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Copyright in the Constitutional Spectrum

The applicable Constitution of the Republic of Estonia¹ contains a separate provision concerning the protection of the rights of authors. A similar provision was not included in the 1920 Constitution of the Republic of Estonia², in the 1933 Constitution Amendment Act³ and in the 1937 Constitution.⁴ Thus, the contemporary legislator emphasises the importance of the constitutional protection of the legal status of authors.

According to § 39 of the Constitution, “An author has the inalienable right to his or her work. The state shall protect the rights of the author”. This provision has been subject to criticism⁵, as its wording in Estonian is ambiguous. The author of this article agrees to the above-mentioned criticism. For criticism, the Constitutional Expert Commission⁶ has proposed that this clause be amended.⁷ Regardless of the criticism, the author of this article considers it important to discuss some of the aspects related to § 39 of the Constitution.

Section 39 of the Constitution serves as the basis upon the adoption of laws protecting the rights of authors. With regard to the topic of this article, the most important of these laws is the Copyright Act.⁸ Nevertheless, § 39 of the Constitution is not the only provision that serves as the foundation of the Copyright Act. The relation of the Copyright Act to the other provisions of the Constitution arises from the purpose of the Copyright Act.

The objective of this article is to analyse § 39 of the Constitution and the purpose of the Copyright Act in relation to the other provisions of the Constitution.

The circumstances related to industrial property are pointed out in this article insofar as it is necessary.

¹ Eesti Vabariigi põhiseadus (The Constitution of the Republic of Estonia). Adopted 28 June 1992. – Riigi Teataja toimetuse väljaanne. Tallinn, 1994. In English available at: <http://www.legaltext.ee>.

² Eesti Vabariigi põhiseadus (The Constitution of the Republic of Estonia). Adopted 15 June 1920. – Riigi Teataja (The State Gazette) 1920, 113/114 (in Estonian).

³ Eesti Vabariigi põhiseaduse muutmise seadus (The Constitution of the Republic of Estonia Amendment Act). Adopted 14–16 October 1933. – Riigi Teataja (The State Gazette) 1933, 86, 628 (in Estonian).

⁴ Eesti Vabariigi põhiseadus (The Constitution of the Republic of Estonia). Proclaimed 17 August 1937. – Riigi Teataja (The State Gazette) 1937, 71, 590 (in Estonian).

⁵ See H. Pisuke. Kas autori õigusi saab võõrandada? (Are Author's Rights Alienable?) – *Juridica*, 1994, No. 4, pp. 89–90 (in Estonian).

⁶ Set up by an order of the Estonian Government in 1996. – See H. Pisuke. Developments in Estonian Intellectual Property Law: Some Issues Concerning Copyright and Related Rights. – *Juridica International*, No. 4, 1999, p. 167.

⁷ See H. Pisuke (Note 5), p. 167.

⁸ Autoriõiguse seadus (The Copyright Act). – Riigi Teataja (The State Gazette) 1992, 49, 615, consolidated text Riigi Teataja (The State Gazette) I 2000, 16, 109, amendments Riigi Teataja (The State Gazette) I 2000, 78, 497; 2001, 50, 289; 56, 335 (in Estonian). In English available at: <http://www.legaltext.ee>.

1. Author's inalienable right to his or her work in Constitution

It has been noted in the final report⁹ of the Constitutional Expert Commission and professional literature^{*10} that the purpose of § 39 of the Constitution is the protection of the rights of authors as *lex specialis* in respect of the provision concerning the legal protection of property provided by the Constitution (§ 32). It follows from this that in order to protect the rights of the author on the basis of § 39 of the Constitution, the rights must be economically valuable.^{*11}

The author of this article cannot fully agree to the assertion that the rights of the author must be definitely valued economically to be protected. To reason the proposition, the wording of § 39 of the Constitution, its relation to § 32 and other related issues will be analysed in greater detail below. The analysis takes account of the fact that the provisions of the Constitution are of a very high level of abstraction and thus serve as descriptions of certain attempts and value decisions rather than classical legal provisions^{*12}, and they may be ambiguous.^{*13} When analysing § 39 of the Constitution, the final report of the Constitutional Expert Commission has been taken as the basis, according to which, first of all, the elements of this section must be defined.

