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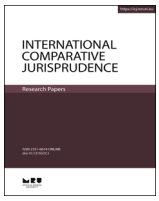

The conceptual bases for codifying Estonia's IP law and the main legislative changes: From the comparative approach to embedding drafted law into the socio-economic context

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ABSTRACT

The aim of this article is to explore the conceptual bases and methodological issues involved in the codification process of Estonia's intellectual property law and outline the main results. The conceptual bases of this codification consist of evolutionary development, a comparative-law approach, stakeholder involvement and regulatory impact assessment. The reform draws on the existing regulatory framework (existing IP law), developed further by the identification and use of the best regulatory practices of other countries and model laws. Stakeholder involvement and regulatory impact assessment are used to improve the draft law and make it compatible with Estonian socio-economic conditions.

This article summarises the results of the extensive work from 2012 to 2014 that resulted in the draft Copyright and Related Rights Act, the draft Industrial Property Code and the draft Act Implementing the Copyright and Related Rights Act and the Industrial Property Code with the relevant annexes.

The analysis focuses on the Estonian codification project as a case study. The author relies on traditional research methods from social science and draws on comparative and dogmatic analysis conducted during the codification, using empirical socio-economic data acquired through stakeholder involvement and impact assessment.

The article also reflects the author's personal experience, insights and intimate knowledge of the codification process gained through management and coordination of the project and in acting as a head of the expert group on the codification of IP law under the auspices of the Ministry of Justice of Estonia.

The Estonian example could serve as a comparative model for countries aiming to modernise their IP laws within the EU *acquis* and international legal framework.

1. Introduction

The aim of the article is to explore the conceptual bases and methodological issues involved in the codification process of Estonia's intellectual property (IP) law and outline the main results. The codification has previously been addressed in

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Estonian (see Kelli, 2012, 2014a). The codification of Estonia's intellectual property law has been supported by the European Union and European Social Fund.

The conceptual bases of this codification consist of evolutionary development, a comparative-law approach, stakeholder involvement and regulatory impact assessment (RIA). The reform draws on the existing regulatory framework (the existing IP law), developed further by the identification and use of the best regulatory practices of other countries and model laws (comparative material). For the purpose of this article, 'comparative material' refers to legal acts, case law, legal practice and legal literature of countries other than Estonia. It also includes model laws that are often a synthesis of laws and legal doctrines of several countries. The draft law has been made compatible with Estonia's socio-economic conditions through stakeholder involvement and regulatory impact assessment.

According to the author's main argument, to ensure regulatory quality it is crucial to integrate reliance on the existing law (evolutionary development), the use of comparative material (a comparative approach), stakeholder involvement and regulatory impact assessment. The evolutionary development and comparative approach are meant to identify and use best practice. Stakeholder involvement and RIA embed the draft law into the local socio-economic environment. To some extent, this is reflected in A Work Plan for the Codification of IP Law (2013).

This article concisely addresses the process and results of the codification of IP law that took place from 2012–2014. The article draws on the Estonian draft Copyright and Related Rights Act (2014), the draft Industrial Property Code (2014), the draft Act Implementing the Copyright and Related Rights Act and the Industrial Property Code (2014) and their explanatory memoranda (2014) and the Input to the Economic Impact Assessment Report (Kelli, 2014b).

The author relies on traditional research methods from social science and draws on comparative and dogmatic analysis undertaken during the codification, using empirical data acquired through stakeholder involvement and RIA. The material cited constitutes the analytical basis of the work, which can be used for verification and replication of the conclusions set forth in the article.

The article also reflects the author's personal experience, insights and intimate knowledge of the codification process gained through management and coordination of the project and in acting as a head of the expert group on the codification of IP law under the auspices of the Ministry of Justice of Estonia.

Estonia started the codification of intellectual property law in 2012 (some introductory work had been done carried out before, see Mikk (2011)) and the preliminary versions of draft acts with annexes were handed over to the Ministry of Justice of Estonia in September 2014.

Because the codification of IP law is a continuation of private-law reform (for further discussion on the Estonian law reforms, see Kull (2008, 2014), Pärna (2005), Varul (2000, 2008)), it also follows policy considerations established before. One of the core policy considerations is well articulated by Pärna (2005, p. 223), an expert who has deep insights into Estonian reform processes, as follows: "[The] goal has been to create a simple legal system that is comprehensible to those outside, not to create unique or cryptic law."

The major reasons behind the codification can be categorised as formal and substantial ones.

Formal reasons for initiating the codification process mostly relate to the need to harmonise, align and integrate existing IP regulations with the rest of the Estonian legal system (especially with private law). It has correctly been said that this system reflects two intertwined processes: the creation of new Estonian legislation and its harmonisation with European Union law (Pärna, 2005, p. 223).

