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Improvement of the Intellectual Property System as a Measure to Enhance Innovation^{*2}

1. Introduction

The Estonian economy requires a transformation to tackle economic crisis and to achieve sustainable growth. The recent report on the competitiveness of the Estonian economy emphasises that Estonia has to concentrate on increasing exports and innovation.^{*3} It is obvious that orientation to the domestic market and low labour costs cannot serve as competitive advantages for Estonia any longer. As a result, Estonian companies should start creating value within different value chains by contributing to knowledge-incentive products and services. In other words, more Estonian companies have to become innovative^{*4} and internationally oriented. As a matter of fact, these two objectives are closely interrelated. The cost of knowledge creation does not depend on whether the knowledge is utilised in domestic, regional, or global markets. Because of the possibility of such parallel exploitation of knowledge, entrepreneurs are interested in commercialising it in regional and global markets. Since intellectual property (IP) encourages innovation by protecting investments in knowledge creation and enhancing utilisation of knowledge, the author analyses the possibilities of improving the legal framework for IP to enhance innovation in the example case of Estonia.

The author's approach is based on the following assumptions. Firstly, without any doubt highly qualified and skilled human capital combines with entrepreneurial spirit to constitute a key driving force behind innovation.

Secondly, fostering innovation requires several measures. Improvement of IP regulations is one of these. The regulatory framework that supports innovation is, however, much wider than that covering just IP matters. For instance, the legal framework for biotechnological research is just as crucial for innovation as IP law is. These

¹ The author would like to thank Professor H. Pisuke for his assistance.

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³ U. Varblane *et al.* Eesti majanduse konkurentsivõime hetkeseis ja tulevikuväljavaated. Aruanne tellitud Eesti Arengufondi poolt (The Estonian Economy's Current Status of Competitiveness and Future Outlooks. Report ordered by the Estonian Development Fund), p. 39. Available at http://www.arengufond.ee/upload/Editor/ty_raport.pdf (8.02.2009) (in Estonian).

⁴ For the purpose of this paper, innovation means creation and exploitation of new knowledge. For further discussion, see A. Kelli. Some Issues of the Estonian Innovation and Intellectual Property Policy. – *Juridica International* 2008 (15), pp. 104–114.

regulations are especially relevant since Estonia has defined biotechnologies as the strategic key technologies in supporting innovation.⁵ In addition, different incentive systems (tax incentives to stimulate business research, export subsidies, etc.) could play an important role.⁶ Still the impact of IP should not be underestimated. The pivotal role of IP for innovation has been given particular emphasis by the European Commission.⁷

Thirdly, the author presumes that every country has its unique cultural, economic, demographic, natural, historical, and other conditions that have to be considered in the structuring of legal frameworks for enhancing innovation. As a result, the legal framework of IP cannot be 'imported' even from highly innovative and successful countries.⁸ However, this definitely does not mean that experience of other countries should be disregarded.

The first section of the paper addresses problems pertaining to the legal validity and scope of IP protection. The author argues that possibilities to challenge legal validity of IP rights applying to specific knowledge and the existence or absence of a clearly defined scope of protection influence the utilisation of the IP system. Some practical aspects of this are highlighted in the article.

In the second section, the author analyses how to increase the comprehensibility and consistency of IP legislation. According to the OECD, good regulations have to "(i) serve clearly identified policy goals, and be effective in achieving those goals; (ii) have a sound legal and empirical basis; (iii) produce benefits that justify costs, considering the distribution of effects across society and taking economic, environmental and social effects into account; (iv) minimise costs and market distortions; (v) promote innovation through market incentives and goal-based approaches; (vi) be clear, simple, and practical for users; (vii) be consistent with other regulations and policies; and (viii) be compatible as far as possible with competition, trade and investment-facilitating principles at domestic and international levels".⁹ Acknowledging the importance of all requirements put forward by the OECD, the analysis in the paper is, for reasons of space, confined to addressing clarity, simplicity, practicality for users, and consistency of IP regulations.

In the last section of this article, the author focuses on enhancement of the flexibility and appropriateness of IP limitations. The author's argument is that strong IP regimes that would include a broad scope of protection, extensive rights, few limitations, harsh sanctions, etc. do not necessarily facilitate innovation. The design of an IP system (including limitations) should be based on the socio-economic conditions of the relevant country. In addition, a constantly changing IP system requires limitations that are flexible enough to balance the differing interests of the stakeholders of the IP system.

2. The legal validity and scope of IP protection

IP is traditionally defined as legal rights resulting from intellectual activity.¹⁰ It has been explained that information constitutes the subject matter of IP protection.¹¹ The immaterial nature of protectable subject matter entails advantages and challenges at the same time. One of the advantages is the possibility of parallel exploitation of information. Given the intangible nature of knowledge, it is also a challenge to exclude others from using it. The protection of information in some form of IP establishes control over it.

Utilisation of IP is facilitated when the legal validity of protection is not easily challenged and the subject matter of IP protection is clearly defined. For instance, the parties to a copyright or patent licence agreement usually assume that a work or invention is legally protected and invalidation or narrowing the scope

⁵ Knowledge-based Estonia. Estonian Research and Development and Innovation Strategy 2007–2013, p. 6. Available at <http://www.hm.ee/index.php?0&popup=download&id=6175> (25.03.2009).

⁶ Innovation voucher scheme and a start-up and growth assistance programme are good examples. See *Innovatsiooniosakute toetusmeetme tingimused ja kord* (Conditions and Procedure for Support Measure of Innovation Vouchers). Entered into force on 7.02.2009. – RTL 2009, 13, 141 (in Estonian); *Alustava ettevõtja stardi- ja kasvutoetuse tingimused ja kord* (Conditions and Procedure for Start-up and Growth Assistance for Starting Entrepreneurs). Entered into force on 8.02.2008. – RTL 2008, 11, 136; 2008, 96, 1327 (in Estonian).

⁷ See, e.g., Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions. Putting knowledge into practice: A broad-based innovation strategy for the EU – COM(2006) 502, 13.09.2006, p. 6.

⁸ See G. S. Erickson. Patent Systems: Does One Size Really Fit All?, pp. 1–10. Available at http://www.iprinfo.com/tiedostot/Erickson_FINAL.pdf (15.12.2008); M. Pohlmann. The Evolution of Innovation: Cultural Backgrounds and the Use of Innovation Models. – *Technology Analysis & Strategic Management* 2005 (17) 1, pp. 9–19.

⁹ OECD. OECD Guiding Principles for Regulatory Quality and Performance, p. 3. Available at <http://www.oecd.org/dataoecd/19/51/37318586.pdf> (26.02.2009).

¹⁰ See Article 2 (viii) of the Convention establishing the World Intellectual Property Organisation. Stockholm, 14.07.1967, entered into force in respect to Estonia on 5.02.1994. – RT II 1993, 25, 55.

¹¹ See W. Cornish, D. Llewelyn. *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights*. 6th ed. London: Sweet & Maxwell 2007, p. 6; P. Drahos. *The Universality of Intellectual Property Rights: Origins and Developments*, p. 2. Available at <http://www.wipo.int/tk/en/hr/paneldiscussion/papers/pdf/drahos.pdf> (10.01.2006).

of protection is not very likely. The same holds true in cases of collateralisation of, for example, a patent. In this section, the author considers how well the subject matter of IP protection is defined and how well the validity of the acquired rights is guaranteed under Estonian law. The following analysis is mostly limited to copyright¹² and patent issues.