Section 39 of the Constitution consists of two elements: the area of protection of the fundamental right and its restriction or interference. The area of protection of the fundamental right is divided into a substantial and personal one.^{*14} In the substantial area of protection of § 39 in the final report of the Constitutional Expert Commission, a very ambiguous reference is made both to the author and work. According to the theory, serving as the basis for the final report, the substantial area of protection of the right consists in the activity, characteristic or status of the bearer of the fundamental right. Proceeding from the above, the author may be present in the meaning of the status (or also the characteristic) and the work as the outcome of the activities of the bearer of the rights. In comparison, the final report of the Constitutional Expert Commission refers to the right of ownership as a general constitutional proprietary right as the substantial area of protection of § 32 (protection of property). Thus, in the final report, the substantial areas of protection of §§ 39 and 32 of the Constitution differ. Due to the marked differences of the substantial area of protection it is difficult to reason that § 39 of the Constitution is *lex specialis* in respect of § 32.

Nevertheless, proceeding from the opinion that § 39 of the Constitution is *lex specialis* in respect of § 32, it would be logical if the substantial area of protection of § 39 similarly consisted in the rights of the author as the relevant proprietary benefit. In order to identify what actually constitutes the substantial area of protection of § 39 of the Constitution, three notions — author, works and the rights of the author — require a closer analysis. Here it is taken into account that the Constitution has its own system of notions that belongs to the domain of constitutional law.^{*15} Consequently, the notions set out in the Constitution may differ both from the notions set out in other laws and used in general language.

1.1. Author

It has been pointed out in literature that the term “author” used in the Constitution signifies the authors of literary, artistic and scientific works (including computer programmes), performers, and the authors of creations works protected as industrial property (inventors, *etc.*)^{*16}, that is, a person engaging in intellectual creation or interpretation in any field. In addition, the Constitution includes among authors those persons who may legally hold the economic rights related to works.^{*17} The latter also include representatives of the copyright industries, such as publishers, music industry, film industry, software industry, *etc.*

⁹ The final report of the Constitutional Expert Commission. Available at: <http://www.just.ee/>: õigusloome>põhiseadus (in Estonian).

¹⁰ T. Annus. Riiğiõigus (Constitutional Law). Tallinn: Õigusteabe AS Juura, 2001, p. 253 (in Estonian).

¹¹ The final report of the Constitutional Expert Commission (Note 9).

¹² See R. Maruste. Põhiseadus ja selle järelevalve (Constitution and Its Supervision). Tallinn: Õigusteabe AS Juura, 1997, pp. 10–11 (in Estonian).

¹³ T. Annus (Note 10), p. 43.

¹⁴ The final report of the Constitutional Expert Commission (Note 9).

¹⁵ See R. Maruste (Note 12), pp. 145–146.

¹⁶ H. Pisuke (Note 5), p. 89.

¹⁷ The final report of the Constitutional Expert Commission (Note 9).

Such treatment of the author coincides with the approach to the personal area of protection of § 39 provided in the final report of the Constitutional Expert Commission, which refers both to natural and legal persons. The extendibility of § 39 of the Constitution both to natural and legal persons is also confirmed by the fact that the rights of the author provided by the section can be regarded as everyone's rights.^{*18}

Consequently, the meaning of the author in the Constitution is wider than in the copyright law of Estonia, which follows the traditions of the copyright law of Continental Europe. In the copyright law of Continental Europe (and Estonia), the author is defined as a natural person who creates a literary, artistic or scientific work. Such concept of the author has come to us on the basis of a feature of the author of the Romanticism — the author as a genius, as a person whose activities are inspired by some muse.^{*19}

