

# Scalable Consumer Content in the Future Digital Environment

Edited by Olli Pitkänen

Contributions by  
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## Final Report

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# EXECUTIVE SUMMARY

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The Nordic consortium studied IPR related obstacles and opportunities that digitalisation brings out with regard to scalable consumer contents in innovative industries. The focus was on growth, internationalisation and cross-sector innovations. Of all intellectual property rights (IPR) the project emphasized the copyright regime, but industrial rights, like patents and trademarks, were also taken into consideration. The consortium included academic partners in Finland, Denmark, and Sweden. They each had their subprojects that were tightly linked together and accomplished in parallel. Each subproject had its own scientific viewpoint on the Nordic innovative industries.

The key findings of the project are:

- The Danish, Swedish and Finnish IP laws are similar to a large extent. They have common historical backgrounds, but they are also essentially regulated by international treaties and EU directives. Therefore, the Nordic Countries don't have too much liberty to radically renew the IPR system by themselves – even though businesses would appreciate a more modern IPR regime.
- Related or Neighbouring rights are a very fragmented and difficult entity to perceive. It seems generally quite random when a thing is protected by a related right and when it is not. They should be clarified by identifying the unified basis of the various related rights and by developing legislation or at least its interpretation in the direction of general lessons and principles rather than that of casuistic and fragmented rules.
- Age rating systems are unnecessarily complicated and disunited.
- The Danish, Swedish and Finnish TV production and gaming industries prefer arbitration over civil court litigation.
- The Danish, Swedish and Finnish IP contracts in the TV production and gaming industries prefer full exclusivity over partly exclusivity.
- Electrodermal activity (EDA) in combination with eye-tracking measurement provides new opportunities for marketing practitioners and scholars interested in studying emotional arousal and its influence on behavior. It enables to record moment-to-moment arousal. It allows to rule out cognitive biases by which self-reports may be affected. It captures arousal even when it is unconsciously experienced. Nevertheless, it should not be seen as a mere replacement of self-reports of arousal. Rather, the role of physiologically measured arousal vis-à-vis self-assessed arousal is an avenue for future research.

We summarize our policy recommendations in the following:

The Nordic Countries should harmonize their Intellectual Property Laws and Licensing policies further than the European Union has been able to do so far. Especially, differences in copyright thresholds as well as the fragmented and unjustified system of related rights create annoying business obstacles.

- In licensing, the creative industries can learn from the best practices from other creative areas.
- The Nordic Countries should remove unnecessary differences in their age ratings in the creative areas.
- The music industry should understand that humans instinctively act on impulses from the primal cord. These impulses generate various reactions which affect how we feel. Music together with scent, is one of very few impulses humans can protect themselves from that will have a direct effect on human well-being.
- Apply a more scientific approach to understand how music affects people in real life settings.
- In retail settings, a pleasant customer experience is key for survival.
- Music can be used to shape behaviour in a good way, eg. more healthy living. Applying more scientific methods to accomplish this is beneficial for society.

“Differences in copyright thresholds as well as the fragmented and unjustified system of related rights create annoying business obstacles.”

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# 1. BACKGROUND

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Creativity and innovativeness are valuable resources in the Nordic countries. To focus on intellectual property rights is a way to expand these resources and develop industries faster on a global level. Intellectual property rights (IPR) includes e.g. copyright, patents, and trademarks. Each of them has a special focus on protecting intellectual property.

The Nordic countries have a common background and history when it comes to IPR and creative industries. Only in recent years have practises started to diverge. The EU is promoting the same questions but is too diverge and slow to grasp fully the opportunities.

Nordic Innovation has funded this pan-Nordic research project to study Scalable Consumer Content in the Future Digital Environment. The research questions to be answered by the consortium have included, what needs to be developed so that the Nordic countries can be regarded as a single market in this field. What is needed, for example, to facilitate common cross-Nordic productions and services which are often ecosystem based, rather than single actor-based. Financing such productions is often difficult since copyright can rarely be used as a guarantee.

The project surveyed the barriers to IPR as a resource for industries in the Nordic region and has given recommendations based on these findings about measures to extend the ecosystem and for better dissemination of knowledge in order to support better cross-sector innovation.

“What needs to be developed so that the Nordic countries can be regarded as a single market.”

## 2. THE PROJECT ACCOMPLISHMENT

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On 13 December 2016, Research Director Olli Pitkänen, Hanken School of Economics/IPR University Center, Finland; Professor Anders Gustafsson, Service Research Center, Karlstad University, Sweden and Associate Professor Torsten Bjørn Larsen, Department of Law, Aalborg University, Denmark (hereinafter the Project Participants) jointly applied Nordic Innovation for a funding of NOK 1.800.000 for the project "Scalable Consumer Content in the Future Digital Environment" (hereinafter the Project). The application comprised the following three sub-projects:

- Sub-project I "The Future of IPR in the Nordic Creative and Innovative Industries". Responsible: Olli Pitkänen;
- Sub-project II "Current and Evolving Contractual Practices in the Nordic Creative and Innovative Industries". Responsible: Torsten Bjørn Larsen; and
- Sub-project III "Metrics and Indicators of Value Creation". Responsible: Anders Gustafsson.

On 15 December 2016, Nordic Innovation accepted the Project application and on 6 April 2017 the Agreement on Funding the Project was signed by Nordic Innovation.

The Project started on 1 February 2017 and was originally meant to end on 31 August 2017. However, Nordic Innovation accepted to lengthen the Project until 31 December 2017. The reason was two-fold i.e. that it had taken the Project Participants longer than expected to collect the required data and that signing of the Agreement had been delayed.

In the Project period a number of Skype meetings have been held between the Participants. In addition, the following Project meetings have been held:

- The kick-off meeting in Karlstad, Sweden, 6 February 2017;
- The "Gaming" workshop with external participants at Rovio in Espoo, Finland, 3 April 2017;
- The "TV Production" workshop with external participants in Copenhagen, Denmark, 16 May 2017;
- The "Music and Design" workshop at Teosto in Helsinki, Finland, 16 August 2017;
- The "Cool and Creative Nordic" conference in Malmö, Sweden, 6 September 2017, where the Projects' preliminary findings were presented;

- A project meeting in Karlstad on 14 December 2017; and
- A project meeting in Aalborg on 20 December 2017.

The project achieved the results according to the plan. It was accomplished in accordance with the Agreement, within the budget, and in the revised schedule.

The results are documented in this Final Report, which is to be submitted to Nordic Innovation after the completion of the Project.

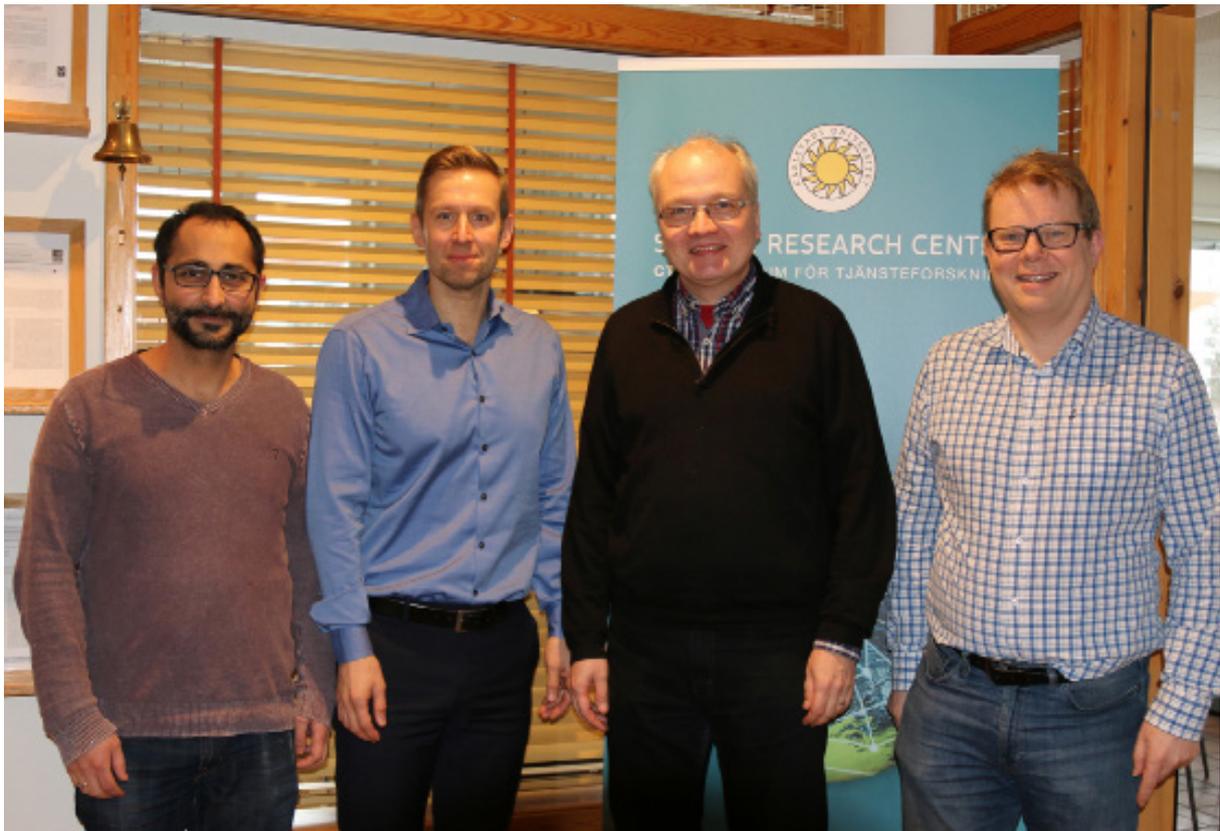


Figure 1 Poja Shams, Torsten Bjørn Larsen, Olli Pitkänen, and Anders Gustafsson, photo: Linda Fridber

# 3. SUB-PROJECT I: THE FUTURE OF IPR IN THE NORDIC CREATIVE AND INNOVATIVE INDUSTRIES

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## 3.1 PURPOSE

The first subproject was to study Intellectual Property Rights (IPR) in relation to the Nordic Creative and Innovative industries. We surveyed the IPR legal framework in the Nordic countries and gave emphasis on how to streamline the Nordic Copyright laws and remove legal obstacles that Intellectual Property Rights may cause to creative and innovative industries. Of all intellectual property rights (IPR) the project emphasized the copyright regime, but industrial rights, like patents and trademarks, were also taken into consideration.

