

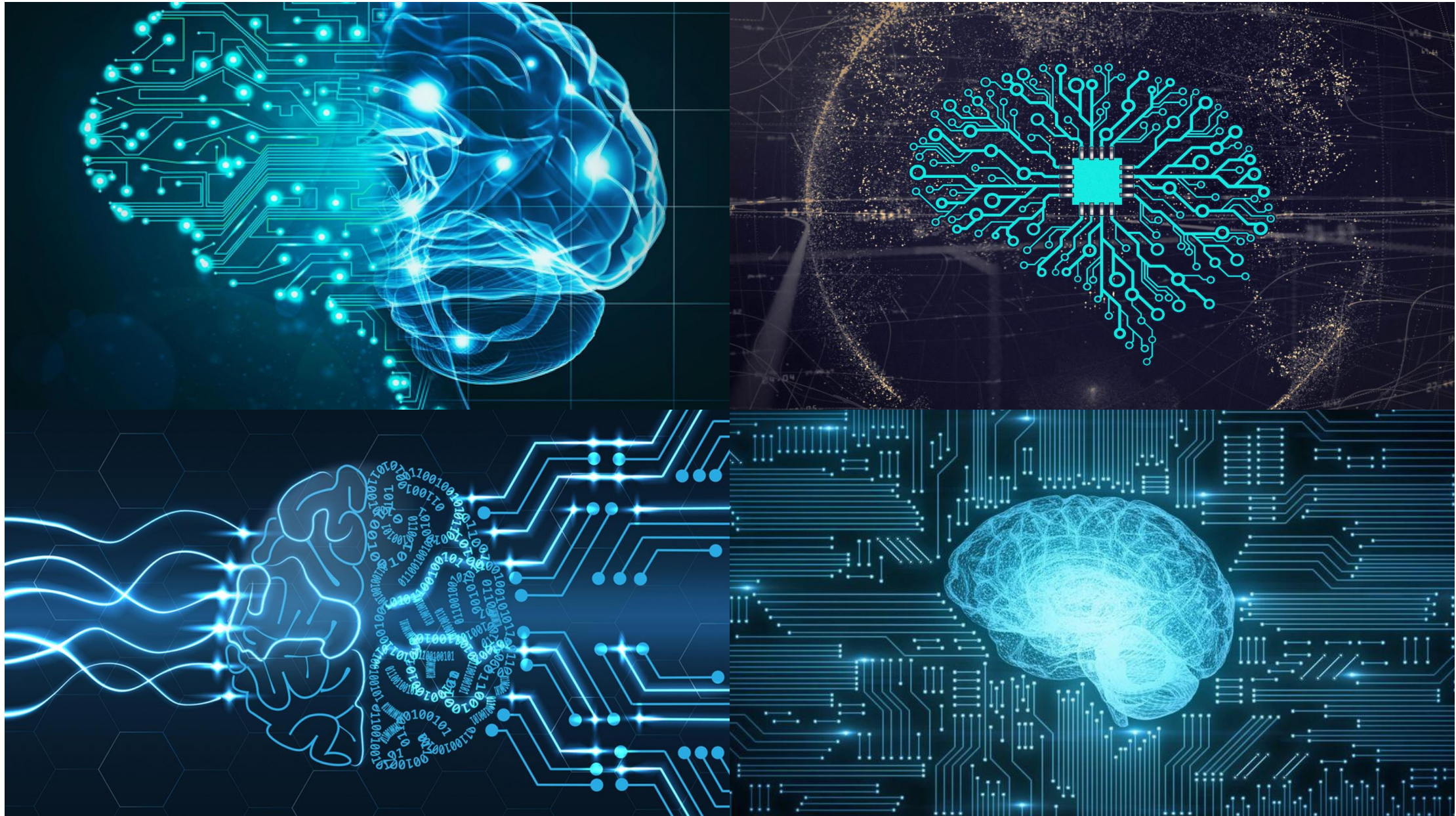


AI and Copyright / Design Right



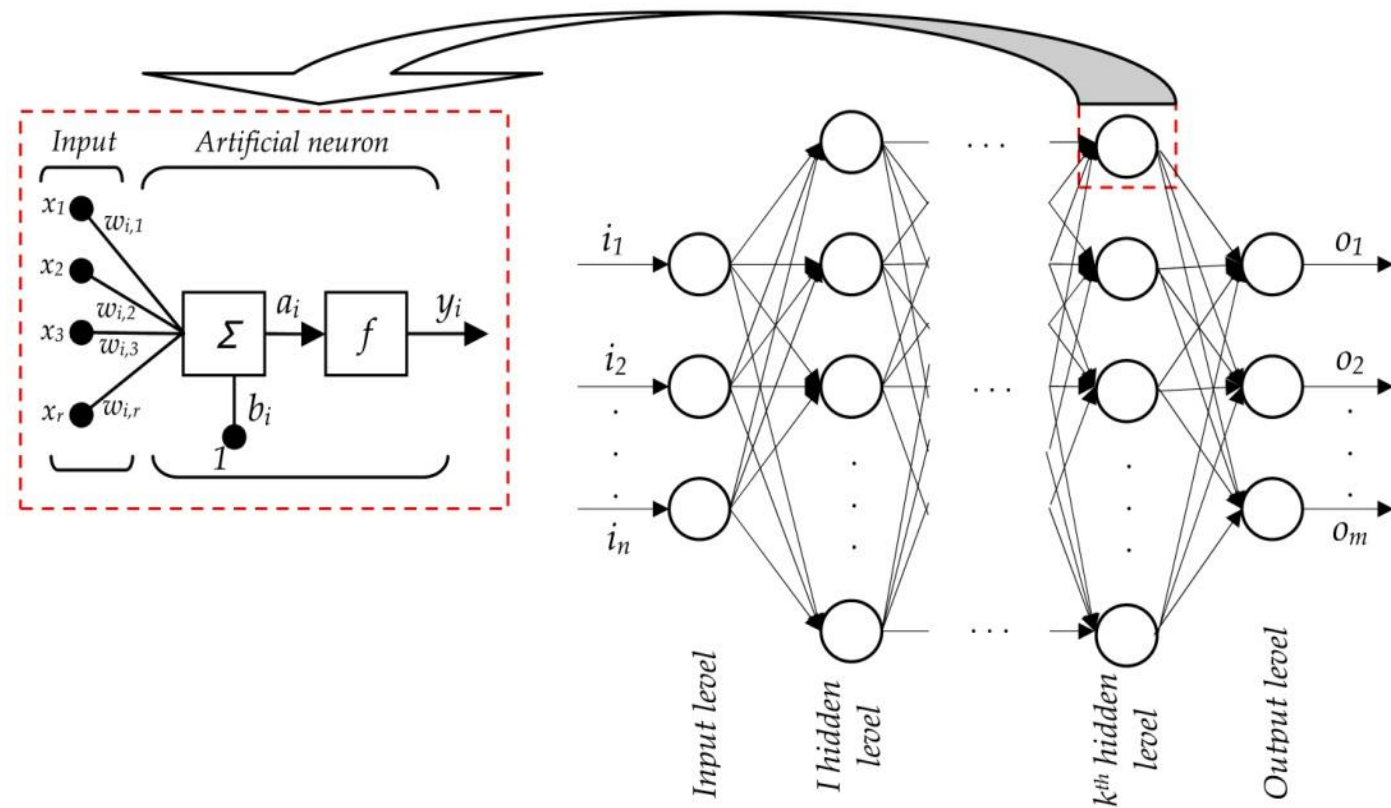
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AI and Copyrightable Work: What is AI?

A system of an artificial neuronal network.



- Plenty of access points for human interference.

