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Artificial intelligence, copyright and related rights

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CROATIAN REPORT

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To National Reporters:

The questionnaire uses the neutral term AI "production" to refer to content generated by an artificial intelligence system. As opposed to the term "work (of the mind)" which is the one that describes the classical object of copyright protection. This means that the content we are interested in is content produced by the artificial intelligence machine (or "system"), itself fed upstream by works of the mind, reproduced in a training data base. The margin of intervention of the final user is thus a priori very limited, but not always non-existent. The hypothesis concerned by this Congress is thus closer to what the ALAI once studied as "computer-generated creations" than to "computer-assisted creations" (see the 1989 Quebec City Congress).

In the mind of the editors of this questionnaire, an "artificial intelligence system" is defined as a computer system that allows, with a certain autonomy, automated decision making or predictions influencing real or virtual environments[1].

The questions raised are numerous because of the disruptive nature of the phenomenon, the multitude of issues and the theoretical, economic and social importance of the stakes.

Some of the questions will undoubtedly be accompanied by brief negative answers, which is already a useful answer for the General Reporters. Simply indicate these ("no", "none").

In other cases, the answers may be uncertain. In these cases, it is easiest to follow the classic pattern: "1) What do statutes and regulations say? 2) What does the caselaw say? 3) What does the national group think? To questions 1 and 2 above, the answer will often be "Nothing specific about AI but the relevant reference text/principle might be ...". Regarding 3), the national group is not obliged to have taken a position.

It is of this uncertainty and diversity that we will try to draw together, in June, a clear picture.

The team of the Scientific Committee (Alexandra Bensamoun, Jane Ginsburg, Silke von Lewinski, Pierre Sirinelli) is of course at your disposal to explain a question that might not seem, because of the particular context, immediately clear.

Thank you all and we look forward to seeing you in Paris.

Note: the questionnaires must be returned by the national groups no later than May 8, 2023. They will be sent to Pierre Sirinelli (pierre.sirinelli@univ-paris1.fr) and Sarah Dormont (sarah.dormont@u-pec.fr).

[1] *This definition is comparable to the one retained by the European Union in the discussion on the AI Act (proposed regulation COM(2021) 206 final, March 2023 position), itself inspired by the 2019 OECD Recommendation on AI.*

Artificial intelligence, copyright and related rights

The contours of the relationship

1. Understanding

1.1 - Has your national or regional law adopted a legal definition of AI?

Within the Croatian legislation there is no definition of AI. However, on the level of EU there is a Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts, Com/2021/206 final having a direct effect to the Croatian legislation.

There is no definition of AI in Croatian legislation. However, at the EU level, there is a Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts, Com/2021/206 final, which has a direct impact on Croatian legislation.

1.2 - Can you provide some examples of current uses of AI and its productions in the cultural sector of your country?

At the moment, there is no exact data on the use of AI and its productions in the cultural sector of Croatia. However, in Croatia, like in many other countries, AI tools are increasingly used in many areas of the cultural sector such as in generating and curating art and music, archiving and preservation, analysis, recommendations etc. (e.g. Chat GPT, Mindjourney, Magenta, Cyanite, Soundful…).

1.3 - *(Optional) What are the issues that have been exposed in your country on this subject: stakes, difficulties, orientations, proposals...?*

Like in global arena, there is an uncertainty about how to treat AI production, are there breaches during the development phase, questions of titularity, liability, etc.

1.4 - Are there any initiatives in your country or region aimed at regulating the use of AI in the cultural sectors?

In Croatia, there are no strong initiatives aimed at regulating the use of AI in the cultural sector.

AI is briefly discussed within the Parliament's Strategy for Digital Croatia for the period until 2032. The Government has formed the working group for defining future national strategy for the development AI in Croatia.

Also, the discussion among experts and general public is intensifying.

2. Understanding the upstream

2.1 - Are the AI system or its components likely to be protected by intellectual property rights (copyright and/or industrial property – patents, trade secrets . . .) ?

If AI systems or their components meet the requirements of a particular intellectual property right, those AI system or components, enjoy the protection of the relevant intellectual property right. In Croatia, there are no specific obstacles that would prevent this.