The Copyright Act¹³ provides that copyright protection does not require registration or fulfilment of any formalities (following the principle of the absence of formalities)¹⁴ and that the creation of a work gives rise to copyright.¹⁵ Works that enjoy copyright protection have to be “original results in the literary, artistic or scientific domain which are expressed in an objective form and can be perceived and reproduced in this form”.¹⁶ At the same time, “[t]he purpose, value, specific form of expression or manner of fixation of a work shall not be the grounds for the non-recognition of copyright”.¹⁷

There are provisions in the Copyright Act that make it virtually impossible to challenge the legal validity of the protection of a work by copyright. For instance, § 4 (6) of the Copyright Act sets out that “[t]he protection of a work by copyright is presumed except if, based on this Act or other copyright legislation, there are apparent circumstances which preclude this. The burden of proof lies on the person who contests the protection of a work by copyright”. Already early decisions of the Estonian Supreme Court have supported the argument that it is very complicated to challenge the legal validity of copyright protection of a work.¹⁸

On the basis of the above, it can be said that the absence of registration requirements has not caused significant disputes as to the existence and legal validity of copyright protection. One of the main reasons is that copyright protects not ideas but expression of ideas. Furthermore, the expression itself does not have to be new in the sense of patent law but has to be original. Originality is defined as “the author’s own intellectual creation”.¹⁹ This means that there are no legal obstacles to using an independently created work even though it is very similar to a pre-existing work created by somebody else. It has also been noted that “[i]f the level of originality of a work is very low, then it is difficult to distinguish the work from its idea”.²⁰ The author agrees that works with a high level of originality enjoy stronger protection than do works with a low level of originality. The likelihood of independent creation of a similar work decreases if the work is highly original.

To sum up, the utilisation of copyright-protected works is not substantially hindered by the possibility of a successful challenge to the protection by copyright. Firstly, it is almost impossible to prove that a work does not enjoy copyright protection. Secondly, on account of the concept of originality, different embodiments of the same idea are protectable.²¹ Still the exact scope of copyright protection can cause disputes.²² The present author is of the opinion that there is no need to amend the legal framework under analysis to make it more innovation-friendly. Some measures, however, could be taken at the company level. Since the principle of presumption of authorship²³ does not always preclude authorship disputes²⁴, companies whose business models depend on copyright protection should develop procedures to guarantee the existence of proof of their title.

¹² Even though innovation is often associated with patents (e.g., innovation is measured by number of patent applications, etc.) the role of copyright for innovation should not be underestimated. It has been correctly emphasised in an EU directive that “[c]opyright and related rights play an important role in this context as they protect and stimulate the development and marketing of new products and services and the creation and exploitation of their creative content”. See Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, the preamble, p. 2.

¹³ Autoriõiguse seadus. Entered into force on 12.12.1992. – RT 1992, 49, 615; 2008, 59, 330 (in Estonian). Unofficial translation available at <http://www.legaltext.ee> (13.02.2009).

¹⁴ The Copyright Act § 7 (3).

¹⁵ The Copyright Act § 7 (1).

¹⁶ The Copyright Act § 4 (2).

¹⁷ The Copyright Act § 6.

¹⁸ See, e.g., CCSCd, 6.05.1998, 3-2-1-60-98. – RT III 1998, 17, 178 (in Estonian); CCSCd, 25.06.1998, 3-2-1-84-98. – RT III 1998, 22, 227 (in Estonian).

¹⁹ The Copyright Act § 4 (2).

²⁰ K. Härmand. Autoriõiguse ja autoriõigusega kaasnevat õiguste kohtupraktika küsimusi Eestis ja Euroopa Liidus (Some Issues about Estonian and European Union Court Practice on Copyright and Related Rights). Master’s thesis. Supervisor Professor H. Pisuke (2006), p. 64. Available at <http://dspace.utlib.ee/dspace/bitstream/10062/993/5/harmand.pdf> (16.03.2009) (in Estonian).

²¹ However, some case law indicates that it is not always understood that copyright does not protect ideas. For instance, the court has had to explain that the use of technical solution described in documents did not constitute copyright infringement. See Judgment of the Tallinn Circuit Court, 19.06.2007, 2-05-17713. Available at <http://www.kohus.ee/kohtulahendid/temp/2-05-17713.pdf> (6.06.2009).

²² The analysis of the Estonian legal practice implies that there is a lack of capabilities in conducting expert assessments related to issues such as whether a work constitutes an unlawful reproduction of work(s) created by other authors. See, e.g., Ruling of the Harju County Court, 3.04.2007, 1-04-156. Available at <http://www.kohus.ee/kohtulahendid/temp/kohtumaarus.pdf> (15.03.2009).

²³ Presumption of authorship is provided by § 29 (1) of the Copyright Act which reads: “[t]he authorship of a person who publishes a work under his or her name, a generally recognised pseudonym or the identifying mark of the author shall be presumed until the contrary is proved”.

²⁴ This has been acknowledged in Estonian legal literature as well. See M. Rosentau. Intellektuaalse omandi õigused infotehnoloogia valdkonnas. Infotehnoloogilise loominguga olemus (Intellectual Property Rights in Information Technology. The Essence of a Work in Information Technology). – *Juridica* 2008/3, p. 180 (in Estonian).

There are also other problems of copyright regimes, such as issues related to ownership of a work created in the fulfilment of contractual obligations^{*25}, exercise of moral and economic rights, limitations, and procedural issues (e.g., estimating damages and proving infringement on the Internet^{*26}), which should not be ignored by entrepreneurs. Proper IP management (with conclusion of detailed contracts, development of enforcement strategy, etc.) could be of great help.

Although copyright and patent systems form a part of the IP system, their basic principles in respect of giving protection are not similar. A work is protected by copyright as of its creation without fulfilment of any formalities. In order to protect an invention^{*27} that complies with the criteria for patentability (novelty, inventive step, and susceptibility to industrial application), formal registration is required.^{*28} Patenting is a complex procedure that involves filing a patent application that could lead to the issuance of a patent. It is important to bear in mind that a patent application and a granted patent are substantially different. Application for a patent has been described as an expression of the applicant's interest and will but a granted patent as an expression of the will of the patent office.^{*29} The question is to what extent stakeholders of the IP system can rely on legal validity and a clear scope of protection of granted patents. It should be noted that a patent can be invalidated and that legal disputes as to the exact extent of the protection are possible. It has been explained that "since the purpose of any patent law is to protect inventions, the patent office will only refuse to grant a patent if the results of the examination clearly preclude the grant. In general, any doubt is resolved in the applicant's favour, since final adjudication on the validity or otherwise of a patent is usually possibly via the courts".^{*30} At the same time, it is essential to consider that low quality of patents could cause several problems (expensive legal disputes, high transaction costs, etc.). The statistics on patents that are valid in Estonia reveal that 172 patents were granted under the Estonian Patent Act^{*31} and 1,009 European patents were entered in the Register of European patents valid in Estonia in 2008.^{*32} As one can see, the quality of European patents is even more relevant for innovation in Estonia than the quality of national patents is. Concerns have been raised over patent quality by the European Commission^{*33} and IP experts.^{*34} The aim of this paper, however, is neither to analyse different aspects of the quality of the European or Estonian national patents nor to make any suggestions on how to improve the quality of patents. The author's main argument is that, even though inventions are protected through patenting procedure, there is no guarantee that a granted patent cannot be invalidated or the scope of its protection disputed. In cases of licensing, transfer, or collateralisation of patent rights, it is crucial in addition to finding the value of a patented invention, analysing technical aspects of the invention, etc. also to address the risks caused by the possibility of invalidation of the patent and unclear scope of protection. It has been suggested that a patent "will only have industrial value to the extent that it covers all embodiments of its innovative concept. Otherwise there will be ways of taking the idea over without infringing the right and any patent will be good only against simple imitators".^{*35} Therefore, it is hard to overestimate the importance of knowing the exact scope of patent protection.

