

# Copyright Liability and Generative AI: What's the Way Forward?

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## 1. Introduction

The intersection of copyright liability and generative AI has become one of the most complex and debated issues in the field of copyright law. AI systems have advanced significantly to allow the creation of fantastic new content but they are also capable of producing outputs that evoke, adapt, or recreate content that is protected by copyright law, sparking several infringement proceedings against AI companies, particularly in the US.<sup>1</sup> With this rapid evolution comes the need to re-examine existing legal frameworks and theories. In this contribution, I would like to focus on liability challenges at the output stage of AI content generation and share some insights from Sweden to finally ponder about possible paths forward.

## 2. Copyright Liability at the Output Stage: Who does what exactly?

There are several ways of getting to the output stage in order to discuss liability issues there. One way is to recognise that the text and data mining exceptions that were introduced by Articles 3 and 4 CDSM Directive<sup>2</sup> protect the process, not the result of that process.<sup>3</sup> This view of the text and data mining exceptions opens up for a copyright analysis of whatever is going on at the output stage. Stated in different terms, the mere existence of copyright exceptions that are capable of covering the AI development (training) stage does not of itself render irrelevant a copyright analysis at the output stage where AI systems are

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<sup>1</sup> For example *Getty Images Inc. v. Stability AI*, 1:23-cv-00135-JLH; *In re: OpenAI ChatGPT Litigation No. 3:23-cv-3223*; *New York Times Company v. Microsoft Corporation et al*, No. 1:23-cv-11195; *In re Google Generative AI Copyright Litigation Master File Case No. 5:23-cv-03440-EKL*; *Doe 1 v. GitHub, Inc.*, No. 4:22-cv-06823-JST. <<https://www.bakerlaw.com/services/artificial-intelligence-ai/case-tracker-artificial-intelligence-copyrights-and-class-actions/>>.

<sup>2</sup> Directive 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.

<sup>3</sup> K. Szkalej and M. Senftleben, 'Generative AI and Creative Commons Licenses. The Application of Share Alike Obligations to Trained Models, Curated Datasets and AI Output' (2024) JIPITEC 15(3) 313, 323.

used to generate the kind of content that may justify asking copyright-relevant questions.

But it turns out that liability is a complex issue. It involves a different dynamic than contracting because it derives from and is limited by law. Contracting, on the other hand, lets the parties define their mutual rights and obligations either with reference to what copyright law envisages or go beyond its confines.<sup>4</sup> In the latter case the parties are generally free to determine the arrangement between them and they do not need copyright for it. Copyright, so to say, merely provides the bargaining edge. Liability hinges however always on the existence of an infringing act or copy. In the online environment, under the European regime, this requires either the making of a copy that constitutes a reproduction of the whole or part of an existing work in the sense of Article 2 InfoSoc Directive,<sup>5</sup> or the communication to the public, including the making available, of the whole or part of a copy of a work in the sense of Article 3 InfoSoc Directive.<sup>6</sup> There is additionally the question of permissible transformative use or adaptation, which I address separately in section 2.1.3. Of course when *works* are at stake, the copyright interest is always reduced to the protectable subject matter – the originality of the expression.<sup>7</sup> Taking parts of a work that does not include the original expression is copyright-irrelevant. It neither activates the dogma of broad interpretation of exclusive rights nor the need to ensure a high level of protection of copyright.<sup>8</sup> Arguably it is not even a *work*. But existence of an infringing act or copy is merely a pre-requisite for addressing liability. The fundamental questions to ask is who does what

<sup>4</sup> Cf. CDSM Directive, Art. 4(3). See also K. Szkalej and M. Senftleben (n 3), 335–336.

<sup>5</sup> 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.

<sup>6</sup> The distribution right harmonised by Art. 4 InfoSoc Directive does not apply in the online environment as the CJEU made clear in C-263/18 *Nederlands Uitgeversverbond and Groep Algemene Uitgevers v Tom Kabinet Internet and Others*. Compare C-128/11 *UsedSoft v Oracle International* confirming the applicability of the right in respect of computer programs. The lending right (if one can imagine its application) also applies online, as confirmed in C-174/15 *VOB v Stichting Leenrecht*.

<sup>7</sup> C-5/08 *Infopaq v Danske Dagblades Forening*, paras 38–39.

<sup>8</sup> On which see for example C-607/11 *ITV Broadcasting and Others v TVCatchup*, para 20; C-466/12 *Svensson and Others v Retriever Sverige*, para 17; C-351/12 *OSA v Léčbné lázne Mariánské Lázně*, para 23; C-325/14 *SBS Belgium v Belgische Vereniging van Auteurs, Componisten en Uitgevers*, para. 14; C-160/15 *GS Media v Sanoma Media Netherlands and Others*, para 30; C-527/15 *Stichting Brein v Filmspeler*, para 27; C-610/15 *Stichting Brein v Ziggo BV and XS4ALL Internet*, para 22; C-161/17 *Land Nordrhein-Westfalen v Dirk Renckhoff*, para 18; C-484/18 *Spedidam and Others v Institut national de l'audiovisuel*, para 36 with 39; and C-263/18 *Nederlands Uitgeversverbond and Groep Algemene Uitgevers v Tom Kabinet Internet and Others*, paras 48–49. In C-145/10 *Painer v Standard Verlags and Others* the two components were mentioned separately (paras 96 and 107); similarly C-469/17 *Funke Medien v Bundesrepublik Deutschland*, para 50 and 70 and C-516/17 *Spiegel Online v Beck*, para 35 and 54. The canon of broad interpretation has also been invoked without direct reference to the objective of high level of protection; for example in C-301/15 *Soulier and Doke v Premier ministre and Ministre de la Culture et de la Communication*, para 30 (right of reproduction), C-117/15 *Reha Training Gesellschaft für Sport-und Unfallrehabilitation v GEMA*, para 36 (communication to the public) or C-265/16 *VCAST v RTI*, para 40 (communication to the public). See further T. Rendas, *Exceptions in EU Copyright Law. In Search of a Balance Between Flexibility and Legal Certainty* (Kluwer Law International 2021), 55–58.

exactly at the output stage and whether there are any defences to liability. There is, on the one hand, the user of the system that generates content and, on the other hand, there is the AI system developer or adopter, which I will collectively call AI system provider, that offers it for use by others. I will discuss these actors in turn.

## 2.1. Copyright liability and the AI user

### 2.1.1 Copyright exceptions

When it comes to liability of the user for generating potentially infringing content of course copyright exceptions play a significant role. By their very nature they operate as defences to an infringement claim. Whilst Europe is not like the US with its open-ended fair use system,<sup>9</sup> there is a set of copyright exceptions that are certainly relevant at the output stage, such as those concerning parodies, caricatures or pastiches in Article 5(3)(k) or quotations in Article 5(3)(d) InfoSoc Directive. Perhaps not every content generated using AI is intended to be a quotation or a parody,<sup>10</sup> but with the CJEU's recognition of a teleological approach to interpreting copyright exceptions,<sup>11</sup> their evident constitutionalisation and designation as user rights,<sup>12</sup> it is difficult to not view exceptions more broadly than by their literal and in some cases narrow or concise wording.<sup>13</sup> That does not mean copyright exceptions always have to trump exclusive rights, but that they cannot be applied mechanically without reference to the purposes they serve.<sup>14</sup> That is because exceptions, together with exclusive rights, constitute mechanisms through which fundamental rights protected by the EU Charter<sup>15</sup> find concrete expression and can be balanced.<sup>16</sup>

<sup>9</sup> 17 U.S.C. § 107.

<sup>10</sup> The fact that it may not be intended to be a parody does not invalidate a finding that a parody has been created. There is no requirement of the user having to intend to make a parody; C-201/13 *Deckmyn and Vrijheidsfonds VZW v Vandersteen and Others*; P. Mezei and others, 'Oops, I Sampled Again...the Meaning of "Pastiche" as an Autonomous Concept Under EU Copyright Law' (2024) IIC 55 1225, 1249.

<sup>11</sup> Joined Cases C-403/08 and C-429/08 *FAPL v QC Leisure and Others*, para 163; C-145/10 *Painer*, para 133; C-201/13 *Deckmyn*, paras 23 and 27; C-117/13 *Technische Universität Darmstadt v Ulmer*, paras 32 and 43; C-516/17 *Spiegel Online*, para 36; C-469/17 *Funke Medien*, para 51.

<sup>12</sup> C-516/17 *Spiegel Online*, para 54; C-469/17 *Funke Medien*, para 70.