Thus, considering that AI systems are generally considered to be software - algorithms, code, and architectural design of AI systems can be protected under copyright, provided they meet the necessary criteria for copyright protection.

The Croatian legal system does acknowledge protection of trade secrets, so there are no obstacles to AI systems being covered by it.

As far as patents are concerned, computer programs are less likely to be registered as patents, unless such a program produces certain technical effects during its execution that it go beyond the inherent physical interactions of programs and computers, provided that all other conditions prescribed by law for the protection of inventions by a patent are met, and in particular the requirements relating to the novelty and inventive level of inventions made with the help of computers.

The name, logo, emblem, label or other distinguishing features of an AI system may also be protected by a trademark.

2.2 - Can rights under copyright be enforced against the use of protected contents by AI training?

> Does the insertion of a pre-existing work into the computer system implicate rights under copyright?

There is still no developed case-law on the indicated issue and it is questionable how the use of protected content by AI training would be treated. However, the insertion of a pre-existing work into the computer system could implicate rights under copyright, like reproduction and making available to the public.

> If so, in order to avoid a finding of infringement, are the copying or storage covered by an exception?

In the context of the question, the following content limitations in Croatian copyright legislation can be considered: temporary acts of reproduction (Art. 182 CA), reproduction of the work for private use with payment of an appropriate compensation (Art. 183 CA), text and data mining for the purposes of scientific research (Art. 187 CA), text and data mining for other purposes (Art. 188 CA), preservation of cultural heritage (Art. 191 CA), Use of out-of-commerce works and other subject matter (Art. 192 CA), restrictions of right to reproduction for the benefit of particular institutions (Art. 193 CA), collections indented for teaching or scientific research (Art. 197 CA), use for teaching (Art. 198 CA), use for digital and cross-border teaching (Art. 199 CA), use of copyright works for judicial, administrative or other official proceedings (Art. 200 CA), reproduction of copyright works permanently located in public places (Art. 204 CA), parodies and caricatures (Art. 206 CA), decompilation of computer programs (Art. 209 CA), specific limitations for actions of authorized holder of copyright data basis (Art. 210 CA).

In order to successfully use one of the mentioned limitations, an AI system trained on the protected content would have to meet (during training and use) all the requirements of a particular limitation. For example, if the holder of an AI system grounds his right to use copyright protected content on the limitation for the use for teaching, then such an AI system should only be used in accordance with Article 198 of the Croatian Copyright Act.

Still, there is no developed case-law, and with the current state of the art, is questionable how the use of protected contents by AI training would be interpreted.

2.3 - In your country, are there any proposals to change the law and in which direction?

> For example, by deeming that the incorporation of preexisting works into AI systems does not create an actionable "reproduction" of the works? Or by creating a new exception? Or by implementing a compulsory licensing system? Other solutions?

At the moment, there are no official proposals to change the copyright legislation for the purpose of implementing solutions tailored to the AI.

2.4 - Do the "terms of service" of the platforms available in your country authorize the copying and storage for the purpose of constituting "training data" and the creation of "AI outputs" of the works posted by the users of the platform? If so, give examples of the relevant Terms of Service.

In Croatia, as in the wold, the most used AI systems are international AI systems. Analysis of several prominent local companies that develop and actively use AI systems, revealed that they do not have specific provisions for artificial intelligence.

2.5 - Are you aware of the conclusion of individual or collective licenses on this point? If yes, in which fields of creation? Under what conditions? If so, give examples.

No.

3. Using AI as a tool for rights management and administration

3.1 - To what extent is AI used to locate or identify protected content, to moderate it, or even to fight against infringement?

Within academia and beyond, AI tools are regularly used to detect plagiarism. However, beyond plagiarism checker we are not aware of AI tools being widely used in Croatia to locate or identify protected content.

3.2 - If computer tools are used for this identification, are there rules to allow the evaluation of the tools used in order to verify the relevance of the results produced by the AI system? (For example, in the framework of the European Digital Services Act, platforms have an obligation of transparency, notably on the tools used and the results they produce - art. 15).

> If the answer is yes, are these rules derived from practice (usages, contracts, softlaw...) or imposed by legislation or regulation, or by case law?

