



ASSOCIATION LITTÉRAIRE ET ARTISTIQUE INTERNATIONALE

ALAI  
2021  
Madrid



## ALAI CONGRESS 2021, 29 Sept. – 1<sup>st</sup> Oct. 2021, Madrid

### **COPYRIGHT, COMPETITION AND INNOVATION**

#### **QUESTIONNAIRE – NATIONAL REPORT OF CROATIA**

*Notes: This questionnaire aims at collecting information of law, caselaw and practices available in each country.*

*Please refer to the ALAI2021 program for further explanation on the Sessions and Panels.*

***Please, keep your answers short and factual.***

**Please send national report to [rxalabarder@uoc.edu](mailto:rxalabarder@uoc.edu).**

**Deadline: 15 August 2021.**

### **1. INTERNAL ADJUSTMENTS IN COPYRIGHT LAWS**

*Identify and explain any specific instances where market competition and innovation concerns haven been specifically addressed by copyright law or caselaw in your country. This may include by means of:*

1.1.- Defining (or interpreting) the scope of exclusive rights to account for competition and innovation concerns.

In the Croatian legislation copyright is defined very broadly as a right with unlimited content.<sup>1</sup> There is no exhausting list of rights, so the author is entitled to do with his copyright work and the benefits deriving from it whatever he likes. Of course, there is set of limitation on exercise of copyright, but they is and have to be strictly provided by law.

Regarding the competition and innovation there is no specific limitation or exception. Also, there is no “specific instance” where market competition and innovation are being considered in a manner that restrict copyright exclusive rights.

1.2.- Defining (or interpreting) the scope of exempted uses (E&L) on account of competition and innovation concerns.

Limitations must be interpreted in accordance with the constitutional principle of proportionality. Generally, particular limitation must be interpreted not broader than it is necessary to achieve the

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<sup>1</sup> The Croatian Copyright and Related Rights Act in Article 18 defined economic component as follows:

Article 18

„The author shall have the exclusive right to do with his copyright work and the benefits deriving from it whatever he likes, and to exclude any other person from it, unless otherwise provided for by the law.“



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objectives of the limitation of copyright. However, in practice there is no guidance on the interpretation of limitations either generally or concerning market competition and innovation.

1.3.- Imposing licensing conditions (statutory licensing, compulsory licensing, compulsory collective management, ECL, etc) or “joint-tariffs”, “one-stop-shops” ... and explain their impact in the market

There is no statutory or compulsory licensing in the Croatian copyright law. Compulsory collective management is provided for the right of broadcasting and rebroadcasting, the rental right, the right to a remuneration for public lending and the right to a remuneration for reproduction for private and other personal use. Possible negative impacts in the market are controlled by the Croatian Competition Agency which intervenes in the market when a collective management society arbitrarily allowed different discounts to the same businesses, bringing undertakings in a disadvantaged position on the market



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1.4.- Explain any relevant licensing practices existing in your country that favor market competition and innovation. Please refer to any copyright markets (i.e., software, publishing, news, audiovisual. ...)

We are not aware of any specific licensing practices that favour market competition and innovation.

1.5.- By any other means?

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## 2. A STUDY CASE: DATA ECONOMY

*Data is called the “new oil” for our economy, as it is being used to develop new products and services. To the extent that this data includes copyrighted works, we want to identify how copyright laws and caselaw are addressing this issue and how different national solutions may have a different impact in the market. In the EU, this activity concerns the exceptions and limitations on Text & Data Mining as well as the regulation on Public Sector Information reuse (PSI)*

*Notice: we are not only talking about corpuses specifically prepared for TDM purposes (i.e., electronic journals, databases, etc), but also about processing (machine reading) of works, in general, (texts, images, etc ) available either online, in digital form or in analogue form.*



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2.1.- Is “machine reading” an act of reproduction? If so, is it being exempted (excluded) under an E&L or as fair use? Is it subject to licensing (if so, what kind of licensing)?

To the best of our knowledge, this issue has never been addressed in practice in Croatia. Based on the broad language of Article 19 of the Copyright and Related Rights Act which defines reproduction as copying “by any means and in any form”, we consider it reasonable that machine reading would fall under this provision.

2.2.- Please provide any examples (laws, caselaw, licensing) regarding the development of databases, search engines, apps, services, etc based on reusing data produced by the Public sector.

Reuse of data held by the public sector is covered by the Right to Access to Information Act (RAIA), which is harmonized with the EU secondary legislation in this field. In recent years, the government has been making various sets of publicly held data open in a structured form, thus enabling their re-use. These data are also shared centrally, via Open Data Portal (<https://data.gov.hr/>). Also, national open licence is established (<https://data.gov.hr/otvorena-dozvola>).

2.3.- Is there any evidence of how these measures (law, caselaw, licensing) are fostering or deterring the development of new services and products and of downstream markets?

There are some interesting new services and apps provided, which are based on the re-use of publicly held data. These include apps providing public transportation information, comparison of expenses by local and regional territorial units, information about schools and kindergartens, information about medical facilities.

