

# ALAI Congress 2017, Copenhagen

## Copyright, to be or not to be

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### Croatian Report

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### *Questionnaire*

#### **The traditional justifications for copyright and related rights**

**In your country, which justifications for copyright have been presented in connection with your national legislation, for example in the preamble of the Statute or in its explanatory remarks or similar official documents?**

In the Croatian legal order, copyright is recognized (considered) as one of the fundamental rights of men and citizens, guaranteed by the 1990 Constitution.<sup>1</sup> Article 69/4 of the Constitution, in the part "Protection of Human Rights and Fundamental Freedoms", guarantees "protection of moral and material rights<sup>2</sup> deriving from scientific, cultural, artistic, intellectual and other creative activities".

Although the Constitution entails no separate provisions on the justification, inclusion of copyright in the category of the fundamental rights and freedoms justifies the existence of the right which enables a creator of an intellectual work to control the use of this work not only by deciding about manner of acquiring economic benefits from the respective use but also by receiving the protection of personal rights in respect of his work.

Justification for copyright is often correlated to justification for the right of ownership as right on tangible objects (rights in rem) and it is considered as one of the universal values.<sup>3</sup>

In making the copyright one of the fundamental constitutional rights, due account was taken of the provisions of the United Nations Universal Declaration of Human Rights<sup>4</sup> on the protection of rights resulting from

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<sup>1</sup> Off. Gaz. Nos.: 56/1990, 135/1997, 113/2000, 28/2001, 76/2010 and 5/2014.

<sup>2</sup> The expression "moral and material rights" in this constitutional provision refers to the rights of personal and patrimonial nature.

<sup>3</sup> Copyright is also acknowledged as a common value of the EU in the Charter of Fundamental Rights of the European Union, in Art 17/2 under the title Right to Property which reads: "Intellectual property shall be protected."

<sup>4</sup> The 1948 United Nations Universal Declaration of Human Rights, Art. 27/2: "Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he/she is the author."

intellectual work, and of the guarantee stemming from the International Covenant on Economic, Social and Cultural Rights.<sup>5</sup>

Given that copyright is among the rights of the highest rank in the Croatian legal order, it is as such freed from interventions of public authorities.<sup>6</sup> The constitutional guarantee has dual impact on copyright – not only every single existing copyright is guaranteed, but also the copyright as a legal institute.<sup>7</sup>

The Croatian Copyright and Related Rights Act (hereinafter: the CRRA)<sup>8</sup> has no preamble, and thus no provisions pointing to the justification of copyright. However, it includes provisions emphasizing the rights protecting author's spiritual connections with his work and his economic interests related to his work, definition of copyright work.

**Are there any similar justifications for related rights? Are the arguments the same as for copyright in literary and artistic works or are there different or additional justifications?**

In addition to copyright, the Croatian copyright law recognises also some other rights which indirectly protect the author's interests. In the Croatian legal order recognised are the following related rights: performer's right, phonogram producer's right, videogram producer's right, broadcasting organisation's right, database producer's right and the right of publishers to their publications.

The related rights are also sometimes divided into the right of performers (colloquially referred to as 'the nearest relative of the nearest neighbour to copyright') and other related rights (colloquially referred to as 'producer's rights'). The distinction is emphasised given that the right of performers also protects their creativity, which differentiates from the author's, but is to a lesser or a greater extent necessary for the performance of the copyright work. Therefore, unlike other related rights, the right of performers entails personal right component (moral rights), and dealing with it is limited in the same way as the disposition of copyright. All other related rights, the so-called producer's rights, protect certain organizational and technical work and correlated investments therein which make it possible for works and performances to reach the public and enable their use. At the same time, the protection of producer's right encourages investments in the creative and artistic activities, which in turn result in higher benefits derived from them.