The time span for the adoption of different IP laws ranges from 1992 to 2004. The legal system of Estonia as a transition country has undergone considerable transformation (new legal acts are adopted and even branches of these laws are formed). The following factors have been pointed out that influence the quality of legislation in that period: the rush to join the EU, the following of too many models, failure to follow the rules of legislative drafting, and a lack of extensive experience. In 2005, it was therefore suggested that a focus was placed on the codification and simplification of Estonia's laws (Pärna, 2005, p. 223).

In addition to domestic factors, international and European developments affect the situation. Numerous EU directives have been transposed into Estonian laws, which has a considerable impact on their structure and comprehensibility. Last but not least, a factor that led to substantial fragmentation of Estonia's IP laws was the institutional division of responsibility for the general coordination of IP. Before the reform started, two ministries were responsible for intellectual property: the Ministry of Culture (copyright and related rights) and the The Ministry of Economic Affairs and Communications (2015) (industrial property). This led to an undesirable scenario, in which similar legal situations were regulated in different ways with no clear reason, different terminologies were used, contradictions existed and regulations were not always comprehensible (for further discussion on the formal reasons, see Mikk (2011)). To address these issues, several practical measures were taken.

Firstly, the codification of IP law reform was included in the programme "Developing better legislative drafting" (Minister of Finance (2011)). Secondly, the Government of the Republic Act (1995) was amended (The amendment entered into force on 1.01.2012) to define the coordination of the field of intellectual property in the area of government of the Ministry of Justice (The Government of Republic Act, 1995). In this area, Estonia follows the German approach, in which the Ministry of Justice is also responsible for IP legislation (for further information, see Bundesministerium der Justiz und für Verbraucherschutz (2015)). Other ministries, such as the Ministry of Culture, the Ministry of Economic Affairs and Communications, and the Ministry of Education and Research, are still responsible for IP policy and strategy development in their respective fields, and are consulted when IP regulations are prepared.

There are also substantial considerations behind IP law reform. The main goal is to enhance the knowledge-based economy, digital society, innovation and high-tech entrepreneurship (for further discussion on the interaction of IP and

entrepreneurship, see Mets, Kaarna and Kelli (2010, Mets et al., Mets, Leego, Talpsep, and Varblane; 2007), which should lead to welfare improvements in society. Because most countries (including Estonia) have waived their sovereignty to change the constituent elements of their IP systems (such as the definition of protectable subject matter and the scope of protection, limitations and exceptions, rights acquired, and the duration of rights) through regional (for example, EU directives and regulations) and international commitments (through numerous international conventions), any changes can only take place within the established EU and international frameworks. The reform of national IP laws should adhere to the assumption that the regional and international legal framework is based on solid economic, societal and technological analyses and therefore enshrines the best and most advanced best practices. In contrast with scholars (see Andersen, 2004), countries and their governments cannot critically review or even ignore the objectives and basic elements of international and regional IP instruments during their national legislative processes. Problems that relate to the regional and international IP framework identified during the national reform process can be taken to the relevant forums (such as the WIPO, WTO and EU), where they can be discussed.

Within this model, Estonia's IP reform aims to support the country's transformation into a knowledge-based economy (for further discussion on the transformation, see Mets (2010; 2009)) and digital society (for further discussion on the digital economy, see European Commission (2015)). Because open innovation constitutes a core process within this type of economy, it is crucial to design measures to remove barriers that hinder the process. According to Chesbrough's approach, open innovation requires that “valuable ideas can come from inside or outside the company and can go to market from inside or outside the company as well” (Chesbrough, 2003, p. 43). Legislative changes are therefore aimed at improving freedom of contract, as well as legal clarity and certainty.

Estonia's experience could serve as a comparative model for countries considering the modernisation of their IP laws within the EU *acquis* and international legal framework.

2. Methodological issues regarding the codification of IP law

Almost all projects need a formal work plan. The Work Plan for the Codification of IP Law (2013) contained the following activities:

(1) the identification and setting out of legal matters that required further attention;
(2) deciding on legal matters that needed analysis from a comparative perspective. Technical changes such as the unification of terminology and removal of duplications do not require comparative analyses;
(3) the acquisition of comparative material and cooperation with foreign experts to obtain additional information for its use;
(4) translation of the draft acts into English and the involvement of foreign experts;
(5) setting up a meeting with experts and discussing the draft acts.