Apart from the provisions of EU law, in Croatia there are no specific rules to allow for an evaluation of the tools to verify the relevance of the results produced by the AI system.

3.3 - To what extent is AI used as a tool to recommend protected content? For example, the proposal of "playlists" by Pandora or any other online communication service making recommendations of works.

Both globally and in Croatia, to our knowledge, AI tools are regularly used to recommend protected content, particularly in the film and music industries (e.g. Pandora, Youtube, Netflix, HBO).

3.4 - Should we fear, through this recommendation, a risk of dilution of contents and revenues due to a possible opacity of the system?

In the current state of the art, there are indeed major pitfalls in relation to AI – privacy, bias and replication, resulting in the opacity of AI systems. Consequently, there is a risk of content and revenue dilution. However, rather than fearing the use of AI based recommendation systems, it seems more reasonable to carefully observe and analyze how such systems function and focus on overcoming the existing pitfalls of AI systems.

3.5 - Does your national or regional law contain transparency obligations on the use of an AI system for rights management in your national or regional law (e.g. the European Digital Services Act)? What are they?

Apart from obligations stemming directly from EU law, Croatian law does not contain transparency obligations specific to the use of an AI system for rights management.

3.6 - In general, do these tools have to comply with rules in terms of product safety or conformity? Are there procedures for certification of these tools by an authority or by professional associations? Are suppliers subject to specific due diligence obligations?

In Croatia, there are no rules concerning the certification of AI tools or specific due diligence obligations. Nevertheless, AI tools are not exceptions and must comply with product safety and conformity rules stemming from the Croatian obligation law rules.

Artificial intelligence and literary and artistic property

The contours of protection

The status of AI Outputs

1. Access to protection

- ***Characterization of the AI output as a "Work" of authorship***

Note: If an AI output has all the external aspects of a work of authorship, is it possible to consider it as a work of authorship protected by copyright?

4.1 - Does a "Work" always imply the presence of a physical person?

Under the existing Croatian copyright regime, "work" always implies the presence of a physical person.

4.2 - From what threshold is it possible to consider that there is a human intervention giving rise to an original work in the realization of an AI output? What types of intervention would allow to know if this threshold has been crossed?

There is no fixed threshold. If AI is only used as a mere technical tool, there are no obstacles to such creations / innovations enjoying the protection they would otherwise enjoy.

If AI substantially produces a content, then such production cannot be recognised as the subject matter of copyright. However, a possible solution could be to consider introducing a new intellectual property right that protectssuch productions.

Croatia does not have any specific solutions in this matter. One way to distinguish between copyright protected works and the AI products is to develop a standard of use-of-AI-as-a-mere-technical-tool and set a threshold there.

4.3 - How can we distinguish between AI-assisted outputs and outputs generated by an AI?

We can distinguish between AI-assisted outputs and AI-generated outputs by considering the standard of technical support. Thus, if an AI tool is only used to technically complement human work (e.g. grammar correction, effects on a photograph), then we can assume that such work is only AI-assisted and enjoys copyright protection. If the AI produces an output, where the human only provides inputs and has no or only partial knowledge of (no control over) what is produced, then that output should be considered AI-generated and should not enjoy copyright protection. The cases

where a human provides an input to an AI tool generating an output can also be observed through the dichotomy of idea v. expression, where a human provides an idea while AI provides an expression.

4.4 - In some countries, it is asserted that there can only be a work of authorship if the form obtained is the result of creative work by the author in the sense that the latter is aware of the result (work) he wants to achieve even if this result is a little different from his hope/expectations. This requirement, for example, would exclude the quality of author of a person deprived of discernment (for example, an insane person, a very young child, a somnambulist...) or would entail the refusal of protection of a production which would be only the fruit of random forces.

Does this condition exist in your country?

At the moment, such condition does not exist in Croatia.

If so, is it a statutory or administrative requirement? Does it derive from caselaw? From secondary authorities (e.g. academic writings)?

4.5 - Are the criteria traditionally considered to be irrelevant (such as merit, or purpose) taken into account in the framework of protecting an AI output?

No.