“IPR issues, obstacles and opportunities that digitalization foster when it comes to growth, internationalization and cross-sector innovation”

The subproject organized a set of future workshops and analysed their results in order to study IPR issues, obstacles and opportunities that digitalization foster when it comes to growth, internationalization and cross-sector innovation. We picked up a few sample sectors, namely games industry, TV and movie productions, music production, and design industry to analyse future IPR challenges. The research questions included, what kind of new types of ecosystems, business models and value chains and challenges and opportunities will emerge in Nordic innovative industries and how the IPR system supports them in the next ten years. In addition, the workshops helped the other subprojects and the participants (e.g. representatives of companies and authorities) to understand the future landscape of Nordic innovative industries.

## 3.2 WORKSHOPS

The three gameful future workshops were facilitated by Vesa Kantola, who is well experienced in organizing similar events. The first workshop took place on 3 April 2017 at Rovio's headquarters in Espoo. The participants were Leena Kuusniemi, Rovio; Topi Siniketo, Avance Attorneys; Tomi Simula, Fingersoft; Jenna Lindqvist, University of Helsinki; Sam Wrigley, IPR University Center; Nicolas Kröger, IPR University Center; Olli Pitkänen, IPR University Center; Torsten Bjørn Larsen, Aalborg University; Poja Shams, Karlstad University; and Vesa Kantola as the facilitator.



Figure 2 Workshop at Rovio, photo: Olli Pitkänen

The theme of the workshop was how to harmonize the market in Scandinavia and find the ideal situation for gaming companies. As a case study for this workshop, we were looking at a concept called Character Garage (“CG”), which is an imaginary digital environment—a garage for expressive digital characters ranging from moving skeletons or skins to “real actors”. These characters can be utilized in short films, internet animations and game design. Its business model combines a physical space with sensory data capture systems, and the offering of these facilities to the co-creation community. CG also offers various distribution options to allow for the sharing and broadcast of creations. CG will use an existing community of improvisation actors and digitise their actions with motion-capture technology. It has elements of co-creation by individual players and customers, business actors in the broadcast and game worlds, and even potentially researchers and academics.



Figure 3 Workshop at Rovio, photo: Olli Pitkänen

The second workshop was on 16 May 2017 in Copenhagen. The participants were Erik Wilstrup, Wil Film; Ida Brinck-Lund, Wil Film; Katrine Schlüter Schierbeck, media lawyer; Live Hide, Nimbus Film; Stiina Laakso, Satu Ry; Anna-Maija Sunnanmark, Nordic Innovation; Erja Korhonen, writer; Olli Pitkänen, IPR University Center; Torsten Bjørn Larsen, Aalborg University; Poja Shams, Karlstad University; Sam Wrigley, IPR University Center; Nicolas Kröger, IPR University Center; and Vesa Kantola as the facilitator. The theme of the workshop was “gameful TV productions” and co-creation contracts: new ways of producing content with new participants in the platform economy. We were asking if a single market in the Nordic Countries would foster joint productions or harm existing financing models? How should IPR and contractual practices be developed to benefit the industry?



Figure 3 Photo: Johanna Rahnasto

The third workshop took place on 16 August 2017 in Helsinki. It was hosted by Finnish Composers' Copyright Society Teosto. The participants were Jani Jalonen, Teosto; Ano Sirppiniemi, Teosto; Teosto; Turo Pekari, Teosto; Otto Romanowski, composer; Taru Kallio-Nyholm, Berggren; Taina Roth, lawyer; Olli Pitkänen, IPR University Center; Johanna Rahnasto, IPR University Center; and Vesa Kantola as the facilitator. In the workshop, we elaborated the role of music and sound as a brand identification tool and asked how music and sound can be used as a potential enhancer for user experience and added sales, and how auditive experiences can be designed.



Figure 4 Workshop at Teosto, photo: Olli Pitkänen

To summarize the discussions in the three workshops, these are the topics that were specifically highlighted:

### 3.2.1 HARMONIZING INTELLECTUAL PROPERTY RIGHTS AND THEIR LICENSING

- Harmonizing the licensing scheme is essential
- Common minimum IPR license terms – usage, among other things, can vary by location (for example, changing one small pixel can constitute “modification”, requiring a modification license, while in other areas, modification as such is not protected.

“Harmonizing the licensing scheme is essential”

- Focus should be on commercial use because anything done by a company can be interpreted as being commercial, even charity can be interpreted as “PR”.
  - Which rights in music can be licensed?
  - Who holds the rights? Legal issues, and what kinds of contracts can be used to resolve those?
  - Moveable copyright: it should be more flexible to assign copyright and not to bind them in a certain person.
  - Different collecting societies have different terms (some give fixed price and others per copy sold).
- Although the copyright laws in the Nordic Countries are very similar, there are national differences in their interpretation (e.g. the copyright threshold is different in Sweden and Finland). Solution: Unified Copyright Court, which had a jurisdiction over all the Nordic Countries to harmonize interpretations.
    - an alternative to this would be a New York Convention/Brussels I Regulation-type treaty that would ensure automatic recognition of foreign judgments (this alternative could be considered alongside the other one in case it might prove politically easier to justify and put into place than the other suggestion of a single court)
    - The unified court, on the other hand, might be more efficient once established, in that its decisions would apply directly, whereas courts applying New York Convention (different in U.S. where U.S. Code mandates direct applicability) may perform prima facie review, etc... and there are exceptions to applicability of both that and Brussels I
- Copyright reform: renew copyright legislation and concepts to match contemporary requirements
    - Fair use doctrine
    - Update the concepts of performance and reproduction and bring in more nuances
    - Reform neighbouring / related rights
- Unified trademark protection, United Trademark Office of the Nordic Countries (similar to US and EU), creation of a “Nordic overlord” IP authority in order to supervise all IP-related matters
- Pan-Nordic Community (?) Trade Mark without any official obstacle examination à shorter time to market
- General Intellectual Property Regulation
- A mess with neighbouring or related rights (producers’ rights, performers’ rights, etc.).
- If geoblocking is not possible, then at least harmonize the rules on international exhaustion. How would the international principle of exhaustion be better than regional? IPR owners have the exclusive right to grant certain rights, collecting societies in certain countries, and the creator only can give the synchronization rights, because they are never transferred even when all other rights may be. The problem is you always need to edit the content if you need a certain length. Cdkeys.com sells codes from countries where they are cheaper (unclear about exhaustion). Some countries have international exhaustion (e.g. U.S.), others do not.
- A game has all the elements of Intellectual Property. However, it is very difficult to obtain global protection unless the game is developed in-house (the idea is to get rid of territoriality).

- Protection of software code under copyright is granted 70 years after author's death, which is a long time.

## "A game has all the elements of Intellectual Property"

- Patents last up to 20 years and they are territorial.
  - Patent litigation is so expensive that it has sparked the patent litigation funding industry.
  - Also very expensive for regular people
  - Those without enough money (to file for/obtain/defend patent) should just "run faster". Those with a large amount can "publish everything" and "mine the market" to completely prevent any entry by other potential challengers.
  - Filing for patents is too difficult due to the vastness of databases
- Software-driven industry is easier to be involved in because there are fewer "patent problems", even though patent trolls do exist.
- United cease-and-desist service operated by bots which would scan through registered IP in a centralized server
- Making the platform. Maybe that's where the money is, if IP rights are distributed too widely to be profitable, or the IP issues are otherwise unresolved.
- Arrives UPC: better and faster decisions in patent cases
- Algorithms creating music and producing sounds: is it just a tool or should e.g. the programmer get the copyright and what are the user's rights? Give up on the idea that the author is always a human-being
- Unpredictable sound-production: who is the author?
- Blockchain and smart contracts will enable self-running businesses and new kind of ecosystems

### 3.2.2 DATA PROTECTION

- Compliance
- Data protection framework (for transfer of data between countries, especially for example UK/EU)
- One data protection ombudsman (similar to centralization of legislative process)
- "Fully-working and bulletproof" data protection that also does not stifle innovation

- “Nordic Privacy Shield” in order to protect all Nordic countries
- Sensor-based automatic playlists for dementers: privacy protection, consent to collect data
- Privacy v. Collecting data about feelings and body. Rights in one’s own data. What is collected, how the data is used and so on.

