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Creativity and Ownership: Protection of Rights in Musical Works in the European Union From Digitisation to Artificial Intelligence

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Креативност и власништво: правна заштита музичких дела у Европској унији од дигитализације до вештачке интелигенције

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Abstract

Even more than intelligence, creativity is considered as a quintessentially human capacity. The same conclusion is fully applicable to the artistic creation in music sector. However, rapid technological development is constantly challenging not only the creative process as such, but also the legal instruments intended to protect the results of intellectual and artistic work. The first part of this article examines the provisions of the new EU Directive 2019/790 dedicated to online content-sharing service providers and fair remuneration of authors/performers, while its second part maps the main challenges the development of artificial intelligence imposes to the protection of rights in musical works.

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Keywords: copyright, rights in musical works, EU Directive 2019/790, digitization, artificial intelligence.

Апстракт

Креативност се, чак и у већој мери него што је то случај са интелигенцијом, сматра суштински људском способношћу. Исти закључак је у потпуности примењив и на уметничко стваралаштво у области музике. Међутим, брз технолошки развој стално доводи у питање не само природу креативног процеса, већ и правне инструменте чији је циљ заштита резултата интелектуалног и уметничког стваралаштва. Први део чланка анализира одредбе нове Директиве ЕУ 2019/790, посвећене пружаоцима услуга дељења садржаја *online* и праведне накнаде за ауторе и извођаче, док се његов други део бави мапирањем главних изазова које развој вештачке интелигенције поставља пред правну заштиту стваралаштва у области музике.

Кључне речи: ауторско право, права над музичким делима, Директива ЕУ 2019/790, дигитализација, вештачка интелигенција.

1. Introduction

The aptitude to conceive abstract notions, together with the ability to engender various intellectual and artistic creations, is often considered as the major *differentia specifica* of humans[2] compared to the other living creatures. In the same vein, "aesthetic value presupposes some foundation on human nature without which one could not speak of beauty or sublimity at all" (Costelloe 2012: 50). More generally, the main common characteristic of all kinds of scientific, academic, literary or artistic works is that they are by nature non-material, intangible, even if they can often be followed by important material outcomes, such as a sculpture, a painting, a sheet music or a book. One important field of legal studies, the copyright law, is dedicated to the protection of these works, having set as one of its main goals to guarantee and protect the ownership and rights of those who invested their intellectual and creative effort to create them.

As the most advanced existing model of cross-border supranational economic and political integration, the European Union (EU) had created an internal market, characterized by the free movement of persons, goods, services and capital, but also a space of flourishing cultural cooperation and exchange, as well as of the protection of cultural heritage. However, the principle of territorial protection of rights and of-

2 For a comprehensive overview of the notion of creativity and its interconnection with human nature, see: Thomas and Chan 2013, Paul and Kaufman 2014, Strauch 2014, Sternberg and Kaufman 2018.

ten divergent national legal traditions have given rise to the need to harmonize national legislation of the EU's Member States in the field of copyright law. Therefore, the protection of the interest of authors (and other rightholders) in music sector has an important place in the Union's legal system, including certain legal acts exclusively dedicated to the rights in musical works.[3]

Nevertheless, the rapid development of digital technologies has profoundly transformed not only the ways musical works are created, but also the means and methods they are distributed and exploited. The relevant legislation in force in the EU was, until very recently, deplorably obsolete, and Directive 2019/790 of 17 April 2019 on copyright and related rights in the Digital Single Market has also brought – together with a set of new problems related to interpretation and enforcement – some significant overarching solutions. One of the issues upon which there are still much more interrogations than real and applicable solutions is the phenomenon of artificial intelligence (AI). Apart from the fact that AI has a potential to profoundly transform the entire music sector, it has another all-embracing feature: the ability to "(co)-create" intellectual and artistic works, the characteristics considered as a quintessence of human nature. Therefore, the objective of the first part of this article is to analyze – using predominantly content analysis and comparative legal method – the existing EU's legal framework applicable to the authors (and other rightholders) of musical works in the context of digitization (Chapter 2). In the second part, the author would seek to go beyond the issues of existing normative solutions, trying to map the main challenges the development of AI imposes to the protection of rights in musical works (Chapter 3).

