

**ALAI BRUSSELS 2014**

**Moral rights in the 21<sup>st</sup> century**

**The changing role of the moral rights in an era of information overload**

**QUESTIONNAIRE**

**REPORT CROATIA**

**AUTHOR : Igor Gliha**

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**CROATIAN REPORT**

**Igor Gliha**

1. Please describe the origin, the objectives and the underlying philosophy of the moral rights in your country.

Croatian copyright law traditionally pays great attention to the protection of personal rights of authors regarding their copyright works and protects them to a higher extent than prescribed in Article 6bis of the Berne Convention. Moral rights are continuously regulated starting from the 1929 Copyright Act, and even before in the 1884 Copyright Act some elements of moral rights had been taken in account.

As every individual is entitled to the right of protection of his person (personality rights), the author enjoys also special rights regarding a copyright work that stands for the expression of his personality and therefore are specially protected. In the Croatian legal system moral rights are also recognised to performers.

Moral rights are strictly enumerated in the Copyright Act (CA) and apart from those recognised, authors and performers do not enjoy other moral rights (unlike the general personality right that belongs to every individual and is recognised as an open right).

Authors' (and performers') moral rights are also protected by criminal sanctions in the Penal Act (Art. 284).

2. What do the moral rights consist of in your country:

- right of disclosure (divuligation)
- right to claim authorship (paternity right)
- right to respect and integrity
- right to repent or to withdraw
- other elements: ...?

The moral rights in Croatian copyright system consist of: the right of first disclosure, right of recognition and indication of authorship (paternity right), right of integrity of a work, right to object to uses that could bring dishonour or discredit to the author's reputation (right of respect), and right to repent or to withdraw (revocation right).

The performers right consists of the right to be recognized and indicated as a performer (paternity right), right of integrity of a performance, right to object to uses that could bring dishonour or discredit to the performer's reputation (right of respect).

3. Can the moral rights be transferred or waived in your country?

The moral rights are by their nature highly personal rights, and they are not transferable. In addition, the moral rights in Croatian law are unwaivable. However, the author may entrust to somebody else the execution of the moral right (without a transfer) or decide not to exercise moral rights (without waiving). For example the author could let someone else decide how and when the work will be made available to the public or decide to make changes to the work. This, however, does not mean that the right itself has been transferred, but only that the author relinquished the exercise of his right that still belongs to him, but it is burdened by the right of another person to exercise some rights. Furthermore, the author may suffer the infringement of the moral right. That, however, does not mean that he waived his right, but that he has been exercising the right of letting somebody else to encroach on the copyright or to prohibit to do so.

4. Which is the term of protection of the moral rights in your country? Is it identical to the term of protection of the economic rights? Can the moral rights be exercised after the death of the author and by whom? Are works in the public domain still somehow protected under moral rights?

In Croatia copyright is a monistic right. Therefore, term of protection is the same for both moral and economic rights. As it is not a perpetual right, the term of protection expires 70 years *p.m.a.*, and the copyright ceases as such, together with its economic and moral right components. Much is the same with the performer's right, but of course the term of protection is basically not calculated *p.m.a.* but from the date of performance/first publication/first communication to the public, and it runs 70 years regarding the fixation of the performance in a phonogram and 50 years regarding the other performances. After the author's (performer's) death, the moral rights during the *p.m.a.* period belong, together with the economic rights, to his heirs, who are basically entitled to exercise them in the same manner as the author himself (performer).

However, even after the copyright expires and the work falls in the public domain, there are some special rules on exercising the content of moral rights, as a universal obligation to recognise authorship. No one may use a copyright work even in public domain without indicating the author's name or may use the copyright work in a manner that prejudices the author's honour and reputation. This obligation stems from the law itself and not from somebody's copyright. Every person with a legal interest is entitled to require from those who do not comply with these obligations to stop infringing them. Pursuant to the law, the legal interest is recognised to the author's heirs, to the associations of authors to which the author belonged, and to the Croatian Academy of Sciences and Arts. These rules apply, *mutatis mutandis*, to the performer's right as well.

5. Do other types of rights (such as “personality rights”, “civil rights”, “publicity rights”, “portrait rights” or other, depending on the jurisdiction) complement the protection of the moral rights in copyright?

The general personality rights could certainly complement the protection of author's interests of personal nature. However, since the authors' moral rights are strongly protected,

there is no need for such complementary protection, at least no such case has been found in the jurisprudence.

6. Does the legislation or case law in your country provide sanctions or other mitigating mechanisms for the abusive exercise of the moral rights, in particular by the author and/or his/her heirs?

In the Croatian law there is no special rule on abusive exercise of the moral rights. However, a general ban on the abuse of rights implicated in the legal order applies to the moral rights as well. Prohibition of a minor technical alterations made by an authorized user in the regular use of a copyright work was in the jurisprudence determined as the abusive exercise of the integrity right, i.e. only significant encroachments in the work constitute an infringement of the integrity right.<sup>1</sup>

In addition, special rule that allows a lawful user of computer programs the alterations and adaptations that are necessary for the use of the computer program might be deemed a rule on preventing the abusive exercise of the integrity right (Art. 110 of the Croatian Copyright Act and Art. 5/1 of the EU Directive on the legal protection of computer programs).