Although the risks outlined can usually be managed by means of a detailed contract, some economic activities, such as collateralisation of IP, could be hampered. The main initiative now should be to raise the IP awareness of Estonian entrepreneurs. These actions should follow the European Commission's advice that "[a] bigger effort is needed to raise awareness of the practical aspects of IP protection in the innovation community".^{*36}

²⁵ Subsection 32 (1) of the Copyright Act provides that the economic rights in respect of a work created under an employment contract or in the public service are transferred to the employer. The Supreme Court has extended the concept of employment contract by saying that it also covers other lasting contractual relationships such as a contract between a company and a board member. See CCSCd, 23.05.2003, 3-2-1-39-03, paragraph 23. – RT III 2003, 20, 196 (in Estonian). Still the situation is not clear if a work is created to fulfil a single order.

²⁶ Section 111¹ of the Electronic Communications Act, which became effective on 15.03.2009, obliges a communications undertaking to preserve information concerning electronic communications. This regulation could be useful in proving copyright infringement taking place on the Internet. See Elektroonilise side seadus. Entered into force on 1.01.2005. – RT I 2004, 87, 593; 2008, 28, 181 (in Estonian). Unofficial translation available at <http://www.legaltext.ee> (14.06.2009).

²⁷ An invention could be defined as "a solution to a specific problem in the field of technology". See WIPO. WIPO Intellectual Property Handbook: Policy, Law and Use. Geneva: WIPO publication 2001, p. 17.

²⁸ Protection of an invention as a utility model or trade secret and defensive publishing are not analysed.

²⁹ B. Godenhielm. Patentskyddets omfattning i europeisk och nordisk rätt. Juristförbundets förlag 1994, p. 150. Cited from: U. Petrusson. Intellectual Property & Entrepreneurship: Creating Wealth in an Intellectual Value Chain. CIP Working Paper Series. Göteborg: Center for Intellectual Property Studies 2004, pp. 197–198.

³⁰ WIPO. WIPO Intellectual Property Handbook: Policy, Law and Use. Geneva: WIPO publication 2001, p. 26.

³¹ Patendiseadus. Entered into force on 23.05.1994. – RT I 1994, 25, 406; 2009, 4, 24 (in Estonian). Unofficial translation available at <http://www.legaltext.ee> (7.03.2009).

³² Statistical data available at http://www.epa.ee/client/default.asp?wa_id=525&wa_object_id=1&wa_id_key= (19.01.2009).

³³ See Communication from the Commission to the European Parliament and the Council. Enhancing the patent system in Europe – COM(2007) 165, 3.04.2007.

³⁴ See B. Andersen, S. Konzelmann. In search of a useful theory of the productive potential of intellectual property rights. – Research Policy 2008 (37), pp. 12–28.

³⁵ W. Cornish, D. Llewelyn (Note 11), p. 8.

³⁶ Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions. Putting knowledge into practice: A broad-based innovation strategy for the EU – COM(2006) 502, 13.09.2006, p. 7.

3. Increasing the comprehensibility and consistency of IP legislation

It has been explained in the legal literature that the success of regulation depends on that regulation's comprehensibility.³⁷ Ambiguous and contradictory regulations could lead to high transaction costs, which might hinder entrepreneurship and innovation. Furthermore, considering that the majority of Estonian entrepreneurs are SMEs with limited resources, the legislator should provide standard regulations to address situations wherein companies have not concluded detailed IP-related contracts. Absence of clear and sufficient regulations serves as good grounds for legal disputes, which divert resources from companies' core business.

The need to analyse the consistency of Estonian IP regulations with the rest of private law was already being emphasised by Estonian lawyers in 2006.³⁸ The author agrees with their argument and adds that there is also a need for some unification within the IP system itself. For instance, the legal status of IP created within an employment relationship should not depend on whether this is a design, invention, or copyright-protected work.³⁹ At the same time, it is necessary to bear in mind that knowledge protected by IP rights is often exploited in regional and global markets. Some IP instruments (e.g., European patents, Community trademarks, and designs) even though valid in Estonia are not 'products' of the Estonian national legal system. Consequently, initiatives to improve the existing IP system should not be limited to alignment of IP legislation with the rest of national law, including private law. The author argues that one of the main objectives of improvement of the Estonian IP system is to make it more user-friendly. Stakeholders of the IP system (entrepreneurs, consumers, the third sector, public institutions, academia, etc.) should be able to understand and utilise that system. To achieve this objective, fragmented and unsystematic efforts should be avoided. Currently, the Organisation of Research and Development Act⁴⁰ provides that "the Ministry of Economic Affairs and Communications shall organise technological development and innovation policy".⁴¹ It should be acknowledged that fostering innovation requires contributions from all public institutions and agencies. Of course, at the end of the day, it is up to Estonian entrepreneurs how well they can manage innovation and take advantage of the IP system.

The European Commission has suggested: "The assessment of the impact of regulation on innovation needs to be enhanced. Regulation should be predictable, flexible, simple and effective."⁴² This advice is especially valid for Estonia because the IP awareness of Estonian society (including entrepreneurs) is not very high and the majority of Estonian entrepreneurs are SMEs who have not acknowledged all of the possibilities that IP offers. The actions to be taken are twofold. Firstly, there is a continuous need to raise entrepreneurs' IP awareness and encourage them to actively use IP instruments (e.g., patents, utility models, designs, licensing and assignment of rights, and compulsory licensing). Secondly, the author shares the widespread opinion among Estonian IP experts that IP regulations should be clear, detailed, comprehensive, and even explanatory. The author believes that development of the legal framework for IP according to this approach could facilitate exploitation of the IP system. This section focuses on the last measure mentioned. There are a myriad of controversial issues that should also be addressed — for instance, procedural issues such as the compatibility of the obligation to provide information in action related to IP⁴³ set out by § 280 of the Code of Civil Procedure with the principle *nemo tenetur se ipsum accusare* provided by § 22 (3) of the Constitution of the Republic of Estonia.⁴⁴ The analysis in this article is for the most part limited to issues of clarity and consistency of regulation concerning exploitation of IP rights. The Estonian copyright, patent, and utility model regulations are used as examples.