2. Protection of rights in musical works in the European Union's digital single market – directive 2019/790

As far as the supranational legislative framework is concerned, the EU Directive 2019/790 of 17 April 2019 on copyright and related rights in the Digital Single Market is the latest and the most comprehensive attempt to set up a system of legally binding rules related to the consequences of digitization on copyright protection. The Directive 2019/790 has finally entered into force on 7 June 2019, and has given rise to an extremely interesting and often heated debate, which lasted for almost three years, starting from the moment when the European Commission has drafted the proposition of this act (14 September 2016). Before turning to the question of the impact of the Directive 2019/790 on the protection of rights in musical works, a few introductory remarks will be dedicated to the laborious process of the adoption of this act.

3 It is, for example, the case of Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, *Official Journal of the EU* L 84 of 20. 3. 2014. However, this article will focus only on the issues of the protection of rights in musical works related to the digitization and artificial intelligence.

The majority of the EU's legislation is adopted by the European Parliament (EP) and the Council, on the basis of a proposal from the European Commission.[4] Whenever the importance of the regulated issue and accompanying public interest impose some important interventions in the text proposed by the Commission, this practically requires the trilateral consultations in the triangle EP-Council-Commission. The importance of the Directive 2019/790 and the scale of the debate its adoption has generated could be best illustrated by the interest it brought about in the EP. In September 2018, the EP's plenary session has adopted 86 amendments to the text proposed by the Commission, proposing more or less substantive changes of the preamble and 18 (of, at that time, 24 existing)[5] articles of the Directive 2019/790. The intensity of the lobbying in favour or against some of the Directive's provisions was unprecedented[6] and it included the participation of numerous stakeholders (authors, companies, civil society, governmental bodies, international organizations), while Axel Voss, the member of the EP who was the rapporteur for this legal act, was a subject of a bomb threat.[7] In any case, the text of the Directive 2019/790, as it was proposed by the Commission, and its final text are substantially different. The Member States of the EU are obliged to transpose the provisions of the Directive into their internal legal orders no later than 7 June 2021.

Numerous provisions of the Directive 2019/790 are relevant for the protection of rights in musical works and their, even superficial, analysis would require significant space. When it comes to music in the era of digitization, the two major changes brought about by the last two decades are the increasing accessibility of various musical contents,[8] on the one hand, and the basis upon which its authors and performers are remunerated, on the other. Consequently, the focus will first be on the provisions of the Directive 2019/790 dedicated to online content-sharing service providers (subchapter 2. 1), before turning to the question of fair remuneration of authors and performers (subchapter 2. 2).

4 The procedure to be followed for each piece of legislation depends on the legal basis upon which it is adopted. For more on inter-institutional relations in the EU's legislative procedures, see (Engel 2018).

5 Final version of the Directive has 32 articles; for its full text in all official languages of the EU, see https://eur-lex.europa.eu/eli/dir/2019/790/oj, [accessed 21. 07. 2020].

6 The intensity and the scope of the lobbying within the EP is well illustrated by numerous fake news and deliberately generated misinformation about Directive's various provisions; for an overview of some important dilemmas, see EP's document *Questions and Answers on issues about the digital copyright directive*, https://www.europarl.europa.eu/news/en/press-room/20190111IPR23225/questions-and-answers-on-issues-about-the-digital-copyright-directive, [accessed 21. 07. 2020].

7 See https://www.euractiv.com/section/digital/news/copyright-mep-in-bomb-threat-scare/, [accessed 23. 07. 2020].

8 For example, it is clearly stated in preamble (para. 61) of the Directive 2019/790 that "online content-sharing services providing access to a large amount of copyright-protected content uploaded by their users have become a main source of access to content online".

