox is developed with the United States legal order in mind, the insights it offers remain relevant in other jurisdictions. In the EU, where design protection is more robust than under US law, litigation remains infrequent.

The Piracy paradox is closely related to the First-Mover Advantage which refers to the notion that original design-

ers may enjoy a limited window of opportunity to commercially benefit from their creations before imitations enter the market. In essence, this concept complements the mechanisms of induced obsolescence and anchoring, as it highlights the temporal gap between the release of an original design and the proliferation of copies. During this interim period, the designer may be able to attract customers and generate sufficient revenue to justify the creative and financial investment involved in producing the original work.³⁰

However, the viability of this advantage hinges on the assumption that there is a meaningful delay between the launch of the original design and the emergence of copies. In practice, especially given the speed and efficiency of today's globalised production and distribution systems, this assumption is increasingly questionable.³¹ This notion ties in well with the consideration of smaller creators as it highlights the need for a sufficient time window for the creator to make money on its product before it gets copied.

2.5 Fast Fashion and its Litigation

Fast fashion refers to “cheaply produced and priced garments that copy the latest catwalk styles and get pumped quickly through stores in order to maximise on current trends”.³² Rather than being a traditional part of the fashion industry, fast fashion can be viewed as a parallel and often competing industry, one that significantly influences the broader fashion ecosystem.

Figure 3 The fashion Pyramid and Fast Fashion



Two primary preconditions underpin the fast fashion model: (i) identifying commercially successful designs, and (ii) replicating and distributing those designs as

²⁶ Raustiala & Sprigman (n 10).

²⁷ Ibid., p. 1698.

²⁸ Ibid., pp. 1718–1727.

²⁹ Ibid., pp. 1728–1735.

³⁰ Ibid., p. 1759.

³¹ Ibid., p. 1762.

³² Rashmila Malti, ‘The Environmental Impact of Fast Fashion, Explained’ (Earth.org, 20 January 2025) <[https://earth.org/fast-fashions-detritmental-effect-on-the-environment/#:-:text=The%20term%20fast%20fashion"%20was,%2C%20Forever%2021%2C%20and%20H%26M](https://earth.org/fast-fashions-detritmental-effect-on-the-environment/#:-:text=The%20term%20fast%20fashion)> accessed 17 May 2025.

quickly as possible. Today, a fast fashion item can reach the market within as little as 15 days of a trend's emergence.³³

Whereas the traditional fashion industry once operated on a seasonal model of two to four collections per year, fast fashion has replaced these with a continuous release cycle. Many fast fashion brands now introduce new styles on a weekly, or even daily basis. This accelerated cycle has blurred the distinction between the originators of a trend and those who imitate it, disrupting established mechanisms of creativity, authorship, and attribution in fashion.³⁴ Important to note is that the copying is not limited to the big fashion houses, smaller creators are also affected by the copying.³⁵

As the fashion industry has shifted, legal disputes concerning design copying have become increasingly visible. The rise of fast fashion has not only triggered a growing number of lawsuits but also heightened public awareness of the challenges facing original designers. Today, litigation functions as more than a legal remedy, it has become a lens through which one can examine the shifting power dynamics.

Recent case law underscores evolving nature of these disputes. In *Dr. Martens v. Shein*, the British footwear company, through its parent AirWair International, alleged trade mark infringement, claiming that Shein marketed boots that closely resembled its iconic designs, even using images of Dr. Martens products to promote lookalikes. The case was later settled.³⁶

The dynamics become even more precarious when independent designers are involved. In one example, Welsh designer Sonia Edwards brought an action against Boohoo Group, alleging that the company had copied five of her original designs protected under unregistered design rights. While the court acknowledged the creativity of her work, the claim ultimately failed due to insufficient evidence that Boohoo had access to her designs, citing her limited market exposure and small social media presence.³⁷ This outcome reveals a core limitation in the existing legal framework: that success often depends as much on visibility and reach as on creative merit. For emerging designers with modest platforms and limited resources, asserting ownership and securing recognition remains a formidable challenge.

Even well-established brands encounter obstacles when attempting to enforce their rights. In *Adidas v. H&M*, a legal battle that spanned nearly 25 years, Adidas sought to protect its three-stripe trade mark from what it claimed was infringement by H&M's two-stripe design. Despite

the iconic status of the Adidas mark, the Dutch Supreme Court ultimately ruled in favour of H&M, concluding that the differences in stripe spacing and design prevented consumer confusion.³⁸ The decision underscores the difficulty of asserting exclusivity over minimalist or widely used elements in an industry where visual overlap is common, and the aesthetic lexicon is collective.