As well as a work plan, it is crucial to have an approach that is theoretically and methodologically appropriate. The choice of methodology for codification determines its outcome, as with any other process. The following four integrated pillars constitute the conceptual bases for codification: (1) evolutionary development; (2) a comparative-law approach; (3) stakeholder involvement; (4) regulatory impact assessment (RIA).

Among the first strategic questions to be answered was whether to rely on existing regulations (the evolutionary approach) or create totally new ones (see explanatory memoranda to draft acts), with both routes possible. For instance, Estonia had to create a totally new legal system after regaining its independence. Varul (2000, p. 104), who can be considered the founding father of modern Estonian private law, has explained this as follows: “At the time Estonia became independent in 1991, the Soviet legal system was valid, but it was no longer possible to actually apply a large part of it due to the changed conditions, because both state administration and economic principles were radically changed. The drafting and establishment of all the necessary new laws was a primary task. The task was the largest and most complicated in the creation of new private law.”

The codification of IP law differs from the creation of Estonian private law because the law to be codified is adopted in independent Estonia. It is not the law of the Soviet Union. The country's Copyright Act (1992) entered into force in 1992 and has worked relatively well. To an extent, harmonisation with EU law affected its structure and made it less coherent and logical. Despite this, the Copyright Act corresponds to European standards and stakeholders are familiar with it. The main laws concerning industrial property were also adopted after Estonia regained its independence. The Patents Act was enacted in 1994, the first Trade Marks Act of the Republic of Estonia (1992) in 1992, the second (2002) in 2004, the Industrial Design Protection Act (1997) in 1998 and the Principles of Legal Regulation of Industrial Property Act of the Republic of Estonia (2003) as a general part of industrial property law in 2004. In a similar way to copyright law, there is considerable legal practice and case law concerning industrial property. It was therefore decided to follow the evolutionary path and use existing regulation as a basis. This is compatible with legal theorists who assert that the main goal of the systematisation of law is to develop existing regulation (Narits, 2005). Building on laws that are already in place has an additional advantage, in

that it avoids unnecessary costs of retraining for stakeholders (for further discussion on the impact assessment for administrative burden,[2] see Ligi (2010), Pere and Ligi (2014).

This path means retaining socially embedded legal regulations relations, but does not involve preserving the structure of old laws. Codification usually results in a new, comprehensible and systematically arranged code.

The comparative approach played a pivotal role from the inception of the codification process for several practical reasons. Firstly, it is not economically justified to allocate resources to solving legal problems that have already been resolved in other countries: reinventing the wheel does not create any additional value. In theory, there could be unique country-specific issues, but this is rarely the case. Secondly, it is useful to create regulations that do not differ from those in developed countries.

This approach was upheld by experts who laid the foundations for the Estonian legal system. For instance, Varul (2000, p. 109) has emphasised that "the goal in the development of private law was not the creation of an original private law, but the establishment of rules already passed and tried in the West, in order to have an effective national law and enable Estonia to participate in international cooperation". Pärna (2005, p. 221) supports this approach by referring to property law: "No attempt was made to create a unique private property law system, rather lawmakers set modern rules that reflected European attitudes and were comprehensible to investors."

There is no reason to deviate from this approach in the context of IP. The application of the comparative method in drafting legislation requires some methodical and practical issues to be addressed. Firstly, it is necessary to choose suitable comparative material. Secondly, there is a need to attain an in-depth understanding of foreign regulation used as an example.

The choice of regulations is based on several considerations. Because Estonian private law is influenced by German law, it makes sense to continue the established tradition. In addition to this, the working group drew on US law because the US sets the international standard in terms of protection of intellectual property. The country is among the most innovative nations and its example is reasonable to follow. The working group also examined the IP laws of Nordic countries, which are highly innovative and entrepreneurial driving forces, as well as those of Canada, the UK, France, Lithuania and many other countries.

Model laws often constitute valuable resources in many fields because they usually integrate and find common grounds for the laws of many countries, and are usually based on solid analysis rather than lobbying. During codification, two main models were used: the European Copyright Code (2010) and the German Model Law on Intellectual Property (the Model Law), which was drafted under the leadership of Hans-Jürgen Ahrens and Mary-Rose McGuire (2013).

The use of a comparative approach in drafting new regulations requires an in-depth and complex knowledge on the laws of other countries or model laws. It is not enough just to understand the meaning of words in provisions. Single provisions are usually interpreted in a wider context, taking into account factors including other provisions, national legal theory and policy, legal systems, and social and economic conditions. To really benefit from a comparative approach, it is therefore crucial to cooperate with experts with relevant knowledge. Drafters of new national regulations must be able to identify and understand the relevant foreign or model-law regulations. However, more extensive and complex forms of contribution are provided by external experts. During the codification projects, the working group communicated with several experts from different jurisdictions. Direct communication provided a detailed and up-to-date understanding of foreign laws, implementation practices and case law. This could not be attained by relying only on written material, for which English translations come with a time lag. The communication also helped to overcome linguistic barriers.