### 3. EXTERNAL ADJUSTMENTS: ANTI-TRUST AND BEYOND

*Please provide examples (law, caselaw, market practices) of how anti-trust law, unfair competition or any other legal adjustments apply to copyright licensing markets (offline and online). For instance, provide examples regarding the following scenarios:*

**3.1.- “Essential facilities” doctrines to foster the development of downstream markets** Croatia is one of the classical civil-law legislations based on natural law theory and personality doctrines with focus on the author. Hence, the “essential facilities” doctrines would not be applicable to the Croatian copyright legislation considering that it is specific for the common-law systems, particularly the US system.<sup>2</sup>

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<sup>2</sup> See *United States v. Terminal R.R. Ass'n*. Later on, it further developed through cases like *Associated Press v. United States* and *Otter Tail Power Co. v. United States*. However, the term essential facilities was initially coined by Neal in 1970. and in practice first used in *Hecht v. Pro- Football, Inc.*; See *United States v. Terminal R.R. Ass'n*, 224 U.S. 383 (1912); *Associated Press v. United States*, 326 U.S. 1 (1945); *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973).; *Hecht v. Pro- Football, Inc.*, 570 F.2d 982 (D.C. Cir. 1977); *MCI Communications Corp. v. AT&T Co.*, 708 F.2d 1081 (7th Cir. 1983)



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However, Croatia is also Member State of the European Union, making the EU legislation and case-law directly applicable to the Croatian legislation. Regarding the cases concerning the refusal to license of undertakings in a dominant position, the CJEU has developed the exceptional circumstances doctrine.<sup>3</sup> The exceptional circumstances doctrine has some similarities with the US essential facilities doctrine considering that they deal with the similar issue.<sup>4</sup> Still, the exceptional circumstances doctrine was developed independently in different surroundings and there are substantial differences between the approaches developed in the EU and the US.<sup>5</sup> Moreover, in the EU, there is still no agreement on the appropriate interpretation of the exceptional circumstances doctrine, so the doctrine is still evolving.

Thus, for the cases concerning the refusal to license of undertakings in a dominant position, the Croatian competent authorities should apply the exceptional circumstances doctrine as interpreted by the CJEU. However, considering that such cases necessarily involve an undertaking in a dominant position exploiting copyright, such cases do not occur often. In Croatia, there were no such significant cases raised before the competent bodies, except for the cases concerning collective management organisations (see *infra* Q&A 3.4.). Still, with development of online platforms, basing their business on exploitation of software, it is not unlikely that such a case could attract attention of competent authorities (i.e. Croatian Competition Agency).

### **3.2.- Vertical integration of markets (producers/distributors); tying sales (e. g. exclusive sale of decoders by pay-TV platforms)?**

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<sup>3</sup> See Opinion of Advocate General Gulmann of 1 June 1994, *RTE and ITP v Commission*, Joined Cases C-241/91 P and C-242/91 P, EU:C:1994:210; Judgment of 6 April 1995, *RTE and ITP v Commission*, Joined Cases C-241/91 P and C-242/91 P, ECLI:EU:C:1995:98; Judgment of 16 December 1999, *Micro Leader Business v Commission of the European Communities*, T-198/98, EU:T:1999:341; Judgment of 29 April 2004, *IMS Health*, C-418/01, EU:C:2004:257; Judgment of 17 September 2007, *Microsoft v Commission*, T-201/04, EU:T:2007:289; Judgment of 6 December 2012, *AstraZeneca AB and AstraZeneca plc v European Commission*, C-457/10 P, EU:C:2012:770; Judgment of 16 July 2015, *Huawei Technologies Co. Ltd v ZTE Corp. and ZTE Deutschland GmbH*, C-170/13, EU:C:2015:477

<sup>4</sup> It might be argued whether some influence of the essential facilities doctrine can be found in the exceptional circumstances doctrine.

<sup>5</sup> In the US, the “essential facilities” conditions establishing liability under the competition rules on the prohibition of monopolization are: control of the essential facility by a monopolist; a competitor’s inability to practically or reasonably duplicate the essential facility; the denial of the use of the facility to a competitor; the feasibility of providing the facility to competitors; and absence of regulatory oversight from an agency.

In the EU, the conditions forming the exceptional circumstances as set in *IMS Health* are: indispensability of the protected product or service for carrying on a particular business; the new product condition; the absence of objective justification; elimination of competition on the downstream market. Still, in CJEU's practice, interpretation of those conditions can vary significantly particularly comparing *IMS Health* to *Microsoft*.



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Per available practice, it seems that in Croatia there are recently no cases dealing with vertical integration of markets or tying sales concerning copyright.

**3.3.- Bundling of rights/means of exploitation (cable, satellite, internet, cellphones): upstream and downstream competition issues.**

Per available practice, it seems that recently in Croatia there were no cases dealing with bundling of rights/means of exploitation concerning copyright.

**3.4.- Licensing prices (also under collective licensing) deemed unfair, discriminatory, anti-competitive by courts; arbitration or mediation procedures to set prices; government price-setting ...**

In Croatia, there were several cases dealing with unfair licensing prices under collective licensing discussed as a potential abuse of dominance. In their essence, the cases concerned disputes over fair and equal payment of compensation fees charged by collective management organisations for the use of copyright works.

