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## *Evaluating Potential Intellectual Property Rights Infringement through Imitation in Advertising and Market Communications*

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**Abstract:** As today's products and services are becoming more and more similar, so do all forms of market communications. Although not a new phenomenon, imitation in advertising and other forms of market communications is becoming increasingly frequent. This is due to hyper-productivity, the ever expanding media ecosystem and new digital platforms that ensure wide distribution and availability of intellectual works. Copywriters, designers, creative directors and others who work in the market communication industry have online magazines, blogs dedicated to the creative industry, portfolio websites, social networks and various other sources of inspiration which tempt them to imitate works of others. The article gives an overview of regulatory and self-regulatory environment in the Republic of Croatia and proposes a framework for evaluating possible infringements of *intellectual property rights* (IPR), both intentional and coincidental, through various forms of advertising and market communications.

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**Keywords:** imitation, plagiarism, market communications, copyright infringement, intellectual property rights

## INTRODUCTION

Today's products are getting more and more similar and it is becoming increasingly difficult for consumers to notice differences and real benefits of competing products. Consequently, advertising and other forms of market communications are also becoming more similar while many marketers are faced with a dilemma whether to create or imitate.

As Antolović points out, the creation and production of intellectual works in advertising and market communication industry represents an especially fertile ground for various types of IPR violations and infringements. (cf. [2]) This is because of the great number of new messages that are created every day throughout the world and because of the nature of the messages which allows simple distribution and wide availability, enhanced by the latest digital technologies.

Violations in the field of intellectual property can take several basic forms, from imitation to plagiarism and copying of copyrighted materials [1]. They have become so common that some marketers don't consider the ethical implications of their acts, but only fear being caught using objects of intellectual property without authorization.

Sometimes it is hard to draw the line where inspiration by another's work ends and violation begins. It should be noted, though, that ideas alone cannot be protected under the copyright law, but only specific creative expressions of ideas through any medium of artistic/creative expression, such as logos, designs, paintings, photographs, illustrations, manuscripts, sound and video recordings etc.

Using examples of real cases, we will show, based on the regulatory standards in the Republic of Croatia, on one hand, and good practices of the advertising industry, on the other hand, the methodological framework and the approach to the evaluation of the advertising messages and other forms of market communication that represent a potential infringement of IPR.

## REGULATORY ENVIRONMENT IN THE REPUBLIC OF CROATIA

The Act on unauthorized advertising determines the conditions under which comparative advertising is allowed. It specifically states that, among other conditions, "comparative advertising is permitted if it does not lead to identification between traders, between advertiser and its competitor or between goods, services, trademarks, trade names or other distinctive features of the advertiser and its competitor" and "if it does not refer to the goods or services being advertised as imitation of goods or services protected by trademark or copyright." [3]

According to the Consumer protection act, "a commercial practice shall also be regarded as misleading if, in its factual context, taking account of all its features and circumstances, leads or is likely to lead the average consumer to make a purchase decision that he or she would not have made otherwise, including any form of placing products

on the market, including comparative advertising which leads to identification of that product with another product, trademark, trade name or other sign of recognition of competitor on the market.” [4]

The field of intellectual property in market communications is also regulated by the Copyright and Related Rights Act and the Trademarks Act.

## SELF-REGULATORY ENVIRONMENT IN THE REPUBLIC OF CROATIA

The Code of advertising and marketing communications is the principle instrument of advertising self-regulation in Croatia for all actors (advertising agencies, media, advertisers, support organizations) and a national mechanism for accepting and resolving consumers’ concerns and complaints about advertising. It complements the existing legal framework (laws, regulations, directives and guidelines) and it is administered by HURA, The Croatian Association of Communications Agencies, whose ethics committee is dedicated to ensuring the integrity and viability of advertising in Croatia and fostering community confidence in advertising. The Code establishes criteria for responsible advertising and provides the principles upon which content of advertising messages is evaluated in response to consumer, trade and special interest group complaints.