AI and Copyright: Starting Points

Definition:

“Artificial intelligence is an entity ..., able to receive inputs from the environment, interpret and learn from such inputs, and exhibit related and flexible behaviors and actions that help the entity achieve a particular goal or objective over a period of time.” (*Daniele Faggella*)

AI and Copyright: Steps 1 – 3 (4)

- **Step 1:** The particular goal or objective to be achieved is determined (a) by a human (b) not by a human.
- **Step 2:** The data bases or data selection criteria that are used for the input data are determined (a) by a human, or (b) not by a human.
- **Step 3:** The way how the input is being interpreted, treated and processed and how the AI system learns from prior activities (a) is determined by a human, or (b) no human intervention is involved in determining the behavior and activities of the AI system.
- ~~(Step 4:~~)

AI and Copyright: What is protected

Civil Code of the Russian Federation, Part. IV, Article 1228, para.1

For a work to be protected by copyright law in Russia,

- 1) it has to be a result of intellectual activity of its author,
- 2) whose creativity has led to its creation.

AI and Copyright: Legal Theory of what is protected

CJEU in Infopaq, C-5/08: “original in the sense that it is its author’s own intellectual creation”, “suitable for conveying to the reader the originality of [a work] by communicating [something] which is... the expression of the intellectual creation of the author”

Football Association Premier League/Murphy, C-403/08 / C-429/08: "the author's own intellectual creation".

Painer, C-145/10: “is an intellectual creation of the author reflecting his personality and expressing his free and creative choices in the production of that photograph.”

Funke Medien, C-469/17: “to make free and creative choices capable of conveying to the reader the originality of the subject matter at issue, the originality of which arises from the choice, sequence and combination of the words by which the author expressed his or her creativity in an original manner and achieved a result which is an intellectual creation”

Football Dataco, C-604/10: “Compilations of data or other material, whether in machine readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations shall be protected as such.”

AI and Copyright: What is not protected

Civil Code of the Russian Federation, Part. IV, Art. 1228 para. 1 al.

”Citizens who have not made a personal creative contribution in achieving such a result, including those who have rendered merely technical, consulting, organizational, or financial support or assistance to the author or who have merely assisted in the formalization of rights to such a result or its use, as well as citizens who have exercised supervision over the process of the relative work, shall not be considered as the authors of the result of intellectual activity.”

No copyright in security camera recordings (Supreme Court of the Russian Federation, Part 80 of Session Resolution No. 10 of April 23, 2019 on Application of Part IV of the Civil Code of the Russian Federation; Ruling of the Ninth Appellate Arbitration Court of 20 April 2011 № 09АП-2257/2011 on case № A40-113912/10-12-720; Decision of the Arbitration court of city of Moscow of 04.02.2011 on case № A40-131349/10-67-236)

AI and Copyright: Free scope

Conclusions from Cofemel: Copyright requires

- a free scope, which opens the room in which the author can exercise his freedom and creativity,
- the acts of the author by which he or she exercise his or her choices and decisions and thereby expresses his or her personality, and
- a result (“work”), which reflects the personality, the choices and decisions of the author.

Not relevant:

- *The intent of the author to exercise his or her choices and decisions and thereby to express his or her personality.*
- *The use of the computer as a tool.*

AI and Copyright: Who can be an author and who cannot

- Authors may be the persons using the AI system: data selection, data modelling, determining weight and presumptions, choice of ideal result and measure of difference, structure of backpopulation (output as input).
- No AI system (machine) can be the author in terms of copyright, and neither can the financier of the AI system.
- No copyrightable work if created by AI system autonomously, based solely on an idea, but without human interference in any level of the creation process.

AI and Copyright: Objective Originality

Objective Originality Test:

- Would the creation of the same work, if created by a human author, show sufficient originality as to constitute that author's own intellectual creation?

AI and Copyright: Work of Art

The Next Rembrandt



©?

This picture may be protected by copyright. Or is it not? And if not, is it then without protection?

AI and Copyright: Authorship

Machines and apparatus as such cannot be authors of a work in a copyright sense; the author of a work can only be one or several natural persons.

GEMA: No registration of a computer generated work possible.



SACEM: has registered AIVA (Artificial Intelligence Virtual Artist) Music as composer

SUISA: Interesting subject. May have registered AI generated works if the method of creation was not disclosed

AI and Copyright: Authorship

Many users are collaborating in the creation of a work by using an AI system.

- Renaissance workshop
- Work-for-hire
- UK Copyright, Designs and Patents Act 1988, Article 9 Authorship of work.