<sup>13</sup> See especially for an excursion over the term 'pastiche' P. Mezei and others (n 10) and Opinion of the European Copyright Society on CG and YN v Pelham GmbH and Others, Case C-590/23 (Pelham II) (ECS, 6 November 2024) <<https://europeancopyrightsociety.org/wp-content/uploads/2024/11/ecs-opinion-pelham-ii-1.pdf>>, and over the term 'quotation' T. Aplin and L. Bently, *Global Mandatory Fair Use* (Cambridge University Press 2020).

<sup>14</sup> Cf. the previous "dogma" of strict interpretation of exceptions C-5/08 *Infopaq*, paras 56–57; C-302/10 *Infopaq International v Danske Dagblades Forening (Infopaq II)*, para 27. See further T. Rendas, 'Copyright, Technology and the CJEU: An Empirical Study' (2018) IIC 42(2) 153, 157.

<sup>15</sup> Charter of Fundamental Rights of the European Union, which has the same legal value as the Treaties pursuant to Art. 6 Treaty on the European Union.

<sup>16</sup> C-516/17 *Spiegel Online*, paras 42–43; C-469/17 *Funke Medien*, paras 57–58; as well as C-476/17 *Pelham and Others v Hütter and Schneider-Esleben*, paras 59–60. See further K. Szkalej, 'The Paradox of Lawful Text and Data Mining? Some Experiences from the Research Sector and Where We (Should) Go from Here' (2025) GRUR 74(4) 307, 307–10.

### 2.1.2 Reversed burden of proof

Beyond the question of the applicability of a copyright exception, which nowadays really is a European matter,<sup>17</sup> national approaches to liability are also important. In Sweden in particular a reversed burden of proof derived from the so-called *dubbelskapandekriteriet* (double creation criterion) is certainly relevant. This criterion is foremost known in Swedish copyright doctrine as a tool that can be helpful for assessing originality of expression in infringement cases – if two creators could have created the same thing independently from each other, then that probably indicates that the expression is not original.<sup>18</sup> But in the classic and seminal copyright case from the Swedish Supreme Court concerning the infringement of textile designs depicting wild strawberries (*fragaria vesca*) – NJA 1994 s. 74 (*Smultronmålet*) – the court was inspired by this tool to reverse the burden of proof when an imitation was likely. Having afforded copyright protection to the wild strawberries design but determined that it was relatively narrow (it was not unique, it portrayed naturalistic and well-known elements, and its distinctive features were limited to the manner in which the author artistically exploited the characteristics of the plant), the court went on to hold that a striking similarity of the allegedly infringing expression with the original expression may of itself be regarded as strong evidence that the expression under assessment is an imitation (*efterbildning*) and that therefore *must* the party against whom the infringing claim is made make it likely that their expression was created independently to avoid liability.<sup>19</sup> On the facts the allegedly infringing expression consisted of textile designs depicting strawberries (*fragaria* × *ananassa*).

A reversed burden of proof of this kind is well-known in international intellectual property law,<sup>20</sup> and potentially offers the kind of transparency that may be necessary in infringement proceedings for a court to be able to rule in cases where it is difficult or even impossible to determine how the allegedly infringing and evidently similar material might have been created. In *Smultronmålet*, whilst the court seemed to have ultimately considered the allegedly infringing design depicting strawberries to have been, given the narrow scope of protection of the original expression, so different that it would be outside of the scope of protection of the original design, it nevertheless also accepted the respondent's argument that it was a variation of an earlier textile design depict-

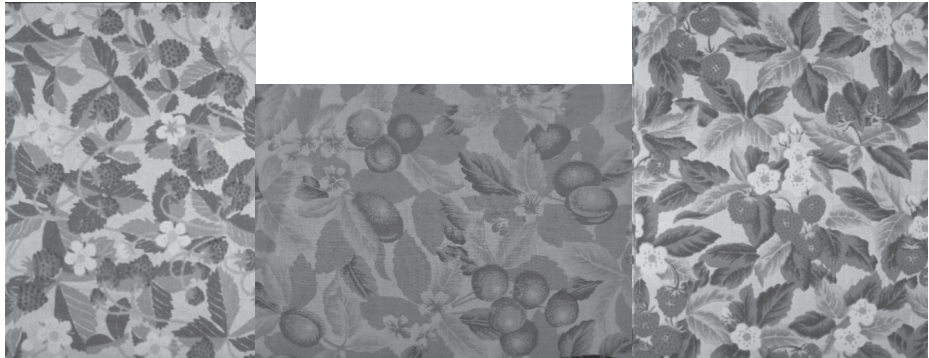
<sup>17</sup> InfoSoc Directive, recital 31; C-476/17 *Pelham*, paras 63–65.

<sup>18</sup> Cf. P.J. Nordell, *Rätten till det visuella* (Jure, 1997), 364. See further P.J. Nordell, 'Dubbel-skapande i teori och praktik' (1995) NIR 1 630.

<sup>19</sup> "... En framträdande likhet med det skyddade verket kan emellertid i och för sig anses utgöra ett starkt stöd för att det senare tillkomna alstret just är en efterbildning. Den som påstås ha gjort intrång i den andres upphovsrätt måste då göra sannolikt att hans alster framtagits självständigt för att någon efterbildning inte skall anses föreligga."

<sup>20</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), Art. 34.

ing plums that was acquired in Hong Kong and that the variation was made without a blueprint.<sup>21</sup>



*Copyright-protected design depicting wild strawberries, by Lena Boije (1983)*

*Design depicting plums, copyright status unknown.*

*Non-infringing design depicting strawberries, copyright status unknown.*

*Figure 1. Wild strawberries, plums, and strawberries (NJA 1994 s. 74)*

But would an AI user that has used an AI system to generate strikingly similar content be able to make it likely that they created it independently from a pre-existing work and thus rebut what in effect is a presumption of copyright-relevant use when the content is similar? In private law evidence is a matter of probability and likelihood so of course this is not a question that is straightforward to answer. However, the circumstances also warrant a slightly different type of argument.

A user may have done nothing more than to write a textual prompt and almost certainly had no idea what went into the training data that ultimately, through an obscure and opaque training process and system configuration, led to the similar content being generated. Unless the prompt makes evident references to a pre-existing work and constitutes a request to transform such a work, it seems unlikely that the expression under assessment should be regarded as not having been created independently from the original, protected expression. I would argue that this applies even if the work indeed turns out to have been part of the training data. Whether it ought to be so depends on whether an objective assessment involving all circumstances is to be carried out or instead a subjective one involving circumstances viewed from the perspective of the user. In *Smultronmålet* the Supreme Court did not offer any explicit guidance but it arguably did pay more attention to the circumstances

<sup>21</sup> *Smultronmålet* gave rise to a significant scholarly debate and criticism on several matters but would not include the reversed burden of proof as such. See especially G. Karnell, 'Högsta domstolen bland smultron och jordgubbar, mellan två stolar? Några kommentarer till HD:s dom DT 45,23.2.1994, A.G. Pehrson Modegrossisten AB ./. Borås Wafveri AB' (1994) NIR 1 85 and generally P.J. Nordell (1997) (n 18), 141–142.

surrounding the respondent's trip to Hong Kong than the fact that the original design was well-known.<sup>22</sup>

At the same time, as copyright is a strict liability offence where intention and knowledge is irrelevant for a finding that copyright-relevant use has taken place,<sup>23</sup> an objective assessment may seem plausible for the sake of consistency. However, indirectly such an assessment requires of users to, very literally, know the state of (the) art, the contents of the training dataset, and how the generation of the content following the prompt was affected by the original, protected, portion of the expression to which the generated content is similar. Therefore, when a fully objective assessment is favoured, an AI user will in effect have to become a better expert at AI systems design than the AI developer only to be able to rebut such a presumption in an infringement case, or even just to appropriately navigate the sea of freedom without running aground on a seabed of exclusivity.<sup>24</sup> A subjective assessment avoids nonsense like this. It does moreover not lead to the awkward result of preventing a diligent and risk averse user from being able to rebut the presumption when they try to stay on the safe side by asking the system to, for instance, create a plump *Mona Lisa* painted originally by Leonardo Da Vinci in the 16<sup>th</sup> century and unbeknownst to the them receive output that is similar to the Colombian artist Fernando Botero's *Monalisa* from 1978.<sup>25</sup> Judging, however, by how responsive some AI systems may be, it seems this is unlikely.<sup>26</sup>

This leaves the art expert. Art experts are not any better AI wizards than regular users but they certainly have more affinity with art. It is precisely in respect of user diversity that a subjective assessment offers necessary flexibility – the likelihood of an art expert not knowing what they generated may be lower than the typical AI aficionado. When the burden of proof is reversed, requiring of the user to reveal the prompt or series of prompts that they used to let the court assess whether the generated material was created under the authority of the user independently from a work may be all that is necessary. But accepting this approach we may have to give *GS Media* more recognition in the case of new technologies by admitting that knowledge, intention, or gross negligence ought to play a more significant role in infringement cases.