³⁷ R. Narits. Õiguse entsüklopeedia (Encyclopaedia of Law). Juura, Õigusteabe AS 2002, p. 133 (in Estonian).

³⁸ M. Käerdi, R. Lang, J. Raidla, P. Varul, U. Volens. Ettevõtja õigus. Tegevuskava ettevõtjusealase õiguskeskkonna rahvusvahelise konkurentsivõime parandamiseks (Entrepreneurial Law. Action Plan for Improving the International Competitiveness of the Corporate Legal Environment). – *Juridica* 2006/4, p. 232 (in Estonian).

³⁹ This approach is also supported by Estonian IP professionals. See, e.g., J. Ostrat. Töösuhtes või muu lepingu täitmisel tehtud leiutise õigusliku reguleerimise probleem. Kas lepinguvabadus või eraldi seadus? (Problems in the Legal Regulation of an Employment-Relationship Invention. Freedom of Contract or a Separate Law?). – *Juridica* 2007/3, p. 198 (in Estonian).

⁴⁰ Teadus- ja arendustegevuse korralduse seadus. Entered into force on 2.05.1997. – RT I 1997, 30, 471; 2007, 12, 66 (in Estonian). Unofficial translation available at <http://www.legaltext.ee> (26.02.2009).

⁴¹ The Organisation of Research and Development Act § 13 (3) 1).

⁴² Putting knowledge into practice: A broad-based innovation strategy for the EU (Note 36), p. 6.

⁴³ Subsection 280 (1) of the Code of Civil Procedure provides: "If an action is filed due to an infringement or danger of infringement of copyright and related rights or industrial property rights, the court may require at the reasoned request of the plaintiff that the defendant or another person provide written information concerning the origin and distribution systems of the goods or services infringing a right arising from intellectual property". See *Tsiviilkohtumenetluse seadustik*. Entered into force on 1.01.2006. – RT I 2005, 26, 197; 2008, 59, 330 (in Estonian). Unofficial translation available at <http://www.legaltext.ee> (8.03.2009).

⁴⁴ Eesti Vabariigi põhiseadus. Entered into force on 3.07.1992. – RT 1992, 26, 349; 2007, 33, 210 (in Estonian). Unofficial translation available at <http://www.legaltext.ee> (7.03.2009).

The conclusion that it is almost impossible to challenge the legal validity of the protection of a work by copyright does not mean that there are not any problems related to the copyright regime. Besides issues concerning the subject matter of protection, other elements in the copyright system are crucial as well. For instance, the catalogue of rights vested in the author of a work and the possibilities for exercising these rights form a legal framework within which economic exploitation of a work takes place. The Copyright Act provides a general principle that “[a]n author shall enjoy the exclusive right to use the author’s work in any manner, to authorise or prohibit the use of the work in a similar manner by other persons”.⁴⁵ The Copyright Act, however, does not explain specific issues such as the possibility to transfer and license an unknown use of a work. Since the Copyright Act does not forbid or restrict it, because of the principle of freedom of contract⁴⁶, these agreements should be held to be valid. The IP-related literature supports the position that it is allowed to transfer and license the right to use a work in a manner that was unknown at the time of the conclusion of the contract.⁴⁷ Still, if we adhere to an approach whereby the Copyright Act must enhance awareness and be explanatory, a provision allowing transfer and licensing of an unknown use of a work could be added.

The exercise of the moral rights of an author and the interrelation of economic and moral rights is a problem requiring clear regulation. Some moral rights may interfere with the economic exploitation of a work.⁴⁸ The usual practice is that Estonian entrepreneurs do not always conclude detailed author’s contracts⁴⁹ that include provisions on the exercise of moral rights.

While economic rights are transferable⁵⁰, the same cannot be said of moral rights. The Copyright Act⁵¹ explicitly provides that “[t]he moral rights of an author are inseparable from the author’s person and non-transferable”.⁵² This provision gives rise to the question of whether it is possible to license the moral rights. The general understanding is that it indeed is allowed to license moral rights.⁵³ The wording of some provisions of the Copyright Act supports this approach.⁵⁴

From the above, it can be said that, presumably, it is possible to license at least some of the moral rights. Still many aspects of licensing of moral rights remain a controversial issue in the Estonian legal literature. For instance, H. Pisuke by referring to ‘ghost authorship’ and trademark issues⁵⁵ suggests that “for the purposes of Estonian law, moral rights cannot be assigned. However, it is possible to issue an exclusive licence and a non-exclusive licence for exercising any moral right”.⁵⁶ There are also opinions that differ from this. M. Rosentau poses the question of how to distinguish a general exclusive licence from transfer of the moral rights, the latter being forbidden. Therefore, he argues that it is not allowed to license the moral rights *in corpore et in genere*. It is essential to agree on how every single moral right will be exercised. Some moral rights are not licensable at all.⁵⁷ The author admits that licensing moral rights involves some degree of risk. This gives rise to questions such as what happens when there is a general exclusive licence for the exercise of the moral rights or no agreement exists in respect of the moral rights.

⁴⁵ The Copyright Act § 13 (1).

⁴⁶ The principle of freedom of contract is based on the right to free self-realisation which is guaranteed by § 19 of the Constitution of the Republic of Estonia.

⁴⁷ See A. Kalvi. Autorilepingu uus kuub (New Skin of Author’s Contracts). – *Juridica* 2003/4, pp. 251, 257 (in Estonian); P. Varul, I. Kull, V. Kõve, M. Käerdi. *Võlaõigusseadus II. Kommenteeritud väljaanne* (Law of Obligations Act II. Commented edition). Tallinn: Juura, Õigusteabe AS, 2007, p. 337 (in Estonian).

⁴⁸ Subsection 12 (1) of the Copyright Act defines the right of integrity of the work, the right of additions to the work and the right of supplementation of the work as moral rights. Pursuant to § 13 (1) of the Copyright Act the right of alteration of the work is an economic right. As seen there is an overlap of these rights.

⁴⁹ An author’s contract is defined as “an agreement between the author or his or her legal successor and a person who wishes to use the work for the use of a work on the basis of which the author or his or her legal successor transfers the author’s economic rights to the other party or grants to the other party an authorisation to use the work to the extent and pursuant to the procedure prescribed by the conditions of the contract”. See the Copyright Act § 48 (1).

⁵⁰ The Copyright Act § 11 (3).

⁵¹ Section 39 of the Constitution of the Republic of Estonia also provides the following principle: “[a]n author has the inalienable right to his or her work”. Literal interpretation of this section could mean that it is not allowed to transfer or license the moral and economic rights. This, however, is not the case. The problem has been analysed by H. Pisuke. See H. Pisuke. *Kas autori õigusi saab võõrandada?* (Are the Author’s Rights Inalienable?) – *Juridica* 1994/4, pp. 89–90 (in Estonian).

⁵² The Copyright Act § 11 (2).

⁵³ See, e.g., A. Kalvi (Note 47), p. 258; P. Varul, I. Kull, V. Kõve, M. Käerdi (Note 47), p. 337; H. Pisuke. *Moral Rights of Author in Estonian Copyright Law*. – *Juridica International* 2002 (7), p. 170.

⁵⁴ See the Copyright Act §§ 12 (1) 3) and 4).

⁵⁵ H. Pisuke refers that sign marks usually do not contain any reference to the authors who created them.