Some disputes never proceed to final adjudication but nevertheless leave a significant imprint on the public conversation. In *Kai Collective v. Boohoo*, the independent brand accused Boohoo of copying its distinctive "Gaia" printed mesh design.³⁹ Although the case was settled out of court, it sparked widespread attention across social media and fashion forums, illustrating how reputational harm and brand identity can be contested as much in the public sphere as in the courtroom. In this vein, platforms like Diet Prada, a social media platform known for exposing design plagiarism and industry malpractice, have become influential actors. Their public critiques, especially of fast fashion giants like Shein, now function as informal but potent mechanisms of accountability, especially where formal legal remedy may be inaccessible or cost prohibitive.

Together, these cases reveal the increasingly digital terrain of brand protection, where algorithmic visibility can be as commercially significant as physical product similarity. Furthermore, they reveal that litigation in the fast fashion era is rarely just about legal protection in the traditional sense. Rather, it often reflects broader struggles over authorship, visibility, and market access in an industry where originality and imitation are tightly intertwined.

3. THE SCOPE OF THE INTELLECTUAL PROPERTY PROTECTION OF FASHION

There are three main categories of IP rights that are relevant when it comes to fashion: Copyright, Design rights and Trade Marks. These will be discussed below, followed a comparison between the three.

3.1 The Copyright Protection of Fashion

Among the various forms of IP protection available to the fashion industry, copyright is often the first to come to mind due to its strong association with creative expression. Copyright arises automatically upon the creation

³³ Ibid.

³⁴ Alyssa Hardy, 'Everything You Need To Know About Fast Fashion' (Vogue, 24 April 2024) <<https://www.vogue.com/article/what-is-fast-fashion>> accessed 3 May 2025.

³⁵ Ibid.

³⁶ *AirWair International Ltd. v. Zoetop Business Co., Limited*, Case No. 5:20-cv-07696.

³⁷ *Edwards v Boohoo.com UK Ltd & Ors* [2025] EWHC805 (IPEC). See also Rachel Gittins 'Welsh designer loses court battle against fashion giants Boohoo over bikini copy claim' (The Independent, 30 April 2025) <<https://www.the-independent.com/news/uk/home-news/sonia-edwards-bohoo-bikini-case-b2742112.html>> accessed 5 May 2025.

³⁸ Lucas de Groot 'adidas v H&M' (Taylor Wessing, 9 April 2020) <<https://www.taylorwessing.com/en/insights-and-events/insights/2020/04/adidas-v-h-m-the-everlasting-battle-of-the-stripes>> accessed 5 May 2025.

³⁹ Tami Makinde 'Kai Collective vs Boohoo: Why we need to reevaluate our relationship with fast fashion' (Native, 5 March 2021) <<https://thenativemag.com/fast-fashion-boohoo-kai-collective/>> accessed 5 May 2025.



of an original work and typically lasts for the life of the author plus 70 years.⁴⁰

Under EU law, a “work” must be identifiable with sufficient precision and objectivity. This means that while fashion is sometimes dismissed as subjective, it is distinguishable from purely sensory impressions like taste and can be objectively identified and therefore can qualify for protection.⁴¹ Fashion must also meet the originality threshold to gain protection.⁴²

Originality requires the work to be the author’s own intellectual creation.⁴³ A work is an author’s own intellectual creation if free and creative choices have been made that reflect the author’s personality.⁴⁴ In *Painer*, a case concerning photography, the Court mentioned several different features that could indicate that a photograph reaches the originality threshold,⁴⁵ for fashion these features could translate to colour selection, silhouette alterations and fabric manipulation in fashion could satisfy this standard.

Copyright does not protect works that are purely functional. In *Brompton Bicycle*, the Court stated that shapes dictated solely by technical function are excluded, but

if creative choices remain, protection is possible.⁴⁶ For instance, a plain t-shirt may lack originality, but a version with a distinctive print or cut might qualify. Standard functional elements like belt loops or zippers are generally not protected unless used in an original way.

Lastly, it is important to acknowledge that copyright only protects against copying, it does not protect against independent creations of a similar or identical piece.⁴⁷ This means that while the protection arises at the creation of a work, the protection is limited to *direct* copying.

One logistical challenge with copyright is its enforcement. As there is no registration required, designers bear the burden of proving that their work qualifies for protection. This could mean that while the protection itself is free of cost, the cost of enforcement may equal or even exceed those of registered rights such as design protection.

