

# **Building a National Intellectual Property Protection System: Some Issues Concerning Copyright and Related Rights in Estonia**

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In Estonia, the building of a national intellectual property (IP) system started during the first independent Republic of Estonia (1918-1940), and was completed more than 50 years later, after the re-establishment of independence in 1991. The purpose of this article is to provide a historical overview of the Estonian legislation pertaining to copyright and related rights, to address some issues of its enforcement, and to focus on the perspectives in the European and global context. The main emphasis is on the aspect of “law in law books”. Implementation, enforcement and case law, which in practice are as important as legislation, are covered in a more general way to illustrate the main subject.

## **1 Historical Overview**

### ***1.1 Pre-history of Estonian IP Protection in the Global Context***

Innovation and creativity are characteristics of the human nature. Creators as such have existed from the very first years of the human history. The first wall paintings and stone axe drew on the knowledge and information exchange of that time. Although it is not quite correct to compare the time dating back to thousands of years with today’s Information Society, the subject of creativity – a human being – has largely remained unchanged in his or her nature and motives of action. A human being is characterised by curiosity and a passion to create something new, and, in addition to such inherent motivation, the current needs of individuals and a society constitute the motivating force of creativity.

Works are individual and collective at the same time. The sources of creativity derive from the history of author’s nationality, the society he or she belongs to, from the culture and traditions, and from the legal system. An author in a totalitarian society has to exercise his or her creativity in a different way than an

author in a democratic society. Author's law (copyright law) as specific rules of law targeted at creators of intellectual values also constitute one of the criteria of the freedom of an author.

The history of protection of authors' rights in a particular society influences its current state and future development, as well as the attitudes of the society to the concept and to its practical implementation. The attitudes of the society are expressed mainly in those of the legislature, executive power, judiciary and the public.

The protection of authors' rights through copyright has a long history in the Estonian society although the history is somewhat controversial.

The first Copyright Act in the world was enacted in England in 1710.<sup>1</sup> In 1710, Estonia became part of the Russian Empire. The first few articles on authors' rights in Russia were enacted in the framework of public law, as part of the Censorship Act as late as in 1828. In an Act of 1830, the concept of author's right (copyright) was recognised as a property right, but it was only in 1887 that the corresponding provisions were transferred from the Censorship Act to the Property Act, which formed part of the Civil Code. The fifty sections pertaining to copyright were added as notes to § 420, Part 1, Volume X of the Civil Code.<sup>2</sup>

In 1865, an extensive civil code – the Baltic Private Law Code<sup>3</sup> was enacted in Estonia like in other Baltic provinces of Russia. §§ 3981-3993 regarding contracts also contained provisions on publishing contracts (*Verlagscontract*).<sup>4</sup> However, there were no special provisions regarding the rights of authors in the Baltic Private Law Code.

In 1911, the Copyright Act of the Russian Empire was adopted which was one of the most modern Acts in Europe at the time.<sup>5</sup> It was also enacted in the Baltic provinces. During the whole period of the independent Republic of Estonia (1918–1940), this Act was in force. In the thirties, a national draft Copyright Act was prepared based on the German law model. However, it was never adopted.<sup>6</sup>

In 1927, Estonia became party to the Berne Convention for the Protection of Literary and Artistic Works (1908 Berlin Act).<sup>7</sup> This was a political decision arising from the obligations assumed by Estonia under trade agreements.<sup>8</sup> Joining

<sup>1</sup> A. Latman, R. Gorman, J. C. Ginsburg. *Copyright for the Eighties. Cases and Materials*. Second Edition. The Michie Company. Law Publishers, Charlottesville, Virginia, pp. 1-4.

<sup>2</sup> Б.С. Антимонов, Е.А. Флейшиц. *Авторское право*. Москва, Государственное Издательство Юридической Литературы, 1957, p. 20.

<sup>3</sup> M. Luts. *Private Law of the Baltic Provinces as a Patriotic Act*. Juridica International. Law Review, University of Tartu, V 2000, pp. 157-167.

<sup>4</sup> H. Pisuke. *Autoriõigus läbi aegade*. Kõsimused ja vastused, 1981, 4, p. 46.

<sup>5</sup> About the 1911 Act see Ал. Пиленко. *Новый закон об авторском праве*. С.-Петербург. Издание А.С. Суворина, 1911.

<sup>6</sup> P. Ambur. *Märkmeid autoriõiguse kaitse seaduse projekti kohta*. Õigus, 1939, No 9, p. 410-414.

<sup>7</sup> See part 2.3.1.

<sup>8</sup> The trade agreements entered into by Estonia and France in 1922 and by Estonia and Hungary in 1923 contained provisions under which each party accorded protection for the authors of the other party under the 1908 Berlin Act of the Berne Convention. In the 1925 trade agreement between Estonia and Great Britain, Estonia assumed the obligation to accede to the Berne Convention.

the international copyright protection scheme was not widely supported by the cultural circles and cultural industries of Estonia at that time. In the 1920s, many Estonian authors, major publishers and the public were not ready to accept international principles of copyright protection and favoured the free use of foreign works.<sup>9</sup> In order to support culture and local authors a special state fund – *Kultuurikapital* (the Cultural Endowment) – was created by Cultural Endowment of Estonia Act (1925). The Cultural Endowment provided support to writers, composers, artists and other creative people in the form of monthly stipends and pensions and enjoyed great popularity. The fund's rather stable resources were obtained from alcohol and tobacco excise duties and gambling tax. As the market of the Estonian cultural industry was relatively small, the state policy was to support authors from the state fund. Copyright was regarded as a somewhat less important instrument at that time.

In 1932, a collecting society, *Eesti Autorikaitse Ühing* (EAKÜ) (the Estonian Authors Protection Association) was set up aimed at the collective management of authors' rights. The EAKÜ had agreements with several similar organisations in other countries, and thus also represented foreign authors of the Member States of the Berne Convention.

During this period, legal research in the field of copyright was very modest. No textbooks, monographs and scientific articles were published.