The author has also been regarded as a function^{*20} by which certain discourses in a given society are characterized.^{*21} Certain aspects of such approach to the author's influence in society have to be accepted. If we take this main idea from the approach to the author as a function and transform it into the context of the topic of this article, we may say that in society, the author has been subjected to the role of a mediator of communication, the importance of which changes in line with the changes in society. When developing some of the aspects of the approach to the author as a function further, it can be extended also to the authors of technical solutions, such as inventions. Thus, the author gathers ideas and information to perform his or her function, processes them and offers them to others for examination.

From the aspect of intermediating communication, copyright industries play a role similar to the author.

The differences between the activities of the author and the copyright industry are of an economic nature. However, in the Constitution, the economic interests of a group of individuals (authors) cannot be prioritised over that of another group (copyright industries).

The approach to the author as a function is dynamic by nature, whereas the Constitution emphasises the stationariness of the author as a status or characteristic, *i.e.* what the value of the author's status or characteristic is at the given moment.

Irrespective of the stationariness of the approach to the author, it would still be possible to bring the author to the centre of the substantial area of protection of § 39 of the Constitution. However, in such a case, as noted above, it is hard to reason that § 39 is *lex specialis* in respect of § 32. The protection of the author as a status or characteristic in the Constitution shifts the emphasis from the property to the valuation of creativity and innovation and the investments related thereto in society. Such approach is very appropriate for the modern day when humans can be replaced by computers and software in particular creative tasks (for example, in translating a letter). Nevertheless, it would be difficult to set interferences to such a status of the author in a usual manner according to the provisions of the Constitution.

1.2. Work

In § 39 of the Constitution, work signifies the products of creative activity, such as literary, artistic and scientific works, inventions, utility models, trademarks, designs, *etc.* All these products are abstract collections of information created as a result of the intellectual work of an individual. They can only be used if shaped or inserted into corporeal items. For example, a literary work as such is a particular amount of information, whereas a book is a thing or a corporeal item into which relevant information has been inserted. A literary work published on the Internet does not have a corporeal form.

It seems that due to its abstract nature, work cannot be in the centre of the substantive area of protection of § 39 of the Constitution. Work still has an important role — the status of the author cannot be identified without it. To be more precise, in the sphere of private law, work and its characteristic features determine the type of specific protection (copyright, patent, trade mark law, *etc.*) to which the work of the author is subjected.

¹⁸ M. Ernits. Holders and Addressees of Basic Rights in the Constitution of the Republic of Estonia. – *Juridica International*, No. 4, 1999, p. 12.

¹⁹ See M. Woodmansee. The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author'. – *Eighteenth-Century Studies*, 1984, Vol. 17, No. 4, p. 427.

²⁰ See M. Foucault. What Is an Author? – J. V. Harari (ed.). *Textual Strategies: Perspectives in Post-structuralist Criticism*. Ithaca, NY, Cornell Univ. Press, 1979, pp. 141–160.

²¹ J. V. Harari. Critical Factions/Critical Fictions. – J. V. Harari (ed.). *Textual Strategies: Perspectives in Post-structuralist Criticism*. Ithaca, NY, Cornell Univ. Press, 1979, p. 42.

1.3. Rights of author

Guided by the notion of the author provided above, it is clear that the rights of the author specified in § 39 of the Constitution encompass the entire intellectual property.²²

The notion of intellectual property set out in the Convention on the Establishment of the World Intellectual Property Organisation (WIPO)²³ covers both copyright and industrial property rights.