### 3.2.3 CONTRACTS

- Double-click requirements (to signify agreement)
- Need to shorten, not lengthen contractual terms for consumers

“Need to shorten, not lengthen contractual terms for consumers”

- There is a conflict of interest: companies want lower requirements, but also need to reduce liability
  - Apple and Android have parental settings that install blocks, but they are hardly ever used
- Creative commons, but set up to work commercially
- Pan-Nordic contract practices and one-stop shop
- How much creative commons and open source is used in contracts by game developers?
  - When development of games is outsourced, then the contract always contains open source code, and anyway, code is written using open source tools
  - If there is open source code, contracts can contain overly liberal clauses enabling others to use the code in some circumstances. Some companies force subcontractors not to use open source.
- On the consumer protection side, there are differences between the Nordic countries. Therefore, where there are the worst penalties, people will not try to satisfy those authorities and they instead “choose the easier road”. Norway is especially bad, but kinder on the consumer side.

### 3.2.4 AGE RATINGS

- All Nordic countries should have the same age limits because, even in the EU, there is a lack of harmonization in that area
- Compliance

- A unitary content rating system is urged
  - This makes everything easier to understand (age restrictions for games, etc...)
  - They were able to identify 14 distinct age rating systems in use
  - In Italy, any video clip is considered a "movie", meaning that clearance has to be obtained from the Italian movie rating agency

PEGI and BBFC are used in the UK, with PEGI being for games and BBFC for films

- Only BBFC is legally binding, whereas PEGI is a general guideline
- Simplifying age rating to 17+ would reduce these complications
  - In fact raising age rating sometimes even increases downloads
- Nordic Consumer Protection Directive (relates to age ratings and common marketing practices)
- The EU has implemented age legislation due to US COPA (Child Online Protection Act)

### 3.2.5 OTHER

- Accountability requirements (it needs to be clear who is responsible to the consumers)
- Unify laws and practices (IP employment contracts), but also data protection in order to achieve open market.
- Harmonization of legislation
- Also centralized legislation (good for creating the legislation in the first place)
- It would be good to have one platform for distribution of products. If Apple doesn't use the product, the app will just "sit there" unused, i.e. Apple is the sole distributor. They are also able to change terms of contract at will so interpretation cannot even be used as a starting point for disputing terms.
- One of the advantages of Finland is instant access to a global audience (when developing games, however, creating a Nordic Market may backfire significantly reducing this).
- Need to be common specifications, but the question is who should control/set them.
- The Nordic Countries are still a fairly small market, meaning that we need to have the best people in order to be able to compete on the global market
  - Need to make it easier for companies to attract foreign workers
  - Need to loosen up immigration policies to allow foreign workers to be brought in (Indian, USA, etc...)
- Cooperative atmosphere (even between local competitors, because "we compete not only against each other, but also against the whole world").
  - Not immediately asking for NDA's, for example Rovio and other company lawyers asking each other for help on legal issues
- Taxation: are taxes different between regions and does this affect price points between

different Nordic countries.

- Would a Nordic one-stop shop be sufficient?
  - For example, how could we ensure that nobody in Germany could “touch” the product?
  - Therefore it would be better to lobby on the EU level
- There needs to be a common approach to marketing the whole region collectively
  - In other words, “a unified front” towards the outside world.
- Totally open and free data transfer system with 100% security
- Distribution/broadcasting freedom
- In order for a unified market to exist, things such as frame rate, etc... need to be standardized
- Language requirements are an extra cost to developers - compliance
- Reducing the number of platforms, and even phone models, would ease User Interface issues (costs incurred from testing different models and creating different User Interfaces, as well as modifying/adapting compatibility for each)
- If you put a card chip into a phone, the card companies could pass on all liability to the phone company, arguing that the phone now acts as a “card” and the phone company thereby acts as a card issuer. However, nowadays, the phone company would be considered a “wallet” and not a “card”.
- Could centralized/unified legislation be achieved via a treaty? (Similar to EU model on a smaller scale.)
- Pan-Nordic legislative process: harmonized legislation, unified protection, etc...
- Open ID, but the problem is who would store it.
- A “Fair access to marketplace” directive (to combat situations such as with Apple, where all services have to go through them with regards to payment).
- Lobby for the industry at Nordic regional level.
- Create a body responsible for standards.
- Sometimes, when Danish courts lack case law, they do look at Finnish and Swedish rulings for guidance.
- Recently, startups have been lobbying for a faster visa (immigration).
- Knowing the rules beforehand allows for educated decisions to be made.
- Law firms do not give free advice to 10 firms hoping that 1 will survive and they will then

have a long-term attorney-client relationship.

- In other words, here is a shortage of effective legal advice aimed at startups.
- How to bring foreign talents to the Nordic countries?
- Marketing to children prohibited in Sweden.
- Taxation: local requirements eg on VAT calculation.
- TV and movie production business models:
  - What types of business models are ideal? Business model should be at the center. Banks, for example are often confused about valuation when obtaining financing, and tend not to be generous with funds as a result
  - Awareness of the concept.
  - Super-engagement. If there is a lack of belonging in the real world, children can seek belonging from the virtual world instead. Not necessarily a good thing, but a thing nonetheless.
  - Media is a large part of our identity.

“Media is a large part of our identity.”

- State-funded opportunities.
- Crowdfunding. State funding can support this as well.
- Feedback from the community.
- Multiple use within the different media. Creating something that can be used by different media, and gaining the awareness from that.
- With regards to business models, we would need more cooperation between production companies working across borders, international cooperation.
- Why narrow ourselves down to the Nordic market? Nordic market is a niche market (niche marketing), but it is still a limitation to be only Nordic. We should find another niche.
- In Scandinavia, we co-produce a lot, but the content that we produce rarely travels past Scandinavia. It is rarely a problem of funding, but with television, for example, the audience has to be considered. Good content should travel more easily. It is not an issue of language, necessarily. “If it’s good, people will see it.”
- Politics is necessary in order to avoid the problem of corporations only seeking the “lowest-hanging fruit.” Doing so does not increase the quality, so the political aspect is necessary for that.
- The co-creation could have a space within the brand shop, which, for example, would grant loyalty points for good content to creators.
- If you want to have somebody put money in, they need something in return
- Courage. Everybody can have the ideas, but taking risks is what is important. It concerns everything. Not only the first step, but the next step after that, and so on.
- The 10 fans, according to ANT-theory.
- The issue of dealing with creative commons and incorporating it into the business model.
- Co-production co-financing initiatives.
- Fanbase and crowdfunding. Seems as though it could be kickstarted beforehand. Nonprofit, but not government-based (NGO?).
- For profit-making, we need, from the policymakers, that they accept common terms for IP rights distribution and especially profit-sharing.
- Physical (i.e. tangible) one-time products rather than subscription. It would be a simple by-product. Simply paying for what you like.

## “AI to create unexpected encounters between stakeholders.”

- Ways in which AI can be used to support CG’s business in the Nordic context
  - AI to create unexpected encounters between stakeholders - ties in with platforms.
  - Could be used in production, or in character creation.
  - AI could automatically change the ad/branding within the content, depending upon the location (adapting to target market).
  - Incorporate AI as a search tool.
  - Just like in Hollywood, where they test films on an audience at previews, this would become easier with AI.
  - Similar to how Netflix selects, based on profile what movies you might like, a recommendation system based on AI.
  - In computer animation, it could be used to create animation files.
  - Create a user experience, and then use that experience when creating content next time. Using AI to collect data, and then based on that, creating the next time (the next “script”, for example). Reminiscent of the idea of giving chimpanzees 20 years, after which they are bound to come up with a useable script.
  - It doesn’t necessarily need to be a screenwriter/producer who create it, but something/someone still needs to do it in order for it to come into being.
  - However, what needs to be established is what kind of niche needs to be developed.
  - Even in the distant future, machine learning will not be adequate in order to entirely replace.
  - Current technology can send a banner on livestream, it can identify a banner, it can even identify that it is about politics, etc. and target those who it thinks would like to see it. The problem is that it can very easily be tricked, for example by clicking on things at random, so that eventually the ads would be incorrectly targeted.
  - Trying to reach as many viewers or customers as possible can have a negative or degenerative effect on the quality of the end product because compromises need to be made.
- Product Placement in music: marketing laws (eg. TV ads). Is it always mandatory to inform if music includes product placement?
- Liability if self-steering car gets into an accident while the passengers were wearing headsets and VR goggles
- Environmental protection: should we restrict sound pollution and protect sound landscape in rural areas? How about in cities?

### 3.2.6 HEADLINES WHICH SUMMARIZE THE FIRST WORKSHOP:

- Non-fragmentation
- “Online Confusion Finished”
- From Nordic to Global: The need to look outside our borders
- Innovation Law

- Harmonization
- Alternative Distribution Payment
- “No Nord Left Behind”
- Alternative Nordic solutions needed to common problems
- Unifying the Nordics
- Centralized Decision-Making
- Better rules for existing content
- A Nordic open market requires unification and centralization
- “Nords Nag for New Solution”
- Co-sharing peer support

“A Nordic open market requires unification and centralization.”

### 3.2.7 HEADLINES WHICH SUMMARIZE THE SECOND WORKSHOP:

- We still need a producer!
- Tools for birthing a phenomenon
- Entertainment is a two-way exchange on a whole new level
- Confusion, Potential and New Ecosystems for thematic improvisation
- Old people discussing new technology
- Creative Chaos.
- There always must be an extraordinary idea first
- The current ways will change
- New Financial Possibilities
- We have to learn from the young (e.g., watching players play Minecraft may seem unfulfilling to older generations because it has no start/end, but the advantage of it is that you can start watching for 5 mins and then stop, and it doesn't matter when you

started.