The period from 1918 to 1940 can be summed up as follows:

- 1) national copyright legislation was non-existent. Consequently, copyright was not regarded as an economic or legal priority. Authors were regularly supported from a special state fund (the Cultural Endowment Fund);
- 2) accession to the Berne Convention was the government's economic and political decision severely criticised by the public. There was no common understanding why foreign works must be protected. It was assumed pragmatically that a developing country may use foreign works without any restrictions in order to advance its education and culture;
- 3) a collective management organisation was set up. There is no doubt that this was a positive step in the protection of authors' rights. The activities of the organisation have not been studied in Estonia yet and therefore we cannot assess its effectiveness;
- 4) legal research into copyright was practically non-existent. The principles of copyright were mainly taught within the framework of civil law and commercial law courses.<sup>10</sup>

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<sup>9</sup> K. Hell. *Autorite õiguslik kaitse eesti Vabariigis aastatel 1918-1940*. Diplomitöö. Juhendaja dots. H. Pisuke. TÜ, 1991, p. 44-52.

<sup>10</sup> A. Piip. *Kaubandusõigus ja -protsess*. Akadeemilise Kooperatiivi Kirjastus, Tartu, 1939, p. 166-167.

## 1.2 Socialist Copyright Law of the Soviet Period

A totalitarian society is characterised by four typical behaviours of authors: support to the official ideology by works; adaptation to official requirements with an attempt to express one's genuine ideas by allegory; giving up the creation of works; and expression of one's genuine ideas in defiance of possible sanctions. The influence of politics and ideology on law as the state's normative system was remarkable in the socialist system. Creating literary and artistic works in the socialist society was state-oriented, centrally planned and controlled. State involvement in the field of copyright was crucial: the ideology determined both the legal framework of the protection of works as well as the direction of the creative work of authors. Creative work drew on the official ideology of "building communism" and deviations were not tolerated; opposition was punished. Estonian authors and artists were also forced to make a choice during the periods 1940-1941 and 1944-1991. A number of authors were repressed because of their works.

The Soviet copyright law had laid down its principles by 1940 when Estonia became an unwilling part of the Soviet Union. Like culture and law as whole, copyright and its underlying doctrine were governed by the ideology of the communist party.<sup>11</sup>

During the last decades of the Soviet State, the copyright provisions were included in Part IV of the Civil Code of the Estonian SSR (CC) of 1964. Part IV of the CC was worked out in full conformity with the 1961 Fundamentals of Civil Legislation of the USSR and the Soviet Republics. The Soviet copyright legislation and doctrine were in force until the adoption of the Estonian Copyright Act in 1992. But the political and ideological background of the CC was abandoned after the restoration of independence. The newly established Estonian State was built on the principles of a free market economy and democracy.

In 1973, the USSR became party to the Universal Copyright Convention (UCC) signed in 1952 in Geneva.<sup>12</sup> UCC was the first international multilateral agreement in the field of copyright to which Russia and its successor USSR acceded. Accession to the Convention brought about amendments to the Soviet legislation and its implementation. The state all-Union Copyright Agency (VAAP) with its branches in the Soviet republics was established in 1973.

Extensive state regulation and non-recognition of the freedom of contract were typical of Soviet copyright law. The economic and personal rights of authors were limited and author's fees were strictly regulated by the state. Author's rights were not treated as exclusive rights but as usual, socialist subjective rights (rights belonging to the subject of legal relationships). The term of copyright was 15 years after the death of the author. After accession to the UCC, the term of

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<sup>11</sup> About the history of Soviet copyright law see Б.С. Антимонов, Е.А. Флейшиц. *Авторское право*. Москва, Государственное Издательство Юридической Литературы, 1957, р. 22-40; А.П. Сергеев. *Право интеллектуальной собственности в Российской Федерации*. Учебник. Москва, Проспект, 1999, р. 37-39.

<sup>12</sup> СП СССР 1973, 24, 139. See also M. Boguslavski. *Rahvusvahelise autoriõiguse kaitse NSV Liidus*. Tallinn, Eesti Raamat, 1976, p. 16 – 18.

copyright was extended in 1974 up to 25 years *pma*. Such term was also valid for co-authors.

Author's fees were prescribed by regulations of the governments of the USSR and the republics and were regarded as remuneration based on the quantity and quality of works. There was room for negotiations only within the limits of state prescribed rates of fees under standard author's agreements. Authors lacked an independent right to communicate with foreign users – this was organised centrally and as a rule, through the state collective management organisation VAAP.

Estonia was bound by the UCC until re-establishment of its independence on 20 August 1991. The position of the Estonian State was that agreements to which the USSR or the Estonian SSR was party were not automatically valid in the Republic of Estonia re-established on the principles of *restitutio in integrum*. The Ministry of Foreign Affairs officially announced to UNESCO that Estonia is no longer party to the UCC.<sup>13</sup> Accession to UCC was never seriously discussed after 1992.

The Soviet legislation and doctrine did not recognise related rights of performers and producers of phonograms. Broadcasting organisations enjoyed copyright to their broadcasts.<sup>14</sup>

Despite its ideology and the limited nature of author's rights, the Soviet copyright law in Estonia also had a positive role in the preparation for the transition to western copyright principles. Accession to the UCC in 1973 resulted in the introduction of international standards and doctrine under which works produced by foreign authors may normally be used with the consent of the author and against payment of remuneration. The Soviet generation of 1945-1974 supported the principle of the free use of works created by foreign authors. At the beginning of the 1980s, copyright law was started to be researched and taught.<sup>15</sup> As a result, copyright law constitutes now an organisationally and scientifically independent field.<sup>16</sup> The Estonian copyright and related rights terminology was also coined during this period.

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<sup>13</sup> *Letter of the Estonian Minister of Foreign Affairs to the Director General of UNESCO of 16 June 1992. See also H. Pisuke. Berni konventsioon ja Eesti: minevikust tulevikku. Eesti Jurist, 1993, No.11, p. 19, 20, 26.*

<sup>14</sup> § 490(4) of the Civil Code of the Estonian SSR.