In order to confirm the proposition that § 39 of the Constitution is *lex specialis* in respect of § 32 and to identify the substantive area of protection of § 39, the relation of intellectual property to property as defined in the law of property has to be explored. It may be said briefly that intellectual property historically emerged from property at the time when the need to protect the investments made to implement the outcome of the mental work of individuals (for example, for producing an invention or printing a literary work) arose. Originally, a distinction was made between the areas of copyright and industrial property law, while the former was related to intellectual culture and the latter to industry. At the time, the protection of investments meant the protection of proprietary benefits, which was secured by granting privileges to specific investors. With the copyright tradition of Continental Europe developing further, besides the economic rights of the author, the rights related to the personality of the author — the so-called moral rights — came to be recognised. The moral rights of the author, such as the right to paternity or the right of integrity, are related to the inner “self” of an individual, to the mental and emotional sphere of an individual. It is impossible to ascribe direct economic value to such rights; nevertheless, it is possible to assess the economic damage caused by infringement of such rights. Following the example of copyright law, the legal tradition of Continental Europe recognises some of the moral rights of the author also in the area of industrial property. The existence of these moral rights distinguishes between intellectual property and property as defined in the law of property. Thus, intellectual property is a perfect example of “abstraction”: it signifies abstract rights to abstract objects²⁴ (collections of ideas). In addition, a distinction is made between intellectual property and property by the territoriality and fixed term of the protection of these rights. Intellectual property and property have a similar feature as neither of them is absolute, when proceeding from public interests. Consequently, we can currently speak about intellectual property only as about a historical and very special form of property. In this sense, § 39 of the Constitution could be considered to be *lex specialis* in respect of § 32 (protection of property).

If § 39 of the Constitution is *lex specialis* in respect of § 32, the substantive areas of protection of these sections should be similar. Thus, if the substantive area of protection of § 32 consists in the right of ownership, the rights of the author are suitable to serve as the substantive area of protection of § 39. Contrary to the author as the status (or characteristic), the rights of the author may be restricted in a common manner, *i.e.* in accordance with law. Such interference, as in the case of property, has been established in the interests of the public. For example, copyright laws provide for an institute of free use of works, which enables the public to use a work without soliciting the author’s consent separately when particular conditions are met. On the part of industrial property, the rights of a patent owner are restricted, for example, by the issuance of a compulsory licence applied for under law and a list of exceptions provided by law in which the use of an invention is not regarded as a infringement of the rights of patent owner. Thus, as an interim summary of the above discussion, it may be noted that § 39 of the Constitution is *lex specialis* in respect of § 32, and the substantive area of protection of § 39 consists in the rights of the author, not the author or his or her work. Although it is the rights of the author that constitute the substantive area of protection of § 39 of the Constitution, it does not follow from this that these rights must definitely be economically valuable as the rights provided in § 32.

Guided by the above fact that the moral rights contained in the substance of intellectual property does not have direct economic value, we have to assume a position that the substantive area of protection of § 39 of the Constitution is wider than only the economically valuable rights. Consequently, § 39 of the Constitution should not be interpreted narrowly, disregarding the content of intellectual property and also the notion of the author set out in the same provision.

Section 39 of the Constitution has been established on the basis of the internationally recognised human rights. The moral rights of the author are recognised besides economic rights in article 27 (2) of the Universal Declaration of Human Rights²⁵ and in article 15 1c) of the International Covenant on Economic, Social

²² See also T. Annus (Note 10), p. 253.

²³ The notion of intellectual property has been provided in the Convention on the Establishment of the World Intellectual Property Organisation (WIPO). – Riigi Teataja (The State Gazette) II 1993, 25, 55.

²⁴ See P. Drahos. A Philosophy of Intellectual Property. Dartmouth, 1996, p. 153 ff.

²⁵ Adopted at the UN General Assembly 10.12.1948. – Kirjatäht inimõigustest (Writing on Human Rights). Tallinn: Eesti Raamat, 1989 (in Estonian).

and Cultural Rights.^{*26} The purpose of article 1 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)^{*27} is to protect a very wide range of proprietary interests. It embraces immovable and moveable property and corporeal and incorporeal interests, such as shares and patents. The essential characteristic is the acquired economic value of the individual interest.^{*28} Thus, article 1 of protocol No. 1 of ECHR can only be applied to the economic rights of the author. But the justification of the recognition of the moral rights with reservations may be derived from article 10 of ECHR (freedom of expression).