- Creating a supermarket where sellers/customers can be same people (e.g. Unity).

### 3.2.8 HEADLINES WHICH SUMMARIZE THE THIRD WORKSHOP:

- Music in health-care, sensors and well-being
- Development and research of legislation
- Sound reproduction, noise-cancelling, artificial and personalized sound environment

“Artificial and personalized sound environment.”

## 3.3 STUDY ON NORDIC INTELLECTUAL PROPERTY RIGHTS<sup>1</sup>

### 3.3.1 INTRODUCTION

An overview of applicable international law (Bern Convention, WTO TRIPS Agreement) was used as a starting point, as it forms the absolute minimum basis for IP protection in any of the given Nordic countries to which such law applies onto which further legal protection can then be added. In accordance with the goal of establishing a single unified Nordic market at least in terms of legislation, thereby creating an ideal environment for these industries to flourish and be competitive at the global level, the various differences in IP protection can be overlooked as they are irrelevant in that only the weakest link in such a framework can be used as a basis for extrapolation onto all of the other countries in question, that is, with regards to minimum protection in the region as a collective whole.

Having established the groundwork upon which to add further, suggestions as to how to create this ideal environment were then assessed with regards to past implementation and feasibility. These suggestions, derived from the workshop on the topic, have formed the main focus of the study.

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<sup>1</sup> This chapter is partly based on Nicolas Kröger's Master's thesis "Innovation Law: Contemporary Legal Issues and Rules for Creative Industries in the Nordics and Ways to Solve Them" (University of Eastern Finland Law School 2018), which was funded and written as a part of the Project.

### 3.3.2 CURRENT LEGAL PROTECTION FRAMEWORK

As a starting point, the international IP law framework that is currently in place should first be assessed for two reasons. Firstly, it is necessary to do so before being able to ascertain whether or not the framework in place needs to be improved upon. Secondly, in the event that such improvements might be deemed necessary, an adequate understanding of the current framework would be a prerequisite for determining specific areas of focus. Due to the nature of the gaming industry and its products – primarily computer programs - falling under the statutory protection of copyright, the analysis of this legal framework is focused on copyright law.

### 3.3.3 BERNE CONVENTION AND WTO TRIPS AGREEMENT

The Nordic countries are all contracting parties of both the Berne Convention for the Protection of Literary and Artistic Works and the WTO TRIPS Agreement, greatly simplifying this portion of the analysis of their current IP protection framework. This is due to the fact that ‘with the exception of the provisions of the Berne Convention on moral rights, all the main substantive provisions’... (of both the Berne and Paris Conventions) ...‘are incorporated by reference and thus become obligations under the TRIPS Agreement between TRIPS Member countries.’ It is for this reason, therefore, that ‘the TRIPS Agreement is’...‘sometimes referred to as a Berne and Paris-plus agreement’<sup>2</sup>

In other words, this means that for the purpose of this research, only the differing provisions of the Berne Convention on so-called ‘moral rights’<sup>3</sup> will need to be addressed (the Nordic countries have applied these provisions wholeheartedly and not with the same reservation as in the case of some common law jurisdictions, such as, most famously, the U.S.<sup>4</sup>) before continuing onto the provisions of the TRIPS Agreement, as addressing any of the other portions of the Berne Convention would be superfluous, being as it may that they are already contained within the provisions of the TRIPS Agreement in the above-explained manner.

### 3.3.4 MORAL RIGHTS UNDER THE BERNE CONVENTION

Article 6bis of the Berne Convention contains these aforementioned moral rights accorded to the authors of literary and artistic works. The text begins by clearly discerning between the rights of the author, both economic and otherwise:

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2 Taubman, Antony – Wager, Hannu – Watal, Jayashree: A Handbook on the WTO TRIPS Agreement. Cambridge University Press 2012, p. 11

3 Rajan, M. Moral Rights: Principles, Practice and New Technology. Oxford University Press 2011, p. 7-9

4 Wells, N. What are Moral Rights? 20 July 2017.  
(<https://www.wellsiplaw.com/what-are-moral-rights/>)

'Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.'<sup>5</sup>

It is important to remember that, due to the distinction made between moral rights and those economic rights that are attached to copyright pointed out here, while an author may assign his or her economic rights to another party, he or she retains moral rights to the work and can still invoke them in certain instances, such as if the work is not used for its intended purpose or is defaced in some way<sup>6</sup>.

Finally, the issues of enforcement, both during and after the author's life, as well as territoriality also in relation to enforcement, and this is explained in the last sections: 'The rights granted to the author' ... 'shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed... The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed.'<sup>7</sup>

### 3.3.5 TRIPS AGREEMENT

Having first addressed the moral rights under the Berne Convention, Section 1 of Part II of the TRIPS Agreement lists the 'Standards Concerning the Availability, Scope and Use of Intellectual Property Rights', specifically those concerning 'Copyright and related Rights'.

This Section begins with Article 9, which deals specifically with the aforementioned differences between Berne and TRIPS, first requiring adherents to '...comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto.' However, in the same paragraph, the following exemption is made: 'Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of that Convention or of the rights derived therefrom.'<sup>8</sup> In other words, as Article 6bis of the Berne Convention is where the moral rights are contained, it is here that the text states that parties to TRIPS are not required to grant those same rights to copyright holders.

Next is Article 10, entitled 'Computer Programs and Compilations of Data', which states rather clearly and concisely that 'Computer programs, whether in source or object

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5 World Intellectual Property Organization. WIPO-Administered Treaties: Berne Convention for the Protection of Literary and Artistic Works. 25 July 2017. ([http://www.wipo.int/treaties/en/text.jsp?file\\_id=283698#P123\\_20726](http://www.wipo.int/treaties/en/text.jsp?file_id=283698#P123_20726))

6 Sundara Rajan, Mira T. Copyright and Creative Freedom: A Study of Post-Socialist Law Reform. Routledge Studies in International Law. Taylor & Francis. 2006. p. 41-42.

7 Cornell University Law School. Legal Information Institute. 30 July 2017. (<https://www.law.cornell.edu/treaties/berne/6bis.html>)

8 World Trade Organization. Uruguay Round Agreement: TRIPS. 20 July 2017. ([https://www.wto.org/english/docs\\_e/legal\\_e/27-trips\\_04\\_e.htm#1](https://www.wto.org/english/docs_e/legal_e/27-trips_04_e.htm#1))

code, shall be protected as literary works under the Berne Convention (1971).<sup>9</sup> The importance of this simple phrase, for the videogame industry in particular, cannot be overstated, as it forms a primary source of the legal protection enjoyed by the industry. Lastly, the protections under this Article also extend to ‘compilations of data, which by reason of the selection or arrangement of their contents constitute intellectual creations...’

Article 11 covers ‘rental rights’ and stipulates that with regards to ‘...computer programs and cinematographic works... rights holders shall have ‘...the right to authorize or to prohibit the commercial rental to the public of originals or copies of their copyright works...’ This is an important right from the perspective of the rights holder in that the other protections granted to them would effectively be severely diminished or even nullified without such a right affecting distribution. In fact, the text of this very same article goes on to address the possibility of situations wherein lax rental rights might lead to ‘...widespread copying of works...’ which might be ‘...materially impairing the exclusive right of reproduction...’ It should serve as a reassurance, especially to those within these creative industries, to see that such factors have evidently been considered during the drafting of this Agreement.

Finally, Article 12 specifies the ‘...the term of protection of a work...’<sup>9</sup> However, with regards to this final section, it is imperative to note that these original stipulations are somewhat dated at least with regards to the Nordics, being that the current situation in all of the Nordic countries is that the term of protection for copyright has since been extended to the lifetime of the author, plus 70 years, as opposed to the original 50 years.

### 3.3.6 IMPROVING PROTECTION

The idea of whether protection levels should be increased in the Nordics begs the question: what purpose would this serve? Or, to be more precise, what desirable results could be achieved by doing this? In order to answer this question, the original purpose of copyright law should first be examined as a starting point.

Rather interestingly, although nearly all nations are now parties to both the Berne Convention and TRIPS, and have thus enacted stringent copyright legislation, there are still differences in what is seen as the main purpose of copyright law within these signatory countries. Since the focus of this research is upon the Nordics, their perspective will be first to be examined.

The Nordic countries are all civil law countries, which means that they belong to the group of countries with ‘copyright systems based on “moral rights” justifications, rather than the incentive theory...popular in the U.S. and other common law countries.’

“Moral rights” are thought to arise naturally out of the deep connection that creators

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9 World Trade Organization. Uruguay Round Agreement: TRIPS. 20 July 2017. ([https://www.wto.org/english/docs\\_e/legal\\_e/27-trips\\_04\\_e.htm#1](https://www.wto.org/english/docs_e/legal_e/27-trips_04_e.htm#1))

have with their works. Because of that connection, this story goes, the law must recognize creators' rights around attribution and reputation. In copyright based on moral rights theories, creators have some economic rights (such as the right to make copies), but they also have parallel rights to attribution and to prevent uses of their works of which they disapprove. In many countries, the moral rights cannot be sold or given away, and remain with the creator no matter who controls the economic rights.<sup>10</sup>

“Moral rights” are thought to arise naturally out of the deep connection that creators have with their works.