- Characterization of a performer's performance

4.6 - In order to be vested with a neighboring right, does the performer necessarily have to be a natural person?

In other words, is an "interpretation" from an artificial intelligence protectable under neighbouring rights?

Under the existing Croatian neighboring rights regime, the performer must necessarily be a natural person. Thus, AI “interpretations” are not able to meet the requirements for the protection of the performer’s right.

4.7 - In order to be vested with a neighbouring right, must the performer necessarily interpret a work created by a natural person?

In other words, is the interpretation, by a human being, of a production of artificial intelligence protectable under neighboring rights? (Suppose an AI-generated musical composition: if performed by a human being, would the performance be protectable?)

Under the existing Croatian neighboring rights regime, the performers are actors, singers, musicians, dancers and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform copyright works from literary and artistic field or expressions of folklore. Hence, the neighbouring right of performers imply performing work eligible for copyright protection, only those created by a human.

- If the AI output does not qualify for copyright protection

4.8 - Are the productions generated by AI, that are not covered by copyright, in the public domain?

As things stand, it is questionable whether the productions generated by AI are in the public domain. The question of the rights over such AI generated productions is usually regulated within the terms of service of a particular AI tool provider.

4.9 - In your country, could the productions generated by AI be qualified as "commons" (it being understood that, in some countries, the notion of "commons" has a different meaning than "public domain")? Under what conditions or according to what criteria?

No, there is no difference between commons and public domain under the Croatian law.

4.10 - How can we be sure that the creation presented as realized by an author is not an artificial production?

The question is similar to the question of how we can be sure that the work was really created by the person claiming the authorship or whether it is a plagiarism.

4.11 - Usually, a collective management organization (CMO) manages a catalog attached to an author without making distinctions between "works" / "productions". How to manage the case of an author whose usual works belong to his repertoire but who would also use an AI system to generate other "productions"?

2. The rights regime

- The choice of the right (nature, ownership, regime, limitations)

** <u>As your legislation currently stands:</u>*

5.1 - Is the output generated by an artificial intelligence system likely to be protected by copyright in your country?

At the moment, there are no provisions providing such copyright protection for AI-generated outputs, unless AI tools are used only as a technical tool (see 4.3.).

5.2 - If applicable, does the production generated by an artificial intelligence system benefit from a full copyright, in particular as regards the duration and scope of the rights, or from a modified or special right?

Not applicable.

5.3 - If there is a protection by an adapted or special copyright (as it exists sometimes for certain works, as for example, in Europe, concerning computer programs), what are the modifications or adaptations?

Not applicable.

5.4 - Who is the author? Who would be the owner of the rights? Could the output be considered a joint work? If so, between whom and in what cases?

Not applicable.

5.5 - Is there a special ownership rule (presumption, or even fiction, as it exists in some countries for computer-generated creations; see for example, art. 9 (3) Copyright, Designs and Patents Act (CDPA) in England)?

No.

** In the event of a possible legislative change:*

Are there any concrete proposals in your country related to the items listed below? If so, answer questions 5.6 and following.

If not :

i) the national rapporteurs can give their personal opinion while making it clear that these are mere proposals of secondary authorities (e.g., academics) and not positive law;

ii) or they can go directly to the questions numbered 6 and following.

5.6 - What would be the criteria to be retained to allow access to copyright protection for AI outputs?

Probably copyright protection is not the best solution for AI outputs.

One solution that could be viable is to consider the output as a "product of AI" and acknowledge its *sui generis* status. That could be done by introducing a new intellectual property right, as we have done, for instance, with semiconductors, plant variety protection or data basis, when the need arose.

5.7 - Should a specific copyright be created for these productions?

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5.8 - With what particularities (e.g., duration and content of the rights) ?

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5.9 **-** Can there still be a moral right ?

No.

5.10 **-** Should there be a special ownership rule (presumption, or even fiction, as it exists in some countries for computer-generated creations)?

It might be possible to consider creating a *sui generis* right.

5.11 **-** Should a deposit be required? / A declaration of "origin"?

If a new right is introduced, it seems reasonable that this right should be a registry right, particularly for reasons of legal certainty.

5.12 **-** Should a kind of neighbouring right or a sui generis right be created?