In addition, it is the opinion of the author of the article that the expression “the inalienable right of the author” does not allow for the interpretation of § 39 of the Constitution only as a provision setting out the protection of the economic rights of the author.^{*29} In addition to the prohibition against the waiver of the economic benefits of the author, the term “inalienable” covers a prohibition against expropriation of the moral rights of the author contrary to his or her will. In relation thereto, the protection of the economic rights of the author on the basis of § 39 of the Constitution as separate from § 32 can be reasoned.

Thus, the existence of § 39 of the Constitution as *lex specialis* in respect of § 32 is reasoned by the specifications of the rights held by the author: besides the economic benefits, the author also has moral benefits, which are not directly economically valuable. Proceeding from the above, once again, the opinion that it is not the status of the author but the rights of the author, which need to be protected as a bundle of moral and economic benefits that have to be emphasised in the substantive area of protection is confirmed. The protection of authors’ rights is conditioned by the special status of the author. The special position of the author as a bearer of authors’ rights also relates § 39, in addition to the sphere of economic benefits, to intellectual culture and innovation. The preamble to the Constitution also refers to the relation with culture.

The analysis of § 39 of the Constitution may be summed up by providing a new wording to the objective of that provision.^{*30} The objective of § 39 of the Constitution is to ensure authors a sphere of freedom upon the use of special rights — intellectual property rights — by enabling them thereby to make their contribution to the development of culture and promotion of the economic life of society.

2. Constitution and purpose of Copyright Act

Section 39 of the Constitution, which forms the constitutional basis of the Copyright Act, is not the only provision of the Constitution to be taken into account upon the enactment and application of the Copyright Act.

The professional literature also refers to § 25 of the Constitution under which authors have the right to compensation for moral or economic damage caused by the unlawful action of any other person as a constitutional basis of the Copyright Act.^{*31} Sections 39 and 25 of the Constitution are thus important from the aspect of the status of the author.

From the aspect of the positive copyright law, § 123 (2) of the Constitution is important, determining the position of the treaties ratified by the *Riigikogu* (Parliament of the Republic of Estonia), including the treaties concerning the rights of authors, in the hierarchy of the legal provisions of Estonia.^{*32}

Although the author is the central subject of copyright law, the purpose of copyright law is broader than ensuring authors the right to their works. According to § 1 (1) of the Copyright Act, the purpose of this Act is “to ensure the consistent development of culture and protection of cultural achievements, the development of copyright-based industries and international trade, and to create favourable conditions for authors, performers, producers of phonograms, broadcasting organisations, producers of first fixations of films, makers of databases and other persons specified in this Act for the creation and use of works and other cultural achievements”.

Such wording of the purpose of the Copyright Act is indicative of the historically evolved main principle of copyright: to maintain a balance between the private interests of copyright owners and public interests of

²⁶ Adopted at the UN General Assembly 16 December 1966. The Covenant entered into force with regard to Estonia 21 January 1992. – Riigi Teataja (The State Gazette) II 1993, 10/11, 13.

²⁷ Convention for the Protection of Human Rights and Fundamental Freedoms with Protocols Nos. I, IV and VII and selected reservations and declarations. Secretariat to the European Commission of Human Rights. Strasbourg, 1994. The Convention entered into force with regard to Estonia 16 April 1996. – Riigi Teataja (The State Gazette) II 1996, 11/12, 34.

²⁸ See D. J. Harris, M. O’Boyle *et al.* Law of the European Convention on Human Rights. London: Butterworths, 1995, p. 517.

²⁹ See H. Pisuke (Note 5), p. 89.

³⁰ Compare with the objective provided in the final report of the Constitutional Expert Commission, in the first section of clause 1 above.