2. 1. Online content-sharing service providers

The unprecedented technological development in the last several decades, and particularly the digital transformation, have profoundly transformed not only the creative process itself, but also the means of distribution and exploitation of various intellectual creations. While some authors, following *open source* initiatives, allow unlimited free access to their creative works, so that "programmers can fix problematic elements of the software and create new and improved uses" (Turcotte 2019: 156), other authors are often facing unlawful distribution and dissemination of their copyright protected works. In this respect, particularly vulnerable are audiovisual works, whose potential availability on video-on-demand platforms – apart from potentially being very positive if this accessibility is, for example, the author's free choice or if it fosters the dissemination of out-of-commerce works – requires a substantially new and adapted legal framework. As it is rightfully remarked in preamble (para. 3) of the Directive 2019/790, "legal uncertainty remains, for both rightholders and users, as regards certain uses, including cross-border uses, of works and other subject matter in the digital environment". When compared with authors, the position of performers of various audiovisual works is often even more complex when it comes to equitable remuneration (Watt 2014). On the other hand, nowadays it is much less true that "diversity of musical sounds and ideas [...] is contingent on the diversity of those afforded a voice" (Meier 2015: 410), given that content-sharing Internet platforms, in principle, offer everyone a chance to present their work to the public. Nowadays, there are numerous "audio social media platforms" allowing peer-to-peer sharing for personal use, out of which some (*like Chirbit.com and SoundCloud*) were founded back in 2008, while *Instagram*, the most popular free photo and video sharing platform, was launched in 2010.

Various content-sharing platforms critically depend not only on user upload, but also on the traffic it generates. Those platforms often claim that they represent a mere *technical framework* for interaction of users and, therefore, do not need to get prior authorization from a rightholder. This is not only a colossal simplification, but it also opens a highway for violation of copyright, lack of appropriate remuneration for the use of audiovisual work and, what is often forgotten, significant unjustified profit for content-sharing platforms. The content on those platforms cannot be considered *neutral*, given that its quality and/or attractiveness generates interest of the users (*clickable content*), and, consequently, increases the cost of advertisement on those platforms and generates higher income. In such a context, the claims of content-sharing service provides that they assure "wider access to cultural and creative works and offer great opportunities for cultural and creative industries to develop new business models" (Dir. 2019/790 pream. para. 61) sound not only exceptionally cynical, but it also tries to hide the fact that "the initial dream of green 'co-creation' and 'co-consumption' enabled by platforms and shared by many early platform enthusiasts seems to have been replaced by a platform-powered capitalist market economy more able to extract value" (Reillier and Reillier 2017: 209). The situation is even worse if the extracted value is based upon unwanted absence of remuneration for the authors of audiovisual works. The Directive 2019/790 seems

to have taken this in consideration, but the normative solutions it brings are far from being exhaustive and satisfactory.

The key preliminary legal issue is to establish whether the providers of online content-sharing services, by allowing user upload of music and other audiovisual works on their platforms, engage in copyright-relevant acts. If those platforms, as providers claim, represent a mere *technical framework,* the responsibility for copyright violation could theoretically be transferred to the user (uploader), a party which is not only economically weaker than the platform itself, but, in majority of cases, does not have any direct commercial interest from the upload of copyrighted work. If there is no doubt about the fact that, in various existing legal systems worldwide and in Europe, "the current scope of copyright easily leads to perverse outcomes, with aspects of over- or underprotection that cannot easily be reconciled with any underlining rationale for copyright protection" (Hugenholtz and Kretschmer 2018: 10), the uncertainty remains over the ways of assessing whether the uploaded works are effectively used, if they are, by whom, and how to ensure the remuneration.

Both the existing legal solutions in the EU and the doctrine agree upon the fact that, for example, "mere reception of a broadcast as such is not a copyright relevant act" (Stamatoudi and Torremans 2014: 212), and, therefore, the same solutions should, *mutatis mutandis*, be applied to all users of platforms other than those responsible for upload. When it comes to service providers, introductory, explanatory and, thus, not legally binding provision (para. 61 of the preamble) of the Directive 2019/790 simply notes that "legal uncertainty exists as to whether the providers [...] engage in copyright-relevant acts and need to obtain authorization from rightholders for content uploaded by their users who do not hold the relevant rights in the uploaded content." The same provision also affirms "it is therefore important to foster the development of the licensing market between rightholders and online content-sharing service providers". Those proclamatory and vague principles are further elaborated by Article 17 of the Directive 2019/790.