On the subject of imitation, the Code states that “marketing communication should not imitate those of another marketer in any way likely to mislead or confuse the consumer, for example through the general layout, text, slogan, visual treatment, music or sound effects”. [5]

## FRAMEWORK FOR EVALUATING IPR INFRINGEMENT THROUGH IMITATION

While copying is unauthorized literal reproduction of the whole, or substantially the whole, of an intellectual work and plagiarism is similarity with some common element, imitation represents similarity of an intellectual work at first glance, which could lead to consumer confusion and consequently to a change in purchase behavior.

The following framework and criteria can be used in determining whether some work was merely inspired by other work or there is enough evidence to suggest that violation of IPR has occurred (cf. [1]):

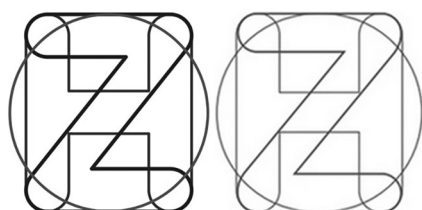
- a. Type of products – Are the products (or services) of the same or similar kind and do they meet the same consumer needs? Are the companies direct market competitors?

- b. Period of creation – How much time has passed between the launch of the original and launch of the potentially infringing work? The greater the time difference, the smaller the possibility for consumer confusion because of the very nature of advertising.
- c. Target market – Do companies have the same or similar target consumer groups and do they represent competition within the observed product category?
- d. Distribution channels – If the observed products are present in the same distribution channels, especially if they are placed in the same place of purchase area (e.g. stacked on the same shelves in a supermarket), the possibility of consumer confusion is increased, both communication wise and in terms of buying behavior.
- e. Content of message/work – The analysis of common elements (name, text, color, typography, symbol, photos, illustrations, script, music etc.) is one of the key criteria in determining whether someone’s IP right has been infringed.
- f. Distinctiveness of the work – Although the communication style and tone may indicate similarities, visible difference between works at first glance is needed from the perspective of the average consumer. Are the differences noticeable?
- g. Period of broadcast – This refers to the period of communication launch of intellectual works. The greater the time difference, the smaller the possibility for consumer confusion due to weakening of memory and advertising impact.
- h. Confusion – Will the average message recipient be confused because of the difficulty in perceiving key differences and similarities?
- i. Identification of companies – Does the average message recipient have difficulty in identification of the companies (brands, products) because of the similarities of intellectual works?
- j. Change of purchasing behavior – Would the average message recipient due to confusion and identification of products change his purchasing behavior and buy “the wrong product”?
- k. Damages to the creator - Does the creator - author of the original work suffer damages due to the consumer confusion and change in their purchasing behavior? (It does not matter if the costs of proving damages are greater than actual damages.)

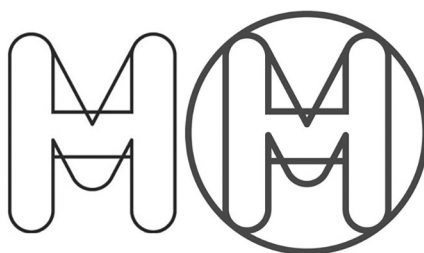
Apart from these case-specific criteria, one should also take into consideration the general nature of advertising – people do not consume media because of the advertising messages, they frequently avoid them. The impact of advertising on the average consumer, including the messages that potentially violate IPR, is often overrated.

We should always observe the above mentioned parameters from the perspective of an average consumer and, when possible, use proven market research techniques to test the perception of the similarities and complement the framework.

