

Bird & Bird

# IP & Synthetic Media: Copyright & Style

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# Copyright Protection in the EU

## *Basics: originality + expression*

- **Originality**

- Author's own intellectual creation,
- Reflecting the personality of the author
- As an expression of his free and creative choices

- **Expression**

- Protection can only relate to an 'objective and identifiable expression'
- Subjective impressions are excluded (taste (*Levola/Hengelo*); aesthetic effect (*Cofemel*))
- Reference to idea/expression dichotomy
  - No protection if the separation between idea (concept/construction principle) and forms is blurred
  - E.g. Funke Medien (Afghanistan Papers)

# Style always excluded from copyright protection?

- Style = the universal entity common to the multitude of individual productions covered by it
- Copyright protection is however possible within a broader style: the specific manner in which each of the individual creations expresses the style.



# Listen to 'new' Nirvana song, Drowned In The Sun, created by Artificial Intelligence

News

By Louder ( Louder ) published 6 April 2021

Hear a Nirvana song written by AI, as part of a project examining mental health issues in the music biz



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(Image credit: Raffaella Cavalieri/Redferns/Getty Images)

If you heard *Drowned In The Sun* introduced on radio as a previously unreleased song from **Nirvana**, it's highly likely that you'd take the DJ's words at face value. In reality, the song is an AI composition, created as part of an initiative raising awareness of mental health issues in the music business.



# Reproducing style ≠ infringement?

- **Style vs. moral rights**

- Right to integrity of the work: distinguishing between what constitutes excessive borrowing and what falls within the scope of creative freedom

- **Style vs. legitimate interests of rightholders?**

- Three-step test:

*The exceptions and limitations [...] shall only be applied 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 rightholder (Art.5.5 InfoSoc Directive).*

- **Style vs. personality rights?**

- Voice
- Likeness

# Style & infringement test



- Mio (C-580/23)

– Questions referred in Mio regarding assessment of copyright infringement:

*What is the significance of*

*(a) the degree of originality of the work for the scope of the work's protection?*

*(b) the fact that the work and the allegedly infringing subject-matter of applied art consist of elements found in common designs or build on and constitute variations of earlier known designs or an ongoing design trend?*

# Style & infringement test

- **AG Szpunar in *Mio*:**

- Courts must determine whether creative elements of the protected work have been reproduced in a recognisable manner
  - *"What distinguishes two works is not the overall impression but the details that uniquely personalise them"*
- Originality is inherent to the work itself, not dependent on differences from other works
- Inspired by the same prior subject matter or design: only the 'new' creative elements are original to the derivative work and only the reproduction of those new elements constitutes an infringement of that work
- Mere fact of following the same artistic trend or current as the author of an earlier work does not constitute infringement in the absence of the reproduction of creative elements of that work

- **Cf. *Pelham I* case (C-476/17):**

*However, where a user, in exercising the freedom of the arts, takes a sound sample from a phonogram in order to use it, in a modified form unrecognisable to the ear, in a new work, it must be held that such use does not constitute 'reproduction'.*

→ **Synthetic media = not infringing if protected work is not recognisable/ is part of ongoing trend?**

# Other exceptions that can allow synthetic media based on style?

- **Pastiche?** (*Pelham II*)
- **Parody?** (*Deckmyn*)
- **Derivative / transformative works?** (*Institutul G. Călinescu*)

# Style & pastiche? (Pelham II (C-590/23))

- **Questions referred in Pelham II:**

- *Is 'use for the purpose of pastiche' 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?*
- *Does use 'for the purpose of' pastiche 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?*

# Style & pastiche? (Pelham II (C-590/23))

- **AG Emilou**

- ‘pastiche’ = broad range of artworks characterised by overt stylistic imitation, with as essential characteristics:
  - (i) to ‘evoke an existing work’ (or several works, or a genre, or an artist, or a school), by adopting his, her or its (or their) distinctive ‘aesthetic language’, otherwise foreign to the ‘pasticheur’, while
  - (ii) being ‘noticeably different’ from the source imitated. Indeed, as stated above, such a ‘pastiche’ is not designed to be a bad faith forgery substituting itself for the source, but is, in fact,
  - (iii) intended to be recognised as an imitation.
- The precise purpose of the ‘pastiche’ is irrelevant: it may be, like a ‘parody’, an ‘expression of humour or mockery’, or otherwise critical of the source material. It may, instead, be a tribute or homage to that material.
- The ‘pastiche’ exception would provide creators with 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.