As it has already been underlined in the introduction, the adoption of the Directive 2019/790 was a lengthy and laborious process, during which many of its provisions have undergone substantial changes in various phases of its elaboration. It was particularly the case of its Article 17 (in the Commission's initial proposal from 14 September 2016, it was Article 13); the final text gained significantly in volume (from initial three to final ten paragraphs), but, in numerous aspects, lost in precision and applicability. As an instrument of Union's legal system whose objective is to reduce disparities between national legislations (Ćemalović 2015), every EU directive is "binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods" (TFEU Art. 288-3). Given that every phase of the adoption of the Directive 2019/790 has added some novel normative solutions, its Article 17 ended up as by far the longest provision of the entire act, setting up some general rules, but subsequently allowing complex exceptions. It remains to be seen how the EU Member States will proceed in transposing this provision into their internal national legal orders.

The keystone of Article 17 of the Directive 2019/790 is the rule obliging every online content-sharing service provider to obtain an authorization from the right-

holder of copyright-protected work; in principle, this authorization is given by concluding a licensing agreement. Therefore, "if no authorization is granted, online content-sharing service providers shall be liable for unauthorized acts of communication to the public, including making available to the public, of copyright-protected works and other subject matter" (Art. 17-4). However, service providers could avoid the responsibility for copyright infringement if three cumulative conditions are met: 1) they demonstrated that best efforts have been made to obtain authorization; 2) they made best efforts to ensure the unavailability of specific works that have been uploaded in unauthorized way and 3) they "acted expeditiously [...] to disable access to, or to remove from their websites, the notified works [...] and made best efforts to prevent their future uploads" (Art. 17-4c). Given the existing technical possibilities for unauthorized dissemination of audiovisual – and, even more, musical – works, it remains very doubtful how the notion of *best efforts* will be interpreted in internal legal orders of EU Member States. Should it, for example, mean that every absence of clear and unequivocal authorization from rightholder means that there is a copyright infringement? Moreover, the simple removal of notified musical works from provider's website does not prevent the use of "peer-to-peer technology in order to reproduce and disseminate copyrighted music [...] without authorization" (Mazziotti 2008: 135). Only a very short lapse of time during which certain musical work has been available on provider's website is sufficient to let the ghost out of the bottle, thus limiting the practical effects of the removal from the website. As the outcomes of some copyright infringement suits in the USA have shown, one of the possible solutions might be the introduction of specific licensing scheme "that could develop into industry standard when dealing with mechanical licensing of sound recordings by copyright owners to online networks" (Millstein et al. 2020: 97). In spite of some positive changes introduced by the Directive 2019/970 (to be transposed in Member States' internal legal order until 7 June 2021), the EU's Digital Single Market is still far from being fully operational in the music sector.

2. 2. Fair remuneration of authors and performers

One of the major motivations for the adoption of the Directive 2019/970 was the plausible intention to ensure a fair remuneration in exploitation contracts of authors and performers; this is particularly important in audiovisual and, especially, musical sector. In spite of the fact that, in some cases, financial rewards are "distributed in a profoundly uneven way" (Meier 2015: 410), digitization allows various technical ways to establish, with a sufficient level of accuracy, how and to which extent certain works are (or can possibly be) exploited, also allowing to determine a fair remuneration when authors or performers license or transfer their exclusive rights for the exploitation of their works. However, as it was the case of online content-sharing service providers analyzed in the previous sub-chapter, the Commission's proposal for a Directive has undergone numerous – often profound – changes, and its final text is certainly more detailed, but not always clearer and more advantageous for the authors. Moreover, it remains to be seen how some of its often very general provisions will be transposed in the national legal systems by the EU's Member States. Without

entering in a more profound analysis of the differences between the initial and final version of the Directive, this sub-chapter will focus on its scrutiny *de lege lata*.