## PRACTICAL APPLICATION OF FRAMEWORK



HZZO



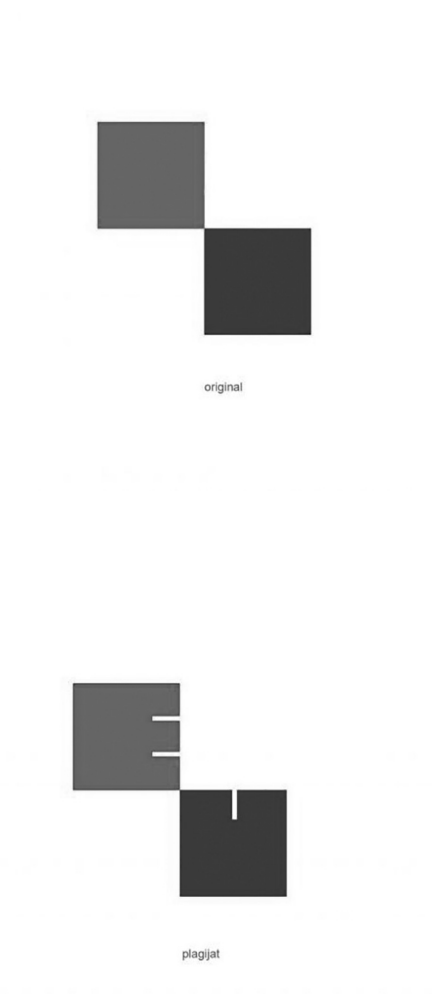
MHF

**Figure 1.** The new logo of HZZO and logo of MHF (downloaded from [6] and [7])

Figure 1 shows the new visual identity of Croatian Health Insurance Fund (HZZO) and the visual identity of UK's Mental Health Foundation (MHF). Applying the criteria laid down in the framework (a, e and f), we can conclude that both organizations operate in the field of human health, there is a high level of overall visual similarity of logos and one identical element (letter "H"), which suggests imitation and even plagiarism.

On the other hand (criteria c, h, i, j and k), the target market is different (geographically) and the HZZO logo is unlikely to cause consumer confusion, identification with MHF, change in purchasing behavior and damages to the creator. This is probably why neither

MHF, nor the author of their logo have taken a legal action against HZZO and the author of the work.



**Figure 2:** Visual identity of Croatia by Boris Ljubičić & key visual of campaign by Innovo DDB (downloaded from [8])

The left side of Figure 2 shows visual identity of the Republic of Croatia developed by the designer Boris Ljubičić and the right side shows the visual identity of the campaign related to Croatia’s accession to the European Union, developed by the advertising agency Innovo DDB.

In this case, the object of communication is the same – the Republic of Croatia and the graphic marks are communicating with the same target market. Although the first visual identity was developed in the early 1990s, it has been promoted occasionally ever since, so both of them are communicating simultaneously. The analysis of the content of both works reveals common elements and a high level of similarity, at first glance, which can confuse the average message recipient and result in damages to the original creator.

It should be noted that, although most findings suggest that this is a case of imitation and plagiarism, a work containing a simple arrangement of basic geometrical shapes is unlikely to be entitled to copyright protection. But this calls for a separate analysis which goes beyond the purpose of this article.

## CONCLUSION

Addressing the issue of growing number of imitations in advertising and market communications, this article explores the current regulatory and self-regulatory environment in the Republic of Croatia and suggests a framework for evaluating possible violations of IPR, demonstrating its application on two practical examples. Using the proposed framework, general remarks and results of available consumer tests, a well-rounded assessment can be made whether works represent potential infringement of IPR.

## REFERENCES

- [1] Antolović, K. and Haramija, P. (2015). Responsible Advertising. Zagreb, K&K Promocija & HURA, pp. 272-274.
- [2] (2017-06-19) <http://www.media-marketing.com/kolumna/kako-ocjenjivati-plagijat-u-oglasavanju/>
- [3] Act on unauthorized advertising, Article 6, Narodne novine, no. 43/09
- [4] Consumer Protection Act, Article 33, Paragraph 3, Point 1, Narodne novine, no. 41/14, 110/15
- [5] Code of advertising and marketing communications (2014), Article 16, HURA
- [6] (2017-06-23) <http://www.hzzo.hr>
- [7] (2017-06-23) <https://www.mentalhealth.org.uk>
- [8] (2017-06-23) <http://stari.dizajn.hr/index.php?id=1260-anketa-kome-pripadaju-kvadrati>