3.2 The Design Protection of Fashion

Design rights protect the appearance of a product. This may include, but is not limited to, features such as lines, contours, shape, texture and colour. The EU offers two types of design protection: registered EU designs (REUD) and unregistered EU designs (UEUD), both of which require that the design be novel and possess individual character.⁴⁸

REUDs are obtained through registration with the European Intellectual Property Office (EUIPO) and

⁴⁰ Council Directive (EU) 2011/77 of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights [2011] OJ L265/1, art 1.

⁴¹ Judgement of the Court (Grand Chamber) of 13th November 2018, C-310/17, EU:C:2018:899, *Levola Hengelo*.

⁴² Judgment of the Court (Third Chamber) of 12 September 2019, C-683/17, EU:C:2019:721, *Cofemel*.

⁴³ Judgement of the Court (Fourth Chamber) of 16th July 2009, C-5/08, EU:C:2009:465, *Infopaq International*.

⁴⁴ Judgement of the Court (Third Chamber) of 1 December 2011, C-145/10, EU:C:2011:798, *Painer*, p. 89.

⁴⁵ *Ibid.*, p. 91.

⁴⁶ Judgement of the Court (Fifth Chamber) of 11th June 2020, C-833/18, EU:C:2020:461, *Brompton Bicycle*, p. 23.

⁴⁷ *Cofemel* [n43], p. 26.

⁴⁸ Art 4–6 Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs. [CDR].

provide protection for up to 25 years, in five-year increments.⁴⁹ UEUDs arise automatically upon first public disclosure within the EU and last for three years.⁵⁰ The fashion sector, an industry that produces a large number of designs that have a short market life,⁵¹ was explicitly identified in Recitals 15–16 of the Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs (CDR) as a key beneficiary of the UEUD system.

To meet the novelty requirement, a design must not have been previously disclosed to the public. In *Easy Sanitary Solutions*, the Court held that novelty must be assessed by comparing the design to specific, clearly identified earlier designs, not general impressions or combinations.⁵²

The individual character requirement focuses on the overall impression the design makes on the informed user. An informed user is defined as someone with familiarity in the product area but not a technical expert.⁵³ In *Karen Millen*, the Court clarified that comparisons must be made with specific earlier designs and not hypothetical combinations. It broadens the scope of protection by including designs that give the same overall impression.⁵⁴

For fashion this means that the presence of armholes and waistbands does not preclude protection if the overall appearance is distinctive. For example, a unique cut, silhouette or surface treatment may give rise to a sufficiently different overall impression.

UEUDs do not protect against independent creation, therefore, while the protection is aimed at the fashion industry, it is a little limited in comparison to REUDs.

According to EUIPO data, fashion-related designs (e.g. clothing and headgear) account for roughly 8,5% of all REUD filings,⁵⁵ highlighting the sector's reliance on design rights.

3.3 The Trade mark protection of fashion

While copyright and design rights protect individual creations, trade marks protect the distinctive identity of a brand. In the fashion industry, where brand image, origin, and recognition are central, trade mark protection plays a crucial role in preserving consumer trust and market differentiation.

Under EU law, trade marks protect any sign capable of distinguishing goods or services from each other. Words, logos, colours, shapes, or combinations thereof can all

be protected under trade mark law.⁵⁶ Protection requires registration either at national level or through the EU Trade Mark (EUTM) system administered by EUIPO.⁵⁷ An EUTM provides unitary protection across all member states for an initial 10-year term, renewable indefinitely.

To be eligible for registration, a sign must be distinctive and clearly represented.⁵⁸ Lack of distinctiveness, or signs consisting solely of shapes or features that result from the nature or function of the product, may lead to absolute refusal. For example, in *Philips* the Court refused protection for the shape of a rotary shaver because its form was technically necessary.⁵⁹ Similarly, in *Lego Juris* the Court held that even if alternative designs exist, a shape primarily dictated by function is not registrable.⁶⁰

In fashion, this principle excludes protection for functional design features (e.g., the way a strap secures a bag or a fastening mechanism), even if widely recognized. Furthermore, acquired distinctiveness, where a mark becomes associated with a brand through use, does not always override exclusions based on functionality.

Non-traditional marks like colour can qualify. In *Louboutin*, the Court accepted that a red sole applied to a particular part of a shoe could function as a trade mark, provided the mark does not relate to the shape itself.⁶¹ This case affirms the potential for fashion brands to protect key visual identifiers, but only under precise legal framing.