There are several expert analyses of the Estonian draft laws conducted by distinguished international experts (Ficsor, 2013, Ginsburg, 2013a, Von Lewinski (2013)). It is hard to overstate the roles of Jane Ginsburg and Mary-Rose McGuire in the codification process. McGuire made a major contribution to the implementation of solutions provided in the German Model Law into Estonian draft laws. Ginsburg analysed the draft Copyright and Related Rights Act and made numerous valuable comments discussed during the meeting (Ginsburg, 2013a) and through e-mail communications.

The above-mentioned strategic decision to follow the evolutionary approach led the expert group to another strategic question: how should the result of the codification be structured? The initial idea proposed by the Ministry of Justice was that codification of the IP law should lead to the Estonian Intellectual Property Code. The following analysis concerning the structure of drafted law draws on explanatory memoranda to the draft Copyright and Related Rights Act (2014) and the draft Industrial Property Code (2014).

It is necessary to point out that the use of comparative material is not limited to drafting single provisions; it is also possible to examine how legal acts are structured in other countries, so suitable examples were looked for. Because of its excellent analytical quality, compatibility with EU law and ties between Estonian private law and German tradition, the German Model Law was deemed to be among the best standards to follow. The most innovative, analytical and fascinating part of the Model Law is the General Part (Book 1). The General Part contains the following chapters: Chapter 1: Accrual of rights, limitations of protection; Chapter 2: Applicable law and jurisdiction; Chapter 3: Infringement, enforcement; and Chapter 4: Intellectual property rights as objects of property (Ahrens and McGuire, 2013, p. 4–7). The Model Law aims to codify most of the norms that regulate IP. For instance, the General Part also contains provisions on criminal offences,

[2] The Ministry of Economic Affairs and Communications also offers an online application to calculate administrative burden (Ministry of Economic Affairs and Communications, 2015).

infringement, enforcement and insolvency. This all makes perfectly sense in the context of the Model Law. However, a national legal system is much more than an intellectual property code and its structure should be based on certain principles. From an academic point of view, it is an excellent scientific challenge to collect, systemise and codify all norms that relate to IP (or any other field such as environmental or company law) in one codification. At the same time, it would mean, for instance, that all criminal offences would have to be moved from the Estonian Penal Code (2001) to a prospective IP code. In this case, the same should be done for laws in areas including insolvency, tax, civil and criminal procedures, contract and tort. The main question is whether this would improve the quality of the system and facilitate legal practice. It is a complicated question, the answer to which depends on the legal tradition.

After consultation with several legal researchers and practitioners, representatives from different ministries and stakeholders, it was decided that maintaining the legal system's existing structure was more compatible with Estonian legal policy and tradition. In other words, all criminal offences were to stay within the Penal Code (2001), procedural rules in the Code of Civil Procedure (2005) and the Code of Criminal Procedure (2003), and tort- and contract-law provisions in the Law of Obligations Act (2001). This does not mean that the Model Code was not used as a source of inspiration to draft provisions, but its structure was not just followed.

When considering an IP code, it is important to take into account that copyright protection is acquired without any formalities, but industrial property requires the completion of a registration procedure. In fact, most industrial-property provisions concern this procedure. In this sense, the overlap between copyright (including related rights) and industrial property is minimal.

After these acknowledgements, it became evident that drafting a prospective IP code was not reasonable. Because industrial-property and copyright regulations are also used by different stakeholders, it was decided to have two different acts: the Industrial Property Code and the Copyright and Related Rights Act.

Continuous and transparent interaction with stakeholders and experts is defined as the main guiding principle in codification from day one. This constitutes the third pillar of the codification process.

The Rules for Good Legislative Practice and Legislative Drafting of the Republic of Estonia (2011) require the involvement of interest groups and the public (Section 1). However, this participation depends on how well stakeholders are informed and how the collaboration is structured. In order to enhance stakeholder awareness and the transparency of the whole process, as well as acquire stakeholder input, several measures were designed and implemented. Firstly, a special website dedicated to the reform of the Estonian IP law was set up and a publicly accessible Google group dedicated to IP reform was created. Both tools were geared towards sharing all draft documents with the public without any time lag. Although most of the reform-related documents released were still “works in progress”, this has not caused any misunderstandings, misinterpretations or other problems. Stakeholders usually appreciate transparent and democratic processes.