The key principle to be introduced in all EU Member States is that authors and performers are "entitled to receive appropriate and proportionate remuneration" (Art. 18-1). It should first be underlined that there is often a long way from *being entitled* to *actually receiving* a fair remuneration. The Directive 2019/970 specifies that, within every national legal system, "different mechanisms" can be used to determine what "appropriate and proportionate remuneration" actually means, while the principles of contractual freedom and "fair balance of rights and interests" (Art. 18-2) should be taken into account. When it comes to the mechanisms directly provided for it in the EU legislation, two most important are *transparency obligation* and *contract adjustment mechanism*.

As it is the case in numerous fields of artistic creation, popularity of certain musical works, on the one hand, and their cultural, aesthetic and/or educational value, on the other, are rarely in perfect harmony. Moreover, as some authors have rightfully remarked, "why not question the assumption that aesthetic quality belongs only to 'composer's music' and not to popular music?" (Dayan 2016: 141). Without further analyzing these meta-legal issues, it is beyond any doubt that, in the digital environment, the only criterion that could be impartially applied is the extent of exploitation of certain musical work. In such a context, the transparency obligation introduced by the Directive 2019/970 provides that authors and performers should receive "on a regular basis, at least once a year [...] up to date, relevant and comprehensive information on the exploitation of their works and performances from the parties to whom they have licensed or transferred their rights [...] in particular as regards modes of exploitation, all revenues generated and remuneration due" (Art. 19-1). Therefore, according to the EU legislation, the fairness of the remuneration is effectively based upon the actual revenue generated in the exploitation of a work by the first contractual counterpart of authors and performers, entity which is most often the publishing company. Given the high disproportion in resources and economic strength between the author or performer of a musical work, on the one hand, and the legal entity to whom they have licensed/transferred their right, on the other, transparency obligation has a real potential to contribute to a more fair remuneration of creative work. It is worth noting that a system based on the interest of end-users – where popularity is the only applicable criterion – can only lead to the situation where "a handful of superstars [are] achieving incredible wealth and the majority of working artists [are] struggling for fair remuneration" (Meier 2015: 410). However, it is also true that the digital environment, at least in theory, allows everyone to become a superstar, while the provisions of the Directive 2019/970 related to transparency obligation oblige the rightholders to inform the authors about the success of their work.

Contract adjustment mechanism provided in the Directive 2019/970 is complementary to transparency obligation analyzed in previous paragraph. As it has been already underlined, if the existing mechanism uses popularity (and, consequently, revenues generated in exploitation of a certain musical work) as the only applicable criterion, at least it does not hinder anyone's aptitude to become

a superstar. If in a particular sector in one of the EU Member States there is no applicable collective bargaining agreement allowing to adapt remuneration of authors/performers to actual exploitation of their works, the Directive empowers them "to claim additional, appropriate and fair remuneration [...] when the remuneration originally agreed turns out to be disproportionately low compared to all the subsequent relevant revenues derived from the exploitation of the works or performances" (Art. 20-1). However, in spite of the fact that transparency obligation and contract adjustment mechanism are fully complementary, the latter critically depends on the former, given that the rightholders should continuously inform authors/performers about the exploitation of their works/performances and revenues generated. If it is true that "small- and large-scale changes in the market due to the introduction of new technologies" (Ronchi 2019: 153) were particularly visible in the music sector, allowing to end-users to make and unmake superstars, the EU legislation at least enables authors and performers to have some economic benefits.

3. Challenges imposed by artificial intelligence to the protection of rights in musical works

There is no provision of the Directive 2019/970 mentioning *expressis verbis* the notion of artificial intelligence (AI); this is perfectly understandable, given the fact that the main objective of this piece of EU legislation is to regulate copyright-related dissemination and exploitation of creative works in the context of digitization. In other words, in this stage of its development, EU's copyright legislation treats technology more as a tool allowing new uses of works, than as a tool of their potential (co)creation. In spite of some scientifically plausible classical approaches defining the intelligence as a deeper and wider capacity for understanding the environment (Strenberg and Kaufman 2011), including "the aggregate or global capacity [...] to act purposefully" (Wechsler 1958: 7), human-level machine intelligence is capable of producing works that could be vaguely considered artistic. The same conclusion is applicable to musical works, especially taking into consideration that in algorithmic composition "several methods of AI are not exclusively used for the generation of musical structure, but represent components of comprehensive systems" (Nierhaus 2009: 228). In any case, in the current state of EU's copyright legislation, the issue of AI as a potential "author" of certain musical works, and consequently, their copyright status, remains far from being resolved. Therefore, there are two fundamental questions to be answered. First, how, and to which extent, the actual copyright-related legal framework could be applied to musical works created by AI? Second, what would be the guiding principle for adequate future legal solutions in this respect? An interesting recent event shall be used as a starting point in answering both of these questions.