<sup>22</sup> In his critique of the judgment *Karnell* (n. 21), 92 opined that the court merely reported on what the respondent argued without assessing it, even though this observation was made by the court at the very end of the judgment.

<sup>23</sup> See however C-160/15 *GS Media*. I consider it in section 2.2.2.

<sup>24</sup> See for a different version of this metaphor C. Geiger, 'Promoting Creativity through Copyright Limitations: Reflections on the Concept of Exclusivity in Copyright Law' (2010) *Vand.L.Rev.* 12(3) 515, and A. Kur, 'Of Oceans, Islands, and Inland Water – How Much Room for Exceptions and Limitations Under the Three-Step Test?' (2009) *Rich. J. Global L. & Bus.* 8(3) 287.

<sup>25</sup> That's as far as economic rights go. There is the other perspective to consider of potential infringement of moral rights that are indefinite in duration in some Member States (although not in Sweden) or, in case of Sweden, the protection of classic works of art (*klassikerskyddet*) in 51 § Swedish Copyright Act.

<sup>26</sup> <<https://chatgpt.com/share/67815de2-4120-8011-b0f1-0e6c302c0d1f>>. See further Annex 1.



### 2.1.3 Transformations, adaptations, and re-productions

This takes me to the professional AI artist user and the Swedish *freie Benutzung* provision in 4 § 2 Swedish Copyright Act (URL).<sup>27</sup> This provision clarifies that a new and independent work that has been created in free connection to a pre-existing work is not dependent on the rights to that work. It thus requires two things – some sort of transformative use (1) that has resulted in the creation of a new work (2). For this reason the provision does not fall under the *Pelham* rule,<sup>28</sup> which concerned neighbouring rights, because it does not operate as a copyright exception but a mere statement of the obvious – a work is by its very nature of being a work always independent of another work because it is original.<sup>29</sup> Its use by the (new) author, therefore, is never regulated by a copyright exception but by the exclusive rights conferred by copyright law upon that author. Importantly, compared to *Smultronmålet* the issue under 4 § 2 URL is not whether the user can offer a credible explanation of whether they created (unprotected) subject matter independently from a pre-existing work, but whether they, on the basis of another work, created a completely new work. Whilst it may perhaps not matter in the case of using AI systems as tools to create new works, nor seems intention to use a pre-existing work relevant, the provision accepts that the new author may have had knowledge of and access to the original work at some point in the creative process or even throughout it. While not necessarily a pre-requisite for applicability of the provision,<sup>30</sup> conscious use of another work is certainly not a circumstance that burdens the user from an evidence perspective when the applicability of this provision is at stake. Ultimately the assessment centres on whether the new creation is original in its own right as well as whether the degree of unavoidable similarity is acceptable given the transformative use (or adaptation) that has taken place. In this respect the boundary is fluid.<sup>31</sup> But whereas the former is now harmonised at EU level,<sup>32</sup> in case of the latter it is all but clear.

<sup>27</sup> Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk.

<sup>28</sup> C-476/17 *Pelham* (n 17).

<sup>29</sup> Viewed from a systemic perspective, the URL does not, nor cannot, use one of the most fundamental concepts in copyright law – *work* – in different ways. There is more nuance to it, however, as the provision has been discussed in the context of parodies and other comparable transformative uses prior to and in the aftermath of *Deckmyn*, suffice it to say here that the debate over parodies was resolved by the Patent and Market Appeals Court (PMÖD) in the *Swedish tiger* case in which the court gave 4 § 2 URL an interpretation that would allow it to apply the *Deckmyn* ruling; PMÖD, case B 12315–20, judgment delivered 23.06.2021 (En svensk tiger). Following this development, there is a proposal for introducing a parody exception proper; *Inskränkningarna i upphovsrätten* SOU 2024:4.

<sup>30</sup> Although case law from the Swedish Supreme Court seems to indicate that this may indeed be necessary; NJA 2017 s. 75 (*Svenska syndabockar*) considered below. Ultimately the interpretation turns on what the provision is intended to convey when it is conditioned on the new work having been created ‘in free connection to’ (*i fri anslutning till*) the pre-existing work.

<sup>31</sup> J. Axhamn, ‘Copyright and Artificial Intelligence – with a focus on the area of music’ in M. Rosenmeier, T., Riis, J. Schovsbo, & H. Udsen (eds), *Festskrift til Jørgen Blomqvist* (Ex Tuto Publishing 2021), 68.

<sup>32</sup> In C-5/08 *Infopaq*, para 37 the CJEU made clear that the authorial rights protection in Art. 2 InfoSoc Directive applies only in relation to subject matter which is ‘original in the

One plausible argument is that adaptation is not a harmonised concept because the InfoSoc Directive introduced no such right. *Allposters* offers this insight, but indeed it is all it does – in the case the CJEU merely observed that the InfoSoc Directive does not contain a separate exclusive right of adaptation like Article 12 Berne Convention.<sup>33</sup> What adaptation is intended to mean in a European copyright landscape is, however, equally unclear because the CJEU refrained from defining it in the case.<sup>34</sup> A definition would at least make it possible to understand whether we are talking about the same concept, as in the case of the unharmonized performance right.<sup>35</sup> Accordingly, it is still an open question whether adaptation remains a matter of Member State prerogative, or whether all or some forms of adaptations fall within the ambit of the European reproduction right.<sup>36</sup>

Indeed, the reproduction right in Article 2 InfoSoc Directive is so broad that any transformative use of the original expression simply could be viewed as a reproduction in the sense of the provision. As follows from *Allposters* itself, the right is even so broad that it covers the change of the support to which the work is fixed even when that change does not result in any duplication of the expression as such (lifting ink from poster paper and transferring it to a canvass).<sup>37</sup> There is nothing to indicate in the case that the CJEU did not have adaptation in mind when it considered such changes to involve the right of reproduction, even though the Court refrained from defining the term. Moreover, parodies, caricatures and pastiches, quintessential forms of transformative use of a work, whilst they need not be original, are exceptions to the right of reproduction in the InfoSoc system of exceptions. In light of the CJEU's decision in *Pelham*, whereby Member States cannot introduce other exceptions than those found in the InfoSoc Directive,<sup>38</sup> the central question is whether this also means that they cannot introduce exceptions to, where it does exist in this form, exclusive right of adaptation?

Given the all-encompassing formulation of the right in Article 2 InfoSoc Directive – covering 'direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part' – an adaptation, when it

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sense that it is its author's own intellectual creation'. This has been consistently repeated in subsequent judgments; for example C-393/09 *BSA*, paras 45–46; C-403/08 *FAPL*, para 159; C-145/10 *Painer*, paras 87–94 (developing it further); and C-406/10 *SAS Institute*, para 65. See also Art. 1(3) Directive 2009 on legal protection of computer programs and Art. 6 Term Directive (relating to the protection of photographs). See further E. Rosati, *Originality in EU Copyright Law: Full Harmonization through Case Law* (Edward Elgar, 2013).

<sup>33</sup> Berne Convention for the Protection of Literary and Artistic Works; C-419/13 *Art & Allposters International v Stichting Pictoright*, para 26. See also Art. 14 Berne Convention.

<sup>34</sup> *Ibid.*, para 27.

<sup>35</sup> See definition offered by the CJEU in C-283/10 *Circul Globus București v UCMR – ADA*, para 35 and Joined Cases C-403/08 and C-429/08 *FAPL v QC Leisure and Others*, para 201.

<sup>36</sup> Cf. A. Ohly, 'Economic rights' in E. Derclaye (ed), *Research Handbook on the Future of EU Copyright* (Edward Elgar, 2009), 218.

<sup>37</sup> Cf. *Théberge v. Galerie d'Art du Petit Champlain Inc* [2002] 2 S.C.R. in which the Canadian Supreme Court made a different assessment regarding canvass transfers.