³¹ See H. Pisuke (Note 6), p. 167.

³² *Ibid.*

society. In this, public interests are related to the development of society as a whole, including, *inter alia*, the ensuring of the main human rights. Protection of public interests is founded on the provisions of the Constitution. The objective of the Copyright Act in relation to some of the provisions of the Constitution will be examined below.

2.1. Continuity of culture and guarantee of protection of cultural achievements

The Constitution imposes on our country the task to guarantee the preservation of the Estonian nation and culture through the ages. As the task idea has been provided in the preamble to the Constitution, this may give rise to a question concerning its legal impact. The legal impact of the preamble cannot be underestimated.^{*33} The preamble is the core of the Constitution: the higher the generalisation of the provision of the preamble, the wider its area of control over the remaining provisions of the Constitution.^{*34} Moreover, it has been opined that the provision of the preamble to the Constitution concerning the preservation of the Estonian nation and culture may have a direct legal force.^{*35} The objective concerning the preservation of culture in the preamble to the Constitution obliges the state to take all the necessary measures to achieve the goal that is of interest for the public.^{*36} The Copyright Act also serves as a measure for achieving the purpose of the Constitution.

The provision of the purpose of the protection of culture both in the Constitution and the Copyright Act gives rise to a question about the meaning of culture. This is a difficult task as culture has a wide variety of different meanings.^{*37} However, the notion of culture has retained one characteristic of its original meaning^{*38} — the sense of process, since agriculture or culture of the mind are never created instantaneously. Consequently, culture should signify a value system, which has been created in human society and develops constantly.^{*39} In respect of such a notion of culture, in the modern day, it is often difficult to distinguish between what national values are and what they are not and thus we may speak about culture as a general system of values.

The state institutions mostly regard culture in its static meaning, *i.e.* through the institutionalised activities sponsored by business and government.^{*40}

According to the final report of the Constitutional Expert Commission, the idea of the preamble to the Constitution is to ensure the protection of Estonian national culture primarily through the Estonian language.^{*41} Such a conclusion does not mean that the representatives of other national cultures were in a position where they were discriminated against in Estonia. Their rights are guaranteed on the basis of other provisions of the Constitution^{*42} and laws.

The objective of the protection of the continuity of culture and cultural achievements set out in the Copyright Act is not solely related to national culture or the cultural minorities living in Estonia. The Copyright Act values culture in its widest sense. The treaties concluded in the area of copyright law^{*43} impose on Estonia the obligations to protect the rights of the authors of the foreign countries that are parties to the treaties in Estonia as those of our own authors. The purpose of copyright law to protect the so-called borderless culture and the interests of those authors who do not reside in Estonia is not contrary to the Constitution. With such purpose, the state institutions are not forced to enact any special laws or other measures to protect cultural goods or authors of non-Estonian origin. The exercise of specific rights of authors falls within the sphere of private law, not constitutional law.

³³ See H. Schneider. Põhiseaduse preambula: tema tähtsus ja õiguslik loomus (Preamble to Constitution: Its Importance and Legal Nature). – *Juridica*, 1996, No. 9, pp. 442–450 (in Estonian).

³⁴ *Ibid.*, p. 449.

³⁵ T. Annus (Note 10), p. 33.

³⁶ The final report of the Constitutional Expert Commission (Note 9).

³⁷ See Culture. – *International Encyclopedia of Communications*. Vol. 1. New York, Oxford: Oxford Univ. Press, 1989, pp. 435–438.

³⁸ In Latin *cultūra* – tilling, cultivation; cultivation of land; shaping, development.

³⁹ Culture (Note 37), p. 435; Kultuur. – R. Kleis, J. Silvet, *etc.* Võõrsõnade leksikon (Dictionary of Foreign Words), Tallinn: Valgus, 1979, p. 365.