In January 2020, Damien Riehl, musician, developer and attorney specialized in copyright law, together with Noah Rubin, created an algorithm capable of generating an extremely high number of melodic combinations consisting of eight notes and

twelve beats, applicable in pop music; producing 300.000 melodies per second, the algorithm "created" over 68 billion melodies, and all of them have been uploaded to the website *Internet Archive.* Moreover, Riehl and Rubin have used MIDI format, where notes are replaced by numbers (do, ré, mi, ré, do becomes 1, 2, 3, 2, 1), and they indicated that the license *Creative Commons Zero* is applicable to all those melodies. From the legal perspective, they intended to make all those melodies freely accessible to everyone interested, concomitantly trying to annihilate any possibility for whichever musician to establish any exclusive rights on works containing them. Riehl and Rubin have also declared[9] that they intend to create similar algorithms applicable in jazz and classical music. Moreover, AI potentially offers numerous other possibilities in the music sector, allowing us to imagine that practically the entire "creation" in this field could become completely independent from any direct human involvement.

Independently from purely musicological considerations that will not be further elaborated, the key legal issue is to determine whether the AI-based music generation could fully enjoy the status of a creative work that could benefit from copyright protection. Therefore, if both text and melody can be subject to AI-based writing and composition, can the works generated in this way be considered as "artistic works" in terms of Article 2 *of the Berne Convention for the Protection of Literary and Artistic Works*? In other words, can an "artistic" work generated by AI be considered original? The answer to this question is the starting point of any further elaboration regarding the existing and potential future copyright-related legal solutions.

If musical works generated by AI can be considered copyrightable, the future might, in many aspects, give reason to Riehl and Rubin, and lead to highly probable collapse of the existing model of copyright protection. The fact that a high number of (new) melodies is either freely accessible to everyone or it becomes intellectual property of a single entity (or few of them) would, in both scenarios, lead to tectonic changes in the music sector, fostering its further "algorithmization" and dehumanization. If it is true that AI "still cannot master everyday creative skills" (Sawyer 2012: 3), some artists consider that AI will make live music obsolete, given that "we are nearing the end of human-only art"[10]. From the latter affirmation to a dystopian future in which AI itself (and not its creator or possessor) might become the owner of its "creations" is only one step. In any event, musical works generated by AI should not benefit from the same scope and type of copyright protection usually granted to works created by humans. In other words, melodies generated by algorithm created by Riehl and Rubin might, from the legal perspective, be considered as belonging to public domain, but any imaginable future musical

9 Sources: Le Monde https://www.lemonde.fr/big-browser/article/2020/02/27/pour-empecher-les-proces-pour-plagiat-dans-la-musique-un-algorithme-met-68-milliards-de-melodies-dans-le-domaine-public_6031016_4832693.html, TEDx Talks https://www.youtube.com/watch?v=sJtm0MoOgiU; Internet Archive https://archive.org/download/allthemusicllc-datasets, [accessed 26. 07. 2020].

10 Source: https://consequenceofsound.net/2019/11/grimes-live-music-obsolete/, [accessed 31. 07. 2020].

work of human origin, using some elements of those melodies, but also numerous other creative components, should benefit from copyright protection. Any other solution would seriously undermine not only the existing level of the protection of creativity in the music sector, but also the fair remuneration of authors/performers, and, consequently, the quality and sustainability of artistic production. This does not mean that the existing model of copyright protection should not evolve in many aspects, granting to the works (co)generated by AI certain level and scope of protection. However, even if one agrees that it "wouldn't be impossible to foresee that the artificial intelligence will reach a point that enables it to generate artworks that are inseparable from human artworks," (Kurt 2018: 76), AI is, luckily, still unable to "generate" (or even imitate) inspiration, contemplation, spontaneity and fervour, some of the key drivers of genuinely human creativity.