7. How would a conflict between the exercise of a moral right and of any other proprietary right, such as the right to “material” property on the “carrier” of the work, be solved in your country? (e.g. mention of the name of the author on a building, modification of a utilitarian work, demolition of an artistic work, graffiti on a building,...)

The Croatian CA entails special provisions on the relations between ownership and other proprietary rights in rem in which a copyright work is embodied and copyright in that work (Arts. 77–79 of the CA). In solving this conflict, the copyright has a priority. Thus, an owner cannot exercise his ownership contrary to copyright. In this conflict, interest of an author is more endangered than the interest of an owner – therefore it deserves an advantage. There is a special rule on the integrity right respectively the demolition of a thing on which the copyright has been fixed. The owner is free to destruct the thing unless an original work or a single remaining copy (if the owner knows that he has the only remaining copy of the copyright work) is in matter. Before destroying the original work or a single remaining copy, the owner is obliged to notify the author about the destruction and offer him to buy it off at a price equivalent to its real value. If it is not possible to hand over the original aimed for destruction to the possession of the author, the owner is obliged to allow the author to make a copy of the work. There is a special case related to the situation where the original of a copyright work is fixed on a thing without the owner’s consent (e.g. graffiti on a building) – in that case the owner may freely destroy his thing. The owner of the thing who demolishes the copyright work against the said rules infringes the author’s moral rights.

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<sup>1</sup> The Supreme Court of the Republic of Croatia, Pz-5739/ 02, 6 April 2003, Ing reg SP, 2003, insert 3, p. 9.

There are even more special rules on destruction and alteration in relation to architectural works. Owner of an architectural work can freely destroy it, but is obliged to notify the author about the destruction, and to allow the author to photograph the work as well as to supply the author with a blueprint copy of the work. With regard to an alternation of a building as a work of architecture, the author cannot oppose alternations of his work of architecture which are necessitated by severe reasons such as safety or technical reasons. In cases of the reconstruction of the work of architecture, the author cannot oppose the use of other materials, if the materials used in the construction thereof have proved to have deficiencies, or if such materials cannot be obtained, or if they can be obtained only with disproportionate difficulties or expenses. In such cases, the author is entitled to request the owner of the building to, in addition to indicating the author's name, make a note concerning alternations of the work and the time they were made.

8. How would a conflict between the exercise of a moral right and the exercise of the right to freedom of expression or other fundamental rights be solved in your country?

In the Croatian legal system, copyright is considered one of the fundamental rights, guaranteed by the Constitution (Art. 68/4, under the section "Protection of Human Rights and Fundamental Freedoms").<sup>2</sup> If the matter relates to achievement of a "balance of interests" between the fundamental rights, then this balance is reached by applying the social adequacy doctrine, which shows which right or interest takes precedence over another. Rights and interests protected by stricter sanctions, which more intensely reflect the needs of the society, take precedence over the right that limits another right.

The rule in Art. 94 of the CA on parodies and caricatures might be considered a special rule on the exercise of the right to freedom of expression and author's moral rights. This rule is one of the rules on limitations of copyright allowing the transformation of a work into a parody or caricature to the extent necessary for the purpose thereof.

The Croatian CA stipulates some other limitations of copyright (and related rights) with a purpose of exercising the right to freedom of expression such as the possibility of reproduction, distribution and communication to the public of works for the purpose of reporting of a current event (provided that such use is to the extent justified by the purpose and manner of reporting on current events); as well as newspapers' articles on and photographs of current political, economic or religious topics, which are released through other media of public communication, provided that the author has not expressly prohibited such use, and that the work is used to the extent justified by the purpose and manner of reporting; and public political, religious or other speeches made in the national or local governmental bodies, religious institutions or at the national or religious ceremonies (Art. 89 of the CA). In the category of limitations of copyright for the purpose of freedom of expression also belong the rules on quotations for purposes of scientific research, teaching, criticism, polemics and revision (Art. 89 of the CA). However, these rules primarily regulate conflicts between the economic rights and the freedom of expression.

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<sup>2</sup> Article 68 paragraph 4 of the Constitution reads: "Protection of moral and material rights [‘moral and material rights’ in this constitutional provision refer to the rights of personal and patrimonial nature] deriving from scientific, cultural, artistic, intellectual and other creative activities shall be guaranteed."

9. How do authors exercise their moral rights in practice? Do they consider this a matter of importance? How do they want to be acknowledged (which modalities exist for the exercise of the rights of authorship and integrity)? How do they impose respect of their moral rights when they are faced with derivative works? Do licences (in particular via creative commons) commonly provide a prohibition to create derivative works? Are there in your country model contracts per sector (such as the literary, audiovisual, musical, graphic arts or artistic sectors) that are made available by professional organisations or by collective management organisations and that contain clauses regarding the moral rights? If so, which ones?