<sup>15</sup> X. Пизуке. *Правовое регулирование архитектурной деятельности*. ЛГУ, 1984 /H. Pisuke. *Legal Regulation of Architectural Activities*. Candidate of Science Thesis/; A. Kalvi. Kirjastamise õiguslikke küsimusi. Magistritöö. Tartu Ülikool, 1999 /A. Kalvi. *Legal Questions of Publishing*. Master's Thesis/. Some publications on Estonian copyright law in English: H. Pisuke, *Protection of Intellectual Property in Estonia. The Present Situation and Perspectives*. Tartu: Intellectual Property Centre Baltconsult LTD. 1992; H. Pisuke: *A Simple Guide to IP Developments in Estonia, June, Managing Intellectual Property*, [1993], 12 – 18; H. Pisuke, *Developments in Estonian Intellectual Property Law: Some Issues Concerning Copyright and Related Rights*, *Juridica International. Law Review, University of Tartu*, IV 1999, pp. 166-171; H. Pisuke. *Copyright and Related Rights: Achievements and Perspectives*. 3 Õigusinstituudi Toimetised, February [2000], 3–13 /in Estonian, with summary in English/.

<sup>16</sup> Both the University of Tartu and the Institute of Law have a Department of Intellectual Property. The general intellectual property course is compulsory. Copyright, related rights and industrial property can be studied under electives.

### **1.3 Creating a New National IP System**

#### **1.3.1 Fundamentals of reforms in post-Soviet countries**

As a result of the collapse of the Soviet Union and the establishment of independent states during 1991-1992, all the former Soviet Socialist Republics, including Estonia, had to carry out reforms affecting the whole society and encompassing political, economic and legal reforms. This meant the transformation of the entire legal system starting from the adoption of a new Constitution.

In the field of intellectual property, there were a lot of crucial issues which demanded radical legal solutions. Below a few of them are mentioned:

1) *The place of intellectual property in the state's political and ideological system.* Several countries adopted the position that intellectual property rights are the fundamental rights of a person, provided for in the chapter of the Constitution concerning the fundamental rights and freedoms.

2) *The place of intellectual property in the state's economic system.* As a result of transition from the socialist planned economy to a market economy, intellectual property became an instrument of market economy. For example, in Estonia, the so-called liberal market economy is being implemented, where the role of the state in regulating economic relations is minimum.

3) *The place of intellectual property rules in the state's legal system.* The Soviet legal system entailed the following intellectual property institutes: author's rights (copyright), rights in inventions, and rights in discoveries. All these three institutes formed separate parts of the Civil Code. The Soviet doctrine did not recognise the theory of intellectual property as specific exclusive economic and moral rights.

Several newly established legal systems, including Estonia, regulate intellectual property related issues in separate laws, thus outside the framework of the Civil Code. But in several countries of the former Soviet Union copyright is regarded as part of the civil law and regulated in the Civil Code.<sup>17</sup>

4) *Models of new intellectual property system.* All the former Soviet republics which became independent have relied on the Berne Convention, Rome Convention (1961), WIPO treaties and the WTO TRIPS Agreement in drafting their own intellectual property legislation. Ten countries of East and Central Europe, including the three former Soviet republics Estonia, Latvia, and Lithuania, are the associated members of the European Union whose legislation is also modelled on the basis of EU directives. The adoption of international conventions and standards of EU legislation is an international obligation for these post-socialist countries who are now candidate countries

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<sup>17</sup> This approach was adopted by the Russian Federation and States following the model of Russian Federation legislation.

of the European Union. Harmonisation of legislation with the EU legislation also determines the direction and content of the new Estonian intellectual property legislation.

During the first years of reforms, it was relatively easy to adopt new legislation and transpose into it the provisions of international conventions and of models from foreign countries, as well as scientific ideas of academia. Now, lobby groups, especially these connected with cultural industries, have also become an influential factor in legislating. At times such lobby groups have succeeded in blocking some provisions not favourable to them, and this is a growing tendency.

5) *Implementation.* The new legislation based on international models has given a powerful impetus to the development of institutions dealing with the implementation of intellectual property. State intellectual property agencies, state patent offices, copyright departments at the Ministries of Culture or Justice, collective management organisations, special police task forces to fight piracy, etc. – are some examples of institutions specially founded or developed during the reforms.

6) *Enforcement.* A dichotomy between the law in law books and the law in real life is particularly well expressed in enforcement issues. A response to the question whether the post-socialist countries are prepared to transpose the standards of advanced countries is given in the field of enforcement, and especially in the fight against copyright piracy and counterfeiting. It is easier to create completely new law or new provisions, especially in a country which has lacked a law in a given area.<sup>18</sup> Why does implementation constitute such a problem? In most cases, the law just cannot be implemented due to a lack of due procedure, administrative capacity or implementing institutions, whereas in some cases there is no wish to do so for one or another reason.

7) *Case law.* The case law in the field of intellectual property rights is still in its early phase of development.<sup>19</sup>

8) *Information to the public.* In all the post-socialist countries the need to improve information efforts relating to intellectual property and providing practical advice has been a very topical issue. The training of judges, civil servants, police and customs officers, and the training of trainers, students, authors and other target groups are among the key issues of enforcement of new intellectual property laws.

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<sup>18</sup> For example, some post-socialist countries, which lacked consumer law as such, have enacted more extensive consumer legislation than in several Member States of the European Union.

<sup>19</sup> The Internet web site of the Estonian Supreme Court is located at “www.nc.ee”. The web site contains a database of the judgments of the Supreme Court (in the Estonian language). Tartu Circuit Court has a similar database: “www.tarturk.just.ee”. Databases of judgments of other courts of appeal and county and city courts are being developed.

### 1.3.2 Constitutional basis for copyright

The Estonian Constitution, adopted on June 28, 1992 by a referendum,<sup>20</sup> contains several provisions, which form the basis for the protection and enforcement of intellectual property rights. § 32 of the Constitution reads: “The property of every person is inviolable and equally protected.” § 39 contains a paragraph specially devoted to IP protection: “An author has the inalienable right to his or her work. The state shall protect the rights of the author.” Of other constitutional provisions, § 25 is of utmost importance as it says: “Everyone has the right to compensation for moral and material damage caused by the unlawful action of any person.”

The wording of § 39 concerning the protection of intellectual property has brought about some criticism in the Estonian legal literature, as the expression “inalienable right” has different meanings.<sup>21</sup> For this reason, the Committee for the Legal Expert Analysis of the Constitution, set up by the Estonian Government in 1996, has proposed that this constitutional provision be amended as follows: “An author has the right to his or her work. Such right shall be protected by law.”<sup>22</sup>

According to the aforementioned Committee, § 25 of the Constitution also needs amendment. The new proposed version is as follows: “Everyone has, *in the cases and pursuant to the procedure established by law*, the right to compensation for moral or economic damage caused by the unlawful action of any other person.” The new proposed version restricts the possibilities to demand compensation for moral damage only to the cases directly established by law. As the current Copyright Act includes provisions on compensation for moral damage in the case of copyright infringement, this amendment, if adopted, will not affect copyright protection.