**Is it possible with any certainty to trace the impact of such justifications in the provisions of the law, or is their influence more on a general (philosophical) level?**

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<sup>5</sup> International Covenant on Economic, Social and Cultural Rights of 1966, Art. 15/1/c: "The States Parties to the present Covenant recognize the right of everyone: (...), c) to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he/she is the author".

<sup>6</sup> Freedom from the intervention of public authorities in the copyright implies that the authorities are not permitted to overstep certain limits, under requirements strictly determined by law.

<sup>7</sup> On the constitutional protection of copyright and some reflections on problems related to the protection see: Crnić, J., "Ustavne odredbe o autorskom pravu" (Constitutional Provisions on Copyright), *Zbornik HDAP, (CCLS Collected papers)*, No. 1, 2000, 15 et seq.

<sup>8</sup> Off. Gaz. Nos. 167/2003, 79/2007, 80/2011, 141/2013 and 127/2014.

The Croatian copyright law is grounded on the monistic theory, and for creators (both authors and performers) it entails moral and economic rights that are inseparable. The Croatian CRRA respects that creator could be, by nature of things, only natural person, and that, by the same token, the right on his intellectual creation belongs to the creator, as stipulated in Art. 2/1: "Copyright shall belong, by its nature, to a natural person who has created a copyright work.", and Art. 2/2: "A right of performers shall belong, by its nature, to a natural person who has performed a work in the literary or artistic domain, or the expressions of folklore."

In addition to the abovementioned, the justification could be traced in the provisions on copyright works and acquiring of copyright:

Article 5/1 CRRA: "A copyright work shall be an original intellectual creation in the literary, scientific and artistic domain, having an individual character, irrespective of the manner and form of its expression, its type, value or purpose, unless otherwise provided for in this Act."

Article 9 CRRA stipulates: "(1) The author of the work is a natural person who has created the work. (2) Copyright in a work belongs to its author by the mere act of the creation of the work."

The evidences of justification are also detectable in the rules on content of a copyright:

Article 2/4 CRRA: "Copyright and related rights may be limited against the will of their holders only under conditions and in a manner provided by law", and

Article 13 CRRA: "(1) Copyright shall include moral rights, economic rights and other rights of authors. (2) Copyright shall protect personal and intellectual ties of the author with his work (moral rights of the author), economic interests of the author in respect of his copyright work (economic rights of the author) and other interests of the author in respect of his work (other rights of the author)."

### **Are there similar, or different or supplementary justifications for copyright and related rights expressed in the legal literature?**

In the leading Croatian copyright doctrine and legal literature, the justification of copyright has not been brought into question. The idea prevails of copyright as a right similar to ownership, with basic difference reflected in the object – a copyright work as an intangible (immaterial) object and a thing (*res*) as a tangible object. The main challenges are whether collecting management societies be allowed to determine the tariffs as representatives of the rightholders, or is it necessary that they have some kind of approval from the users side.

## Economic aspects of copyright and related rights

**Has there in your country been conducted research on the economic size of the copyright-based industries? If yes, please summarize the results.**

**Has the research been conducted in accordance with a generally accepted and described methodology in order to make it comparable to similar research abroad?**