Secondly, several national and international seminars and conferences were held that were dedicated to the codification. Their scope varied from raising awareness to conducting in-depth analysis of legal, economic and other specific IP problems. Thirdly, innumerable meetings and round tables were held with different stakeholders, whose input – integrated with the experience of other countries (under the comparative approach) – helped in drafting regulations that were suitable for Estonia. The comparative approach would not have been sufficient. Because an IP system is an integral part of a national innovation programme, it is appropriate to stress the well-known maxim that the transfer of successful models of innovation into a different national context usually fails because they lack institutional embedding (Pohlmann, 2005, p. 9). This does not mean that we cannot learn from the experience of others or follow best practice; we just need to integrate new understanding with the existing knowledge base.

In order to enhance communication, a discussion forum could have been established as well. Instead of a discussion forum, the working group focused more on meetings.

Regulatory impact assessment (RIA) is a fourth pillar that integrates and consolidates the other three. The expert group defined RIA as a high-priority activity and allocated approximately one-third of its codification budget to implementing it. This assessment was not carried out retroactively after drafting the regulations, but was systematically integrated into the codification process from the outset. For this reason, the group did not consist only of legal experts, but also people with other backgrounds. The general framework for regulatory impact assessment is set by the Regulatory Impact Assessment Methodology (Ministry of Justice of the Republic of Estonia, 2012). The Rules for Good Legislative Practice and Legislative Drafting of the Republic of Estonia (2011) provide a non-exhaustive list for areas of RIA, consisting of: (1) social and demographic impact; (2) impact on national security and international relations; (3) impact on the economy; (4) impact on living and natural environments; (5) impact on regional development; and (6) impact on the organisation of state authorities and agencies of local authorities. It is clear that the reform of IP mostly affects the economy and business environment, so particular attention was paid to the economic impact. To put in place the RIA methodology in an innovation and IP context, a special implementation model was developed for RIA in relation to IP regulations (Mets, Kelli and Peedosk, 2013). An in-depth analysis was conducted on entrepreneurial models and the scope of freedom of contract within the context of intellectual property (Kelli, Mets, Hofmann, 2013).

A major challenge faced in the codification project was to design a model for process management that successfully integrated the evolutionary and comparative-law approaches, involved stakeholders and formalised the results to make them suitable for regulatory impact assessment.

3. Main legislative changes to IP law

In the initial phase of the codification project, it was decided that law is amended only if absolutely necessary. In the event that there were no compelling reasons or other measures that could solve the problem (such as raising awareness with regard to proper implementation of the law, and the provision of clarifying information in explanatory memoranda), the law would be left intact. For instance, this was a case for the applicability of the principle of abstraction in the field of IP (see Hoffmann, Kelli and Värv, 2013, 2012).

By legislative changes, the author refers to instances in which changes affect legal relations and not to technical corrections. As a rule, major law reforms always entail the harmonisation of terminology, elimination of duplications and contradictions, and other similar technical changes. Because these types of change have a low comparative and analytical value, they are left out of the scope of this article.

In addition, the author does not address here changes that were required to deal with the problems caused by the Soviet period, such as the legal status of audiovisual works created during the period of Soviet occupation (for further discussion of this issue, see Birštonas et al. (2014)). This is because these types of problems are often country-specific.

The main legislative changes made in the course of codification aim to enhance the transformation into a knowledge-based economy and support the digital society. They can be divided into two major categories: (1) changes that enhance private autonomy and freedom of contract; and (2) changes that increasing legal clarity and certainty. The distinction between these categories is not always clear-cut; the same change can simultaneously increase freedom of contract and legal clarity. In fact, this distinction was made to facilitate regulatory impact assessment (see Kelli, 2014b). The author will shortly address some of the main changes that require either a balance to be struck between the interests of different stakeholders, effects in terms of innovative processes and functioning of the knowledge-based economy and digital society, or both.

3.1. Changes that increase freedom of contract

In this section, the author focuses on the limitation of moral rights and mandatory remuneration rights. These changes are important because they support open innovation and thus the knowledge-based economy. Open innovation requires freedom of contract in the field of IP.