Courts' case-law entails a long list of cases in which authors require protection of their moral rights, which in turn shows that they really care about the moral rights. Good examples of infringement of the author's honour or reputation are for example use of an author's music in a film abounding with obscene scenes;<sup>3</sup> publication of an author's work in a magazine with whose editorial policy he does not agree;<sup>4</sup> unauthorized destruction of a copyright work by pulling down a sculpture that was put up in a public place.<sup>5</sup> Regarding the infringement of the right of integrity examples are a significant downsizing of an illustration;<sup>6</sup> changing of the rectangular shape of a photograph to a circle;<sup>7</sup> inserting six new windows in the architectural work without the author's authorization;<sup>8</sup> unauthorized shortening of the work;<sup>9</sup> removing a part of the picture and mutilating the picture.<sup>10</sup>

10. Do collective management organisations play a role in the exercise of the moral rights in your country?

In the practice there is no significant involvement of collective management organisations in the exercise of the moral rights. Due to the personal nature of moral rights they are usually exercised and enforced individually. However, according to special rules on the paternity right and right to respect and integrity of the work after the expiration of the term of protection (Art. 106 of the CA, see more under 4), the associations of authors to which the author belonged, including the collective management organisations, are entitled to require termination of activities that do not respect the obligation to recognize authorship, pay respect

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<sup>3</sup> The Commercial Court of the Republic of Croatia, Pg-1794/81, 6 April 1982, I. Gliha, *Autorsko pravo – sudska praksa*, (Copyright – Court's Case-Law), p. 11, decision No. 54a.

<sup>4</sup> The High Commercial Court of the Republic of Croatia, Pg-5467/99, 16 June 2000, *Ing reg SP*, 2001, insert 3, p. 11, decision No. 377.1.

<sup>5</sup> The High Commercial Court of the Republic of Croatia, Pg-4082/01, 9 October 2001, *Ing reg SP*, 2002, insert 3, p. 1, decision No. 377.2 and High Commercial Court of the Republic of Croatia, Pg-2986/94, 7 January 1995, *Praxis Iuridica Mercatoria* No. 3, 1995, decision 61

<sup>6</sup> The Supreme Court of the Republic of Croatia, Pg-705/99, 18 April 2000, *Ing reg SP*, 2001, insert 3, pp. 11–12, decision 377.2

<sup>7</sup> The Supreme Court of the Republic of Croatia, Pg-1858/84, 13 November 1984, I. Gliha, *Autorsko pravo – sudska praksa*, (Copyright – Court's Case-Law), p. 10, decision No. 47

<sup>8</sup> The Supreme Court of the Republic of Croatia, Pg-1181/01, 29 October 2003, *Ing reg SP*, 2004, insert 3, p. 1, decision No. 371.131.3.

<sup>9</sup> The High Commercial Court of the Republic of Croatia, Pg-478/85, 13 April 1985, I. Gliha, *Autorsko pravo – sudska praksa*, (Copyright – Court's Case-Law), p. 10, decision No. 49

<sup>10</sup> The High Commercial Court of the Republic of Croatian, Pg-3687/01, 25 February 2003, *Ing reg SP*, 2004, insert 3, p. 2, decision No. 371.131.3.

to the work, and to the honour or reputation of the author. However, in the legal practice no such case of the CMOs' involvement has been found.

11. In your country, is it provided in legislation, case law and/or scholarly literature how the moral rights apply with regard to particular forms of use, such as:

- “artistic quotation”
- user generated content
- folklore
- orphan works
- cloud computing
- alternative (free) licensing schemes (in particular open source licences or creative commons)
- international aspects (determination of jurisdiction and applicable law)

In Croatia there are no special rules in the legislation or jurisprudence with regard to application of the moral rights to the above mentioned particular forms of use. Also, in the respective literature problems of moral rights with regard to these forms of use have not been specifically dealt with.

12. The objective of certain moral rights appears to be changing in the digital context. The right of disclosure, which enables authors to decide when their works can be made public, is invoked at times to protect the confidentiality of certain kinds of content or data or their private dimension. The right to claim authorship (paternity) is changing into a right of attribution which places more emphasis on the identification of one contributor among others (for example, on Wikipedia or in free licences) than on recognition of authorship. Lastly, the right of integrity may become a right through which to protect a work's authenticity. Indeed, while modifications to works are more and more widely authorised, authenticity is assuming greater importance, notably through the use of technological measures to guarantee it. In your country, are there any indications in legislation, case law and/or scholarly literature that the moral rights “shift” in a digital environment:

- From a divulgation right to a right to the protection of privacy (private life)?
- From a right to claim authorship (paternity) to a right to attribution?
- From an integrity right to a right to respect the authenticity of the work?
- Up to acknowledging similar interests and rights akin to moral rights for authors and performing artists, for the benefit of publishers, producers and broadcasters?

Indeed, digital environment has been seriously challenging copyright. However, that does not necessarily mean that the paradigm of copyright, including the moral rights, ought to change. The Croatian Copyright Act is designed to be technologically neutral. There are no indications either in Croatian legislation or in the jurisprudence or literature on dogmatic changes of moral rights in digital environment or "shifting" to some other rights for that environment.