The examples are as follows: CCA, case Hrvatsko društvo skladatelja – Zaštita muzičkih prava, Zagreb (Croatian Collecting Society – Music Copyright Society), class: UP/I 030-02/2008-01/41, CCA, case Hrvatsko društvo skladatelja – Zaštita muzičkih prava, Zagreb (Croatian Collecting Society – Music Copyright Society), class: UP/I 030-02/2008-01/41, Resolution of 3 November 2009.; CCA, case CCA v HDS ZAMP, class: UP/I 030-02/2008-01/21, Resolution of 16 December 2010.; CCA, case Hrvatsko društvo skladatelja – Zaštita muzičkih prava, Zagreb (Croatian Collecting Society – Music Copyright Society), class: UP/I 030-02/2011-01/008, Conclusion of 5 July 2011.; CCA, case CCA v Hrvatsko društvo skladatelja – Zaštita muzičkih prava, Zagreb (Croatian Collecting Society – Music Copyright Society), class: UP/I 034-03/2013-03/005, Resolution of 6 December 2013.; CCA, case CCA v Hrvatsko društvo skladatelja – Zaštita muzičkih prava, Zagreb (Croatian Collecting Society – Music Copyright Society), class: UP/I 034-03/15-01/017, Resolution of 13 November 2015.; CCA, case CCA v HDS ZAMP, class: UP/I 034-03/17-01/013, Resolution of 23 November 2017; CCA, case CCA v Hrvatsko društvo skladatelja, Zagreb (Croatian Collecting Society – Music Copyright Society), class: UP/I 034-03/18-01/008, Resolution of 14 November 2018.

All the mentioned cases concerned the particular collective management organisation performing collection of fees for using copyright works and affecting at least two relevant markets. In majority of the decided cases, the Croatian Competition Agency did not find the violation of competition rules on abuse of dominance. The



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Agency considers that, when the differences between charged fees resulted from an agreement between a collective management organisation and a user rather than the Tariff, such agreement is considered aligned with the Croatian Copyright Act and does not violate competition. The exception were cases where the collective management society arbitrarily allowed different discounts, respectively applied different conditions for the same businesses, bringing undertakings in a disadvantaged position on the market.<sup>6</sup>

#### 4. ONLINE MARKETS: “VALUE GAPS” (ONLINE PLATFORMS)

*Notice that complete and valuable information resulting from the stakeholders’ dialogue and written consultations currently launched by the EU Commission will be available at the time of the Congress. [https://ec.europa.eu/newsroom/dae/document.cfm?doc\\_id=68591](https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=68591)*

*<https://ec.europa.eu/digital-single-market/en/news/directive-copyright-digital-single-market-commission-seeks-views-participants-stakeholder>*

*Please include only information that is specific to your country.*

4.1.- Is there any norms and/or relevant caselaw addressing the value gap issue, as applied to UGC platforms?

*If you are an EU country, have you addressed the transposition of Art. 17 CDSM Directive?*

Art. 17 of DSM Directive are to be in implemented in the Croatian legislation with the new Copyright and Related Rights Act, which is currently in the in the parliamentary procedure and it is expected to be adopted and enter into force during 2021.<sup>7</sup>

4.2.- Is there any norms and/or relevant caselaw or licensing addressing news aggregation?

*If you are an EU country, have you addressed the transposition o f Art. 15 CDSM Directive?*

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<sup>6</sup> See for instance CCA, case Hrvatsko društvo skladatelja – Zaštita muzičkih prava, Zagreb (Croatian Collecting Society – Music Copyright Society), class: UP/I 030-02/2008-01/41, Resolution of 3 November 2009; CCA, case CCA v Hrvatsko društvo skladatelja – Zaštita muzičkih prava, Zagreb (Croatian Collecting Society – Music Copyright Society), class: UP/I 034-03/2013-03/005, Resolution of 6 December 2013.

<sup>7</sup> The implementation of Art. 17 of DSM Directive is realised through Arts. 36/2/12, 50, 51, 52, 53. of the draft of that Act. The Draft is available at: [https://www.sabor.hr/sites/default/files/uploads/sabor/2021-07-30/110102/PZE\\_61.pdf](https://www.sabor.hr/sites/default/files/uploads/sabor/2021-07-30/110102/PZE_61.pdf)



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Art. 15 of DSM Directive, is being implemented by the draft of the new Copyright and Related Rights Act quite to the letter, but also referring the corresponding recitals for the interpretation.<sup>8</sup>

4.3.- Is there any norms and/or relevant caselaw addressing other value gaps?

*For instance, regarding cloud storage and compensation for private copying*

No.

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<sup>8</sup> Arts. 163, 164, 166, 167, 171, 218/3/4, 222. of the Draft have implemented Art. 15 of the DSM Directive. The text available at: [https://www.sabor.hr/sites/default/files/uploads/sabor/2021-07-30/110102/PZE\\_61.pdf](https://www.sabor.hr/sites/default/files/uploads/sabor/2021-07-30/110102/PZE_61.pdf)