Simply raising the protection levels (i.e. terms and/or scope of protection), however, would not have any effect upon these moral rights, so moral rights alone would not serve as a justification for such an increase. Indeed, although it may seem paradoxical to do so on account of the Nordic countries' civil law traditions, a common law justification would seem, in this case, more suitable.

The quintessential common law justification is contained in one simple and concise sentence, most famously exemplified in Article I, Section 8, Clause 8 of the United States Constitution, as follows: ‘to promote the progress of science and useful arts, by securing for a limited time to authors and inventors the exclusive right to their respective writings and discoveries.’<sup>11</sup>

It is not difficult to see how this approach benefits private enterprises, as it enhances their ability to maximize profits from intellectual property rights derived from their economic activities without the problems - from the employer's perspective - that tend to arise from the granting of moral rights to those in their employ who are creators or co-creators of copyrighted works (regardless of the copyright itself belonging to the employer, as moral rights are considered irrevocably separate). This is doubly so in relation to the videogame industry, as with other creative industries in general. Thus, it could reasonably be expected that applying such an approach towards the creation of new legislation might make such a jurisdiction more attractive to those industries.

Returning to the civil law viewpoint, however, perhaps the most relevant justification for such legislation is the one provided by the European Commission, which has stated that ‘an efficient and effectively enforced intellectual property infrastructure is necessary to ensure the stimulation of investment in innovation and to avoid...infringements that result in

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10 University of Minnesota. Libraries. 25 July 2017. (<https://www.lib.umn.edu/copyright/purpose#econ>)

11 Ohio Bar Association. LawFacts Pamphlets. 22 July 2017. (<https://www.ohiobar.org/ForPublic/Resources/LawFactsPamphlets/Pages/LawFactsPamphlet-16.aspx>)

economic harm.<sup>12</sup> From this, one could infer that the recognition and protection of the moral rights of authors is not necessarily seen by legislators in civil law jurisdictions as anything which would form a barrier to the effectiveness of IP regulation in stimulating investment in creative industries, or, if it forms such a barrier, then it is not seen as an insurmountable one, but instead, one which is hardly even merit mention within the grand scheme of policymaking.

### 3.3.7 UNIFIED ADJUDICATION: CURRENT STATE OF AFFAIRS

Having discussed the provisions of the TRIPS Agreement relating to copyright protection, it is also necessary to examine how those same provisions are actually enforced. In Part III of the TRIPS Agreement, entitled 'Enforcement of Intellectual Property Rights', these enforcement measures are explained in detail in Section 1, beginning from Article 41, which begins by requiring parties to the Agreement to 'ensure that enforcement procedures...are available under their law so as to permit effective action against any act of infringement of intellectual property rights..., including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements'<sup>13</sup>. It primarily consists of standards to be followed in order to ensure accordance with internationally agreed-upon norms with regards to the fairness of these enforcement proceedings, stating, for example, that 'procedures concerning the enforcement of intellectual property rights shall be fair and equitable...' and '...shall...' not '...be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays' and that 'decisions on the merits of a case shall preferably be in writing and reasoned...' and '...shall be made available at least to the parties to the proceeding without undue delay...', with 'decisions on the merits of a case...' being '...based only on evidence in respect of which parties were offered the opportunity to be heard' and '...parties to a proceeding...' having '...an opportunity for review by a judicial authority of final administrative decisions and, subject to jurisdictional provisions in a Member's law concerning the importance of a case, of at least the legal aspects of initial judicial decisions on the merits of a case...' Simply put, the requirements listed are for fair trials and appellate review of judicial decisions made by lower courts.

The final part of this article may, at first, seem inconspicuous and unimportant. However, upon closer examination, it would appear of particular interest in relation to this research topic. The wording is as follows: 'It is understood that this Part does not create any obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general, nor does it affect the capacity of Members to enforce their law in general.'

Nothing in this Part creates any obligation with respect to the distribution of re-

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12 European Commission. Enforcement of Intellectual Property Rights. 20 June 2017. ([http://ec.europa.eu/growth/industry/intellectual-property/enforcement\\_en](http://ec.europa.eu/growth/industry/intellectual-property/enforcement_en))

13 World Trade Organization. Uruguay Round Agreement: TRIPS. 20 July 2017. ([https://www.wto.org/english/docs\\_e/legal\\_e/27-trips\\_04\\_e.htm#1](https://www.wto.org/english/docs_e/legal_e/27-trips_04_e.htm#1))

sources as between enforcement of intellectual property rights and the enforcement of law in general. This, in fact, directly addresses the possibility of establishing a distinct ‘judicial system for the enforcement of intellectual property rights’, a suggestion which was actually made by one of the participants during the “Gameful Workshop” held in Espoo at Rovio. This suggestion is revisited and expanded upon later within this report.

### 3.3.8 LESSONS FOR CENTRALIZED ADJUDICATION

The concept of centralized adjudication for IP-related cases can be considered to be a natural continuation of harmonization of law, in that a single tribunal whose decisions would be binding in all Nordic jurisdictions would ensure unified and directly-applicable interpretation of the harmonized legal framework. In fact, the suggestion was even made, during the aforementioned workshop at Rovio, that one unified copyright court could be used to handle copyright cases in all of the Nordic countries, although this would, of course, first require harmonization of this area of the law within the countries in question, beyond the above-mentioned.

However, if nothing else, the provisions of the TRIPS Agreement signify that such harmonization is, in fact, entirely achievable. Indeed, further reassurance can be drawn from the statement made at the meeting in Copenhagen by Prof. Torsten Bjørn Larsen, who was keen to mention that it is already the case that ‘sometimes, when Danish courts lack case law, they do look at Finnish and Swedish rulings for guidance.’<sup>14</sup>

“The provisions of the TRIPS Agreement signify that such harmonization is, in fact, entirely achievable.”

### 3.3.9 UNITARY RATING SYSTEM

A ‘unitary content rating system’, as suggested by Leena Kuusiniemi, General Counsel of Rovio, would ‘make everything easier to understand’. During her work as General Counsel, she and her legal team were ‘able to identify 14 distinct age rating systems in use.’ There were also differences in the scopes of these rating systems, that is, what genres of works they covered. For example, ‘in Italy, any video clip is considered a “movie”, meaning that clearance has to be obtained from the Italian movie rating agency.’<sup>15</sup>

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14 Torsten Bjørn Larsen Aalborg University. 3 April 2017

15 Kuusiniemi, Leena Rovio Oy. 3 April 2017

Another example of such discrepancies, given by Samuel Wrigley from the University of Helsinki, is of the 'PEGI and BBFC...used in the UK, with PEGI being for games and BBFC for films', with only BBFC being 'legally binding, whereas PEGI is only a general guideline'.<sup>16</sup>

Continuing on this subject, Legal Counsel Tomi Simula of Fingersoft added that 'Simplifying the age rating to 17+ would reduce these complications. In fact, raising the age rating sometimes even increases downloads!' (of apps, games and other digital content). In his opinion, 'all Nordic countries should have the same age limits because, even in the EU, there is a lack of harmonization in that area'.<sup>17</sup>

All Nordic countries should have the same age limits because, even in the EU, there is a lack of harmonization in that area.

"All Nordic countries should have the same age limits."

### 3.3.10 RELATED OR NEIGHBOURING RIGHTS<sup>18</sup>

A growing proportion of the value around us is intangible, and the way in which these valuable intangible assets are being legally treated is becoming increasingly important both to businesses and to the lives of private individuals. Copyright and related rights are at the centre of this phenomenon. It is thus unfortunate that the relevant legislation has become increasingly complex and less comprehensible. Pihlajarinne notes: "Perhaps the biggest problem of all is the casuistry of current legislation, or, in other words, the specific concepts describing activity."

In the Project, our aim was to outline the subject matter of the protection of related rights under the Nordic Copyright law. The question is, in particular, whether a common ground that would clarify the legal situation and make the system more sustainable in a changing world can be found within the fragmented field of related rights.

In this part of the report, we go through the disjointed field of related rights, pointing out that the related rights do not have a consistent object of protection, unlike copyright and industrial property rights. Finally, we show how the related rights could be clarified in the future by emphasizing the importance of investment in defining subject matter of protection.

According to Nordic Copyright laws, anyone who has created a written or artistic work holds a copyright to the work. Thus, copyright protects the results of creative labour. The work is required to be regarded as an original result of the creative labour of its author. In creating the work, the author has made choices that are not obviously the only correct ones

<sup>16</sup> Wrigley, Samuel John Peter University of Helsinki. 3 April 2017

<sup>17</sup> Simula, Tomi Fingersoft Oy. 3 April 2017

<sup>18</sup> Results of our study on neighbouring rights is also published in Pitkänen, O. (2017). Mitä lähioikeus suoja? Lakimies, 115(5), 580-602.

and which persons of equivalent skill would not have made through their own knowledge. A large number of non-trivial choices leads to the fact that no one else engaged in the same work would have been likely to come to the same conclusion – even the same author would probably not have been able to reach the same result when undertaking the same task once more. At that point, it can be said that this is a creative work and its result is protected by copyright.