⁵⁶ H. Pisuke (Note 53), pp. 170–171.

⁵⁷ M. Rosentau. *Intellektuaalse omandi õigused infotehnoloogias. Autori isiklikud õigused* (Intellectual Property Rights in Information Technology. The Moral Rights of the Author). – *Juridica* 2007/9, pp. 653–654 (in Estonian).

The author is of the opinion that there are some safety net provisions that can be used in the above described situations. Subsection 370 (3) of the Law of Obligation Act⁵⁸ provides: “If the right of use to which a licence agreement extends is not clearly specified in the agreement, the extent of the right of use shall be determined pursuant to the objective of the agreement.” According to the Estonian legal literature, the above-mentioned provision might be applicable to moral rights as well.⁵⁹ It could also be assumed that if an author had given someone else his permission to use his work, for instance, as a logo incorporated into a trademark, and were to claim afterwards that this use violates his moral rights (e.g., his name not being attached to the trademark violates his right of authorship), then his conduct could be considered to go against the principle of good faith (the prohibition of *venire contra factum proprium*).

M. Rosentau proposes that the overlap of some moral and economic rights should be removed.⁶⁰ The current position of the Estonian Ministry of Culture, which is responsible for drafting the new Copyright and Neighbouring Rights Act, seems to be that the right of integrity of the work, the right of additions to the work and the right of supplementation of the work will be moved to the catalogue of the economic rights.⁶¹ The author supports both suggestions and is also of the opinion that it should be provided *expressis verbis* that all moral rights which concern exploitation of a work are licensable. This would certainly enhance legal certainty.

The lack of legal certainty is not common only for copyright law. The same problems exist in Estonian industrial property law as well. The Patent Act and the Utility Models Act⁶² do not provide regulation concerning how two or more patent or utility model owners can exercise their rights (if together, separately, or some rights together and others separately). Some Estonian patent law experts have suggested that, because of unity of invention (an invention is an indivisible whole), joint owners of a patent or utility model should exercise their rights together. It is not excluded that law should be amended to entitle every patent or utility model owner to the right to issue non-exclusive licences. Preferably, however, these issues should be regulated by joint owners in a contractual relationship.⁶³ Still the author would like to emphasise that, especially in respect of utility models, which are often utilised by SMEs, there could be some standard dispositive regulation. Even though in the absence of a detailed contract the principle of analogy and provisions on interpretation of a contract etc. could be applied the rights and obligations of joint patent or utility model owners remain unclear. Therefore, a dispositive regulation is needed that would determine how joint patent or utility model owners could exercise their rights.

The possibilities for exercising the rights of an inventor are not very clearly set out either. Subsection 13 (9) of the Patent Act provides that “[t]he proprietary rights of an author are transferable and inheritable”. On the basis of this principle, it could be assumed that the right of an inventor “to receive fair proceeds from the profit received from the invention”, as provided by § 13 (8) of the Patent Act, is freely transferable. However, § 43 (1) of the Patent Act sets out that a contract transferring the right to apply for a patent “shall contain provisions which ensure, pursuant to § 13 (8), the right of the author to receive fair proceeds from the profit received from the invention during the entire period of validity of the patent”.⁶⁴ This requirement creates legal uncertainty. On the one hand, the right to receive fair proceeds from the profit received from the invention is a proprietary right and therefore transferable. On the other hand, the wording of § 43 (1) of the Patent Act prescribes that a contract transferring the right to apply for a patent has to ensure an inventor’s right to fair proceeds from the profit received from the invention. The author of this paper suggests that, in order to avoid legal disputes and foster exploitation of the patent system and thereby innovation, it should be clearly provided that the right to fair proceeds from the profit received from the invention is transferable. Subsection 43 (1) of the Patent Act should be amended to comply with the principle of transferability of the proprietary rights.

The format requirements for IP contracts (contracts related to licensing or transfer of IP rights) involve practical issues concerning copyright and industrial property regimes alike. The Copyright Act, the Patent Act, the Utility Models Act, and the Industrial Design Protection Act⁶⁵ require a written licence agreement.⁶⁶ The Trade Marks Act⁶⁷ does not prescribe format requirements for licence agreements. Despite the fact that licence agreements are essential tools for the utilisation of IP, written form is not always used. Subsection

⁵⁸ Võlaõigusseadus. Entered into force on 1.07.2002. – RT I 2001, 81, 487; 2008, 59, 330 (in Estonian). Unofficial translation available at <http://www.legaltext.ee> (14.02.2009).

⁵⁹ A. Kalvi (Note 47), p. 258.

⁶⁰ M. Rosentau (Note 57), p. 666.

⁶¹ Isiklike õiguste kataloog (The Catalogue of the Moral Rights). Available at <http://wp.kul.ee/> (14.06.2009).

⁶² Kasuliku mudeli seadus. Entered into force on 23.05.1994. – RT I 1994, 25, 407; 2008, 59, 330 (in Estonian). Unofficial translation available at <http://www.legaltext.ee> (19.02.2009).

⁶³ The author’s personal communication with R. Kartus (e-mail, 11.02.2009).

⁶⁴ The Utility Models Act provides the same regulation. See the Utility Models Act §§ 12, 40.

⁶⁵ Tööstusdisaini kaitse seadus. Entered into force on 11.01.1998. – RT I 1997, 87, 1466; 2008, 59, 330 (in Estonian). Unofficial translation available at <http://www.legaltext.ee> (19.02.2009).

⁶⁶ The Copyright Act § 49 (1), the Patent Act § 46 (1), the Utility Model Act § 43 (1); the Design Act § 74 (7).

⁶⁷ Kaubamärgiseadus. Entered into force on 1.05.2004. – RT I 2002, 49, 308; 2006, 61, 456 (in Estonian). Unofficial translation available at <http://www.legaltext.ee> (19.02.2009).

83 (1) of the General Part of the Civil Code Act^{*68} provides that “[u]pon failure to comply with the format provided for a transaction by law, the transaction is void unless otherwise provided by law or the objective of the format requirements”. The Estonian Supreme Court has found that an author’s contract authorising the use of a work is not void on account of not having been concluded in writing. The requirement of written form protects both parties by ensuring legal certainty in respect of the rights and obligations. However, declaring oral author’s contracts void would be harmful for authors because they would lose their rights and the other parties would be freed from their obligations.^{*69} The author is of the opinion that the impact of the Supreme Court’s decision is not limited to copyright licence agreements. In principle, it should be applicable to technology and design licence agreements as well. Since entrepreneurs do not always conclude written IP contracts, the author proposes that IP laws should be changed to allow oral non-exclusive licences. Depending on the type (e.g., licensing or transfer of the rights) and object (e.g., a work, an invention, a design, or trade secrets) of the IP contract, format requirements can be differentiated. Any approach that may be chosen, however, should be consistent.

Format requirements are only one facet of problems related to IP contracts. It has also been suggested that IP contracts require a consistent conceptual framework, the legal status of the industrial property registers has to be specified, and regulations concerning similar issues should be unified.^{*70} All of the issues raised require thorough and extensive analysis.