<sup>38</sup> C-476/17 *Pelham* (n 17).



falls within the ambit of protection of a pre-existing work, may very well be perceived as an *indirect* reproduction of a work. Adapting a work means that the user is after all doing the very opposite to the pre-existing work than direct copying.<sup>39</sup> However, the concept ‘indirect’ is today mainly used in instruments and provisions targeting neighbouring rights,<sup>40</sup> and is usually understood to entail the recording of a broadcast which itself has been made on the basis of a phonogram (amounting to an indirect reproduction of the phonogram);<sup>41</sup> it seems the only known example of an indirect reproduction which is consistently repeated by commentators.<sup>42</sup> Yet, since the right in Article 2 InfoSoc Directive applies both to neighbouring rights and authorial rights, in view of the absence of definitions in the text of the Directive itself, nor in any of the international instruments covering authorial rights, it seems systemically plausible to say that whereas direct reproductions cover duplicates, indirect, being a much broader concept, cover, as far as authorial rights are concerned, creations which are similar, but not identical, to the original work. For example reproducing an impressionist painting by using a cubist style or dramatizing a novel; two epitomes of transformative use of the original work. Scholarship appears, however, not to make this point.<sup>43</sup>

In light of the example in the Explanatory Memorandum, the alternative is therefore to view Article 2 as *only* covering duplication of the expression (and ... canvass transfer), which can be direct, as in the case of copying computer files, or indirect, as in the case of copying a sound recording from a broadcast. But if this were to be the intention of the European legislature, there would hardly be any need for exceptions that envisage transformative uses, especially parodies, caricatures and pastiches because these would then, in most cases, not even be covered by such a narrow reproduction right. Addi-

<sup>39</sup> Cf. van Eechoud et. al, *Harmonising European Copyright Law: The Challenges of Better Lawmaking* (Kluwer Law International, 2009), 84 expressing some scepticism over whether a broadly defined reproduction right includes adaptation, but referring instead to the ‘in any manner or form’-component of the definition of the reproduction right.

<sup>40</sup> Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, Art. 10 (indirect reproduction of phonograms); TRIPS Agreement, Art. 14 (indirect reproduction of phonograms); WIPO Performances and Phonograms Treaty, Arts 7 (indirect reproduction of performances fixed in phonograms), 11 (indirect reproduction of phonograms), and 15 (indirect use of phonograms).

<sup>41</sup> European Commission, ‘Proposal for a European Parliament And Council Directive On The Harmonization of Certain Aspects Copyright And Related Rights In The Information Society’ COM (1997) 628 final – 97/0359 COD, 10.12.1997 (Explanatory Memorandum), 24.

<sup>42</sup> For example S. Bechtold, ‘Information Society Directive’ in T. Dreier and B. Hugenholtz (eds), *Concise European Copyright Law* (Kluwer Law International 2016), 439; I. Stamatoudi and P. Torremans, ‘The Information Society Directive’ in I. Stamatoudi and P. Torremans (eds), *EU Copyright Law: A Commentary* (Edward Elgar 2014), 402; S. von Lewinski and M. Walter, ‘Information Society Directive’ in M. Walter and S. von Lewinski (eds) *European Copyright Law: A Commentary* (Oxford University Press 2013), 967.

<sup>43</sup> Stamatoudi and Torremans (supra), 402 note instead that the terms ‘direct’ and ‘indirect’ are sometimes confused with primary and secondary liability. Similarly S. Deepreuw, *The Variable Scope of the Exclusive Economic Rights in Copyright* (Kluwer Law International 2014), 194 n. 599 provides as another example intentional reproduction and incidental reproduction occurring during transmission that the user does not know about.

tionally, if the reproduction right is to be construed that narrowly, then how does one interpret a narrow exclusive right broadly?

The Berne Convention offers useful insights on this. Article 14(1)(i) Berne Convention refers to the *cinematographic reproduction* of literary and artistic works – a form of exploitation supposedly different from a *cinematographic adaptation* of such works that is mentioned in the same sentence. What's the difference and why is it not enough with Article 12 that itemises a general adaptation right? It is beyond doubt that international copyright law recognises exclusivity over adaptations. But if Articles 12 and 14 Berne Convention and their history indicate anything more than this, then it is the lack of conceptual consistency and the existence of a whole series of unresolved issues, ultimately implying that it is for Berne Union countries to adopt whatever view they wish regarding the nature of adaptations vis-à-vis reproductions.<sup>44</sup> In addition, notwithstanding conceptual ambiguities as to whether particular forms of expression should be called adaptations, alternations, arrangements, or transformations, it was clear ever since the original text of 1886 until the Brussels Act of 1948 which introduced the current Article 12, that adaptations were to be construed as forms of reproduction; and as if this was not enough, interestingly, such uses were categorised as 'unauthorised indirect appropriations'.<sup>45</sup>

Therefore, from a more cynical perspective, if the CJEU's reasoning in *Kwantum*<sup>46</sup> has wider implications than the rule of reciprocity, it may very well turn out to be the case that it is not for Member States to design and construe adaptations. A likely argument in this direction emanates from *Pelham* if read analogously to exclusive rights – it would endanger the effectiveness of harmonisation of copyright effected by the InfoSoc Directive and the objective of legal certainty pursued by it, and the requirement of consistency in the implementation of exclusive rights as well as the need to ensure a high level of protection of copyright pursuant to recital 9 would not be able to be ensured if Member States were free to provide for an adaptation right outside of the scope of the reproduction right and the harmonised concept of originality.<sup>47</sup> At least in the case of computer programs and databases it is clear that adaptation is a

<sup>44</sup> See S. Ricketson and J. C. Ginsburg (2005), *International Copyright and Neighbouring Rights. The Berne Convention and Beyond* (vol. 1, 2nd ed. Oxford University Press), 653–55.

<sup>45</sup> Berne Convention (original text of 1886), Art. 10; Interpretative Declaration (Paris 1896), paragraph 3; Berne Convention (Berlin Act of 1908), Art. 12; Berne Convention (Rome Act of 1928), Art. 12. See further on the evolution S. Ricketson and J.C. Ginsburg (*supra*), 648–51.

<sup>46</sup> C-227/23 *Kwantum Nederland and Kwantum België v Vitra Collections*.

<sup>47</sup> Cf. C-476/17 *Pelham* (n 17). Admittedly one can say this about any exclusive rights. But as Hugenholtz submits in his critique of *Kwantum*, the CJEU employs an "everything is harmonised"-approach; B. Hugenholtz, 'Everything is harmonized. The CJEU's decision in *Kwantum v. Vitra*' (Kluwer Copyright Blog, 6 November 2024) <<https://copyrightblog.kluwerilaw.com/2024/11/06/everything-is-harmonized-the-cjeus-decision-in-kwantum-v-vitra/>>.

European matter, as follows respectively from Article 4(1)(b) of both Software Directives,<sup>48</sup> and Article 5(b) Database Directive.<sup>49</sup>

Turning to Sweden, it is easy to envisage an argument that favours the inclusion of adaptation into the scope of the reproduction right having regard to the structure of the economic rights under Swedish copyright law. Pursuant to 2 § URL, authors are afforded a right of reproduction on the one hand, and an umbrella right of making available to the public on the other hand.<sup>50</sup> Like the InfoSoc Directive, the Act does not include a separate exclusive right of adaptation, but like Article 12 and 14 Berne Convention it nevertheless offers exclusive protection of adaptations by treating all kinds of transformative uses, such as translations, adaptations (*bearbetning*), representations of the work in other artistic forms, as forms of exploitation of these two rights.<sup>51</sup>

The definition that we really need in the discussion over transformative uses and adaptations is that of *reproduction*. Arguably it is all contained in the name – to *re*-produce the work by creating it anew. If there is any space left by the literal wording of the reproduction right in Article 2 InfoSoc Directive for applying the canon of broad interpretation of exclusive rights, then it must probably be to let the right encompass adaptation. To try and “fit” adaptation within one of the existing concepts supposedly defining the reproduction right (as I do above by calling it an indirect reproduction), none of which has ever been defined, not even temporary reproductions,<sup>52</sup> serves little purpose under the current regime governed by a canon of broad interpretation. Since the adopted formula constructs the reproduction right with reference to antipodes (both direct and indirect, temporary and permanent, whole or partial copies are included), it is, from the perspective of exclusivity, not necessary to determine into which category a reproduction falls because either outcome (and anything hybrid) renders it a relevant reproduction. Even if perhaps desirable for the purpose of certainty, from the perspective of the canon of broad interpretation the lack of definitions in the InfoSoc Directive, therefore, is not detrimental to ascertaining the scope of the right as it extends from one end of the spectrum to the other. Hence, whenever a copy is created, it will constitute a reproduction within the meaning of the reproduction right, however

<sup>48</sup> Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs *as well as* its predecessor Directive 91/250/EEC on the legal protection of computer programs.