Trade marks serve a complementary function: rather than protecting a garment's design per se, they protect symbols of brand origin. Louis Vuitton's *Damier Azur* pattern, for example, was denied protection due to lack of inherent and acquired distinctiveness, illustrating the high threshold for patterns that are common or decorative in nature.⁶²

Trade mark protection is more costly than copyright or UEUD but offers longer duration and broader enforcement.⁶³ It is particularly useful for iconic elements that endure beyond seasonal trends.

3.4 Cumulative and Complementary Protection of Fashion under EU IP Law

Fashion items often engage multiple layers of IP protection. In the EU, copyright, design rights and trade marks can function both cumulatively (protecting the same ele-

⁴⁹ Art 12 and 38, CDR.

⁵⁰ Art 11, CDR.

⁵¹ Recitals 15–16, CDR.

⁵² Judgement of the court (Fourth Chamber) of 21st September 2017, C-361/15 P and C-405/15 P, EU:C:2017:720, *Easy Sanitary Solutions*, p. 14.

⁵³ Judgement of the Court (Sixth Chamber) of 18th October 2012, C-101/11 P and C-102/11 P, EU:C:2012:641, *Neuman and Galdeano del Sel v José Manuel Baena Grupo*, p. 124.

⁵⁴ Judgement of the Court (Second Chamber) of 19th June 2014, C-345/13, EU:C:2014:2013, *Karen Millen Fashions*, p. 28–29.

⁵⁵ European Union Intellectual Property Office, 'EUIPO Statistics for Community Designs: 2003-01 to 2025-03 Evolution', p. 7.

⁵⁶ Council Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (codification) [2017] OJ L154/1. (EUTMR), art 4.

⁵⁷ Art 4 (a)–(b), EUTMR.

⁵⁸ Articles 4–7 EUTMR.

⁵⁹ Judgement of the Court of 18th June 2002, C-299/99, EU:C:2002:377, *Philips*.

⁶⁰ Judgement of the Court (Grand Chamber) of 14th September 2010, C-48/09 P, EU:C:2010:516, *Lego Juris v OHIM*.

⁶¹ Judgement of the Court (Grand Chamber) of 12th June 2018, C-163/16, EU:C:2018:423, *Louboutin and Christian Louboutin*.

⁶² Judgement of the General Court (Tenth Chamber) of 10th June 2020, T-105/19, EU:T:2020:258, *Louis Vuitton Malletier v EUIPO*, pp. 32–33.

⁶³ Ibid.

Table 1 Comparison of each protection's subject matter, purpose and key criteria

IP Right	Subject Matter	Purpose	Key Criteria	Protects Against
Copyright	Original works (of both literary, artistic and industrial character).	Encourage original works of the human intellect.	Originality and identifiability.	Unauthorized copying or reproduction of protected works. <i>Not</i> against independent creation.
Design Right	The visual appearance/feature of goods (e.g. shape, lines, colours, ornamentation).	Encourage innovation in visual design.	Novelty and Individual Character.	Copying that results in the same overall visual impression. UEUD: <i>Not</i> against independent creation.
Trade Mark	Distinctive signs identifying commercial origin (e.g. names, logos, colours, shapes).	Source indicator. Ensure market clarity and protect brand identity	Distinctiveness (inherent or acquired)	Unauthorized use likely to confuse consumers or dilute brand distinctiveness.

Table 2 Comparison of Copyright, REUD, UEUD, and EUTM Protections

IP Right	Cost of obtaining	Time to Acquire	Duration	Percentage of fashion-related filings
Copyright	None	Immediate upon creation	Life of author + 70 years	No official statistics
REUD	350€ + 125€ for each additional design	Registration process time (variable)	5 years, renewable up to 25 years	Clothing = 8.5% of filings
UEUD	None	Immediate upon disclosure within the EU	3 years	No official statistics
EUTM	850€ for one class + 50€ for second class + 150€ for each additional class	Registration process time (variable)	10 years, renewable indefinitely	Clothing = 4.6% of filings

ment under more than one regime) and complementarily (each regime protecting different aspects of the same product). This overlap is explicitly allowed under EU law. Article 96 of the CDR confirms that design protection is without prejudice to copyright and trade mark rights, while Article 9 of the Council Directive (EC) 2001/29 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 [2001] OJ L167/10 affirms the independent operation of copyright law.

Cumulative protection occurs when the same feature meets the criteria for multiple rights. For example, a distinctive fabric print may qualify for copyright as an original work, design protection if novel and individually characterised, and trade mark protection if distinctive enough. This allows layered enforcement strategies and longer protection windows, particularly useful for iconic designs.