4. Enhancement of flexibility and appropriateness of IP limitations

One of the main objectives of IP limitations is to strike a balance between the interests of the stakeholders of the IP system. This means avoiding blocking of the development of new useful products, ensuring the free movement of goods, allowing private use, etc. It is possible to distinguish among several types of limitations. Firstly, the definition of protectable subject matter (e.g., the scope of protection can be narrow or wide, and some information may even be excluded from protection) and also the catalogue, extent, and duration of exclusive rights have an impact on a right holder’s legal position.^{*71} Secondly, there are explicitly provided limitations existing within IP systems (e.g., a private use exception). Thirdly, the limitations can also originate from outside the IP system (e.g., competition law concepts to avoid abuse of dominant position). All of these limitations constitute an integral part of the IP system.

The author’s approach is based on the assumption that strong IP regimes (those with a broad scope of protection, extensive rights, few limitations, harsh sanctions, etc.) do not necessarily enhance innovation. Extensive IP limitations could facilitate innovation as well. The design of the IP system should be determined by general and country- and region-specific requirements. A general question that needs to be answered is what kind of IP system would enhance innovation the most. In addition, the IP system should not ignore country- and region-specific conditions (e.g., stage of development). At least wealthy and developed countries have not done this.^{*72} Although Estonia is bound by international obligations, there might be some room for manoeuvring without infringing these obligations. The author takes no stand on whether Estonia should favour a high or low level of IP protection. Probably the approach should be differentiated on the basis of the specific IP regime concerned, the subject of protection, etc. Sometimes extra incentives are created to encourage development of knowledge.^{*73}

⁶⁸ Tsiviilseadustiku üldosa seadus. Entered into force on 1.07.2002. – RT I 2002, 35, 216; 2008, 59, 330 (in Estonian). Unofficial translation available at <http://www.legaltext.ee> (19.02.2009).

⁶⁹ CCSCd, 13.12.2006, 3-2-1-124-06, paragraph 16. – RT III 2006, 47, 397.

⁷⁰ V. Kõve. *Varaliste tehingute süsteem Eestis (System of Proprietary Transactions in Estonia)*. Doctoral thesis. Supervisor Professor I. Kull (2009), p. 226. Available at <http://dspace.utlib.ee/dspace/bitstream/10062/8251/1/k%C3%B5vevillu.pdf> (8.07.2009).

⁷¹ W. Cornish and D. Llewelyn regard protectable subject-matter and the rights conferred as core components of IP system: “As a regime is developed for protecting a form of intellectual property a number of basic decisions have to be made: What types of subject-matter are to be included? Is the right to be conferred only upon application to a government office? How long is it to last? Is it to be a right good only against imitators (as with copyright and unregistered designs), or is it a “full monopoly” that even affects independent devisers of the same idea (as with patents for inventions, registered designs and trade marks)?” See W. Cornish, D. Llewelyn (Note 11), p. 12.

⁷² According to S. Salazar “[t]he exclusion of chemicals from patentability occurred for the first time in history in a German law of 1877. The reasons given at the time were that it was necessary to reinvigorate an industry that was lagging behind its counterparts in other countries. Even before that, a French law of 1844 had expressly excluded pharmaceutical chemicals from patentability. [...] It is said that, once they had achieved a certain level of development of their pharmaceutical industries, the developed countries amended their legislation to extend patent protection to pharmaceutical products. What is certain is that it was not until 1960 that France introduced protection, with Germany following in 1968, Italy in 1978, and Japan and Switzerland in 1976 and 1977 respectively”. See S. Salazar. *Intellectual Property and the Right to Health*, p. 8. Available at <http://www.wipo.int/tk/en/hr/paneldiscussion/papers/pdf/salazar.pdf> (12.03.2009).

⁷³ See, e.g., Regulation (EC) No. 141/2000 of the European Parliament and of the Council of 16 December 1999 on orphan medicinal products. – OJ L 18, 22.01.2000, pp. 1–5.

In this section of the paper, the author analyses some key issues that have to be considered when one designs a set of IP limitations that are intended to enhance innovation. The author's approach is based on two postulates. Firstly, the IP system is in essence a constantly changing dynamic system. This also has implications for the IP limitations. Secondly, the overlap of IP regimes (e.g., the same object can be protected as a work, design, or trademark) has to be considered in the design of limitations.

The IP system is undergoing transformation due to several circumstances.^{*74} Among other factors, the extension of the IP system plays an important role. Broadening of the subject matter of IP protection has been a characteristic feature of the IP system since its inception.^{*75} In addition to the extension of protectable subject matter (to encompass software, biotechnological inventions, domain names, *sui generis* databases, etc.), the inherent tendency toward expansion of the IP system applies to the catalogue of rights as well (e.g., the list of an author's economic rights^{*76} was supplemented with the right of making the work available to the public^{*77}). Also, the term of protection has continuously been extended.^{*78} According to P. Drahos, "[t]he strongly expansionary nature of IP systems shows no sign of changing".^{*79} Consequently, the concept of IP limitations cannot ignore the dynamic nature of IP systems.

It has been emphasised that "[b]efore the WTO TRIPS Agreement^{*80} was signed, states were free to determine what would or would not be patentable within the country. [...] The patenting of essential goods such as medicines and foods was for a long time thought to be self-evidently against the public interest".^{*81} Setting a general standard on an international level, the TRIPS Agreement requires that patents be available for all inventions, whether products or processes, in all fields of technology.^{*82} The TRIPS Agreement explicitly provides that exclusion of micro-organisms from patentability is not allowed.^{*83} Article 1 of the directive on biotechnological inventions^{*84} obliges the EU's member states to protect biotechnological inventions under national patent law, and Recital 11 emphasises the importance of the patent system for encouraging research in biotechnology.

This course of action has raised several ethical^{*85} and practical concerns. W. Cornish and D. Llewelyn have noted that "each type of subject-matter calls for a different balance of public and private interests — the interests of the society as a whole in its economic and cultural development, and interest of the individual to secure a 'fair' value for his intellectual effort or investment of capital or labour".^{*86} Opinions have been expressed also that concern the issues of drug patents specifically. It has been suggested that the patent protection of pharmaceuticals "is a subject with strong social connotations: it touches on areas as sensitive as health and man's quality of life, even his survival".^{*87} In addition, M. A. Heller and R. S. Eisenberg have pointed out that "the lack of substitutes for certain biomedical discoveries (such as patented genes or receptors) may increase the leverage of some patent holders, thereby aggravating holdout problems".^{*88}

Various suggestions have been put forth for addressing this issue. For instance, W. Kingston has expressed an opinion that patents are unsuitable for biotechnology, for a variety of reasons (monopolisation of life science,

⁷⁴ L. Davis describes the following trends which have affected IP: growing prominence of intangible assets as sources of competitive advantage, globalization of business activities, advances in digital technologies of replicability and transferability, and changes in the regulatory framework governing intellectual property rights. See L. Davis. *The Changing Role of Intellectual Property Rights. – Economics of Innovation and New Technology* 2004 (13) 5, pp. 401–404.

⁷⁵ See P. Drahos (Note 11), p. 1; W. Cornish, D. Llewelyn (Note 11), p. 34.

⁷⁶ The Copyright Act § 13.