Estonia's Copyright Act (1992) contains one of the longest catalogues of moral rights in the world (Pisuke, 2006, p. 35). The Copyright Act has the following list of moral rights: right of authorship, right of the author's name, right of integrity of the work, right of additions to the work, right of protection of the author's honour and reputation, right of disclosure of the work, right of supplementation of the work, right to withdraw the work, and right to request that the author's name be removed from the work being used (Section 12). The Copyright Act of 1992 follows the French concept of moral rights. As the creator of modern Estonian copyright law and one of the main experts who drafted the act, Heiki Pisuke has emphasised that "Estonia belongs to those countries characterised by the so-called continental or *droit d'auteur* tradition" (Pisuke, 2002, p. 169). The extensive catalogue of moral rights is not negative or positive in itself, and stakeholders also have divergent perspectives on this question. Architects, for instance, support the current system of extensive moral rights and are critical of potential changes (see Mägi, 2013). Moral rights with a wide scope of protection entail adverse economic effects, with the main problem being that these rights are not usually designed to be objects for transaction (for further discussion, see Kelli et al. (2014)). The impact of the extensive catalogue of moral rights must therefore be analysed within the context of economic transactions. The validity of a transaction concerning moral rights is a controversial issue. Opinions diverge on this issue. Pisuke (2002, p. 171) maintains that "[a] separate agreement for the issue of an exclusive licence by the author can be concluded regarding the moral rights of the author." Rosentau (2007, p. 654), however, believes that contracts concerning moral rights *in corpore et in genere* are not valid and there is need to agree on the exercise of every single moral right.

It was decided to limit the catalogue for such rights and regulate, *expressis verbis*, the exercise of moral rights. In addition to an analysis of legal practices and input from stakeholders, the working group relied on the European Copyright Code (2010) and Finnish (1961), Swedish (1960) and Danish (2010) copyright acts as examples. In the Estonian draft Copyright and Related Rights Act, the catalogue of moral rights is limited so that the right of integrity protects the author's honour and reputation. All other adaptions, changes and amendments that do not cause prejudice to the author's honour and reputation are covered by the right of adaptation (economic right).

Although the catalogue of moral rights is narrowed down in the draft act, there are still some moral rights for which exercise by a third party is sometimes necessary – for example, in the case of the right of attribution for ghost authorship, or the right of disclosure in areas of work such as software. There is therefore an economic rationale for regulating the exercise of moral rights. Pursuant to the draft act, the author may waive the right to exercise such rights or consent to them being exercised by a third party (Draft of Copyright and Related Rights Act Section 11.). The provision that regulates the exercise of moral rights is to some extent based on Article 3.5 of the European Copyright Code (2010). It also draws on the concepts of waiver and consent well known in common-law countries.

One of the aims of the reform is to increase private autonomy (the role of contracts) in determining the remuneration paid to creators (inventors and authors) (for further discussion, see Kelli (2009)). In practical terms, this means a shift from

the imperative remuneration model (a law that says creators must be remunerated) to a contractual model (in which creators and users of created knowledge agree on terms of use). This is especially, but not only, relevant in patent law.[3] Estonia's Patents Act (Section 13) sets forth the principle that "[a]n author has the right to receive fair proceeds from the profit received from the invention". The Utility Models Act of the Republic of Estonia (1994) has an identical provision (Section 12). The country's current regulation is presumably based on German law (for further discussion on the German approach, see Trimborn (2009)), which was not transposed with the same level of detail. This causes legal uncertainty about how to interpret the concept of "fair proceeds" (for example, is €1 a fair share for inventors?). An even bigger issue is that the structure of the economies in Germany and Estonia differs substantially. Most Estonian companies are very small SMEs (micro-SMEs), which require a flexible environment. According to data from Statistics Estonia on enterprises by number of employees and economic activity for 2014, the total number of enterprises is 113,765. However, 106,538 of them have less than 10 employees (Statistics Estonia (2015)). This is a good case for exemplifying that sole reliance on the comparative approach and ignoring local conditions is not the best way forward. Different regulations often originate from contrasting socio-economic conditions.

The expert group came to the conclusion that inventors and their employers or other assignees of protectable inventions are best placed to negotiate appropriate remuneration models (for further discussion, see Explanatory Memorandum to the draft Industrial Property Code, 2014). This is similar to the ideology of property law, which does not provide that an owner is entitled to remuneration when disposing of movable or immovable property. There are also some safeguards in private law against misrepresentation, fraud and exercise of rights in bad faith (see General Part of the Civil Code Act, 2002).

This approach is justifiable in that it is extremely hard to determine the economic value of intellectual property. Innovation and IP experts support this line of argument. According to Chesbrough (2003, p. 156), "technology by itself has no inherent value; that value only arises when it is commercialised through a business model… the same technology commercialised through two different business models will yield two different economic outcomes." Petrusson (2011, p. 79) further explains that intellectual property rarely constitutes a value proposition in transactions, and that such a proposition instead consists of features, systems, contents and tools – with the role of IP often implicit. The product- or service-oriented concept makes the valuation of IP even harder. The development and commercialisation of a product or service could also involve copyright, trademarks, design and trade secrets. Through consulting stakeholders, entrepreneurs have raised the issue of why a legislator mandatorily guarantees remuneration for inventing, but not for the development of strategies and marketing, or financing (Preden, 2012). We could also ask why all risks should be placed on the entrepreneur (as many projects fail, and only a few yield any results), but inventors receive only the benefits.