Complementary protection means that different rights protect different aspects of the same product. A handbag design may be protected under design law for its overall shape, under copyright for a printed pattern, and under trade mark law for its logo or signature colour scheme. Each right has a separate legal basis and enforcement pathway but works together to build a robust IP portfolio.

This multi-layered system provides flexibility and strategic advantages. For example:

- Copyright and UEUDs arise automatically and cost nothing but have limitations in scope or duration.
- REUDs and EUTMs require registration and upfront cost but offer longer protection and stronger legal certainty.
- When one right expires or proves unenforceable, another may still apply.

In fashion, where design, branding, and market perception intersect, understanding the interplay between IP rights is key. The EU's layered framework is both flexible and complex offering powerful tools, but requiring strategic navigation, especially for smaller players lacking legal resources.

3.5 Practical Considerations and Final Thoughts

While the EU offers a layered and flexible IP system, navigating it can be challenging in practice, particularly for small and medium-sized enterprises (SMEs), independent designers, and emerging brands. The legal thresholds for protection are rooted in doctrinal language and case law, often inaccessible to non-specialists. Designers may struggle to understand what is protectable or how to enforce their rights.

Copyright and UEUD offer low-barrier entry points, providing automatic protection without formalities or cost. However, enforcement can be difficult, especially when proving authorship or first disclosure. By contrast,

REUD and EUTM require upfront investment and strategic timing but offer stronger legal presumption and longer duration.

A further complication is the distinction between copying and independent creation. As clarified in *Cofemel* and *Karen Millen*, similar designs created independently do not infringe copyright or UEUD rights. This creates a legal grey zone for designers who feel wronged but lack a legal remedy.

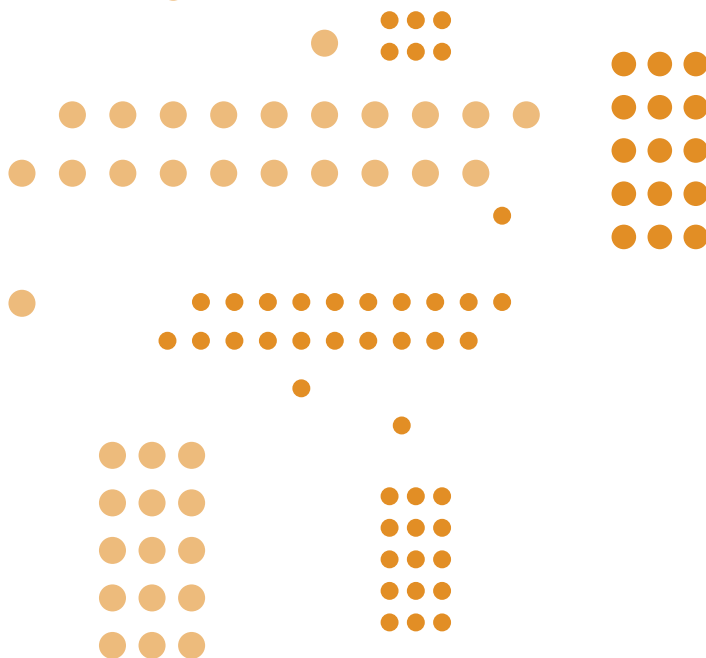
Ultimately, fashion's ephemeral and fast-moving nature demands a pragmatic IP strategy. For trend-based pieces, UEUDs and copyright may suffice. For signature styles or brand identifiers, combining REUD and trade mark protection may be more effective. The EU's system permits such combinations, but accessing its full potential often requires legal insight, financial resources, and strategic foresight.

4. AVAILABLE PROTECTIONS AND THEIR EFFICIENCY

Understanding how fashion functions is crucial to understanding why its protection under IP law is uniquely complex. Fashion is not simply the creation of garments, accessories, and shoes, it is a cultural, economic, and social phenomenon. It is trend-driven, fast-paced, and inherently collaborative. This dynamic benefits creativity and commerce but also challenges legal systems structured around notions of individual authorship and fixed forms of expression. The same fluidity that allows fashion to evolve rapidly is what makes it difficult to regulate.

Raustiala and Sprigman's theory of the piracy paradox argues that copying drives innovation in fashion by fueling trend cycles. Designers benefit from the diffusion of their styles because it keeps fashion in motion, encouraging consumers to seek out the next big thing. This theory made sense in an earlier era of fashion, when styles took time to spread and the original designer still had a chance to benefit commercially and reputationally before others imitated their work. But today, the emergence of fast fashion has changed the equation. Designs are now copied and reproduced at such speed and scale that the original designer may not even receive recognition, let alone a financial return, before being undercut in the market. What the piracy paradox assumes, a delay between creation and imitation, has been dramatically shortened, if not eliminated.