The provisions of an international agreement ratified by the *Riigikogu* (the Estonian parliament) form part of the Estonian legal system and are directly applicable. If laws or other legislation of Estonia are in conflict with such international agreements, the provisions of the international agreements apply (§ 123 of the Constitution; § 2 (2) of the Copyright Act).

### 1.3.3 General overview of the current copyright legislation

The currently effective Copyright Act (CA) was passed on 11 November 1992 and entered into force on 12 December 1992.<sup>23</sup> Several implementation Acts have been adopted by the Government.<sup>24</sup> In January 1995, amendments were made to

<sup>20</sup> RT 1992, 26, 349. The English translation of the Constitution, as well as unofficial translations of other Estonian legal acts can be found on the Estonian Legal Translation Centre’s Internet web site (“www.legaltext.ee”) and publication “Estonian Legislation in Translation”. Only the Estonian language text as published in the *Riigi Teataja* (State Gazette; below - RT) has the force of law.

<sup>21</sup> H. Pisuke. *Kas autori õigusi saab võõrandada?* Juridica, 1994, No 4, p. 89-90.

<sup>22</sup> The documents of the Committee for the Legal Expert Analysis of the Constitution are available on the Internet web site of the Estonian Ministry of Justice “www.just.ee”.

<sup>23</sup> RT 1992, 49, 615. The translation of the Act is available on “www.legaltext.ee”, and in WIPO Copyright Bulletin, February 1994 (the 1992 text).

<sup>24</sup> RT I 1995, 13, 154; RT I 1995, 88, 1502; Annex to RT 1995, 23/24, p. 796-801.



the Criminal Code (§ 136) and the Code of Administrative Offences.<sup>25</sup> § 184<sup>3</sup> of the Code of Administrative Offences established for the first time in the Estonian history administrative liability for infringement of copyright or related rights.

Besides the aforementioned copyright legislation, several very general provisions concerning copyright can be found in the Broadcasting Act (1994), Advertising Act (1998), Industrial Designs Protection Act (1998), and other Acts.

The Copyright Act of 1992 is the first copyright law in the history of Estonia independently drafted and enacted. It is modelled on the principles of the Berne Convention Paris Act (1971). It also introduces some ideas from the WIPO Model Copyright Act, drafted for the post-socialist countries at the beginning of 90s. The copyright laws of the Nordic and Continental-European countries were also relied on. The Estonian Act is based on the European *droit d'auteur* traditions, but in some particular cases (copyright in execution of duties of employment, copyright in audio-visual works<sup>26</sup>), traditional common law solutions are used.

At the time of its passage in 1992, the Estonian Copyright Act complied with all international and a majority of the European Union standards. The Act provided protection for computer programs and collections of data (databases). Authors were granted a broad catalogue of personal (moral) and economic rights, including rental right. No exhaustion of the author's distribution right was applied to the rental of computer programs, audio-visual works or phonograms. It was established that the economic rights of an author can be assigned or an exclusive or non-exclusive licence may be granted.<sup>27</sup>

By the end of 1990s, the Copyright Act no longer complied with some international and EU standards and needed amendment. During the six years from its adoption, no substantial amendments had been made to the Act except for a few formal changes. Thus, two major revisions of the 1992 Act took place in 1999, on 21 January 1999,<sup>28</sup> and 8 December 1999.<sup>29</sup>

The January amendments mainly concerned the enhancement of the fight against copyright piracy, and also collective management of rights. The December 1999 amendments fully harmonised the Estonian law with all the EU copyright and related rights directives adopted by that time. Two new chapters were added: Chapter VIII<sup>1</sup>, introducing *sui generis* protection of databases, and Chapter XII on implementing provisions which will enter into force upon accession to European Union.

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<sup>25</sup> RT I 1995, 11, 114.

<sup>26</sup> §§ 32 and 33 of the Copyright Act.

<sup>27</sup> For an overview of the 1992 Copyright Act see: H. Pisuke. *Estonia Again on the World Copyright Map*. Copyright World, March 1993, Issue 28, pp. 24 – 32. The amendments made in January 1999 are covered in H. Pisuke. *Developments in the Estonian Law*. Copyright World, December 1999/January 2000, Issue 96, pp. 20-23.

<sup>28</sup> Copyright Act, Code of Administrative Offences, Criminal Code, Consumer Protection Act and Customs Act Amendment Act entered into force on 15 February 1999. RT I 1999, 10, 156. For full text of the CA, including these amendments, see RT I 1999, 36, 469.

<sup>29</sup> Copyright Act and Acts Related to it Amendment Act entered into force on 6 January 2000. RT I 1999, 97, 859. For full text of the CA, including these amendments, see RT I 2000, 16, 109.

The amendments of 1999 were derived from the internal development of the Estonian legal system,<sup>30</sup> as well as from international obligations stemming from the negotiations aimed at joining the World Trade Organisation (WTO) and the European Union. There was also pressure from some foreign countries, first and foremost from the USA and Finland, to strengthen the legal basis and enforcement mechanism for fighting against piracy.<sup>31</sup>

As the Copyright Act contains a special chapter on related rights (Chapter VIII), it was drafted in compliance with the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (1961 Rome Convention), and the Convention for the Protection of Producers of Phonograms Against Unauthorised Duplication of Their Phonograms (Geneva 1971). Estonia joined the Rome Convention with the Act of 9 December 1999.<sup>32</sup> On the same day the law was passed to join the Geneva 1971 Convention.<sup>33</sup>

In 1991, the Estonian Authors Association (*Eesti Autorite Ühing, EAÜ*) was established as a legal successor to the Authors Protection Association of 1932.<sup>34</sup> There are several other organisations uniting holders of copyright or related rights but their activities are still in the initial stages.

### 1.3.4 Overview of some amendments made to the Copyright Act in 1999

#### 1.3.4.1 Retroactivity

The 1992 text of the Copyright Act did not provide a direct answer to the question of whether works created before the entry into force of the Act on 12 December 1992 are also protected under copyright during the full term of protection. The 1999 amendments make it absolutely clear in § 88 that such works are protected under copyright within the whole term of copyright which, as a rule, is the life of the author plus seventy years after his or her death.