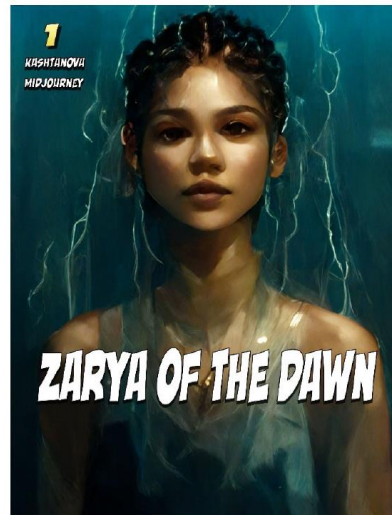
→ **Synthetic media = pastiche?**

# Style & parody? (Deckmyn, C-201/13)

- Essential characteristics of parody:
  - to evoke an existing work while being noticeably different from it, and,
  - to constitute an expression of humour or mockery.
- **Limit:** absence of breach of other fundamental rights

# Style & derivative work? (Institutul G. Călinescu (C-649/23))

- Questions referred regarding derivative works:
  - *Must Article 2(a) of Directive 2001/29/EC be interpreted as meaning that a critical edition of a work, the purpose of which is to produce an authoritative version of the text of an original work, by consulting the manuscript, accompanied by comments and the requisite critical apparatus, may be regarded as a work protected by copyright?*



# Style & derivative work? (Institutul G. Călinescu (C-649/23))

- **AG Spielmann**

- The author of the critical edition produces a creative work and stamps his personality on another person's work, so that he creates a derivative work.
- Necessary to examine what intervention by the author of a critical edition consists of as compared with the original work. The type of works concerned and the specific abilities of other researchers engaged in identical or similar studies may in particular contribute to an understanding of what should be classified as an 'autonomous work', independently protected by copyright, and what is merely a scientific re-editing of knowledge in the public domain.
- No 'detachable' copyright protection: It is not necessary to distinguish between the parts corresponding to the original work, which may have been the subject of textual amendments, and the comments, critical notes or explanations accompanying them in order to distinguish the contributions which give rise to copyright from those which do not.
- Recognition of copyright in a derivative literary work does not make the original works return to the private domain and does not grant the author of that derivative work any exclusive right in the original works.
  - A balance must be struck between the interests involved: the public interest and the need for the public to be able to freely access a work which has come into the public domain or the right to receive information and the protection of works, including derivative works.

→ **Synthetic media = derivative work?**

# Deepfakes (AI Act)

- deep fake = an AI-generated or manipulated image, audio or video content that resembles existing persons, objects, places or other entities or events and would falsely appear to a person to be authentic or truthful (Art. 3 (60) j° rec. 134 AI Act)
- **Deployer of an AI system** that generates or manipulates image, audio or video content constituting "deep fakes" must **disclose that the content has been artificially generated or manipulated** (Art. 50 (4) AI Act)
- **Nuance: if evidently artistic, creative, satirical or fictional**: transparency obligations are limited to disclosure of the existence of such generated or manipulated content in an appropriate manner that does not hamper the display or enjoyment of the work
- **Exception**: authorised by law to detect, prevent, investigate or prosecute criminal offence



# Outlook

- **No Immediate Need for Reform:** The existing framework appears sufficient to address style replication without major legislative changes.
- **Where Reform *Would* Be Valuable**
  - **Personality rights:** It may be timely to harmonize the **right to image** (including its attributes such as voice, dress code, ... including after death).
  - **Moral rights:** harmonization of **right to integrity** and **duration**



# Thank you

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