4. Conclusion

The rapid technological development over recent decades, as well as the recent global public health crisis caused by the SARS-CoV-2 virus (and COVID-19 outbreak it provoked), continue to profoundly transform not only the way various copyrightable musical works are created, but also the modalities of their distribution and exploitation. In the same vein, AI-based music generation raises new concerns regarding the copyright status of such works. As the analysis of the EU Directive 2019/790 on copyright and related rights in the Digital Single Market has shown, the Union's legislation has set a general legal framework in this field. However, the further study of the two specific issues examined more profoundly allows a more nuanced conclusion. First, the Directive's provisions dedicated to online content-sharing service providers set up some general rules, but subsequently allow complex exceptions, while it remains to be seen how the EU Member States would proceed in transposing Article 17 into their internal national legal orders. Second, the rules aiming to establish a fair remuneration of authors/performers predominantly rely on transparency obligation and contract adjustment mechanism, but they both critically depend on the effective enforcement of rightholders' obligation to provide information about the exploitation of the respective works/performances. Finally, if it can be argued that musical works generated by AI should not enjoy the same copyright status as genuinely human creations, there is no doubt that the existing legislation does not offer specific and applicable solutions. The actual copyright-related legal framework has been elaborated for the protection of works of human origin and, therefore, its application to musical works created by AI would require substantive modifications of the legislation, not conceivable without thorough examination from (at least) ethical, musicological and economic points of view. In any case, one of the guiding principles for adequate future legal solutions in this respect should be that the purpose of copyright protection should not be distorted by granting to AI-generated music a status that could undermine genuinely human expressions of creativity.

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Урош Ћемаловић

Креативност и власништво: правна заштита музичких дела у Европској унији од дигитализације до вештачке интелигенције

(Резиме)

Креативност се, чак и у већој мери него што је то случај са интелигенцијом, сматра суштински људском способношћу. Исти закључак је у потпуности примењив и на уметничко стваралаштво у области музике. Међутим, брз технолошки развој стално доводи у питање не само природу креативног процеса, већ и правне инструменте чији је циљ заштита резултата интелектуалног и уметничког стваралаштва. Док је у Европској унији (ЕУ) недавно усвојен нови правни оквир (Директива 2019/790) примењив на ауторе и друге носиоце права над музичким делима у контексту дигитализације, брза еволуција вештачке интелигенције (ВИ) још увек није праћена одговарајућим нормативним решењима у области права интелектуалне својине. Користећи углавном метод анализе садржаја и компаративни правни метод, први део овог чланка је посвећен анализи одредаба нове Директиве ЕУ које се тичу пружалаца услуга дељења садржаја *online* и праведне накнаде за ауторе и извођаче, док се његов други део бави мапирањем главних изазова које ВИ поставља пред правну заштиту стваралаштва

у области музике. Закључци до којих је аутор дошао могу се груписати у три целине. Прво, нова правна решења која се односе на услуге дељења садржаја *online* успостављају нека корисна општа правила, али дозвољавају и велики број изузетака, док још увек остаје непознато како ће државе чланице ЕУ пренети одредбе члана 17 Директиве 2019/790 у своје унутрашње правне поретке. Друго, правила која се тичу праведне накнаде за ауторе и извођаче превасходно почивају на обавези транспарентности и механизму за прилагођавање уговора, али оба та принципа кључно зависе од доследне примене обавезе носиоца права да пружа информације о коришћењу музичког дела. Коначно, музичка дела које је створила ВИ не треба да уживају исти ауторско-правни статус као изворно људске творевине, док би један од водећих принципа за будућа правна решења у тој области требало да буде правило да сврха ауторско-правне заштите не сме да буде злоупотребљена давањем музичким делима које ствара ВИ таквог статуса којим би се подривала заштита изворно људских творевина.

Кључне речи: ауторско право, права над музичким делима, Директива ЕУ 2019/790, дигитализација, вештачка интелигенција.

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