Many designers are ambivalent about IP enforcement. They generally distinguish between inspiration, which is viewed as a natural and even necessary part of the creative process, and direct copying, which is seen as harmful. While most designers agree that nothing in fashion is ever entirely new, they express a clear sense that taking an idea without acknowledgment crosses a line. These views are mirrored in the structure of EU IP law, which permits imitation through independent creation but prohibits unauthorized copying. The law, like the designers,



accepts that fashion involves shared references, while still drawing a line at outright replication.

This nuanced stance suggests that the piracy paradox may no longer capture the lived reality of designers. Rather than viewing copying as a strategic benefit, many now see it as a threat especially when it comes from powerful fast fashion companies that can replicate and distribute a design globally before the original creator has had time to build an audience or reputation. In this way, the current speed of the industry has begun to undermine the very foundations on which the piracy paradox rests.

Fashion can be protected under several types of EU IP rights. While these protections are robust in theory, their practical value depends on whether they are accessible, affordable, and effective in use. Many designers, particularly those working independently or within small enterprises, do not find it worthwhile to pursue legal protection or enforcement. This is not because they reject the idea of protection, but because the cost, time, and effort involved are often disproportionate to the potential benefit. A fashion piece may only be relevant for a few weeks or months; by the time a legal claim is filed and processed, the design may have already lost its commercial value. Even where automatic protection applies, as with UEUD, the burden of proof, the speed of the industry, and the emotional toll of enforcement deter many designers from asserting their rights.

Financial limitations are a key factor. Larger brands and fashion houses are better positioned to absorb costs and manage the administrative complexity of enforcement. Independent designers often cannot. Even among SMEs, there is significant variation in access to legal support and IP knowledge, which correlates closely with size and revenue.

Many designers are unfamiliar with how IP protection works, or even that it exists in the forms available under EU law. This is partly a consequence of the legal system's complexity and partly a failure of communication and outreach. Although the EU has attempted to reduce this burden through grants and IP vouchers targeted

at SMEs,⁶⁴ these efforts are not always widely known or fully utilized. Studies have suggested that IP awareness should begin earlier in life, with legal literacy continuing into higher education and professional training.⁶⁵ For designers outside traditional educational structures, targeted outreach and simplified digital resources could make a meaningful difference. A more integrated, accessible approach to IP information could help close the gap between the legal framework and the people it aims to protect.

Time is another barrier. Legal processes do not move at the pace of fashion. Even fast-track options are rarely fast enough. A design may be copied and exhausted within weeks of its release. If the designer cannot act immediately, the window for protection may close before any legal claim can be made. Moreover, enforcement requires time not just in the legal sense but in terms of the designer's own capacity: collecting evidence, securing legal advice, and confronting a larger party all take time away from designing and producing.

Emotionally, litigation can be draining. Designers have described the process of enforcement as isolating, intimidating, and all-consuming. Without institutional support or legal guidance, many simply choose to endure the copying and move on. For larger companies, by contrast, enforcement is often a routine part of brand protection. This contrast reinforces existing hierarchies in the industry and limits the reach of legal protection to those already positioned to take advantage of it.

These challenges suggest that the formal adequacy of EU IP protection does not translate into practical effectiveness across the industry. While the legal tools are available, they are not equally usable by all. As a result, many designs go unprotected not because they are ineligible for protection, but because the designers behind them cannot access the system. This disparity raises serious questions about the equity of the current framework and the broader implications for creativity and competition in fashion.

5. CONCLUDING THOUGHTS

IP law is built on the premise that innovation deserves protection and that exclusive rights serve as an incentive to create. If creators are routinely denied the ability to benefit from their work, that incentive erodes. The difficulty of enforcing rights in today's fashion landscape may therefore threaten not only individual designers but the long-term vitality of the industry. At the same time, the unique nature of fashion complicates a purely legal approach. In contrast to many other industries, fashion

often relies on visibility, not exclusivity. Copying may sometimes enhance a designer's reputation rather than harm it. In this way, IP's protective logic does not always align with the strategic logic of fashion.

Stakeholders view IP in different ways. Lawmakers typically understand it as a mechanism for stimulating creativity through economic reward. Copiers may see it as a risk or barrier, while designers themselves often see it as a multi-purpose tool: a deterrent, a badge of identity, a commercial asset, or a last resort. These fragmented understandings point to a deeper truth: there is no single role that IP plays in fashion, and no single reform that will solve its challenges.