⁷⁷ H. Pisuke characterises the right of making the work available to the public as an Internet environment right. See H. Pisuke. *Autoriõiguse alused (Copyright Basics)*. Tallinn 2006, p. 41 (in Estonian).

⁷⁸ E.g., Council Regulation (EEC) No. 1768/92 of 18 June 1992 concerning the creation of a supplementary protection certificate for medicinal products. – OJ L 182, 2.07.1992, p. 1–5; Regulation (EC) No. 1610/96 of the European Parliament and of the Council of 23 July 1996 concerning the creation of a supplementary protection certificate for plant protection products. – OJ L 198, 8.08.1996; Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights. – OJ L 290, 24.11.1993, p. 9–13.

⁷⁹ P. Drahos (Note 11), p. 1.

⁸⁰ Agreement on Trade-related Aspects of Intellectual Property Rights. Marrakech, 15.04.1994, entered into force on in respect to Estonia 13.12.1999. – RT II 1999, 22, 123.

⁸¹ P. Boulet, C. Garrison, E. 't Hoen. *Drug Patents under the spotlight. Sharing practical knowledge about pharmaceutical patents* (2003), p. 5. Available at http://www.who.int/3by5/en/patents_2003.pdf (11.03.2009).

⁸² TRIPS Article 27 (1).

⁸³ TRIPS Article 27 (3) b).

⁸⁴ European Parliament and Council Directive 98/44/EC of 6 July 1998 on the legal protection of biotechnological inventions. – OJ L 213, 30.07.1998, 13.

⁸⁵ For further discussion, see A. Kelli. *Some Issues of Intellectual Property and Ethics — Recent Developments in IP Law*. Kraków: Wolters Kluwer Polska 2007, pp. 153–165.

⁸⁶ W. Cornish, D. Llewelyn (Note 11), p. 12.

⁸⁷ S. Salazar (Note 72), p. 8.

⁸⁸ M. A. Heller, R. S. Eisenberg. *Can Patents Deter Innovation? The Anticommons in Biomedical Research*. – *Science* 1998 (280), p. 700.

blocking, and difficulties in determining the type of funding: public or private).^{*89} Recital 2 of the directive on biotechnological inventions, on the other hand, emphasises that “in the field of genetic engineering, research and development require a considerable amount of high-risk investment and therefore only adequate legal protection can make them profitable”. The author is of the opinion that there is no simple solution to the problems described. For the most part, the success of an IP system in fostering innovation depends on the co-operation among the stakeholders of that IP system. There are also legal instruments such as competition law and compulsory licensing that can be used to address problems caused by non-co-operative behaviour.

It is commonplace for one product to be protected by several patents, designs, trademarks, copyrights, secret know-how, etc. Furthermore, several IP instruments could be used to establish control over the same knowledge. Therefore, it is crucial to ensure that these aspects all are considered in the design of IP limitations.^{*90} The copyright, design, trademark, and patent regimes are used as examples.

It is possible for the same object to be protected as a work, design, and trademark. The illustrative list of works protected by copyright includes works of design and fashion design.^{*91} Subsection 2 (3) of the Industrial Design Protection Act provides that “[t]he legal protection of industrial designs provided for in this Act is independent of the protection provided for in the Copyright Act”. The Trade Marks Act requires the author’s consent if a work is to be protected as a trademark.^{*92} The problem is that every IP regime (among them copyright, design, and trademark) has its own set of limitations, which is not necessarily coherent with those of the other regimes. For instance, a trademark owner has no right to prohibit other persons from using the trademark to indicate the intended purpose of a product.^{*93} The Copyright Act does not explicitly provide this kind of limitation. The problem described is not merely of a theoretical nature. The *Dior v. Evora* case^{*94} also involved a question of cumulative protection of trademarks containing pictures by the trademark and copyright regimes. The court held that “the protection conferred by copyright as regards the reproduction of protected works in a reseller’s advertising may not, in any event, be broader than that which is conferred on a trademark owner in the same circumstances”.^{*95}

There is an overlap of patent and design protection as well. This means that the same technical solution can be protected by both patent and design regimes. M. Schlötelburg explains that “[t]he close relation between design and function is, however, common knowledge (‘form follows function’) and established practice. [...] Supplementary protection of an invention by a design in addition to a patent can be achieved in a fast and cost-efficient way by using the figures contained in the patent application for the design registration”.^{*96} The possibilities for protecting a technical solution as a design are limited. It has been emphasised that “design law is only applicable to patentable matter where the invention has materialised in a specific product. The design law does not allow protection of ideas, concepts, or methods. A design right can only provide protection for a concrete embodiment of an apparatus claim or a well-defined product achieved with a method claim”.^{*97} Article 7 (1) of the directive on the legal protection of designs^{*98} sets an additional requirement that “[a] design right shall not subsist in features of appearance of a product which are solely dictated by its technical function”. According to the opinion of Ruiz-Jarabo Colomer, “a functional design may, none the less, be eligible for protection if it can be shown that the same technical function could be achieved by another different form”.^{*99} This reasoning is supported by the EU documents^{*100} and theoretical literature.^{*101} A relevant issue has been raised that it is possible to obtain a monopolistic position over a technical solution by registering all of its materialisations as designs.^{*102}

⁸⁹ W. Kingston. *Unlocking the Potential of Intellectual Property*. – O. Granstrand. *Economics, Law and Intellectual Property. Seeking Strategies for Research and Teaching in a Developing Field*. Boston/Dordrecht/London: Kluwer Academic Publishers 2003, p. 314.

⁹⁰ The need to analyse the existing system of IP limitations from a holistic perspective has been acknowledged by IP experts. See A. Kur. *Differentiated Approach Based on Unitary Ground — A Feasible Approach?* Available at http://www.iprinfo.com/tiedostot/Netti1_Kur.pdf (13.06.2009).

⁹¹ The Copyright Act § 4 (3) 16).

⁹² The Trade Marks Act § 10 (2).

⁹³ The Trade Marks Act § 16 (1) 4).

⁹⁴ Case C-337/95 (*Parfums Christian Dior SA and Parfums Christian Dior BV v. Evora BV*). – ECR 1997, p. I-06013.

⁹⁵ *Ibid.*, paragraph 58.

⁹⁶ M. Schlötelburg. *Design protection for technical products*. – *Journal of Intellectual Property Law & Practice* 2006 (1) 10, p. 675.

⁹⁷ *Ibid.*, p. 676.

⁹⁸ Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs. – OJ L 289, 28.10.1998, pp. 28–35.

⁹⁹ Opinion of Mr. Advocate-General Ruiz-Jarabo Colomer delivered on 23 January 2001, Case C-299/99 (*Koninklijke Philips Electronics NV v. Remington Consumer Products Ltd.*). – ECR 2002, p. I-05475, paragraph 34.

¹⁰⁰ The Commission of the European Communities. *Green Paper on the Legal Protection of Industrial Design*. Working document of the services of the Commission. III/F/5131/91-EN, June 1991, p. 60; The Commission of European Communities. *Amended proposal for a European Parliament and Council directive on the legal protection of designs* – COM(1996) 66, 21.02.1996, p. 7.