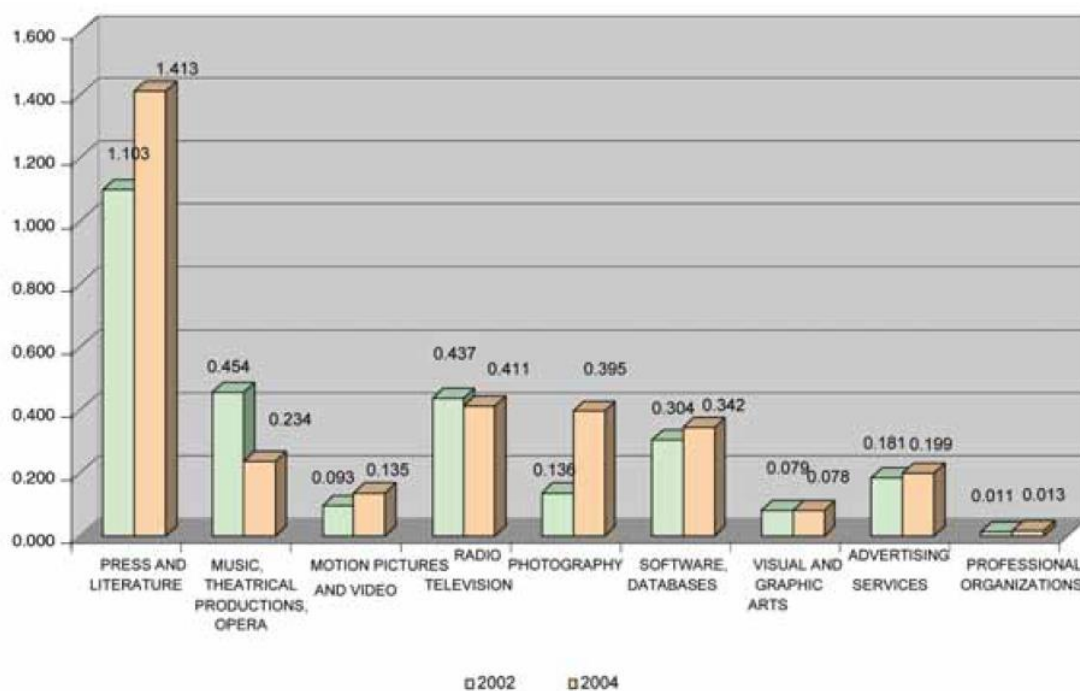
The research on the economic size of the copyright-based industries has been conducted twice in Croatia. The first research of this kind was conducted in 2007, by the State Intellectual Property Office of the Republic of Croatia, and it analysed the data for the years 2002 and 2004. This research entitled “Economic contribution of copyright – based industries to the economy of the Republic of Croatia” applied the official data collected by the Croatian Bureau of Statistics. The methodology applied in the research was generally accepted methodology developed by the World Intellectual Property Office, according to which creative industries are industries that include the cultural industries plus all cultural or artistic production whether live or produced as an individual unit. The creative industries are those in which the product or service contains a substantial element of artistic or creative endeavor. The research in the Republic of Croatia included 54 key and 68 other activities, which were systematized as core copyright industries, interdependent copyright industries, partial copyright industries and non-dedicated support industries and which have different impact factor on the economy. Since the WIPO methodology is widely accepted, the results of the research conducted in the Republic of Croatia are fully comparable with the results of approx. 40 other research studies conducted in other countries of the world, where also the WIPO methodology was used. The results for the Republic of Croatia are published on: [http://www.wipo.int/export/sites/www/copyright/en/performance/pdf/econ\\_contribution\\_cr\\_hr.pdf](http://www.wipo.int/export/sites/www/copyright/en/performance/pdf/econ_contribution_cr_hr.pdf)

The summarized results are as follows:

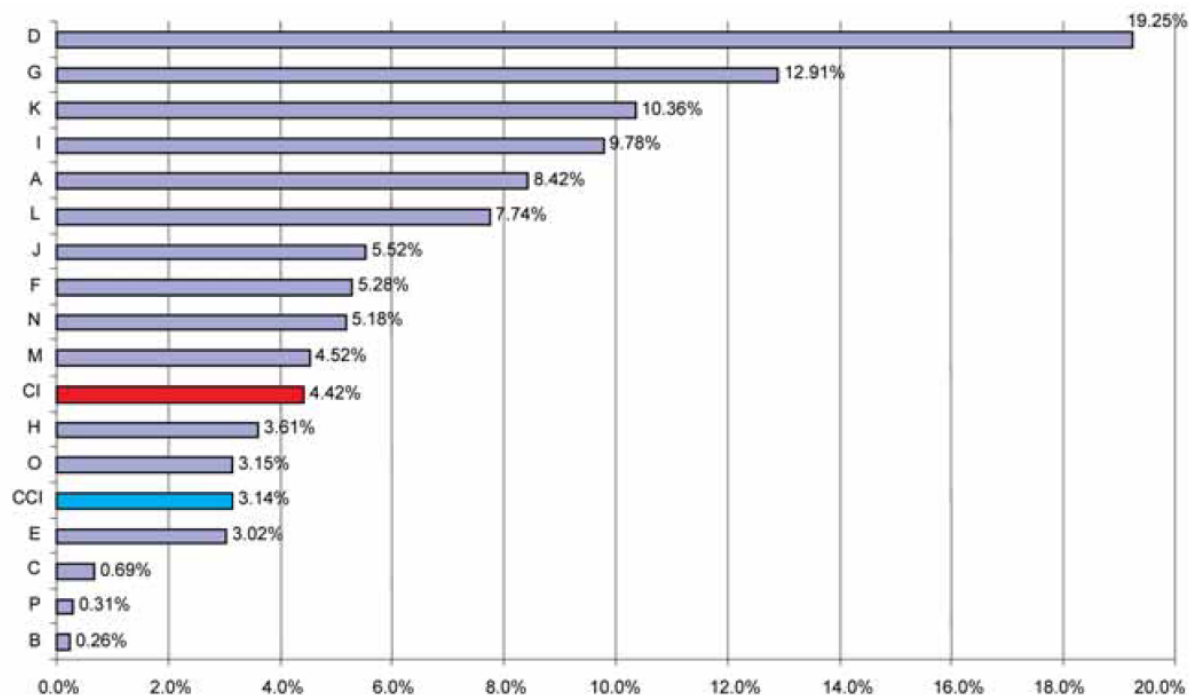
**Table 1. Economic contribution of CBIs in 2002 and 2004**

INDUSTRIES	GVP in thousands of kuna	%	GDP in thousands of kuna	%	Number of employed	%
<b>2002</b>						
CORE	10,789,712	3.90	5,686,752	3.138	36,054	2.797
INTERDEPENDENT	3,364,555	1.026	1,579,157	0.871	12,661	0.982
PARTIAL	1,434,747	0.437	658,015	0.363	5,049	0.392
NON-DEDICATED	154,159	0.047	93,748	0.052	721	0.056
<b>TOTAL CBIs</b>	<b>15,743,172</b>	<b>4.800</b>	<b>8,017,672</b>	<b>4.424</b>	<b>54,485</b>	<b>4.227</b>
<b>TOTAL Croatia</b>	<b>327,966,373</b>	<b>100.000</b>	<b>181,230,888</b>	<b>100.000</b>	<b>1,288,902</b>	<b>100.000</b>
<b>2004</b>						
CORE	13,432,681	3.312	6,436,405	2.994	43,641	3.221
INTERDEPENDENT	3,676,824	0.907	1,900,623	0.884	12,710	0.938
PARTIAL	1,802,993	0.445	689,457	0.321	5,546	0.409
NON-DEDICATED	268,757	0.066	156,901	0.073	1,039	0.077
<b>TOTAL CBIs</b>	<b>19,181,254</b>	<b>4.729</b>	<b>9,183,386</b>	<b>4.272</b>	<b>62,936</b>	<b>4.645</b>
<b>TOTAL Croatia</b>	<b>405,576,439</b>	<b>100.000</b>	<b>214,983,101</b>	<b>100.000</b>	<b>1,355,000</b>	<b>100.000</b>

**Graph 15 Economic contribution of activities of core copyright industries in Croatia in 2002 and 2004 as a percentage of number of employed**