The issue concerning the retroactivity of related rights has also often been discussed: do the owners of rights in performances, phonograms, radio and TV broadcasts enjoy the rights also before 12 December 1992? Related rights were not protected at all in Estonia before the entry into force of the Copyright Act of

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<sup>30</sup> For instance, it was influenced by the drafting of the new Civil Code, Customs Act, new acts regarding civil and administrative procedure, etc.

<sup>31</sup> Estonia was a candidate for the Watch List determined by the United States Trade Representative. The Watch List includes countries where intellectual property rights of US right holders are infringed and where the US Government is authorised to impose economic sanctions under Section 182 of the Trade Act of 1974 (as amended, better known as “Special 301”). 1998 Special 301 Recommendations. Submitted to the United States Trade Representative on February 23, 1998. International Intellectual Property Alliance, 1998, p. 2,4.

<sup>32</sup> RT II 1999, 27, 165. Estonia became party to the Convention on 28 April 2000. Estonia made reservations under Article 5(3), 6(2) and 16(1)(a)(i) of the Convention.

<sup>33</sup> RT II 1999, 27, 166. Estonia became party to the Convention on 28 May 2000.

<sup>34</sup> H. Pisuke. *Estonian Authors' Society Operating*. Teostory, 1992, No 2.

1992. Now there is a clear answer: related rights are protected during the entire term of protection (as a rule, for fifty years).<sup>35</sup>

Protection provided by the Copyright Act is retroactive; materials which were not protected before 12 December 1992 are now protected. However, the Act only applies to instances of use starting from 12 December 1992. The Act does not apply to use that occurred earlier (for example, no remuneration can be claimed retroactively for use of works or phonograms that occurred before 12 December 1992).

#### 1.3.4.2 Fight against piracy

Several amendments introduced to the 1999 Copyright Act concern infringements of copyright or related rights, including the fight against piracy.

The amended version of the Copyright Act contains the legal definition of pirated copy. Under § 80<sup>1</sup>:

“(1) For the purposes of this Act, “pirated copy” means a copy in any form and whether or not with a corresponding packaging, of a work or object of related rights which has been reproduced in any country without the authorisation of the author of the work, holder of copyright or holder of related rights.

(2) “Pirated copy” means also a copy of a work or object of related rights which has been reproduced in a foreign state with the authorisation of the author of the work, holder of copyright or holder of related rights but which is distributed or is going to be distributed in Estonia without the authorisation of the author, holder of copyright or holder of related rights.”

The definition is, in principle, in compliance with the definition laid down in Article 51, Footnote 14 (b) of the WTO TRIPS Agreement.<sup>36</sup> The amended version of subsection 26 (2) of the Estonian Customs Act<sup>37</sup> also refers to the legal definition in the Copyright Act.

Since 1999 the main emphasis in the fight against violations of intellectual property rights by natural persons is on criminal law. The corresponding sections (§§ 184<sup>3</sup> (copyright and related rights) and 184<sup>5</sup> (industrial property)) of the Code of Administrative Offences have been repealed. The Criminal Code was amended by addition of Chapter 15 *Criminal Offences Against Intellectual Property*.<sup>38</sup>

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<sup>35</sup> § 88 (1) of the Copyright Act reads: “This Act also extends to works and results of the work of performers, producers of phonograms or broadcasting organisations which are created before 12 December 1992”.

<sup>36</sup> Agreement on Trade-related Aspects of Intellectual Property Rights. Annex 1C of the Agreement Establishing the World Trade Organisation (Marrakesh Agreement) concluded on 15 April 1994. See 2.3.2. below.

<sup>37</sup> RT I 1998, 3, 54; 36/37, 552; 51, 756; 1999, 10, 156.

<sup>38</sup> Earlier, the Criminal Code contained provisions regarding infringements of copyright and related rights, and infringements of industrial property.

The adoption of the new Penal Code on 6 June 2001<sup>39</sup> concluded the reform of the whole Estonian penal policy.<sup>40</sup> The Penal Code prescribes penalties for offences. Offences are divided into criminal offences and misdemeanours. The Penal Code contains a special chapter *Offences Against Intellectual Property*. Punishments prescribed for a criminal offence, in the case of natural persons, is a fine, detention or imprisonment. The new Code introduces criminal liability of legal persons in the form of a fine or compulsory dissolution.

At present, a natural person is punished for the manufacture of pirated copies by a fine or by imprisonment for up to three years.<sup>41</sup> The same applies to the unlawful reproduction of computer programs. If a natural person infringes copyright or related rights in the interests of a legal person, the natural person may be held criminally liable concurrently with the application of administrative liability for the legal person.<sup>42</sup> A fine or imprisonment for up to three years is imposed for the importation or exportation of pirated copies by a natural person.<sup>43</sup>

The amended Copyright Act provides for the administrative liability of legal persons. For example, a fine between 250,000 – 500,000 kroons is imposed on a legal person for the manufacture of pirated copies.<sup>44</sup>

The criminal liability of a natural person<sup>45</sup> and the administrative liability of a legal person<sup>46</sup> are also prescribed for the manufacture, acquisition, possession, use, carriage, sale or transfer of technical means or equipment designed for the removal of protective measures against the illegal reproduction of works or against the illegal reception of signals transmitted via satellite or cable.

The importation or exportation of pirated copies is treated as a violation of the customs rules; the liability of a legal person for such an offence is provided by the Customs Act.<sup>47</sup>

#### 1.3.4.3 Copyright Committee

The amendments introduced to the Copyright Act in 1999 regulate the activities of the Copyright Committee in more detail. A permanent Copyright Committee under the governance of the Ministry of Culture is nominated by the Government for two years. It is composed of representatives from the ministries concerned,

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<sup>39</sup> It is expected that after the adoption of an implementing Act during the first half of 2002, the Penal Code will enter into force by the end of 2002.

<sup>40</sup> As former administrative offences are treated as misdemeanours, the currently effective Code of Administrative Offences (RT 1992, 29, 396; RT I 1999, 41, 496; 45, 58, 608; 60, 616; 87, 792; 92, 825; 95, 843; 2000, 10, 58; 25, 141). will be repealed. As a result of the reform, the Code of Criminal Procedure will be replaced. The new Code of Administrative Court Procedure (RT I 1999, 31, 425; 33; 40; 96, 846) entered into force on 1 January 2001. The new Code of Criminal Procedure is pending in the parliament at the beginning of 2002.