Still, one thing is clear: fast fashion has changed the game. Its scale, speed, and operational model challenge the assumptions on which EU IP law was built.

What is needed is a broader, more systemic response. Reforming IP law alone is not enough. Instead, a wider initiative involving industry stakeholders, legal institutions, educators, and policymakers may be required. Such an initiative could help reassess not only how the law is written, but how it functions in practice. It could examine who benefits from the current system, who is left out, and what new tools or approaches might offer more equitable access.

As this article comes to a close, we return to where it began: the story of Christian Louboutin and his red soles. That impulsive stroke of colour became one of fashion's most distinctive symbols, so distinctive that it sparked litigation in courts around the world. Louboutin's success in securing trade mark protection stands as an emblem of what IP can achieve. But it also reveals how uneven that protection is. Not every designer has the means to defend their work across jurisdictions. Not every design will be deemed "distinctive" enough. And not every act of copying will be actionable.

IP protection may stand at the gates of fashion, like a guard outside Troy. But fast fashion is the Trojan horse already inside the walls.

⁶⁴ 'SME Fund 2025' (European Union Intellectual Property Office, 2025) <<https://www.euipo.europa.eu/en/sme-corner/sme-fund/2025>> accessed 10 May 2025.

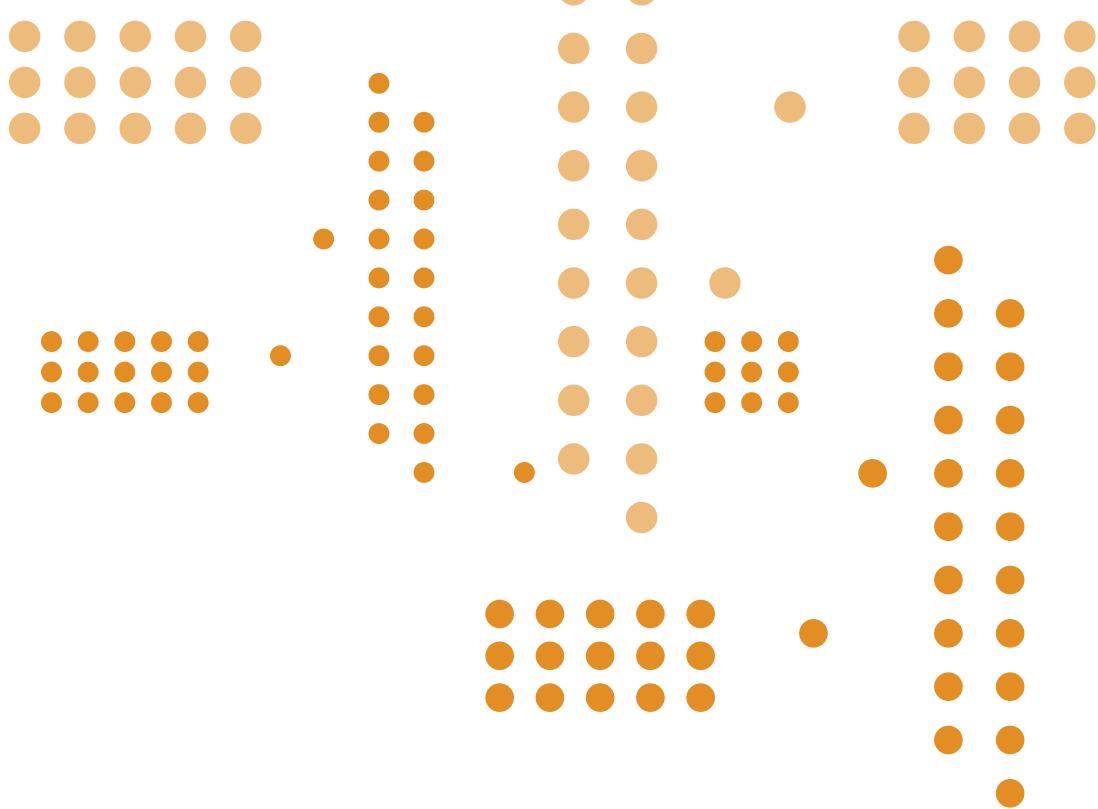
⁶⁵ Christina Wainikka, 'Nationella Immaterialrättsstrategier: En jämförelse av strategiska satsningar runt om i världen' (Svenskt Näringsliv, February 2025), p. 22.