(3) In the case of a literary, dramatic, musical or artistic work which is computer-generated, the author shall be taken to be the person by whom the arrangements necessary for the creation of the work are undertaken.

AI and Copyright: Authorship

CJEU in Luksan, C-277/10 : Member states are free to introduce a presumption of transfer, of rights to exploit the work, provided that such a presumption can be rebutted, i.e., the authors can agree otherwise.

- Presumption in favour of whom?
 - The programmer of the basic AI system?
 - The user of the AI system?
 - The one who defines the goal and objective?
 - The one who controls the input?
 - The one who defines the self-learning process?
 - The Company which sets up the AI system for producing the desired objective, organizes the related activities and pays for it?

AI and Copyright: Applied Art

German BGH in Spacenet decision (Seilzirkus)

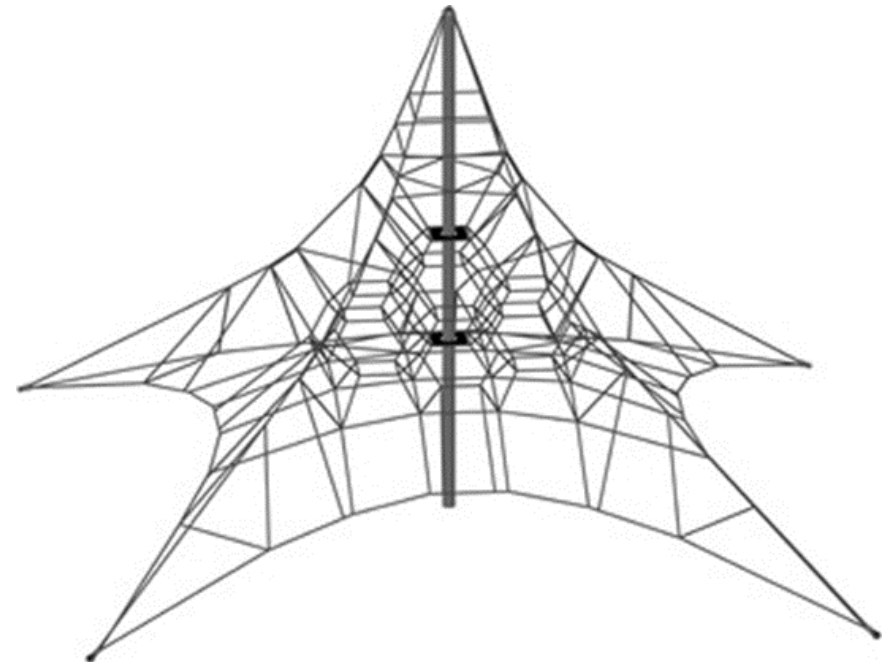
.... the aesthetic effect of the design can only justify copyright protection to the extent that it is not owed to the purpose of use and technically conditioned, but is based on an artistic achievement.

- The result counts, not the choices made by the author.

CJEU in Levola Hengelo; Cofemel:

- Originality must be determined in an objective, not in a subjective fashion.

Set-up of AI system can be with a purely functional goal and intent, provided the result is not or not exclusively technically conditioned and reflects the personal choices and decisions of the author.



AI and Copyright: Software

5 main tasks of software development:

Software design, Software testing, GUI testing, strategic decision making, automated code generation

- all areas where AI can help.

Existing systems (AI or not) can write code, but require a lot of details to be written down about aim and intent.

AI and Copyright: Software

Input to Bayou:

- A “draft program” with variables that are intended to be used in the program.
- A “query” with the intent of the program.



Bayou interprets this query by using a neural network on a corpus of program sketches, or abstract models of the program syntax, of existing open source code.

Bayou associates the user’s request to the intent it has learned from codes on Github and writes the code for the app it thinks the user wants.

- So the input of the software developer becomes more and more high-level, but remains crucial.

AI and Copyright: Creativity by Selection

Originality by selecting from output of AI system:

Step 4: (a) A human makes a creative selection, or (b) no human creativity is involved in the selection of a work from the output of the AI system.