<sup>41</sup> § 280 (3) of the Criminal Code.

<sup>42</sup> § 82 (1) of the Copyright Act.

<sup>43</sup> § 280 (4) of the Criminal Code.

<sup>44</sup> §§ 82–84 of the Copyright Act. 1 US dollar equals 17.5 EEK as at January 2002.

<sup>45</sup> § 281 of the Criminal Code.

<sup>46</sup> § 83 (4) of the Copyright Act.

<sup>47</sup> § 82 (2) of the Copyright Act, § 69 of the Customs Act.

interest groups (authors' and related rights owners' associations, Business Software Alliance, etc.) and academic circles. The tasks of the Committee are twofold. Firstly, its task is to monitor compliance of the level of intellectual property protection with the international obligations assumed by Estonia, analyse the practice of implementation of copyright legislation, and give an overview to the Government about IP protection in Estonia twice a year. The second function of the Committee is to act as a body for the out-of-court resolution of disputes by way of reconciliation of parties. The Statutes of the Copyright Committee were approved by the Minister of Culture on 7 September 1999.

### 1.3.5 Influence of the new Estonian Civil Code on the Copyright Legislation

For various historical and political reasons, Estonia serves as an example of a country where classical civil law enjoys a particular privileged status and is, in some respects, a matrix in building up the entire legal system.

By the beginning of 2002, the new Civil Code consists of five separate laws: the General Part of the Civil Code Act (1994), the Law of Property Act (1993), the Family Law Act (1994), the Law of Succession Act (1996), and the Civil Code of 1964 (where only Part III – the Law of Obligations - is still in force).

On 26 September 2001 the fifth part of the new Estonian Civil Code - the Contracts and Non-Contractual Obligations Act – was adopted, which will come into force in 2002.<sup>48</sup> In its general and special part, the new Act covers the whole law of obligations.<sup>49</sup> The enforcement of the Act will bring along several fundamental changes in copyright legislation. These changes mainly concern the use of works and copyright contracts (Chapter VII), as well as the protection of rights, and liability (Chapter X).<sup>50</sup>

By the beginning of 2002, a completely new version of the General Part of the Civil Code Act, and the sixth part of the new Civil Code – the Private International Law Act<sup>51</sup> – were pending in the parliament. The Acts are expected to be passed in the first half of 2002.

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<sup>48</sup> RT I 2001, 81, 487. The law is also known as the Law of Obligations Act. The entry into force of the Act depends on the passage of the implementing Act, likely to occur in the first half of 2002. The new Act contains 1068 sections.

<sup>49</sup> V. Kõve. *Applicable Law in the Light of Modern Law of Obligations and Bases for the Preparation of the Law of Obligations Act*. *Juridica International. Law Review*. University of Tartu, VI 2001, pp. 30-37.

<sup>50</sup> Apart from the general principles of contracts, the protection of rights, and liability, the Contracts and Non-Contractual Obligations Act contains a separate chapter on licensing contracts (Chapter 18).

<sup>51</sup> At present, the provisions on conflict of laws form part V of the General Part of the Civil Code Act (1994).

## 2 Estonia as Part of the Global Intellectual Property Society

### 2.1 Some Remarks on the Global Intellectual Property Society

The contemporary legal and social theory speaks about a global legal society or a global legal system. According to some scholars, such a global legal society may well exist already. Other scholars argue that neither at present nor in the future will we have a global legal society.<sup>52</sup>

Let me raise two questions. Is it possible to speak about a global legal society in the field of intellectual property as part of the global legal society? The answer is probably yes.

What is a global legal society in the field of intellectual property? This is a situation where uniform basic social and legal principles are globally recognised in the protection of results of creative activity, and where the minimum standards have been agreed upon at least in the following areas: what is protected, which rights are granted and to whom they belong, how the rights are limited in the interests of the society and by which means and in which manner the rights are ensured and protected.

Intellectual property became part of the global legal society only at the end of the 19<sup>th</sup> century by adoption of the Paris and Berne Conventions when the European regional intellectual property protection system developed into a global intellectual property system.

In comparison with other private law institutes, building a global intellectual property system has been a real success story of the 20<sup>th</sup> century. The fact today is that, of all countries of the world, there are more than half of those which have become part of a global intellectual property protection system (joining WIPO<sup>53</sup> and conventions administered by WIPO), and those which have their national intellectual property systems created and implemented on the basis of unified international standards. Such success can be compared only with the global and European harmonisation of contract law.

By today there is a universal global intellectual property system – a unified and standardised body of rules enacted through international conventions and national legislation. It concerns, first and foremost, the traditional fields of intellectual property - copyright and industrial property, but it may also include related rights and new *sui generis* forms of intellectual property protection. To date, intellectual property has been developed in the world for three centuries, the international global harmonisation, for a little over one century, and the results are not bad given the dynamics of the process. For comparison, contract law, for example, has been developed in Europe for about 1500 years when we take the codification of the Emperor Justinian from the 6<sup>th</sup> century, today known as the *Corpus Iuris Civilis*, as the point of departure. The latter resulted from developments of the previous 12 centuries, but the global harmonisation of

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<sup>52</sup> W. Krawietz. *Individualismus versus rechtliche Kollektivsubjekte? Zur "Neuen Unübersichtlichkeit" und Fragmentierung der modernen Gesellschaft*. Materials of International Symposium *Legislation and Legal Policy*, 29.09.-30.09.2000, Tartu.

<sup>53</sup> Estonia is a member of the WIPO since 5 February 1994. RT II 1993, 25, 55.

contract law has yet not reached the same level as intellectual property harmonisation.

When we are speaking about a global legal society, the question arises what is “global”. Whether it covers 100 %, 75 % or 51 %, is a matter of agreement. Probably there are, and will be, some countries, which have no contemporary intellectual property protection system at all.

The speed of movement towards a global legal society in the field of intellectual property has significantly increased in the 1990s as a result of adoption of new international conventions. First and foremost, the activities of the GATT Uruguay Round which led to the establishment of the World Trade Organisation with its TRIPS Agreement<sup>54</sup>, and WIPO with its two new treaties of 1996.<sup>55</sup> The European regional legal area and the regional harmonisation of intellectual property in the framework of Council of Europe and the European Union have strongly contributed to the global one.