¹⁰¹ G. Tritton. *Intellectual Property in Europe*. 3rd ed. London: Sweet & Maxwell 2008, p. 573; WIPO. *WIPO Intellectual Property Handbook: Policy, Law and Use*. Geneva: WIPO publication 2001, p. 114; M. Schlötelburg (Note 96), p. 677.

¹⁰² G. Tritton (Note 101), p. 573; W. Cornish, D. Llewelyn (Note 11), p. 579.

It has been suggested that “[b]ecause overlapping protection presents a variety of challenges to the IP system, disrupts the IP balance, and impoverishes the public domain, we should work to eliminate the overlaps that do exist and, perhaps more importantly and more realistically, attempt to avoid creating overlaps in the future”.^{*103} In principle the author agrees with this suggestion. However, since it is very hard to avoid overlapping protection then the re-conceptualisation of the existing limitations could also be of help. The author does not argue that it is absolutely necessary to introduce several new limitations. Recommendable among the first actions is to analyse the exact scope of the existing limitations and determine whether they are applicable to cases of overlapping protection. For instance, in *Dior vs. Evora* case the court extensively construed the principle of exhaustion of rights by saying that “when trade-marked goods have been put on the Community market by the proprietor of the trademark or with his consent, a reseller, besides being free to resell those goods, is also free to make use of the trademark in order to bring to the public’s attention the further commercialization of those goods”.^{*104} It has also been suggested that “increasing dynamism of technical development and frequency of overlaps will call for “creative interpretation” of the law in any case”.^{*105}

In addition, two further elements remain to be considered. Firstly, the design of the national IP system cannot disregard international and regional legal instruments. The author is of the opinion that Estonia has not taken advantage of all flexibilities found in international IP instruments. For instance, only recently was the Patent Act amended to include provisions on public non-commercial use of invention (§ 47¹).^{*106} Secondly, since IP lawmaking is to a large extent moving into regional and international arenas, perhaps it is more appropriate to take the necessary steps for adopting the necessary limitations in those arenas.

5. Conclusions

The global economic downturn is not the only challenge that Estonia has to face. The problem is that the Estonian economy is not as advanced as the economies of many other European countries. This makes the current economic situation especially difficult. A possible solution could be for Estonian entrepreneurs to focus on the development of innovative and competitive services and products. In this article, the author has explored some possible improvements of the IP system that could enhance innovation in Estonia.

The author presumes that the utilisation of IP is facilitated when the legal validity of protection is not easily challenged and the subject matter of IP protection is clearly defined. In respect of the copyright system, the author concludes that it is very hard to challenge protection of a work by copyright. However, the exact scope of copyright protection can occasion disputes and there is a need to develop capabilities in conducting expert assessments related to issues such as whether a work constitutes an unlawful reproduction of work(s) created by other authors. Measures should be taken by authors to provide ability to prove authorship.

In respect of the patent system, the author has concluded that, although inventions are protected through patenting procedure, there is no guarantee that a granted patent cannot be invalidated or the scope of its protection disputed. The risks created by the possibility of a patent being invalidated or its scope of protection being narrowed have to be managed by means of detailed contracts.

In neither case does the author recommend amendment of the law. Raising the IP awareness of Estonian entrepreneurs could have a better effect for business. Entrepreneurs have to enhance their skills to contractually manage IP-related risks.

The consistency of Estonian IP regulations with the rest of private law is important. Still it is necessary to bear in mind that knowledge protected by IP rights is often exploited in regional and global markets. Some IP instruments, such as European patents and Community designs, are not ‘products’ of the Estonian national legal system. Consequently, initiatives to improve the existing IP system should not be limited to alignment of IP legislation with the rest of national law, including private law. The author has argued that one of the main objectives of improvement of the Estonian IP system is to make it more user-friendly for Estonian entrepreneurs by increasing its comprehensibility and through provision of standard regulations to be applied in cases where the parties have not concluded detailed contracts. Measures to encourage Estonian entrepreneurs’ active use of IP instruments should be initiated.

As a result of the analysis of the legal framework determining the possibilities for exercise of an author’s exclusive rights, the author of this article arrived at two conclusions. Firstly, if we adhere to an approach by

¹⁰³ V. Moffat. *Mutant Copyrights and Backdoor Patents: The Problem of Overlapping Intellectual Property Protection*. – Berkeley Technology Law Journal 2004 (19), p. 1530.

¹⁰⁴ *Parfums Christian Dior SA and Parfums Christian Dior BV v. Evora BV*, paragraph 2 of the operative part.

¹⁰⁵ A. Kur (Note 90).

¹⁰⁶ Tööstusomandi õiguskaitsset reguleerivate seaduste ja nendega seonduvate seaduste muutmise seadus. Entered into force on 1.03.2009. – RT I 2009, 4, 24 (in Estonian).

which the Copyright Act must enhance awareness and be explanatory, provisions on permissibility of transfer, on licensing an unknown use of a work, and on similar matters should be added. Secondly, considering problems related to the moral rights, the author supports the position that the overlap of some moral and economic rights has to be removed by narrowing the scope of the moral rights. It should be provided *expressis verbis* that all moral rights which concern exploitation of a work are licensable. This would certainly enhance legal certainty.

The lack of legal certainty is not only common for copyright law. Similar problems exist in Estonian industrial property law as well. For instance, the Patent Act and the Utility Models Act are silent about how joint patent or utility model owners can exercise their rights (for instance, if together, separately, or some rights together and others separately). Although in the absence of a detailed contract the principle of analogy and provisions on interpretation of a contract, etc. could be applied, the rights and obligations of joint patent or utility model owners remain unclear. Therefore, a standard dispositive regulation is needed that would determine how joint patent or utility model owners could exercise their rights.

The author also proposes that, in order to comply with the principle of transferability of economic rights and avoid legal uncertainty, it should be clearly provided that an inventor's right to fair proceeds from the profit received from the invention is transferable.

Format requirements for IP contracts are a practical issue concerning copyright and industrial property regimes alike. The author proposes that IP laws should be changed to allow oral non-exclusive licences. Depending on the type (e.g., licensing or transfer of the rights) and object (e.g., a work, invention, design, or trade secret) of IP contracts, format requirements can be differentiated. Any approach chosen, however, should be consistent.

On the basis of the analysis of flexibility and appropriateness of IP limitations, the author proposes that strong IP regimes do not necessarily enhance innovation. Equally, extensive IP limitations could facilitate innovation. The design of IP systems should be determined by general and country- and region-specific requirements.

The author suggests that a need to review the existing IP limitations is created in consequence of two factors. Firstly, the IP system is a constantly changing dynamic system. For instance, the area subject to IP protection is becoming broader. Intellectual property limitations that are appropriate and proportionate in one phase of development are not necessarily so in another phase. Secondly, the current tendency is for IP regimes to overlap, which means that a technical solution can be patented and also its appearance protected as a design. In addition, it is usual that many different IP rights are attached to a single product. Consequently mechanisms are needed to reduce the possibilities of abuse of the IP system (use of exclusive rights to block development of new products, problems of excessive pricing, etc.). The problem is that every IP regime has its own set of limitations, which does not necessarily match the other regimes. The author does not argue that it is absolutely necessary to introduce several new limitations. Among the first actions to be taken it is recommendable to analyse the precise scope of the existing limitations and determine whether they are applicable to cases of overlapping protection.