In the case of *Infopaq* (C-5/08), the European Court of Justice ruled that “copyright can only be applied to material that is original in the sense that it is the intellectual creation of its author”. Although differing views<sup>19</sup> have been expressed as to whether the court is seeking to set uniform criteria for the level of originality between different types of work, i.e. how much creativity is required, it is clear that originality is the only justification for copyright in court.

In the *Painer* case (C-145/10), the Court of Justice of the European Union stated that the work protected by copyright is the result of creative intellectual work that reflects the individuality of its author and which emerges from the creative solutions that the author has come to in the realization of his work. This reflects how making creative choices is a prerequisite for copyright as described above.

Despite fragmentary and casuistic copyright legislation, copyright has a very clear and coherent foundation: protecting the results of creative work and thereby promoting creativity in society.

Nowadays, ownership of information or data is often discussed. Applying ownership to even analogously intangible objects is, however, quite problematic.<sup>20</sup> The concept of ownership is fundamentally related to tangible objects. In principle, a proprietor of a movable or fixed object has an extensive exclusive right to dispose his or her property: he may sell, loan, donate, order or deposit it. There are plenty of exceptions, but as a rule the owner has a broad exclusive right to decide on matters concerning his property.<sup>21</sup>

Knowledge and other subject matter of intellectual property rights (IPR) differ greatly from tangible objects. Many others might know the same things and nobody can be prevented from knowing something. Thus, the general rule is that knowledge is not subject to exclusive rights and therefore nobody owns information.<sup>22</sup> Certain information may, however, be subject to more limited rights. Rights concerning information and other intangibles are

19 E.g. Niklas Bruun: Mätäkuun juttu - EYT:n tekijänoikeustulkinta, IPRinfo 4/2009; Ulla-Maija Mylly: Tekijänoikeuden omaperäisyyden harmonisointi Euroopan unionissa, Lakimies 6/2016 pp. 907–930.

20 Olli Pitkänen: “Sinun tietosi eivät ole sinun: rekisteröidyn oikeus hyödyntää omia henkilötietojaan”, Oikeus, 2/2014, pp. 205–207; Anette Alén-Savikko – Olli Pitkänen: Rights and Entitlements in Information: Proprietary Perspectives and Beyond. In: Bräutigam, Mieltinen: Data Protection, Privacy and European Regulation in the Digital Age, Forum Iuris, Helsinki 2016.

21 About the concept of ownership: Leena Kartio: Esineoikeuden perusteet, Lakimiesliiton kustannus 2001; Hannu Tolonen: Absoluuttinen ja eksklusiivinen: Yksityisen omistusoikeuden synty. Teoksessa Omistus, sopimus, vaihdanta – Juhlakirja Leena Kartiolle (toim. E. Tammi-Salminen). Turun yliopisto 2004; Päivi Paasto: Absoluuttinen ja eksklusiivinen omistusoikeus – yhäkö käypä käsite? Lakimies 2004/7-8, pp. 1292–1317; Eva Tammi-Salminen: Vanha ja uusi esineoikeus. Lakimies 3/2009, s. 453–458; Alén-Savikko – Pitkänen 2016; Pitkänen 2014, pp. 205–207.

22 Olli Pitkänen – Päivi Tiilikka – Eija Warma: Henkilötietojen suoja. Talentum 2013, p. 11; Niklas Bruun: Kuka omistaa tiedon? Tieteessä tapahtuu, 2/2001, p. 19.

generally negative rights: they grant the rightholder the opportunity to prohibit others from exploiting the subject matter of those rights.<sup>23</sup>

## “Nobody owns information.”

Intellectual property rights are, in principle, strong exclusive rights. Their purpose is to encourage the production of more intangible assets, as well as reward and acknowledge those who have contributed to the proliferation of intangible assets in addition to safeguarding collective cultural benefits.<sup>24</sup> In economic terms, they can create a monopoly to exploit the subject of protection in business. From the perspective of fundamental rights, they may restrict other rights, such as freedom of expression. Therefore, the relationship between copyright and freedom of expression is tense. Copyright functions on the one hand to promote freedom of speech when it protects the expression of opinion, but it may become an obstacle to the spread of information, especially if it is seen as a strong property-like system.<sup>25</sup> From the perspective of scientific research, it can be extremely harmful for the information to be closed off behind intellectual property rights beyond the reaches of free research.<sup>26</sup> Likewise, art is largely based on borrowing and commenting on previous art. Merges attaches particular importance to the principle of proportionality, according to which intangible property should be proportionate to the value or importance of a protected object. The principle that ‘what no intangible right protects (public domain) cannot be appropriated by anyone’ is what he refers to as nonremoval.<sup>27</sup> Samuelson has identified thirteen different public domains and argued why it is important that they remain outside the scope of protection of intellectual property rights.<sup>28</sup>

It is therefore justified to ask how extensive and strong intellectual property rights must be. It is not sensible to protect anything and everything nor must the strength of protection itself be too strong.<sup>29</sup>

As an example of the above-described problem, (i.e. what should be protected by intellectual property rights and when is the protection is wide to a harmful extent), a copyright issue about the originality threshold may be used. Copyright is not directed at any particular presentation, but the work is required to be the result of the author’s own independent

23 Pitkänen 2014, p. 206.

24 E.g. Kivistö 2016, pp. 297-318;

Paul Goldstein: Copyright, Patent, Trademark and Related State Doctrines. Cases and Materials on the Law of Intellectual Property. Fourth Edition. The Foundation Press, Inc., 1997, p. 6.

25 Taina Pihlajarinne: Keskustelupalstojen ylläpitäjien vastuu: EU-sääntelystä kansalliseen oikeuteen – sananvapausrikokset ja tekijänoikeusrikos. Lakimies 6/2011, pp. 1195-1196.

26 Bruun 2001 pp. 19.

27 Merges 2011, pp. 6-7, 141-143, 150; Heikki Kemppinen: Kirja-arvostelu: Teos immateriaalioikeuksien oikeutuksesta, IPRinfo 3/2012.

28 Pamela Samuelson: Enriching Discourse on Public Domains, 55 Duke Law Journal, 2006, pp. 783-834.

29 Jukka Kemppinen: Digitaaliongelman – kirjoitus oikeudesta ja ympäristöstä, Acta Universitatis Lappeenrantaensis 242, 2006, pp. 108-112.

creative labour. In that case, it is said to exceed the originality threshold or reach the level of a protected work. This distinction is very important because it is, in principle, the only prerequisite for obtaining copyright. It therefore determines which phenomena in the world are protected by copyright and which ones are not.<sup>30</sup>

A corresponding example of patent law is inventiveness: in order for the invention to be patentable, it must be sufficiently inventive, although the scope of patentability has been limited much more than the subject of copyright. Inventiveness means that the invention must be substantially discernible from everything that is already known prior to the filing of the patent application. It is not sufficient that the invention be new or slightly different from that previously known, rather it must also be somewhat surprising to a professional in its field.<sup>31</sup>

Obtaining copyright requires one to exceed the threshold of originality. The work must be the result of independent and original creative labour. This is a rather tough requirement in many instances. From a societal standpoint, sometimes it may also be justified to provide protection for the results of labour that cannot be considered original. In Copyright law, a number of Related or Neighbouring rights have been set forth. They are reminiscent of copyright, but, to some extent, weaker rights than copyright, and do not require exceeding the originality threshold.

“Obtaining copyright requires one to exceed the threshold of originality.”

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30 Compare ECJ Infopaq, C-5/08.

31 Marcus Norrgård – Niklas Bruun: Analogiamenetelmäpatentin suojauspiiri. Osa 1. Lakimies 5/2007.

	Finland	Sweden	Denmark	Norway	Iceland
Performing artist	Section 45	Article 45	Section 65	Section 42	Article 45
Rights protected	Transfer on reproduction device; recording; making available to the public; reproduction, distribution, communication to the public and performance of record	Recording; making available to the public; reproduction; rental	Recording; making available to the public	Reproduction; performance; making available to the public	Recording; reproduction; distribution; broadcasting; communication to the public
Duration	50 years from year of performance /70 years from year of publishing sound recording / 50 years from year of publishing film recording	50 years from year of performance / publishing of recording	50 years from year of performance / publishing of recording	50 years from year of performance /70 years from year of publishing sound recording / 50 years from year of publishing film recording	50 years from year of performance / publishing of recording
Producer of sound recording	Section 46	Article 46	Section 66	Section 45	Article 46
Rights protected	Transfer on reproduction device; public performance; communication to the public; distribution	Reproduction; making available to the public; rental; on demand public performance	Reproduction; making available to the public; Retransmission unaltered and simultaneously with broadcast is allowed	Reproduction; making available to the public; on demand performance; rental	Reproduction; distribution
Duration	50 years from year of recording /70 years from year of publishing	50 years from year of recording / publishing	50 years from year of recording / publishing	50 years from year of recording /70 years from year of publishing	50 years from year of recording / publishing
Producer of moving image	Section 46a	Article 46	Section 67	Section 45	Article 46
Rights protected	Transfer on reproduction device; communication to the public on demand; distribution	Reproduction; making available to the public; rental; lending	Reproduction; making available to the public; Retransmission unaltered and simultaneously with broadcast is allowed	Reproduction; making available to the public; performance; rental	Reproduction; distribution
Duration	50 years from year of recording / publishing	50 years from year of recording / publishing	50 years from year of recording / publishing	50 years from year of recording / publishing	50 years from year of recording / publishing
Broadcaster	Section 48	Article 48	Section 69	Section 45a	Article 48
Rights protected	Rebroadcasting; recording; commercial performance; transfer on reproduction device; transmission, distribution, communication to the public of recordings	Transfer on reproduction device; reproduction and distribution of recordings; rebroadcasting and communication to the public for profit; on demand communication to the public	Rebroadcasting; public performance; transfer on reproduction device	Transfer on reproduction device; rebroadcasting; communication to the public for profit	Rebroadcasting; recording; commercial distribution; distribution and publishing of recordings
Duration	50 years from year of first broadcasting	50 years from year of first broadcasting	50 years from year of first broadcasting	50 years from year of first broadcasting	50 years from year of first broadcasting
Photographer	Section 49a	Article 49a	Section 70	Section 43a	Article 49
Rights protected	Reproduction; making available to the public	Reproduction; making available to the public	Reproduction; making available to the public	Reproduction; making available to the public	Reproduction; publication
Duration	50 years from year of photographing	50 years from year of photographing	50 years from year of photographing	15 years after year of photographer's death, minimum 50 years from year of photographing	50 years from year of photographing
Catalogue and database	Section 49	Article 49	Section 71	Section 43	Article 50
Rights protected	Reproduction; making available to the public	Reproduction; making available to the public	Reproduction; making available to the public; extraction and reuse contrary to normal utilization	Reproduction; making available to the public; extraction and reuse contrary to normal utilization	Reproduction; publishing; extraction and reuse contrary to normal utilization
Duration	5 years from year of production / publishing	15 years from year of production / publishing	5 years from year of production / publishing	15 years from year of production / publishing	15 years from year of production / publishing
Press reports	Section 50	N/A	Section 72	Section 44	N/A
Rights protected	Making available to the public of press releases from abroad correspondents		Making available to the public of press releases from abroad correspondents	Making available to the public of press releases from abroad correspondents	
Duration	12 hours from publication in Finland		12 hours from publication in Denmark	16 hours from publication in Norway	