⁴⁰ Culture (Note 37), pp. 436–437; resolution No. 22 of the *Riigikogu* “Approval of Bases of Cultural Policy of the Estonian State”. – *Riigi Teataja* (The State Gazette) I 1998, 81, 1353.

⁴¹ The final report of the Constitutional Expert Commission (Note 9).

⁴² “The rights, freedoms and duties of each and every person, as set out in the Constitution, shall be equal for Estonian citizens and for citizens of foreign states and stateless persons in Estonia.” (Section 9 of the Constitution).

⁴³ About the ratified treaties of Estonia in copyright law see: H. Pisuke (Note 6).

2.2. Favourable conditions for creation and use of works

Section 39 of the Constitution, which will not be analysed anew here, serves as the basis for the purpose provided by the Copyright Act — to establish favourable conditions for the creation and use of works and other cultural achievements. However, the establishment of suitable conditions to authors (and other creative persons) for creative activity is also related to the other rights of freedom set out in the Constitution.

Authors are ensured the possibility to engage in creative activity by the right to free self-realisation provided in § 19 of the Constitution.^{*44} In the Constitution, the right of the author to free self-realisation is more specifically ensured by § 45 (freedom of speech^{*45}) together with § 40 (freedom of conscience, religion and thought) and § 41 (the right to remain faithful to his or her opinions and beliefs) as well as § 38 (science and art and their instruction are free). To avoid the repetition of issues, the purpose of the Copyright Act will be examined in relation to §§ 19 and 45 of the Constitution below.

The free self-realisation of the author (§ 19 of the Constitution) is manifested in his or her freedom of creation. However, the authors must not damage the constitutional or any other rights of other individuals. For example, when creating works, authors shall not defame anyone's good name or honour (§ 17 of the Constitution), contravene the inviolability of private and family life (§ 26 of the Constitution), *etc.*

The exercise of the freedom of speech provided in § 45 of the Constitution gives rise to a question of whether the Copyright Act is in conformity therewith. Namely, the Constitution grants everyone the right to freely disseminate ideas, opinions, beliefs and other information by word, print, picture or other means, whereas the Copyright Act does not allow other individuals to use works that also consist of ideas, opinions, *etc.* without the consent of the author.^{*46} However, there is no contradiction between the Constitution and the Copyright Act. The Copyright Act grants authors the exclusive right to use only the specific form of expression of ideas and thoughts, not the ideas and thoughts themselves.^{*47}

What should be done if, for some reason, a conflict appears between the exercise of §§ 45 and 39 of the Constitution? A position has been adopted that the provisions of the Constitution are equal and a conflict between them cannot render any provision invalid. All the conflicts between the provisions of the Constitution shall be settled by way of weighting and finding the optimum final solution.^{*48}

The right of the author to free self-realisation may be restricted by law in the cases provided by the Constitution. For example, according to § 45 of the Constitution, the freedom of ideas and speech may be restricted to protect public order, morals, and the rights and freedoms, health, honour and good name of others. Thus, dissemination and exhibition to minors of works, which contain pornography or promote violence or cruelty is prohibited.^{*49}

2.3. Ensuring development of copyright based industries and international trade

In addition to the fact that the Copyright Act recognises the rights of legal persons in relation to the temporal, financial and other investments made by them, the purpose of the Act reflects the need to ensure the development of the industries based on copyright and international trade. As the production related to the outcome of creative activity and the dissemination of the outcome are the two largest branches of the copyright industries, it may be said that the Copyright Act shows a green light to the development of copyright industries.

Why is this so? It appears from the surveys of the economic importance of copyright in other countries in 1982–1997 that the contribution of the copyright industries to gross national product (GNP) amounts to

⁴⁴ See T. Annus (Note 10), pp. 191–192.

⁴⁵ *Ibid.*, p. 231.

⁴⁶ The “sale” of business ideas is a fascinating topic but remains outside the topic of this article.