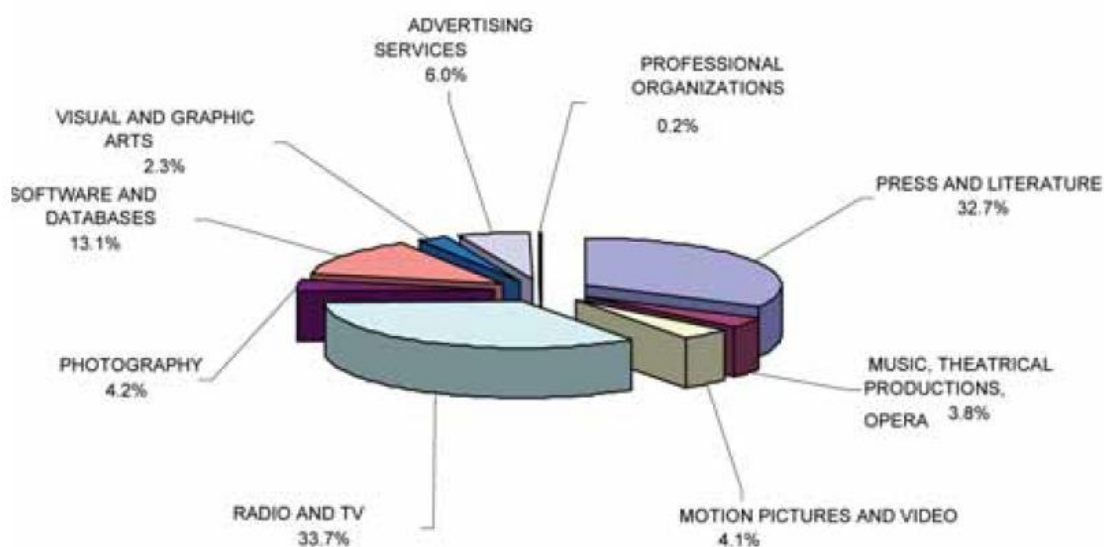
**Graph 8. Economic contribution of CBIs in Croatia in 2002 in comparison to other industries according to NCA as a percentage of GDP**



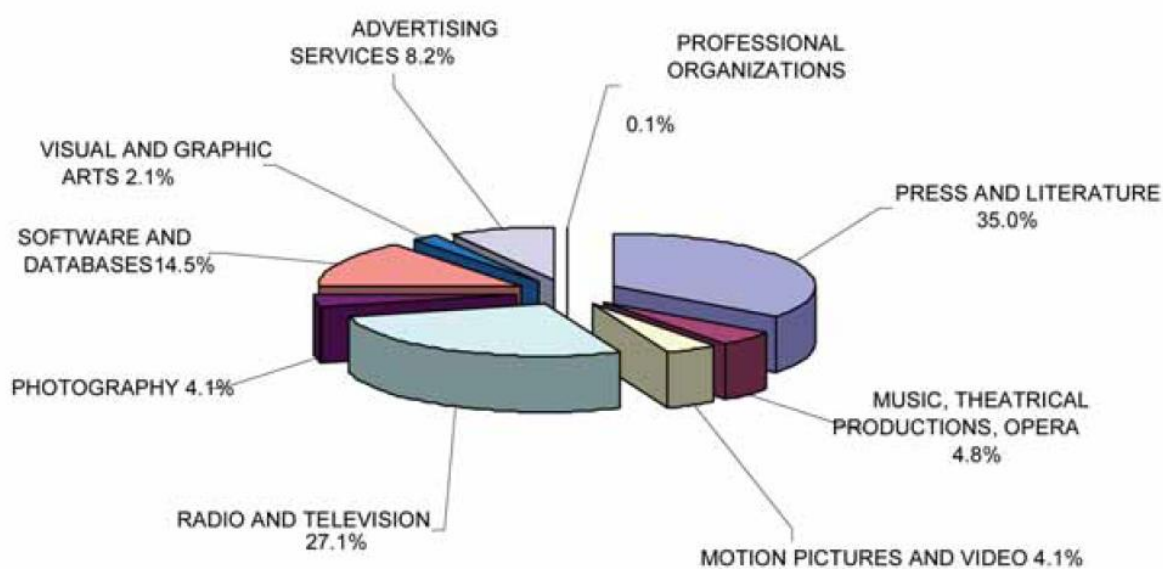
Key reference:

- A Agriculture, hunting and forestry
- B Fisheries
- C Mining and extraction
- CI *Copyright industry*
- D Manufacturing
- E Electricity, gas and water supply
- F Construction
- G Wholesale and retail sale
- H Hotels and restaurants
- I Transportation, storage and connections
- J Financial services
- K Real estate activities, rental and business services
- L Public administration and defense; compulsory social security
- M Education
- N Healthcare and social welfare
- O Other social and personal service activities
- P Household activities
- CCI *Core copyright industry*

**Graph 13. GDP structure of core copyright industries in Croatia in 2002**



**Graph 14. GDP structure of core copyright industries in Croatia in 2004**



Another research in the Republic of Croatia was conducted in 2015 by the Institute of Economics, Zagreb, entitled "Mapping Creative and Cultural Industries in Croatia" (it is available only in Croatian language). It was funded by the Croatian cluster of competitiveness of creative and cultural industries and funded by its members. It does not use in particular any of the generally accepted methodologies, although analyses the variety of different methodologies applied in the European Union and in other countries of the world. Also in this research, general standards are applied, such as standards accepted by the Croatian Bureau of Statistics, Eurostat and the like. The measurement of economic contribution of creative and cultural industries is based on three pillars: the first pillar is the contribution of the sector of creative and cultural industries to the gross domestic product of the Croatian economy, the second pillar is the employment and the third is the business sector, namely entrepreneurship. The study showed that there are 45 activities in the sector of creative and cultural industries, which are divided into 12 different sub-sectors. 43 activities are fully creative, while 2 activities are only partly creative. Because of the specific approach and methodology used, the results of the study are only partly comparable with the similar researches in other countries. The summarised results are as follows:

Gross added value of creative and cultural industries in 2012 was 2.3% of the gross domestic product of the Republic of Croatia. (For comparison, wood and furniture industry was 0.8%, pharmaceutical industry was 1.0% and textile industry 0.7%). Among the creative and cultural industries, the most intensive impact to the gross domestic product was generated in publishing industry (19.9%), electronic media (18.2%), computer programs, gaming and new media (13.7%), advertising and communication (11.8%) and music, performing and visual arts (11.6%). Other sub-sectors, such as film, architecture, design and photography generated 10.7% of the sectorial gross domestic product.

In the eve of 2014, in creative and cultural industries there were 3% of all employed people in the Republic of Croatia. The sub-sectors which add the most value to the gross domestic product are at the same time also the sub-sectors which generate the most employment: publishing 21.1%, advertising and communication 14%, electronic media 12.8%, museums, galleries and libraries 11.2%, computer programs, gaming and new media 10.4 %, music, performing and visual arts 8.7% and all other sub-sectors together 30.1%.

**Has there been any empirical research in your country showing who benefits economically from copyright and related rights protection? If yes, please summarize the results and the methodology used.**

No, there was no empirical research in the Republic of Croatia showing who benefits economically from copyright and related rights protection.

### **Individual and collective licensing as a means of improving the functioning and acceptance of copyright and related rights**

**Is there a wide-spread culture of collective management of copyright and related rights in your country, or is it limited to the 'core' areas of musical performing rights and reprography rights? Please describe the areas where collective management is used.**

In the Republic of Croatia, taking into consideration the population of the country (4.8 mil inhabitants) and the size of the market, it could be assessed that the collective management of copyright and related rights



is relatively wide-spread activity. There are 8 different collective management organizations which have been granted authorization by the State Intellectual Property Office, for the collective management of different categories of rights for different categories of right-owners.