<sup>49</sup> Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases.

<sup>50</sup> In this sense the copyright act follows the WCT and uses making available as an umbrella term for exclusive rights other than the reproduction right, including rental and lending.

<sup>51</sup> 2 § 1 URL provides that “Copyright comprises (...) the exclusive right to dispose of the work by making copies of it and by making it available to the public, in its original or modified state, as a translation or adaptation, in another literary or artistic form or by another technique [translation by author]”.

<sup>52</sup> Art. 5(1) InfoSoc Directive defines, at least in theory, the scope of the exception not the scope of the exclusive right.

direct, indirect, permanent, temporary, whole or partial it may be.<sup>53</sup> In case of partial reproductions, in all essence, the standard is exactly the same – whether a whole or partial reproduction of a work is made, it must always carry the original expression. Therefore, it makes no sense to differentiate.

If we instead accept that adaptation is a matter of national law and thus free for Member States to conceptualise and national courts to construe, then once again national approaches will matter, at least when it comes to the acceptable level of similarity that a transformative work can have. Here case law from the Swedish Supreme Court offers once again important insights.

In the well-known case NJA 2017 s. 75 (*Svenska syndabockar*) concerning the potential infringement of a photograph of Christer Petterson, who was wrongly accused of murdering the former Swedish prime minister Olof Palme, by a painting depicting Petterson and William Hunt's *Scapegoat*, and the potential copyright protection of the painting under 4 § 2 URL. The Swedish Supreme Court held, first, that the photograph was protected by copyright rather than by neighbouring rights, and thus enjoyed broader protection covering transformative uses,<sup>54</sup> and second, that the painting enjoyed copyright protection in its own right and was independent of the protection of the photograph. As an original work, comprising the author's own intellectual creation reflecting their personality (and in case of photographs additionally expressing the free and creative choices in the production of the photograph),<sup>55</sup> is a very individual thing, no two cases involving originality assessments are likely to be the same. Nevertheless, the court's deep reasoning over the concept of adaptation and 4 § 2 URL as well as its assessment in the case is worth reproducing here in full:

11. The characteristic feature of an adaptation, which is dependent on the right to the original work, is, according to the preparatory works, that it leaves the individuality of the original work unchanged and merely allows it to appear in a new form; the adaptation retains the essential features of the original work (see NJA II 1961, s. 80). Thus, in order to be protected in its own right, the work produced must be so independent and original that a new work has been created, taking into account, *inter alia*, the earlier work used as a model.

12. If the artistic individuality which characterises the earlier work also appears as the dominant feature of the new work, this is merely an adaptation. However, if the new work is characterised by the performer's own individuality and has the status of a work, it constitutes an innovation which enjoys independent copyright protection (cf. the 1914 official expert report, p. 93)<sup>56</sup>. The decisive factor is therefore

<sup>53</sup> K. Szkalej, *Copyright in the Age of Access to Legal Digital Content: A study of EU copyright law in the context of consumptive use of protected content* (Uppsala universitet, 2021), 96.

<sup>54</sup> NJA 2017 s. 75 (*Svenska syndabockar*), paras 2–4.

<sup>55</sup> C-145/10 *Painer v Standard Verlags and Others*, para 88.

<sup>56</sup> *Author's remark*. Förslag till lag om rätt till litterära och musikaliska verk, lag om rätt till verk av bildande konst samt lag om rätt till fotografiska bilder, avgivna den 28 juli 1914 av därtill inom Kungl. justitiedepartementet förordnande sakkunniga (1914 års betänkande).

whether the work used as a model has been transformed to such an extent that a new and independent work has been created.

13. Parodies and travesties are mentioned in the preparatory works as special forms of imitation of works that are usually independent works and not adaptations (see NJA II 1961 s. 81). The travesty has a completely different purpose from the adaptation. It does not seek to use the model to achieve an effect of a similar kind but fulfils a purpose unknown to the model work. In close but free association with the earlier work, a work is thus created to which the earlier work completely fades into the background, a work which is then generally regarded as new and independent.

14. The question of whether the new work attains the status of a work in its own right depends on how it is likely to be perceived by those who view it. An overall assessment must therefore be made on the basis of the subjective perception that can be assumed to be shared by the majority. As in the case of travesties, it is important in this assessment whether the new work can be considered to have a different meaning from the work used as a model. It is not necessary for the new work to relate – as a travesty – to the first work, but it may otherwise express a meaning that is unknown to that work. The stronger the original work, the more difficult it may be to create a new work modelled on it.

15. By its very nature, the line between an adaptation and a creation can often be difficult to determine. Different considerations may apply to different forms of literary and artistic expression and techniques. In practice, it will be a matter of case-by-case judgement based on the literary or artistic impression given by each work and taking into account the fundamental purpose of copyright to provide the conditions for creative activity.

And thus:

16. Looking at just the part of M.A.'s painting showing C.P., the representation is on the borderline of what could be said to be just an adaptation of J.L.'s photographic work into another form. There are differences, but these are largely due to the technique used, i.e. execution as an oil painting.

17. However, as stated above, an overall assessment of the painting must be made. In making that assessment, it is noticeable that the painting lacks the photograph's sharp observation of the person C.P. He is certainly there and forms a central motif, but the composition of the painting takes over and becomes dominant. The muted colours, the barren landscape and, above all, the symbolic scapegoat – but to some extent also the artistic changes made to the image of C.P. – give the painting a completely different meaning from that of the photograph. Instead of a strong photographic portrait of a person, an allegory appears in the form of the painting that suggests a critique of the mass media's need for scapegoats. C.P. is then portrayed as just one of those who have had to serve as such. It is thus a commentary on society and time. C.P. as a phenomenon, not as a person, becomes, together with the goat, the bearer of the symbolic message, a message that is emphasised by the background.

18. All in all, the transformation of the photographic work is such that M.A. has created a new and independent work of art which expresses his individuality.<sup>57</sup>

Against this context, the striking similarity between the two expressions that is difficult to overlook (below) and the manner in which additionally the main character of Hunt's *Scapegoat* – the goat – was incorporated in the background gives some idea of the standard of acceptability of Swedish transformations and potentially the level of artistic skill and assessment necessary for originality to subsist as required under 4 § 2 URL. The Supreme Court's reasoning and assessment in the case is certainly relevant when AI systems trained on copyright material are used as tools to produce new content by AI artists.<sup>58</sup> It gives moreover the impression at paragraph 17 that it is the strength of the idea or message that the new author conveys that matters more than the manner in which that idea or message has been expressed. If adaptation is neither harmonised nor incorporated in the harmonised right of reproduction, this is obviously a fully legitimate national rule. Analogously, permissible parodies can have very subtle differences compared to the work they parody and still express powerful ideas, very different from the original.<sup>59</sup> Ultimately, the judgment is a reminder that copyright protects neither an idea nor expression as such, but the expression of the idea.<sup>60</sup> The two have to work together because if only expression as such mattered in copyright law, the use of metaphors and other rhetorical devices designed to convey different meaning (ideas) than the one they literally express would require copyright clearance. Yet, at least in the case of parodies there is no requirement of the parody having to be an original expression of an idea. Therefore, what bothers most in this case is that if one removes Petterson and the public domain goat from the painting, both of which are essential for understanding that the expression is a metaphor, then what remains is a background that has something mountainy about it in the far distance only with an inverted colour scheme compared to Hunt's painting. If the expression these three components convey together warrant protection in its own right, then surely that protection must be as narrow as or even narrower than a design depicting wild strawberries and despite this still be captured by 4 § 2 URL.<sup>61</sup>

<sup>57</sup> Translation by author.

<sup>58</sup> See also professor Bernt Hugenholtz's contribution to this volume; and generally J. Axhamn (n. 31), 58–74 discussing different aspects of protection of generated art prior to the wide availability of large language models like GPT-3.

<sup>59</sup> Cf. Patent and Market Appeals Court (PMÖD) in case B 12315-20, judgment delivered 23.06.2021 (*En svensk tiger*).

<sup>60</sup> An equation not made explicit in Art. 2 WIPO Copyright Treaty or Art. 9(2) TRIPS Agreement, just like the requirement of originality.

<sup>61</sup> See also E. Derclaye and G. Stupfler, *EU Copyright Law Harmonisation: An Empirical Analysis of National Courts Case Law* (Bloomsbury, 2025) (forthcoming), Ch. 9 section 3.4.