⁴⁷ ““Works” means any 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 either directly or by means of technical devices. A work is original if it is the author's own intellectual creation.” (Copyright Act, § 4 (2)).

⁴⁸ T. Annus (Note 10), p. 33.

⁴⁹ Pornograafilise sisuga ja vägivalda või julmust propageerivate teoste leviku reguleerimise seadus (The Act to Regulate Dissemination of Works which Contain Pornography or Promote Violence or Cruelty). – Riigi Teataja (The State Gazette) I 1998, 2, 42 (in Estonian).

2.1–6.6%.⁵⁰ However, it is astonishing that the increase in the contribution of the copyright industries to GNP is faster than the contribution of the representatives of the traditional industries as well as the fact that by its contribution to GNP, the copyright industries are outweighing the contribution of heavy industry that has prevailed in the GNP of countries so far.

These trends can be explained partly by the expansion of the existing copyright industry based on new technology and the creation and establishment of its new branches, partly by the growth in the demand of consumers for entertainment and information intensive products.

If the indicators of copyright industries are so important in the economic sense, they are also important in the social sense: a rapidly growing industry entails the creation of new jobs inside the branch through new investments.

The need to mention copyright industries separately in the Copyright Act was motivated by Estonia's accession to the World Trade Organisation in 1999⁵¹, where the protection of the outcome of intellectual activity and international trade are important fields.

Copyright industries, occupying an important position in the national economy, social sphere and foreign trade of a country, thus demand much attention both from the legislator in enacting laws and the government in creating political development concepts.

In the Constitution, the efficient performance of the copyright industries is ensured, in addition to § 39, by § 31 (the right to engage in enterprise and to form commercial undertakings and unions) and § 32 (protection of property).

2.4. Consideration of public interests

The purpose of the Copyright Act does not mention the protection of public interests *expressis verbis*. An attempt is made to ensure public interests in using works on the basis of § 39 of the Constitution by permitting the restriction of the rights of the author. To a certain extent, public interests are also protected by § 44 of the Constitution, according to which everyone has the right to freely obtain information disseminated for public use.

Conclusions

Section 39 of the Republic of Estonia (protection of intellectual property) is *lex specialis* in respect of the provision concerning the legal protection of property (§ 32). As a result, the substantive area of protection of § 39 of the Constitution consists in the rights ensured to the author — intellectual property rights.

Section 39 of the Constitution has been provided separately from § 32 due to the specifications of intellectual property (including the rights of authors) as compared to property as defined in the law of property. The subject matter of the rights belonging to the author involves both economic and moral rights to the outcome of creative activity. The moral rights of the author are not directly economically valuable.

Nevertheless, § 39 of the Constitution, that forms the constitutional basis of the Copyright Act, is not the only provision of the Constitution that has to be taken into account upon the enactment and application of the Copyright Act. Proceeding from the purpose of the Copyright Act, links may be found between copyright and the preamble to the Constitution, between §§ 19, 25, 38, 40, 41, 45 and § 123 (2). These provisions of the Constitution ensure, on the one hand, the author freedom of creation and the protection of copyrights, and on the other hand, they ensure the copyright industries and public an opportunity to use the work of the author.

⁵⁰ See Economic Importance of Copyright Industries in Finland: Finnish Copyright Industries in 1997. Final Report. Finnish Copyright Institute, 2000; Foreign revenues of US core copyright industries rose 11% to \$67bn in 1997. – Music & Copyright, No. 176, 16.02.2000, p. 3; H. Cohen Jehoram. Kritische Überlegungen zur wirtschaftlichen Bedeutung des Urheberrechts. – GRUR Int, 1989, Book 1, pp. 23–29; A. H. Olsson. Copyright in the National Economy. Some reflections on the basis of a Swedish study on the economic impact of copyright law. – Copyright, 1982, No. 4, pp. 130–133; *etc.*

⁵¹ Riigi Teataja (The State Gazette) II 1999, 22, 123.