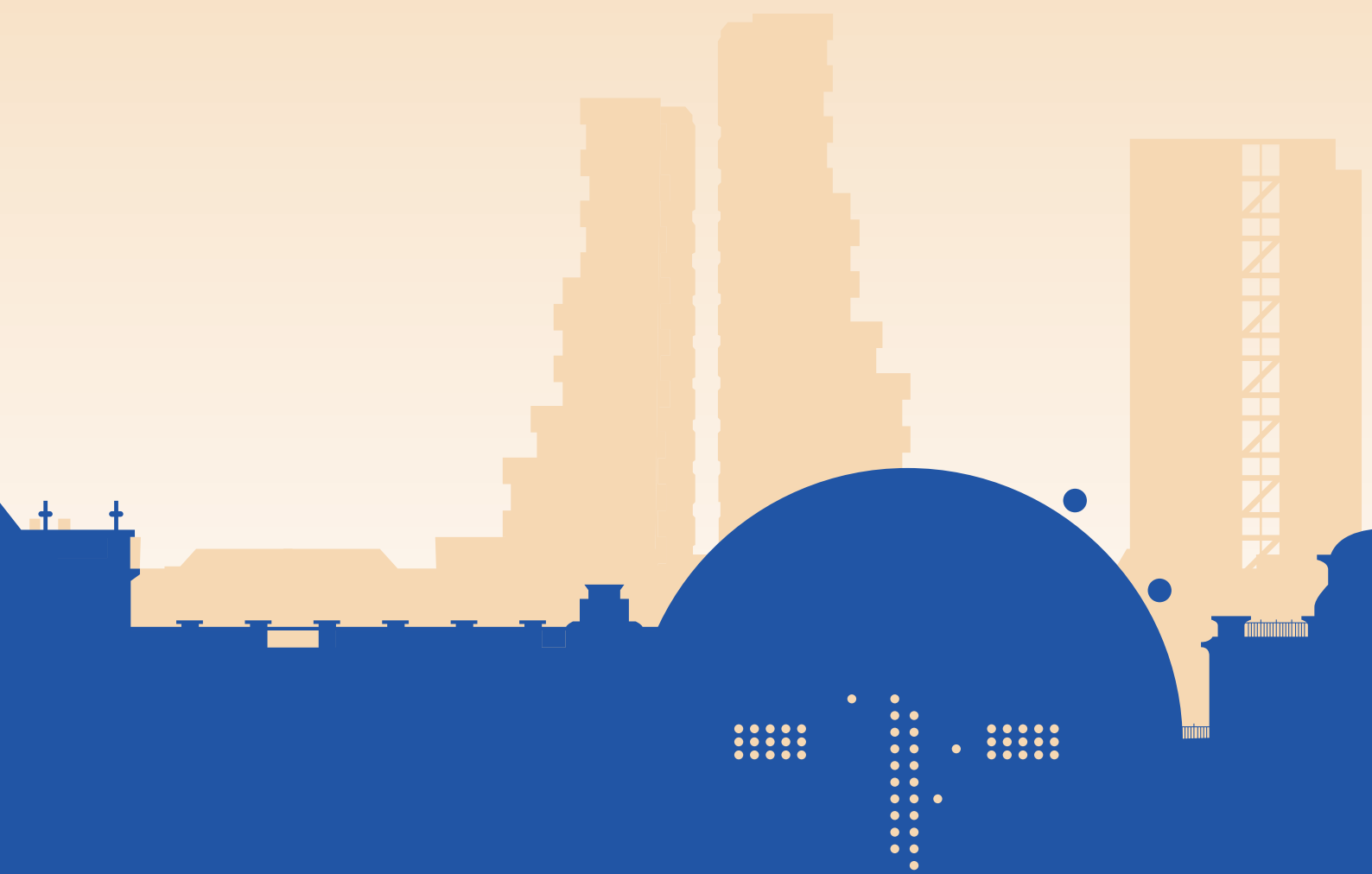


Ragi Vyas

Ragi Vyas holds master's degrees in law from both Stockholm University and the University of Illinois at Urbana-Champaign (UIUC), with a focus on intellectual property and technology law. She wrote her master's thesis at Stockholm University under the title *The Adequacy of EU IP Protection for Fashion*, exploring the legal

and sociological dimensions of protecting fashion in the age of fast fashion. Ragi has long been interested in the intersection of fashion and law, and her work reflects a deep engagement with both creative industries and legal frameworks.





Produced with the support of STIFTELSEN JURIDISK FACKULTETSLITTERATUR
and the sponsorship of

 Groth & Co

Sandart&Partners

VINGE

 AWA

ROSCHIER

CIRIO