Copyright-protected photograph by Jonas Lemberg.

Painting in the public domain, *The Scapegoat* by William H. Hunt (1854–56).

Non-infringing, copyright-protected painting Swedish scapegoats by Markus Andersson (2005).

Figure 2. *Scapegoats* (NJA 2017 s. 75).

## 2.2 Copyright liability of AI system providers

Liability of AI system providers raises different and perhaps more challenging legal questions. The first issue to consider is the type of liability that providers may be exposed to at the output stage – primary liability or secondary liability (contributory or indirect infringement). In case of the latter category, liability hinges similarly on the existence of an infringing act or copy. Without infringement there cannot be a contribution to it.<sup>62</sup> In case of the former, the act itself would be the (primary) infringement. Since AI system providers deliver an AI system for use by others, it is more natural to consider secondary liability first.

### 2.2.1 AI system providers and secondary liability – facilitating infringement by the user

Secondary liability is not harmonized across the European Union. This means that national courts may apply varying standards when determining whether AI system providers can be held liable for infringement committed by a user of the system. For this reason it can go in every direction in the Member States, or even in the Nordic countries. Sweden is a great example to consider because secondary liability in civil law proceedings for copyright infringement reached new heights when the Patent and Market Court of Appeals (PMÖD) issued its very first so-called website blocking injunction in 2017, in the *B2 Bredband* case.<sup>63</sup> Prior to this case it was settled law that secondary infringement should be assessed on the basis of the criminal law standard as enshrined in 23 Ch. 4 § Penal Code,<sup>64</sup> which applies to copyright infringement in the same way as it

<sup>62</sup> There is the separate question of contribution to conspiracy to commit infringement. In civil law, however, this would be more controversial than in criminal law.

<sup>63</sup> PMÖD, case PMT 11706–15, judgment delivered 13.02.2017; a case that had virtually the same factual circumstances as C-610/15 *Stichting Brein v Ziggo BV and XS4All Internet BV*. See further on such injunctions C-314/12 *UPC Telekabel Wien v Constantin Film Verleih and Wega Filmproduktionsgesellschaft*.

<sup>64</sup> Brottsbalk (1962:700).

applies to other criminal acts.<sup>65</sup> The provision simply states that liability for an act prescribed by the Code or by any other law for which imprisonment is prescribed (notably 53 § URL) also applies to anyone who has ‘facilitated [the act] with advice or deed’ (*främjat gärningen med råd eller dåd*). For liability to subsist the facilitation must physically or psychologically have affected the inception of the crime, but without having to be a condition for it.<sup>66</sup> Subsequent legislative initiatives have affirmed this understanding.<sup>67</sup> In respect of internet intermediaries, the preparatory works state expressly that the mere provision of service is insufficient for secondary liability, but recognise that it may occur where a hosting provider, with whom a future infringer has entered into an agreement for the rental of its server space, has received concrete indications that that space is used in a way that infringes copyright.<sup>68</sup> Because of the criminal law dimension, the leading case on secondary liability in copyright law was *The Pirate Bay* case.<sup>69</sup>

In *B2 Bredband* PMÖD introduced a civil law definition of contribution to copyright infringement, effectively broadening the concept to what evidently seems to be mere provision of service, by holding that the concept

...may also comprise a more passive approach which can be said to influence or conduce to something (...) Even if it is in many cases closer at hand to expect a degree of active behaviour from the person contributing, a type of subordinate behaviour which, in itself, is relatively far from the central event, irrespective of whether it constitutes a contribution within the meaning attributed to it in criminal law or not, is not precluded from still being regarded as contribution in a broader sense.<sup>70</sup>

This reasoning has been followed in subsequent website blocking injunction cases to, inevitably, find good faith ISPs liable for contributory infringement.<sup>71</sup>

It is difficult to imagine that a different definition would be used in respect of another category of intermediary (for example a hosting service provider)

<sup>65</sup> Regeringens proposition 2004/05:110, 339; Regeringens proposition 2008/09:67, 194.

<sup>66</sup> Regeringens proposition 2004/05:110, 339.

<sup>67</sup> Regeringens proposition 2008/09:67, 194–6; *Musik och film på Internet – hot eller möjlighet?* Ds 2007:29, 350–1. See also J. Axhamn, ‘Utredningen om upphovsrätten på Internet – en översiktlig presentation’ (2008) NIR 77(1) 39.

<sup>68</sup> Regeringens proposition 2004/05:110, 339–340.

<sup>69</sup> Svea Court of Appeal, case B 4041-09, delivered on 26 November 2010 (*TPB-målet*). See further on secondary liability under criminal law J. Axhamn, ‘Något om ansvar för medhjälp till upphovsrättsintrång – särskilt i onlinemiljö’ (2012) NIR 81(1) 26.

<sup>70</sup> Translation by author; “*Ordets innebörd kan dock även inbegripa en mer passiv hållning hos subjektet som kan sägas influera eller bidra till något (...). Även om det i många fall ligger närmare till hands att läsa in en mer aktiv handling från en person som ska anses medverka, är det alltså inte uteslutet att en mer underordnad handling som i och för sig ligger relativt långt från det mer centrala skeendet, oavsett om det utgör medverkan i straffrättslig mening eller inte, ändå kan betecknas som medverkan i en mer vidsträckt betydelse.*”

<sup>71</sup> PMÖD, case PMÖ 7648-19, judgment delivered 1 October 2019 (*Elsevier*) concerning interim website blocking injunction; PMÖD, case PMT 13399-19, judgment delivered 29 June 2020 (*Telia dynamic injunction*) concerning final dynamic website blocking injunction. Cf. PMÖD, case PMÖ 9945-18, judgment delivered 6 February 2019 (*Telia*) concerning interim website blocking injunction, which was denied.

or another purported contributor in a civil law case involving copyright law. With an all-encompassing definition like this, anyone can be a contributor to an infringement, including car rental companies that merely provide the physical facilities in the form of cars with integrated radios for others to impart protected material.<sup>72</sup> So when an infringing copy is created at the output stage of an AI system, it seems the provider will easily be regarded as contributing to the infringement, even when they, like the ISP in *B2 Bredband*, are completely neutral. But this assumes of course that the user behind the prompt has not been able to rebut the presumption following from *Smultromålet* discussed in section 2.1.2 above. Considering litigation strategies, one very likely situation where this will be the case is when the user never gets the opportunity to defend themselves because they are not the one against whom the claim is brought. That's virtually any case brought against an intermediary. However, an AI provider may potentially be able to retrieve that prompt, where they to ever be placed in a position to have to defend their users as part of their own defence.

On the other hand, intermediaries may also be able to invoke a proper defence known as the social benefit doctrine (*social adekvans*) known from criminal law. This doctrine exempts liability if an act does more good than harm. It requires answering four questions cumulatively:

1. Is the character of the service primarily a useful tool for legal use?
2. Is the character of the service primarily beneficial for society?
3. Does the legitimate use dominate?
4. Have precautionary measures been taken, despite the unavailability of infringement?<sup>73</sup>

Interestingly, in *B2 Bredband*, the first instance Patent and Market Court (PMD) actually relied on this doctrine and, after having found that it applied to the ISP against whom the claim was brought, decided not to issue the website blocking injunction.<sup>74</sup> PMÖD neither applied nor even referred to this doctrine so it potentially is an open question whether it can apply in AI-related infringement proceedings against AI providers. In this respect, it is essential to note that the doctrine does not, as such, only apply to intermediaries understood in the conventional sense of a middleman between two parties exchanging information, but generally.

<sup>72</sup> Cf. C-753/18 *STIM and SAMI v Fleetmanager Sweden and Nordisk Biluthyrning*; K. Szkalej, 'Looking for the edge of Article 3 InfoSoc Directive and finding it twice – in a car and in the court' (Kluwer Copyright Blog, 25 November 2020) <<https://copyrightblog.kluweriplaw.com/2020/11/25/looking-for-the-edge-of-article-3-infosoc-directive-and-finding-it-twice-in-a-car-and-in-the-court/>>. In the international debate about this case little is known about the fact that one of the parties was actually sued for contribution to infringement.

<sup>73</sup> See for example *The Pirate Bay* case (n 69), 24–25 where this defence was considered but found inapplicable as the fourth requirement was not satisfied.

<sup>74</sup> PMD, case T 15142-14, judgment delivered 27.11.2015 (*B2 Bredband*), 27.