What are the global players (or social actors) for forming such a world-wide intellectual property legal system? First of all, states and groups of states. But beyond the states and their communities – it is the industries represented by lobby groups who direct the play. The industries are global market players today. Today’s technological advantages – the global information society - can connect (via the Internet) within seconds all the players.

## 2.2 *Estonia as Part of the Global Intellectual Property Society*

### 2.3.1 *Estonia and the Berne Convention*

On 26 October 1994, Estonia rejoined the Berne Convention. This involved an interesting constitutional law and international law question: how to restore the membership that became effective on 9 June 1927<sup>56</sup> and ended on 6 August 1940.<sup>57</sup> It is stated in the *Riigikogu* (the parliament of Estonia) declaration of 7 October 1992 on the restoration of the constitutional state powers: “As a legal subject, the present Republic of Estonia is identical to the Republic of Estonia proclaimed on 24 February 1918, which fell victim to the aggression of the Soviet Union in 1940 and was unlawfully incorporated into the Soviet Union.”<sup>58</sup> Therefore, it could have been argued that Estonia’s membership had never ended and it would have been possible to resort to the so-called Declaration of Continuity form. After WWII, the Czech Republic and Austria restored their membership of the Berne Convention using this form in 1946 and 1948,

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<sup>54</sup> See 2.3.2. below.

<sup>55</sup> See 2.3.3. below.

<sup>56</sup> RT 1927, 44, Law No 41. *Le Droit d'Auteur* 1927, No, 8, p. 89; No 9, pp. 102-103. Estonia was the 29<sup>th</sup> State which joined the Berne Union.

<sup>57</sup> *Le Droit d'Auteur*, 1941, No 1, p 7. See also S. Ricketson. *The Berne Convention for the Protection of Literary and Artistic Works: 1886 - 1986*. Centre for Commercial Law Studies, Queen Mary College, Kluwer, 1987, p 778, footnote 193.

<sup>58</sup> RT 1992, 40, 533.

respectively.<sup>59</sup> The Declaration of Continuity would, however, have meant that Estonia was bound by the 1908 Berlin Act.<sup>60</sup> The *Riigikogu* passed an Act on 18 May 1994 providing that Estonia was to accede to the 1971 Paris Act of Berne Convention for the Protection of Literary and Artistic Works, in order to rejoin the Berne Convention for the Protection of Literary and Artistic Works of 1886 to which Estonia became party in 1927.<sup>61</sup> It can be concluded that rejoining the Berne Convention was only a political declaration showing the state's intention to regard itself as bound by the Convention that it acceded to in 1927 and not resulting in any legal consequences for the period when Estonia was not a member of the Convention *de facto*. Estonia became bound by the Convention's last revision and did not recognise the obligations resulting from its earlier accession. This position was also expressed in the note sent by the Estonian Ministry of Foreign Affairs to WIPO.

Compared to 1927, the national implementation of the re-accession decision was easier, although not unanimous. The first accession Act passed by the parliament on 6 April 1994 was not proclaimed by the President<sup>62</sup> and only the second Act passed by the parliament on 18 May 1994 became law. There was no major debate in the question of joining as such, rather about the retroactive protection of foreign works after accession.<sup>63</sup>

### 2.3.2 Estonia and the WTO TRIPS agreement

In 1994, the most extensive international agreement on intellectual property – the Agreement on Trade-related Aspects of Intellectual Property Rights – was concluded. It forms Annex 1C of the Agreement Establishing the World Trade Organisation (Marrakesh Agreement).<sup>64</sup>

Estonia received an observer status in GATT in June 1992 and applied for membership in March 1994. In January 1995, the WTO General Council transformed the GATT Accession Working Party into a WTO Accession Working Party. The bilateral and multilateral negotiations for joining the WTO were concluded on 21 May 1999 with the signing of the Protocol of Accession of Estonia to the Marrakesh Agreement Establishing the World Trade Organisation

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<sup>59</sup> S. Ricketson. *The Berne Convention for the Protection of Literary and Artistic Works: 1886 - 1986*, pp. 778-779.

<sup>60</sup> In 1993 the substantial provisions of the 1908 Berlin Act were applied only by the Kingdom of Thai.

<sup>61</sup> RT II 1994, 16/17, 49.

<sup>62</sup> RT 1994, 31, 494.

<sup>63</sup> On the topic of Estonia and the Berne Convention see: H. Pisuke. *Berni konventsioon ja Eesti: minevikust tulevikku*. *Eesti Jurist*, 1993, N0 11, lk. 16-26; H. Pisuke. *Eesti on taas Berni konventsiooni liige*. *Eesti Jurist*, 1994, No 11, pp. 47-52.

<sup>64</sup> The so-called TRIPS Agreement is available on WTO web site: "www.wto.org".



by the Estonian Minister of Foreign Affairs.<sup>65</sup> Since 13 November 1999 Estonia is member of the WTO.<sup>66</sup>

Intellectual property has been a special topic on the agenda during the whole negotiation period. In the field of copyright and related rights, the following main formal requirements were raised: an effective fight against piracy (the adoption of the corresponding legislation, implementation and enforcement of the legislation), accession to the 1961 Rome Convention and the 1971 Geneva Phonograms Convention. Estonia fully applied all the provisions of the TRIPS Agreement from the date of its accession to the WTO, without recourse to any transition period.

The 1999 amendments to the Copyright Act have set a solid legal basis for the fight against piracy. The police, customs, courts and other enforcement institutions have made great progress. Estonia joined the Rome Convention and the Geneva Convention in 1999.

The provisions of the Code of Civil Procedure (CCP; 1998) on safeguarding evidence and on securing actions are interpreted by the Estonian authorities as complying with the requirements of Article 50 (Provisional measures) of the TRIPS Agreement. Probably some special additional provisions should be included in the CCP and the new Draft CCP to fully comply with Article 50.