Table 1 Neighbouring or Related Rights in the Nordic Countries

We may begin by examining database protection as the first of these rights. According to database protection sui generis right, a database whose content has been collected, secured or submitted as a result of considerable investment, is granted protection against unauthorized copying and making available of its contents to the public. The database creator has exclusive rights over the entire contents of the database or its essential elements by making copies of the database and making it available to the public.

The provision is based on the EU Database Directive 96/9/EC. According to it, the database is a collection of works, data or other independent material organized in a systematic or methodological way and which has been made individually accessible electronically or otherwise. This definition is quite unclear and it is not easy to say what is being protected.<sup>32</sup> The essential idea is that the protection is directed towards a database whose collection, securing or presentation has required considerable investment. Therefore, database protection is the protection of a great deal of labour or investment.

“Database protection is the protection of a great deal of labour or investment.”

Radio and television programmes are usually copyrighted results of creative labour. They are joint works that may have been created by scriptwriters, directors, graphic artists, composers, and other creative authors.<sup>33</sup> Depending on the situation, they transfer their rights to broadcast the programme either directly to the broadcasting company or to the production company which then formulates an agreement with the broadcasting company. The broadcasting company, in turn, pays the authors or the production company for the programme and gains the right to broadcast the program either on the basis of the contractor's employment relationship or via a separate contract.

Creating such programming is expensive and requires a great deal of time, tools and know-how. In practice, contributions to programming from production companies has generally been low.<sup>34</sup> Especially with regards to programming targeting only Finland, most of the financial investment in the program is made by the broadcasting company. On the other hand, copying and disseminating programming to the public, for example via a cable network or an internet video-on-demand (VOD) service, is easy and inexpensive. So there is a risk that

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32 Perttu Virtanen: Database Rights in Safe European Home: The Path to More Rigorous Protection of Information. Lappeenranta teknillinen yliopisto 2005;

Olli Pitkänen - Perttu Virtanen - Mikko Välimäki: Legal Protection of Mobile P2P Databases, International Conference on Law and Technology (LawTech 2002), Cambridge, MA, USA, 2002.

33 E.g. Marjut Salokannel: Häviävät elokuvan tekijät. Taiteen keskus toimikunnan julkaisu nro 9, 1990, pp. 23-31.

34 Compare with the Producer's Right below.

someone without permission may convey programs to the public without paying compensation to the broadcasting company that has invested heavily in them.

If the program is copyrighted, the broadcasting company may prohibit unauthorized public dissemination, claiming the copyrights it has received from the authors or production companies. However, even those programs that require the greatest investment are not always protected by copyright. For example, a demanding TV program on a sporting event with a substantial investment may be left unprotected and outsiders may be tempted to copy it and sell it without having to participate in production costs. In order to resolve this “free-rider” problem, the Copyright Law provides for a related right to radio and television companies: “Radio or television broadcasts may not be broadcasted or stored on a device that allows it to be reproduced without the consent of the sending company.” It is intended to protect programs that require considerable investment, but which are not creative enough for copyright. It is therefore a type of investment protection. However, the law has been written in such a way that signal protection does not require investment. Any signal transmitted by a television or radio company receives automatic protection.

In short, today, signal protection applies to all signals transmitted by a broadcasting company regardless of whether they contain anything worth protecting or whether the sender company has invested in the subject matter of protection at all. This can be considered very problematic from the point of view of proportionality.<sup>35</sup>

Producers of sound recordings and image recordings, i.e. music, television and filmmakers, are granted protection for their copyrighted material. As a matter of principle, the record cannot be transferred to a device that allows it to be reproduced, transmitted to the public, nor can it be distributed to the public without the permission of the producer within 50 years of the recording year. Also, no sound recording may be made public to an audience present at a show.

“Protection applies to all signals transmitted by a broadcasting company regardless of whether they contain anything worth protecting.”

Unlike in copyright, the right of a producer may also originate from within a legal person, that is, a production company or other organization within which a record is produced. In the preparatory acts of the Copyright Act, the rights of producers have been described mainly as protection from unfair competition typical of industrial property rights.<sup>36</sup> The provisions of the Swedish Copyright Act have been justified in the past by referring to the complex, demanding and costly process of producing sound recordings: “Den innefattar

35 Merges 2011, pp. 159-191.

36 KM 1953:5 Ehdotus laiksi tekijänoikeudesta kirjallisiin ja taiteellisiin teoksiin, p. 80 and KM 1987:7, p. 44.

val av repertoar och utövande konstnärer, anordnande av lokaliteter med lämpliga akustiska förhållanden, inspelningen som kräver mångahanda arrangemang, slutligen framställningen av matrisen och avdragen av denna, själva skivorna. Uppenbarligen kräves härför uppdriven teknik, behärskad av konstnärlig smak. Kostnaderna för fabrikationen är också betydande. Att utomstående skulle ha rätt att utan vidare tillgodogöra sig resultaten av en sådan verksamhet kan icke vara riktigt.”<sup>37</sup>

The related right obtained by the producer has been, in principle, a fairly workable solution, as it hasn't been necessary to include the right to presentation of the work in the price of the recordings; rather, the producer is able to claim compensation for the playing of recordings on radio separately.

The protection of the producer is, however, meant to function somehow as a protection of the investment, although the importance of the investment is even more difficult to determine than in the case of signal protection of the broadcasting company, and no legal text requires it. All kinds of audio and video recordings are protected regardless of whether they require any investment. It should be noted that the cost of producing recordings can differ greatly: whereas movie production can cost millions of euros, an audio or video clip saved by an amateur on a mobile phone does not actually cost anything. However, the law does not differ between them. By simply turning on a recording device and letting a sound around it be recorded, the “producer” receives a strong exclusive right to their recording for fifty years. As with signal protection, the execution of the proportionality principle can also be considered problematic here.<sup>38</sup>

The performing artist's right is quite remarkable. The performance of a work or folklore protected by copyright cannot be saved without the consent of the performing artist to a device that allows the presentation to be reproduced, nor can it be brought to the audience by radio or television or directly by physically transferring it. The recording of such a presentation may not be transferred without the consent of the performing artist to a device that can be reproduced, conveyed to the public, nor distributed to the public before 50 years have elapsed since the year of performance. Also, no sound recording may be made public to the audience present at a performance. The performing artist therefore has quite a strong right to decide as to the recording of their performance as well as the exploitation of the record. However, the right is tied to what the artist presents, not for example how they present it, how original the performance is, how skilled they are, or how much they have invested in their presentation. The most exquisite performance by the most talented acrobat or magician is not protected, per se, but the presentation of a work of art is protected regardless of how poorly or conventionally it is executed. In principle, it is conceivable that a performing artist might be able to obtain ordinary copyright protection for a sufficiently original performance.

However, at least in Finland, jurisprudence has raised the originality threshold for performing

37 Upphovsmannarätt till litterära och konstnärliga verk, Statens offentliga utredningar SOU 1956:25, p. 366.

38 Merges 2011, pp. 159-191.

artists to such a high level that it is, in practice, unlikely for any performing artist to be granted a copyright for their performance.<sup>39</sup>

The performer's right is based upon the protection granted by the 1961 Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations.

Part III of the Copyright Committee's report states that technological advances have increased the need for protection of performing artists: "Recorded presentations are technologically of high quality and easily accessible. They are also more susceptible to abuse than previously."<sup>40</sup> The purpose of the provision is thus to protect the status of the performing artists from problems caused by the advent of emerging technologies. However, the question may still be asked whether it is the responsibility of the legislature, in particular, to secure old earning models that are not viable in new situations. This could easily lead to a protectionist situation where domestic players would become legally protected after their foreign competitors and would begin to develop new types of behavior too late. Legal protection should be given to real added value and not to old-fashioned practices.