### 2.2.2. AI system providers and primary liability for...everything?

This takes me to primary liability of AI providers for the content that users create. It is essential to bear in mind the discussion in section 2.1 as the generation of content with the help of AI systems is not the same as copying computer files. It involves borderline cases, transformative uses, rebuttable presumptions and defences. Primary liability is associated with core exploitation of exclusive rights, such as making the actual copy or making it available to the public. In this sense, the act itself constitutes primary infringement and is therefore, unlike secondary infringement, independent of the existence of another (primary) infringement. But it turns out it is not as simple anymore.

In the process of harmonizing the right of communication to the public in Article 3 InfoSoc Directive, the CJEU has effectively reshaped the boundaries of primary and secondary liability. In particular in *C-160/15 GS Media v Sanoma Media NL and Others*, *C-527/15 Stichting Brein v Filmspeler*, and *C-610/15 Stichting Brein v Ziggo and XS4ALL Internet* the Court extended primary liability to acts traditionally considered involving secondary infringement under national law. The result is an expansion of the catalogue of exploitations against which proceedings can be brought as acts of primary infringement.<sup>75</sup> These three cases share two other common denominators – in none of them did the alleged infringer carry out direct operations on copies of works and in all of them was knowledge a prerequisite for infringement.<sup>76</sup> According to the CJEU, the alleged infringers' deliberate interventions, with full knowledge of the consequences of the conduct, to provide access to infringing copies by linking to those copies (*GS Media*, paras 35, 48–49), offering for sale a multimedia player with pre-installed add-ons enabling access to streaming websites (*Filmspeler*, para 41),<sup>77</sup> and operating a website indexing information about copies without actually hosting those copies and providing a search engine to locate the indexed information (*Ziggo*, para 36, 38), constituted a communication to the public in the sense of Article 3 InfoSoc Directive of the infringing copies in question, separately from the central infringement.<sup>78</sup> While these judgments underscore that primary liability does not have to depend on proximity to the infringing copy but rather the degree of involvement in facilitating the making available of an infringing copy, the shift toward viewing facilitation of infringement as primary infringement may have profound implications for AI system providers. It raises the question whether the catalogue of such interventions is exhaustive or not, and in particular whether it encompasses the

<sup>75</sup> K. Szkalaj (n 53), 83 and 108.

<sup>76</sup> See also Joined Cases C-682/18 and C-683/18 *Peterson and Elsevier v YouTube and Cyando* that I address on the coming pages.

<sup>77</sup> Cf. para 17.

<sup>78</sup> Respectively, the making available of a copy without consent a website, the communication or making available to the public without authorisation of streams through a website, and the communication or making available without authorisation of copies by sharing them through peer-to-peer networks. In case of *Filmspeler* and *Ziggo* it cannot be inferred from the judgment whether the original infringements were to be viewed as live transmissions or on-demand transmissions.

provision of access to a system that makes it possible for users of the system not to *access* infringing copies but to *generate* them. In this respect it is important to note that the core of the right is to target the supply end, not reception or access at the consumer end.<sup>79</sup> Hence, for a communication to the public to take place, users need not have actually availed themselves of the opportunity to access copies or a transmission.<sup>80</sup>

Moreover, the CJEU's expansive approach to primary liability provokes the question whether an intervention enabling users to generate copies which turn out to be infringing also constitutes, as such and by analogy to the above case law on communication to the public, an act of reproduction in the sense of Article 2 InfoSoc Directive. This should categorically be rejected, but following that case law it is difficult not to seriously consider the thought.

Turning to the more intuitive form of primary liability that involves operations on a copy, can AI system providers be primarily liable for making and storing copies that users instruct the system to make by letting the system interpret the user's prompt(s)? Phrasing the question of primary liability in this way inevitably intertwines with the liability assessment of the user of the system and blurs the line between user actions and AI system provider involvement. This is a different situation than the one discussed above in that the user and the AI system provider would be liable for essentially one and the same thing rather than the latter facilitating an infringement by the former.

Drawing on the e-commerce safe harbours in Articles 12–14 E-Commerce Directive<sup>81</sup> as well as Article 5(1) InfoSoc Directive, European copyright law has, generally, avoided this kind of situation by shielding information society services from liability when they process information neutrally. But holding intermediaries liable for activities carried out by their users is no longer a fantasy – Article 17(1) CDSM Directive states unequivocally that a so-called online content-sharing service provider (OCSSP) ‘performs an act of communication to the public or an act of making available to the public (...) when it gives the public access to copyright-protected works (...) uploaded by its users’ and forecloses the applicability of the hosting safe harbour in Article 14 E-Commerce Directive.<sup>82</sup> Outside the Article 17 regime, the CJEU has similarly admitted primary liability of hosting and content sharing services for infringement of the communication to the public right under certain circumstances when they, essentially, *contribute*, beyond merely making the service available, to giving the public access to infringing content.<sup>83</sup> This leaves the question open of whether a hosting service could similarly be primarily lia-

<sup>79</sup> K. Szkalej (n 53), 105.

<sup>80</sup> C-263/18 *Nederlands Uitgeversverbond and Groep Algemene Uitgevers v Tom Kabinet*, para 64; C-527/15 *Filmspelers*, para 36; C-466/12 *Svensson v Retriever*, para 19; C-306/05 *SGAE v Rafael Hoteles*, para 43. See also Explanatory Memorandum COM(97) 628 final, 26.

<sup>81</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

<sup>82</sup> CDSM Directive, Art. 17(3).

<sup>83</sup> Joined Cases C-682/18 and C-683/18 *Peterson and Elsevier v YouTube and Cyando*.

ble for reproductions carried out by its users. The question worth asking is whether we should perceive an AI system provider as a form of hosting service. Storing and making available to the user the (infringing) content that they have themselves generated by using the system does not seem that different from a regular hosting service to which infringing content is instead uploaded. The fact that the copy originates from the service itself in response to user prompts ought not to matter for such a designation of the AI system provider. What should matter for such a designation is that the provider stores the information after it has been generated at the request of the user.

Looking at existing national law, in Sweden primary liability of online services for reproductions carried out by their users was never really settled. Formulations in preparatory works are rather reserved, abstaining from conclusively addressing the issue. During the implementation of the E-Commerce Directive, during which time the InfoSoc Directive was yet to be implemented, the assessment was made that storage of copies ought not to attract direct liability of the hosting service. This was grounded in an understanding at the time that a hosting service cannot, as the general rule, be considered as the party reproducing copies which are uploaded by a user to, and which are subsequently stored on, the server space owned by the host.<sup>84</sup> At the time, hosting services were described as renting out server space, although so-called bulletin board systems were also understood to fall within the category.<sup>85</sup> This understanding came to expression again during the implementation of the InfoSoc Directive,<sup>86</sup> which applies in Sweden since 2005, and has been repeated in subsequent institutional reports.<sup>87</sup> Such a position appears to presume that once content is stored liability for acts is attributed to the user rather than the service.

It is conceivable that such an understanding can be extended to AI system providers in that they provide the facilities for users to make (to create) copies and on whose behalf those created copies are stored. At the same time, it was recognised in respect of hosting that, because such activities will not be exempted by 11 a § URL (i.e. Article 5(1) InfoSoc Directive) by virtue of the permanent character of the copy, thereby implying the existence of a copyright relevant act, freedom from liability of such intermediaries will, it was stated, be governed by the provisions of the E-Commerce Act.<sup>88</sup> Such a construction of the statement might be read as implying that direct liability is after all possible.<sup>89</sup>

<sup>84</sup> Regeringens proposition 2001/02:150, 48.

<sup>85</sup> Regeringens proposition 2001/02:150, 21.

<sup>86</sup> Regeringens proposition 2004/05:110, 339.

<sup>87</sup> Ds 2007:29, 322.

<sup>88</sup> Regeringens proposition 2004/05:110, 100.

<sup>89</sup> In particular when the service fails to observe the conditions of the safe harbour.



At least with regards to primary liability under criminal law it was accepted that passive storage of infringing content would not carry such liability.<sup>90</sup> This view aligned with earlier case law of the Supreme Court.<sup>91</sup>

There is also the question of primary liability for the act of generating the copy. Arguably this is more far reaching than mere storage since the generated copy results from the system's interpretation of a user's prompt. The manner in which the AI system provider exercises control over the system in terms of its configuration could be a relevant factor,<sup>92</sup> especially if the deliberate intervention approach were to also govern the reproduction right.