### 2.3.3 Estonia and the new WIPO treaties

On 20 December 1996, two new international agreements were concluded in Geneva: the WIPO Copyright Treaty,<sup>67</sup> and the WIPO Performances and Phonograms Treaty.<sup>68</sup> Estonia signed these treaties on 29 December 1997. By that date, the treaties had been signed by 51 and 50 countries, respectively. The treaties have not been ratified by the *Riigikogu* by the beginning of 2002, as several amendments to the Copyright Act are necessary. The Ministry of Culture, responsible for copyright and related rights issues, decided that it would be more useful to adopt amendments to the Copyright Act as a package after the adoption of the European Parliament and Council Directive on the harmonization of certain aspects of copyright and related rights in the information society. This directive, passed in 2001, harmonises the WIPO Treaties within the EU.

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<sup>65</sup> Press Release No 113-E of 21.05.1999 of the Estonian Ministry of Foreign Affairs. "<http://www.vm.ee/eesti/press/1999/0521wto.htm>".

<sup>66</sup> RT II 1999, 22, 123.

<sup>67</sup> WIPO Copyright Treaty (WCT) (1996) with the agreed statements of the Diplomatic Conference that adopted the Treaty and the provisions of the Berne Convention (1971) referred to in the Treaty. WIPO, Geneva 1997. Available also on WIPO web site: "[www.wipo.org](http://www.wipo.org)".

<sup>68</sup> WIPO Performances and Phonograms Treaty (WPPT) (1996) with the agreed statements of the Diplomatic Conference that adopted the Treaty and the provisions of the Berne Convention (1971) and of the Rome Convention (1961) referred to in the Treaty. WIPO, Geneva 1997. Available also on WIPO web site: "[www.wipo.org](http://www.wipo.org)".

### 2.3.4 Estonia and the EU

The harmonisation of the Estonian copyright legislation with the corresponding EU legislation is based on Article 66 and Annex IX of the Association Agreement (the Europe Agreement) which entered into force on 1 February 1998.<sup>69</sup> Article 66 (2) reads: “Estonia shall continue to improve the protection of intellectual, industrial and commercial property rights in order to provide, by 31 December 1999, for a level of protection similar to that existing in the Community, including effective means of enforcing such rights.”

Another requirement to be met by 31 December 1999 was that Estonia should join the conventions set out in Annex IX. As Estonia is party to the Berne Convention, this obligation included accession to the 1961 Rome Convention. In the documents underlying the harmonisation of legislation - the Accession Partnership and Estonian National Work Program for the Adoption of the *acquis* - intellectual property was mentioned as one of the priorities.<sup>70</sup>

Negotiations with the EU regarding Estonia’s possible accession started in March 1998 with the so-called screening exercise. During the negotiations, intellectual property is a topic to be dealt with under Chapter 5 *Company Law*. The Chapter was closed in April 2000, and it was concluded that there should be no obstacles to prevent full harmonisation and implementation of all the EU copyright and related rights directives by possible accession. The 1999 amendments to the Copyright Act fully harmonised 5 EU directives adopted.<sup>71</sup> As for the new EU directives adopted in 2001,<sup>72</sup> they will probably be harmonised in 2002 or 2003.

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<sup>69</sup> RT II 1995, 22-27, 120.

<sup>70</sup> See also Estonian Progress Report for the Commission Review 2001, and National Programme for the Adoption of the *Acquis* 2001 on the web site of the Office of European Integration “www.eib.ee”.

<sup>71</sup> Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs. OJ L 122 17.5.91; Council Directive 92/100/EE of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property. OJ L 346 27.11.92; Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission. OJ L 248 6.10.93; Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights. OJ L 290 24.11.93; Directive of the European Parliament and of the Council 96/9/EC of 11 March 1996 on the legal protection of databases. OJ L 77 27.3.96.

<sup>72</sup> Directive 2001/29/EC of the European Parliament and Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society. OJ L 167/10 22.6.2001; Directive 2001/84/EC of the European Parliament and Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art. OJ L 272/32 13.10.2001.

### **3 Conclusions and Some Perspectives for the Development of Estonian Copyright Law**

The protection of authors' rights through copyright has quite a long history in the Estonian cultural and legal traditions although the history is somewhat controversial. The history started in the tsarist time at the beginning of the 18<sup>th</sup> century, developed during the independent statehood (1918 - 1940), and nearly 50 years of Soviet rule. Estonia is part of the global intellectual property society since 1927 when it joined the Berne Convention. The first authors' collecting society dates back to 1932. But the most effective period for new legislation and legal thinking was the 1990s, of which 1992 (passage of the Copyright Act), 1994 (re-joining the Berne Convention) and 1999 (adoption of major amendments to the Copyright Act) were years of major reforms. In 1992, related rights were introduced to the Estonian legal system, and since 2000, Estonia is party to the 1961 Rome Convention and 1971 Geneva Convention. In the 1990s, Estonia became an independent player in all the major initiatives of the global and regional European intellectual property society (WIPO, WTO, Council of Europe, EU). By the end of 1999, Estonia had harmonised its legislation with the five EU copyright directives and the requirements of the WTO TRIPS Agreement.

It can be stated that the future development of the Estonian copyright law and related rights law will mainly be determined by fulfilling the obligations of international agreements. The new EU directive on copyright in the information society will be harmonised in 2002 or 2003, in the same package with the two WIPO treaties of 1996. The treaties signed in 1997 will be ratified by the parliament at the same time.

The development of the Estonian copyright law is also affected by the general tendencies of development of the Estonian legal system, first and foremost, by private law. The adoption of the Contracts and Non-Contractual Obligations Act in 2001, which forms part of the new Civil Code, will bring along several fundamental changes in the copyright legislation. These changes mainly concern copyright contracts, the protection of rights, and liability. The new Penal Code and customs legislation also contain important provisions on enforcement of copyright and related rights. Although new national legislation, in particular the Civil Code, directly affects the copyright legislation, its influence is not as marked as that of international developments. It is likely that work on drafting a completely new Copyright Act will start in 2003.

The exercise of IP rights is ensured by institutional means. The reform of the court system has practically been completed. The Ministry of Culture, responsible for copyright and related rights, and the Copyright Committee attached to the Ministry, operate in a stable manner. There are several collective management organisations of authors' rights and related rights. However, the case law in the field of intellectual property rights is still in its early phase of development.

To conclude, the building of a national intellectual property system took, for various historical reasons, nearly a whole century, and was completed in the 1990s. At the beginning of the 21<sup>st</sup> century, Estonia has a dynamic and developing IP system complying with the global and European standards.