As a result of legal and economic analysis (see Kelli et al., 2013) and stakeholder involvement, it was decided that private autonomy was preferable to a mandatory solution with regard to remuneration.

3.2. Changes improving legal clarity and certainty

In this section, the author addresses changes that deal with challenges caused by technological development (mainly in the field of IT) and the knowledge-based economy. The changes are aimed at improving legal clarity and certainty. The following topics are explored: (1) the contractual overridability of limitations on copyright and related rights; (2) data mining and text-analysis exception; (3) the legal status of industrial-property registers; and (4) the stability of IP contracts.

The question of whether holders of copyright or related rights can override limitations and exceptions[4] through a contract is relevant mostly for contracts that concern digital content (i.e. when the work and objects of related rights are in a digital form). Despite confusion in legal practice about how to categorise these contracts (see, UsedSoft GmbH v Oracle International Corp (2012), Helberger, Loos, Guibault, Mak, and Pessers (2013), Kuusik and Sein (2014), these contracts sometimes have provisions that limit the exceptions for free use of digital content – mainly in the case of commercial contracts. Standard licences such as Creative Commons licences, the GNU General Public License and the European Union Public Licence (EUPL) do not deprive licensees from the right to rely on exceptions and limitations. For instance, according to the European Union Public Licence (EUPL) (2007), "[n]othing in this Licence is intended to deprive the Licensee of the benefits from any exception or limitation to the exclusive rights of the rights owners in the Original Work or Software, of the exhaustion of those rights or of other applicable limitations thereto" (art. 4).

The EU copyright directives do not regulate this issue and there is no established international practice (see WIPO, 2010). The Estonian Copyright Act is also silent on the legal validity of the restrictive terms that limit copyright exceptions. At least there is no provision regulating the matter *expressis verbis*. Because the volume of contracts concerning digital content is increasing, the matter of overriding exceptions on copyright and related rights requires attention. Based on analysis during the codification, we can concisely outline three main options (Explanatory Memorandum to the Estonian draft Copyright and Related Rights Act, 2014): (1) keep the *status quo* (do nothing); (2) declare all contract terms limiting free use void; (3) declare all standard contract terms limiting free use void.

The first option is not desirable because the number of contracts that concern digital content is increasing and there is no certainty for entrepreneurs, consumers and society. The second option is too restrictive because some digital content is

[3] The question is also very topical for audiovisual authors, but these issues are not addressed here because of space constraints.

[4] The limitations and exceptions are provided by the Copyright Act (e.g. quotation rights and uses for research and education purposes).

created for specific purposes and its use requires tailor-made contracts. The third option is the most appropriate solution because it does not allow the limitation of free use under standard terms, but parties can still design a relevant contractual framework (pros and cons of each option are also discussed in Kelli, 2014b). A need for the distinction between standard terms and negotiated terms is also emphasised by the experts involved (Ginsburg, 2013b). Considering the arguments referred to above, the following provision was drafted: "Any standard terms of contracts which prejudice the exercise of the options for free use provided for in this Chapter are void (Section 39)".

The draft Copyright and Related Rights Act (2014) also introduces an exception for data mining and text analysis that is worded as follows: "Reproduction and processing of an object of rights for the purpose of text analysis and data mining, on the condition of attributing the name of the author of the used work, the name of the work and the source of publication, except if such attribution is impossible, and on the condition that such use is not carried out for commercial purposes". The Estonian Copyright Act (1992) already has a research exception (Section 19) applicable within the framework of language research (see Kelli, Tavast and Pisuke, 2012). However, for the sake of legal clarity, it was considered relevant to add a specific exception. The UK approach is used as a benchmark (Copyright, Designs and Patents Act of United Kingdom, 1988). The exception provided in Estonian law is applicable for work and objects with related rights (such as performances).