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5.13 **-** What would be its characteristics?

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5.14 **-** The rights covered?

-

5.15 **-** Generally speaking, what would be the limitations on or exceptions to this new right?

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5.16 **-** How should this protection be articulated with other existing protections?

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5.17 **-** In the absence of protection by a property right, are there any compromise solutions?

For example, a kind of paying public domain for them: collection of royalties paid to a collective management organization for distribution among authors continuing to create works in the traditional way? What else?

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- AI and violation of rights: the choice of remedy

6.1 - Can an AI output infringe, and to what extent? Who would be liable?

Following the world-wide intense on-going debate on the liability arising from the use of AI models, there are currently no clear? answers as to who is liable and to what extent. On the one hand, there are potential breaches during the training process of AI for the unauthorized use of copyright-protected content and other data (i.e. Getty Images case). Namely, AI models are mainly trained on the data available on the Internet and, at the moment, nobody is likely to ask the rightsholders for licenses, even though AI models are mostly trained for commercial purposes. On the other hand, it is also possible to consider the liability of the user, the person who initiated the production of an output, if such an action is ill-intended, i.e. for misrepresentation, fraud? or other harmful behavior. Possible examples of such behavior are use of AI fakes (e.g. creation of music with voices?? of performers without their permission, use of AI-generated images, fake calls etc.).

6.2 - Are there other legal means (e.g. unfair competition, parasitism) to engage the liability of the person responsible for the AI output? (Who would that person be?)

Although the practice has not yet been developed, there is certainly the possibility of considering other legal remedies, such as unfair competition, where AI is used to gain unfair advantage over competition. In such a case, liability of both an AI developer (for developing the model on unlawful data) and an AI-user (for taking an unfair advantage over competition by using AI-generated content) may be considered. It is also possible to consider such behavior under the existing criminal law provisions.

However, one solution that can be considered to overcome the blurred boundaries of liability of persons involved in the development of an AI model and AI-generated output is to consider introducing the legal personality?? for AI models under a system comparable to companies.

6.3 - Beyond copyright, can personality rights prevent the realization by an AI of a production using the voice or physical aspect of another person?

There is no developed practice on this matter, however, it would be reasonable to have the possibility to exercise personality rights against the production and use of AI-generated data against the person who initiated such product and/or the holder of an AI system, considering the issue of transparency and the source of obtaining the voice or physical aspect of a person in the training process.

- Question of transparency and remuneration

7.1 - In your country, is there a requirement (legal, administrative, jurisprudential, arising from practice) that AI-generated content in general be declared as such (see for example in Europe, the AI Act of April 21, 2021[2] and the more nuanced position of the Council of the European Union of November 2022[3])?

(Optional) If not, do you think that such a solution should be adopted?

[2] https://eur-lex.europa.eu/legal-content/FR/TXT/?uri=CELEX%3A52021PC0206

[3] https://www.consilium.europa.eu/fr/press/press-releases/2022/12/06/artificial-intelligence-act-council-calls-for-promoting-safe-ai-that-respects-fundamental-rights/

At the moment, there are no specific national requirements, such as declaration, with regards to the production of AI-generated content.

One solution that might be sustainable is the introduction of a new intellectual property right concerning artificial intelligence products – "the product of AI". Such a solution would inevitably require the establishment of AI for the registration of AI intellectual property rights and could be comparable to industrial property rights (i.e. patents, trademarks).

7.2 **-** If applicable, how is the sharing and payment of remuneration carried out when AI is involved in the creative process?

(Optional) If there is no existing solution, what solution do you think should be adopted?

There is no existing solution. In the system where industrial property rights for the AI models are recognized, the economic rights, including the right to remuneration, should be granted to the holder of such industrial property right (in one scenario, to an AI model as a legal person; in another scenario to an owner of an AI system), while the relationship with the users initiating the production of a particular AI product could be left to disposal of the parties, i.e. regulated by the terms of service of an AI system or specific licensing agreements.

7.3 **-** If applicable, how is the sum linked to the AI allocated (cultural action? payment to other rights holders...)

(Optional) If there is no existing solution, what solution do you think should be adopted?

See 7.2.