The most developed collecting management organization in the Republic of Croatia is the Croatian Composers' Society Collecting Society (HDS ZAMP), which yearly collects about 14.5 mil € for music authors (composers, music writers and arrangers) for all kinds of use (communication to the public, including broadcasting, rebroadcasting and communication to the public on-line, reproduction rights and private copying). Croatian Performers' Rights Collecting Society (HUZIP) represents mostly music performers, although other categories of performers are also represented. It exercises all types of communication to the public rights of fixed performances, as well as private copying rights, and earns yearly about 4.2 mil €. In the field of music, very active is also the Association for Protection, Collection and Distribution of Phonogram Producers' Rights (ZAPRAF), which yearly earns around 3.6 mil €, and collects remunerations for communication to the public and private copying for the producers of phonograms. In the audiovisual sector, the Croatian Directors' Guild – Collecting Society (DHFR) exercises audiovisual rights both for audiovisual authors and film producers in the field of retransmission rights and private copying and earns yearly about 1.3 mil €.

The Association for the Protection of Publishers' Rights (ZANA) is a collecting society for book publishers, which collects remunerations for private copying and reprography. The Croatian Writers' Association (DHK) is a collecting society for writers, which collects remunerations for public lending rights and private copying and reprography. The Society for the Protection of Journalists' Copyright (DZNAP) is a collecting society which represents press writers and collects remunerations from press-clipping services and uses on the Internet portals. Income of the listed three societies is significantly lower than the income of societies which represent the right owners in the field of music and audiovisual content.

Finally, the Croatian Collecting Society for fine Art (ARS CROATICA) is a collecting society for the resale right, which is not active.

**Are there legislative provisions in your national law aiming at facilitating the management of copyright and related rights? If yes, please summarize.**

In the Croatian Copyright and Related Rights Act there are several provisions which are created in order to facilitate collective management of rights. There is a provision which regulates the legal monopoly of collective management organization. Namely, the competent authority is entitled to issue only one authorization for collective management of rights for the same category of rights and the same category of right owners. Also, there are provisions which regulate the legal presumption of the representation of the right owners which did not expressly authorize the respective collective management organization. This system may be compared with the extended licensing system. The opt-out possibility is also regulated, except in the case where the collective management is obligatory as the single possibility of the exercise of some categories of copyright and related rights. There are provisions which regulate obligatory collective management for music broadcasting rights (authors, performers and producers of phonograms), cable retransmission rights (music and audiovisual authors, performers and producers of phonograms), private copying remunerations (all categories of right owners), rental rights and public lending rights.

It is possible that different collecting management organizations unite themselves by specific contractual arrangements and perform some collective management activities together, in order to optimize the joint expenses of collective management. They can also decide to out-source some technical and administrative services.

**Which models for limitations and exceptions have been implemented in your national law? Such as free use, statutory licensing, compulsory licensing, obligatory collective management, extended collective management, other models? Please provide a general overview.**

In the Croatian national law, there are several models which limit the copyright and related rights. First of all, there is a list of exceptions and limitations of copyright provided for the reproduction right, distribution right and the right of communication to the public, which is regulated in accordance with the InfoSoc Directive. Those exceptions and limitations, such as private copying, ephemeral recordings, free use for disabled persons, free use of orphan works, free use for judicial, administrative or other official proceedings, free use for teaching, free uses for parody and other similar free uses, need to be in compliance with the three-step test, which is also provided for in the national law. Statutory licences are regulated only sporadically in the national law and the legal theory recognizes them exceptionally. For example, there is statutory licence regulated in favor of employer of an author of a computer program where he or she acquires all the economic rights if not agreed otherwise. Also, there is statutory licence regulated in favor of a film producer where the contract on audiovisual production is concluded with the author of the contribution to the audiovisual work. He or she acquires all economic rights necessary for the performance of the purpose of the contract. On the other hand, there is no example of compulsory licensing in the Croatian national law on copyright. Obligatory management and extended collective management, which are also regulated as specific limitation to the copyright, are described in the previous paragraph.