Originality by selection is a different issue from copyrightability of AI created works.

AI and Copyright: Creativity by Selection

Civil Code of the Russian Federation Article 1259. Objects of copyright, Art. 1259(2) “composite works, that is, works representing the result of creative work in the selection or arrangement of materials.”

Article 1260 para. 2 “Copyright in the selection or placement of materials made by them (compilation) belongs to the compiler of a collection and the author of another compiled work (anthology, encyclopedia, database, atlas, or other similar work).”

Football Dataco, C-604/10: “Compilations of data or other material, whether in machine readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations, shall be protected as such.”

AI and Copyright: Other issues

- Copyright infringement by using copyrighted works as input.
- Infringement of copyright in AI generated works by other (traditionally or AI generated) works.
- Infringement by AI generated works of copyright in other (traditionally or through AI generated) works.
- Copyright in computer programs or algorithms used for AI systems.
- Copyright in intermediate works, *i.e.*, works created during each step of the process within the AI system.

AI and Copyright: Other issues

- Duration of protection:
 - Civil Code of the Russian Federation Article 1281 para. 1 (2) “The exclusive right in a work created in coauthorship shall be effective for the whole life of the author outliving the other coauthors plus seventy years, counting from January 1 of the year following the year of his death.”
 - Too long?
 - UK Copyright, Designs and Patents Act 1988, Article 12 (7) “If the work is computer-generated copyright expires at the end of the period of 50 years from the end of the calendar year in which the work was made.”

AI and Design Right: Cumulative Protection, not solely dictated

Cofemel: Cumulative protection by design law and copyright is possible

Explicitly **permitted by Civil Code of the Russian Federation Part IV**

Community Design Regulation / Community Design Directive: outward appearance of a product or a part of a product which results from the lines, contours, colours, shape, texture, materials and/or its ornamentation; new and having individual character, **not** for features of appearance of a product which are **solely dictated by its technical function** (art. 8(1) CDR).

German and Swiss courts: “multiplicity of forms” test, design is not considered as “solely dictated by its function” if alternative designs exist which fulfill the same function.

AI and Design Right

EUIPO has (since **Chaff cutters**) a “no-aesthetic-consideration” test: a design is solely dictated by its function (and thus excluded from design protection) if every feature of the design was determined by technical considerations, regardless of the existence of design alternatives.

CJEU, DOCERAM v CeramTec: modified EUIPO approach.

Excluded from protection are features if “the technical function is the only factor which determined those features, regardless of the existence of alternative designs”.

“[A]ll the objective circumstances relevant to each individual case”, including the existence of design alternatives (provided that they are supported by “reliable evidence”) must be taken into account.

AI and Design Right

Protection as registered design for creations of AI poses less problems than copyright (or patent) protection:

- No human designer required

But choice between different technical alternatives must be based on esthetic rather than technical considerations.

- Set-up of AI system has to include esthetic considerations when choosing between different functional features.

AI and Design Right

UK Registered Designs Act 1949, Registrable designs and proceedings for registration

Sec. 2, Proprietorship of designs, para. (4)

- (4) In the case of a design generated by computer in such that there is no human author, the person by whom the arrangements necessary for the creation of the design are made shall be taken to be the author.

EU Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs

Article 18, Right of the designer to be cited

..... If the design is the result of teamwork, the citation of the team may replace the citation of the individual designers.

AI and Other Rights

Unfair Competition/Passing Off

Data Base Protection: European Union Directive 96/9/EC on the legal protection of databases

New sui generis right?

Dr. Reinhard Oertli, LL.M., Attorney at Law, Partner



Practice Areas

- Technology, Media and Telecommunication
- Copyright and other IP
- Arbitration and Litigation

Education

- University of Pennsylvania Law School, LL.M. (1989)
- Admitted to the bar in Switzerland and New York (1988/1990)
- University of Zurich, Dr.iur. (1988), lic.iur. (1982)

Memberships

- INGRES, AIPPI, ABA, ASA, LCIA
- Swiss-American Chamber of Commerce
- Various board memberships

Languages

- German, English, French, Italian