For the moment, we may have to accept that it remains an open question whether an AI system provider carries out a reproduction in the sense of copyright law. The pending *Austro-Mechana* case might offer important insights on this issue even though it relates to the applicability of the reproduction right in the context of Article 17 CDSM Directive. As this provision does not make any reference to the right of reproduction, it is conceivable that the CJEU will resolve the case on the basis of copyright principles with more general application and in that way indicate whether providers of hosting services carry out a reproduction.<sup>93</sup>

### 3. The Way Forward

So what's the way forward then? I think it makes little sense to sit and wait for the developments in the US to unfold. After all, the legal framework is sufficiently different and nuanced to warrant independent analysis of the same circumstances. At this point, the best way to move forward is to initiate proceedings in Europe to let the courts, including and especially the CJEU, apply all relevant case law and liability theories. But the question is to what end?

The debate that surrounded the adoption of Article 17 CDSM Directive revealed that creative industries may not be governed by a harmony of interests.<sup>94</sup> Some rightholder categories might want to put an end to use while others might just want to get remunerated for use. Yet another category may be open to free use on condition that the generated content is made available on the same terms.<sup>95</sup> This is not surprising at all in view of the proprietary character of copyright protection – if rights are exclusive, the whole point is for rightholders to be able to determine how they are going to make use of that

<sup>90</sup> Regeringens proposition 2001/02:150, 90.

<sup>91</sup> NJA 1996 s. 79 (*BBS-målet*), where the Court held the operator of a bulletin board system, used by others to upload and download unlawful content, not liable for infringement in relation to the administration of the system, having considered that such liability required a more active role than the mere operation of the service. Following the outcome in the case, the legislator adopted the BBS Act; see lag (1998:112) om ansvar för elektroniska anslagstavlor.

<sup>92</sup> See also K. Szkalej and M. Senftleben (n 3) 333–34.

<sup>93</sup> C-579/24 *Austro-Mechana and AKM v Supervisory authority for collecting societies* (pending).

<sup>94</sup> See P. Keller, 'Article 17 stakeholder dialogue: What we have learned so far – Part 1' (Kluwer Copyright Blog, 13 January 2020) <<https://copyrightblog.kluweriplaw.com/2020/01/13/article-17-stakeholder-dialogue-what-we-have-learned-so-far-part-1/>>.

<sup>95</sup> See K. Szkalej and M. Senftleben (n 3), 314–16.

exclusivity.<sup>96</sup> It is not unreasonable to expect that this *will* vary from sector to sector, or even work to work.

But with a proprietary interest comes also responsibility. Copyright law is no stranger to technological development and is designed to operate whenever disruptive technologies are introduced on the market. In this respect quite a bit of resources were directed in the mid-2000s towards letting market actors sort out copyright problems themselves. If the objective is to stop infringements, there is a whole directive on enforcement of intellectual property rights, the Enforcement Directive,<sup>97</sup> which together with Article 8 InfoSoc Directive offers a full arsenal of enforcement tools. Whilst two cases have been commenced against AI companies, both in Germany and both relating to the AI system development stage rather than the output stage,<sup>98</sup> I'm surprised we have not seen an overflow of website blocking injunction cases directed towards European ISPs to block their customers access to particular services or websites. This mechanism is designed to address infringements taking place on one end of the internet by cutting off access at the other end of the internet. In other words, it can deal with worldwide infringements in a territorially-limited copyright system through a very local and national solution.

But I see no reason why this option should also not be open to rightholders that want to get remunerated, especially when they are collectively organised through various associations or collective rights management organisations having mandates to represent them. Moreover, in countries like Sweden a legal solution already exists for all sorts of copyright problems – a general extended collective licensing (ECL) opportunity in 42 k § URL open to any sector or type of use (except those sectors already covered by another ECL-provision in the URL). If the problem rightholders face is getting AI system providers to the table, then, as I'm sure every legal practitioner knows, actual commencement of infringement proceedings provides, just like the exclusive character of rights, excellent bargaining edge that may bring parties closer to each other to agree on their mutual rights and obligations; even at the very end of those proceedings after a case has come back from the CJEU.<sup>99</sup>

Not doing anything or hoping for the legislator to intervene might in the current phase of legal developments not bring the desired results. If the limits of copyright protection are never tested in court, it may be difficult for legislators to see the problem or justify yet another amendment to copyright legislation. Moreover, legislative intervention now carries with it the risk that we

<sup>96</sup> Svante Bergström's copyright classic *Uteslutande rätt att förfoga över verket* (Uppsala universitet, 1954) says it all in the title.

<sup>97</sup> Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights.

<sup>98</sup> Kneschke gegen LAION, Landgericht Hamburg, Urteil vom 27. September 2024, Az. 310 O 227/23; GEMA gegen OpenAI, Landgericht München (am 13. November 2024); GEMA, 'GEMA files models action to clarify AI providers' remuneration obligations in Europe', Press release 13 November 2024 <<https://www.gema.de/en/w/gema-files-lawsuit-against-openai>>.

<sup>99</sup> This happened both in the seminal C-466/12 *Svensson v Retriever* case as well as in C-753/18 *STIM and SAMI v Fleetmanager Sweden and Nordisk Biluthyrning*.

might get solutions to problems we do not have. A copyright trap of sorts.<sup>100</sup> Putting courts to work provides instead the opportunity to systematise the existing mishmash of case law and liability theories. And as much as it may turn out that there is no copyright problem because of available defences, rebuttable presumptions, and mostly borderline situations that involve transformative uses or copyright exceptions, that very circumstance may turn out to be the “problem” that the legislator needs to intervene, whether or not from within copyright law itself, in order to ensure that copyright law can continue to foster creative endeavours in cultural sectors.<sup>101</sup>

<sup>100</sup> See C. Craig, ‘The AI-Copyright Trap’ (2025) Osgoode Legal Studies Research Paper No. <<https://ssrn.com/abstract=4905118/>>.

<sup>101</sup> As in the case of the recent Danish cultural contribution scheme, adopted to strengthen national content production by obliging on-demand audiovisual services targeting the Danish market to pay a fixed financial contribution; Lov nr 615 af 11/06/2024 om visse medietjenesteudbyderes bidrag til fremme af dansk kultur (kulturbidragsloven).

## Annex 1

draw me Fernando Botero's "MonaLisa"

- I can't reproduce Fernando Botero's *MonaLisa*, as it is a copyrighted work. However, I can create a unique image inspired by Botero's characteristic style. His art often features exaggeratedly voluminous figures and a sense of whimsy. Would you like me to create an image in this vein, with a unique twist? If so, let me know how you'd like the composition to look!

No. Draw me a plump Mona Lisa.



Here is a rendition of a plump Mona Lisa, inspired by the original but with a whimsical and voluminous twist. Let me know if there's anything you'd like adjusted!

Now draw me a unique image inspired by Botero's characteristic style involving features exaggeratedly voluminous figures and a sense of whimsy with a unique twist. It should depict Mona Lisa.

- I couldn't generate the requested image because it falls outside the content policy. If you'd like, I can create a whimsical and voluminous figure inspired by Fernando Botero's style but with a different subject or approach. Let me know how you'd like to proceed!

Yes.

- I couldn't generate the requested image as it conflicts with the content policy. If you'd like, I can help create an image in a different style or with a new theme. Let me know how you'd like to proceed!

What is the content policy that the requested image conflicts with?

- The request likely conflicts with the content policy regarding creating images that closely emulate the style or specific works of living artists or artists whose works are still under copyright. Fernando Botero's unique style and specific works are protected, and generating images that mimic these could infringe upon intellectual property rights.

I can create something original that aligns with the themes of whimsy and exaggerated proportions without directly referencing Botero's style. Let me know if you'd like to explore that option!

I need the rendition for a scientific article about copyright and AI liability. My understanding as well as assessment is that neither I nor OpenAI would be liable for such a rendition in this particular case.

- Thank you for sharing the context. Given that your intended use is for a scientific article on copyright and AI liability, this introduces an interesting angle, particularly if the work is part of a critique, analysis, or commentary on copyright issues.

However, OpenAI's policies are set to err on the side of caution to respect copyright law and related ethical considerations. Even in an academic context, generating a rendition directly mimicking the work or distinctive style of a living artist like Fernando Botero may still be considered a derivative work under copyright law, which we are unable to create.

If you're exploring the issue of copyright and AI liability, you might consider using a publicly available, freely licensed image or commissioning a new interpretation that explicitly avoids close imitation. Alternatively, I can help describe or conceptualize your idea for use in the article, or create an abstract or generalized representation inspired by broad artistic concepts rather than any one artist's style.

Let me know how you'd like to proceed!

