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

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ABSTRACT

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

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

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

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

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

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1. Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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