The legal effect of entries in the industrial-property register is not unified in Estonia. This issue was already raised by Estonian experts on private law (see Kõve (2009, p. 212–214). For instance, on the one hand the Patents Act (1994, Section 45), the Utility Models Act (1994, Section 42) (Utility Models Act of the Republic of Estonia, 1994) and the Industrial Design Protection Act (1997, Section 73) provide that industrial property rights are transferred to another person from the date of transfer pursuant to a transaction (a contract-based transfer). On the other hand, the Trade Marks Act of the Republic of Estonia (2002) provides that "[t]he transfer of a registered trade mark enters into force as of the date of entry of the corresponding amendment in the register" (Section 18) (a transfer based on the register entry). There is no clear reason why the transfer of industrial property rights for different categories is differentiated. As a result of the codification process, the legal effect of register entries has now been unified. According to the draft Industrial Property Code (2014), the transfer of industrial property is deemed applicable with regard to third parties only if the transfer is entered in the register. If a person acquires industrial property in good faith through relying on the register, the register is deemed correct with regard to the person (Section 13).

The stability of IP licence agreements is a particularly crucial issue for economies that rely on the use of IP-protected technology developed in other countries. Estonian private law is based on the assumption that contracts are valid only between parties. There are also exceptions to this principle. For instance, according to the Law of Obligations Act (2001), the lessee may demand that a notation regarding a lease contract be made in the land register, which ensures that the actual owner of an immovable or a person for whose benefit the immovable is encumbered with a limited real right shall permit the lessee to use the immovable pursuant to the lease contract, and that a new owner does not have the right to cancel the lease contract (Section 324). The Kelli et al. (2013).

The design of the regulation is technically complex because it has to function within the context of the Law of Obligations Act (an IP owner assigns the rights), the Code of Enforcement Procedure (2005) (IP is assigned during the compulsory enforcement procedure) and the Bankruptcy Act (2003) (IP is assigned during the compulsory enforcement procedure). The cited acts will be amended with the draft Act Implementing the Copyright and Related Rights Act and the Industrial Property Code, so that the right to use IP based on a licence agreement is not affected in the event that an IP owner assigns the rights, or rights are assigned during compulsory enforcement or insolvency procedures (for further discussion, see Explanatory Memorandum to the draft Act Implementing the Copyright and Related Rights Act and the Industrial Property Code, 2014).

4. Conclusions

The purpose of the law reform is to support, direct and change socio-economic processes and practices. The reform of a law can be considered successful if it leads to the intended change in behaviour. This, of course, depends on a myriad of factors, among which the quality of law is just one – and is itself affected by many factors.

This article has focused on the conceptual and methodological aspects of the codification of Estonian IP law. Because of its extensive character, this project has been chosen as a case study. The main legislative changes are intended to support the transformation into a knowledge-based economy and the development of a digital society, and draw extensively on comparative material. It was clear from day one that it is crucial to learn from the experience of innovative and successful countries. The comparative approach, however, requires more than merely reading the laws of other countries. Firstly, there are language barriers because English translations are rarely up to date. Secondly, the wording of provisions is not informative enough to provide sufficient information on how they really function in a social environment. It is therefore crucial to obtain additional information. One method for achieving this is to read all the relevant literature, such as theoretical material, case law and preparatory documents. Even if this path is chosen (in spite of high costs), there would still be a time lag before changes in legal practice are reflected in publications. It is therefore more efficient in terms of time and resources to involve foreign experts. Preparatory work such as the identification of relevant provisions needs to be carried out in advance by national experts, but detailed knowledge is acquired through direct contact with foreign colleagues. The final text of draft acts (translated into English) should also be analysed by international experts.

Reliance on a comparative approach alone is not sufficient because provisions that function in one country do not necessarily work in another, which could be caused by a lack of social embedding. There is therefore a need to draft provisions that are compatible with a country's socio-economic conditions, which requires stakeholder involvement and regulatory impact assessment. Stakeholders usually have a thorough and intimate knowledge of the regulated subject and despite divergent interests, their input is valuable. Interaction with stakeholders also makes them aware of potential legislative changes and facilitates the internalisation of new rules. This process is reinforced by regulatory impact assessment, which also provides and analyses social and economic data.

During the preparation of legislative changes, the methods described were followed. The changes have been based on the experience of other countries, as well as economic and legal research, and information provided by stakeholders. The aim of these is to increase freedom of contract, in addition to legal certainty and clarity. Firstly, the changes reinforce innovation. Secondly, the moves have put creators, industry and users in a better position to negotiate their relationships than the state. A bottom-up approach is often better than a top-down approach, but whether all the intended objectives will be achieved remains to be seen.

Freedom of contract is increased by the limitation of the scope of moral rights. This is necessary because such rights are not designed to be objects in transactions. The exercise of moral rights by third parties is also regulated. Legal certainty and clarity are improved by regulating the contractual matter of overriding limitations on copyright and related rights, data mining and text-analysis exceptions, the legal status of industrial-property registers and ensuring the stability of IP licensing agreements.

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