"Legal protection should be given to real added value and not to old-fashioned practices."

According to the right of the photographer, the photographer has the exclusive right to do as they will with a photo by making copies of it and making it available to the public. This standard photo protection is an oddity within the field of intellectual property rights, because alongside this, photography which exceeds originality thresholds receives copyright protection.

Previously, it was not possible for a photograph to be the subject of copyright, but a separate law on the right to a photograph gave all photographers a similar related right. It should be noted that photography differed quite significantly from nowadays. Certainly, enthusiasts were already taking pictures, but each picture was separately exposed to film, and the number of images was not as large as today. The related right to the protection of a photograph may have appeared quite sensible as a solution at the time.<sup>41</sup>

However, when the Copyright Act was amended so that a photo could be subject to copyright, a related right was also preserved alongside it. Differing views have been present-

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39 KKO 1975 II 37.

40 KM 1987:7 p. 15 and 26.

41 Rainer Oesch: Oikeus valokuvaan – tutkimus valokuvan suojan kehityksestä ja sisällöstä. Suomalaisen lakimiesyhdistyksen julkaisuja A-sarja N:o 194, 1993; Risto Sarvas – David M. Frohlich: From Snapshots to Social Media - The Changing Picture of Domestic Photography, Springer-Verlag London, 2011.

ed on how high a threshold has been created for the photographs, but it is possible to say that the photograph is required to be quite original in order to be protected by copyright. This has probably been affected by the fact that the photograph is, in any case, protected by related right, so the pressure to obtain copyright protection is not very substantial.<sup>42</sup>

Photography as a phenomenon has experienced great changes with the advent of digitalization. Nearly everyone has a smartphone or other device constantly with them that can take photos. It is estimated that in 2017 people took a total of over one trillion ( $10^{12}$ ) or a million million photos.<sup>43</sup> From this, one can roughly calculate that e.g. in Finland people collected at least one billion ( $10^9$ ) photos per year in total. Additionally, various surveillance cameras continuously take large amounts of photos automatically. Taking a picture today is very easy and does not usually require any investment. The overwhelming majority of those photographs do not have any value even for the photographers themselves. It is extremely difficult to understand why all of them must still be protected by their own related right. The matter is complicated even further by the fact that digitalisation has made distinguishing between photographs and non-photographs even more difficult. With computer and digital imaging, it is possible to produce images that can be mistaken for photos despite never having been in any camera. By the same token, it is easy to alter a picture taken with a camera so that it can no longer be recognized as a photo.

Photos may certainly need protection in the sense that they may contain private information, regardless of how poor in quality and otherwise valueless they may be. For example, a photo can tell where the person who took the picture or the person shown was and whom they were with. However, neither copyright nor related rights are needed to protect privacy; rather, for this purpose, there are personal data regulations and criminal law provisions protecting privacy.<sup>44</sup>

If we can make sure that the originality threshold of photos is not higher than for any other works, and that copyright thus provides the necessary protection for those photos that need it, there no longer appears to be a need for a separate photographer's related right in the modern world.

Related rights do not constitute a coherent whole. Rather, they are a series of distinct, almost point-like protections covering an inconsistent and small part of valuable intangible matters. In most industries, everything that does not exceed the originality threshold, and thus falls outside the scope of copyright protection, does not receive the protection of any related rights either. If a melody composed by a musician, a textured fabric woven by a textile artist, a brief written by a lawyer, a design made by an engineer, and a calculation made by an economist do not exceed the originality threshold, are not patentable and are not protected as trade secrets, they may be copied freely - at least no related rights protects

42 The Finnish Copyright Council 2016:3-5.

43 Stephen Heyman: Photos, Photos Everywhere. The New York Times, 29.7.2015.

44 Pitkänen-Tiilikka-Warma 2013, p. 41 ja 43;

The Finnish Data Protection Ombudsman's Office: Valokuva ja yksityisyyden suoja henkilötietolain kannalta, päivitetty 27.7.2010.

them. The same applies to producers other than producers of sound and video recordings. For example, an event producer may not have a related right to an event he or she has organized. Companies other than radio and TV companies do not have a right to the signal that they broadcast, and a performer who presents something other than a work protected by copyright will not be granted protection for his performance.

As previously stated, it is important not to protect everything and that the protection is proportionate to the added value produced. Intellectual property rights always create monopolies that can be harmful. Freedom of speech, scientific research and artistic expression require the ability to use what already exists. Overly strong rights must not be allowed to restrict this. It is therefore necessary to carefully weigh the question of whether more is to be gained or lost from related rights.

“Overly strong rights must not be allowed.”

The legislature seems to be tempted to create new and scattered related rights. On 14 September, the European Commission adopted a proposal for a Directive on copyright in the digital single market (COM (2016) 593). According to the proposal, independent legal protection should be created for publishers of magazines. The new related right would apply to the publishers of daily newspapers, magazines, specialist magazines and news sites. Instead, among others, book publishers and publishers of scientific and academic journals remain outside the scope of protection. Related right protection would only apply to digital use, but would not apply to linking.

The Commission justifies the vagueness of the new related rights by the fact that publishers encounter problems in licensing the use of their publications online and in trying to recover their investment costs. The Commission has also referred to the fact that the related rights would solve the problems encountered by publishers with regards to the fact that they do not have all the rights to the digital forms of the publications contained in their own archives. The Commission considers that, since publishers are not recognized as rightholders, licensing and enforcement in the digital environment is often complex and inefficient.<sup>45</sup>

The addition of a new related right in the form presented cannot be considered justified. The products of media publishers' are already protected by copyright, so the publisher is usually able to form a contract with the authors to pursue their interests in spite of not being the original rightholders.

The subject of the protection is defined very vaguely in the proposal. The Explanatory

Memorandum sets out three main reasons for a new form of protection: facilitating the dissemination of publications, securing investment and enforcing rights. For the last part, the justification is logically incorrect because the matter does not concern the implementation of existing rights, but instead, it concerns an entirely new law.

The reasoning for this protection also refers to investments made and the necessity of safeguarding them. This may, in itself, be a well-reasoned statement, but when viewed more broadly perspective, from the viewpoint of related rights or intellectual property rights as a whole, it seems that once again there is a movement to create a new scattered related right without considering the entirety of related rights and the clarity of legislation.

“ There is a movement to create a new scattered related right without considering the entirety of related rights and the clarity of legislation.”

The above mentioned is a discussion on data ownership that has already taken place at the EU. The Commission, among other things, held a round table discussion in Luxembourg on 17 March 2016 and ordered a report on this subject.<sup>46</sup> Since then, however, the concept of ownership of data has been partially abandoned and attempts have been made to find other legal instruments to determine who can exploit data, which is becoming more and more important in a digitized world. At the time of writing, the Commission’s latest idea seems to be the right of the data producer.<sup>47</sup> The idea has certain merits if it is narrowly examined solely from the point of view of economic exploitation of data. However, if one evaluates the proposal more broadly in relation to the entirety of related rights or intellectual property rights, one cannot be surprised that, once again, a new, narrow, related right, would be created.

The new related rights are reminiscent of a can of worms: when the lid is opened, new demands slither out from new sources. Media publishers have, in fact, essentially referred to equal treatment with those who already have access rights, but in the case of fragmented regulation, one can always argue that fairness again requires the creation of a new point-to-point approximation. Returning to more general principles would reseal the can of worms.

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<sup>46</sup> Legal study on Ownership and Access to Data, a study prepared for the European Commission DG Communications Networks, Content & Technology by Osborne Clarke LLP, 2016.

<sup>47</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: “Building a European Data Economy”, SWD(2017) 2 final, 10.1.2017.

## 3.4 FINDINGS

The Danish, Swedish and Finnish IP laws are similar to a large extent. They have common historical backgrounds, but they are also essentially regulated by international treaties and EU directives. Therefore, the Nordic Countries do not have much liberty to radically renew the IPR system by themselves – even though businesses would appreciate a more modern IPR regime. Maybe the European Union could use the Nordic Single Market as a testbed to trial innovative IPR solutions? The Nordic Countries would proceed in frontline to renew the IPR system in order to give advantage to their businesses and show the way to the rest of Europe.

"The Danish, Swedish and Finnish IP laws are similar to a large extent."

Related rights are a very fragmented and difficult entity to perceive. It seems generally quite random when a thing is protected by a related right and when it is not. This raises the question as to whether the system of related rights could be clarified by identifying the unified basis of the various related rights and by developing legislation or at least its interpretation in the direction of general lessons and principles rather than that of casuistic and fragmented rules.<sup>48</sup>

The greatest common denominator for existing related or neighbouring rights seems to be the protection of the investment. A database whose collection, assurance, or presentation has required a considerable amount of investment may be subject to database protection. Signal protection is designed to protect programming that requires considerable investment. Rights of the image and sound producers can be seen as protecting investments made into recordings. In principle, these also involve a business risk and their subject matter is intangible. If a photographer and performing artist were able to obtain adequate protection through the copyright in Section 1 of the Copyright Act, they would not necessarily need their own related rights. In such a case, based on the arguments for related rights, it would be difficult to identify the existing justifications of any other particularly valuable subject matter that would need to be protected apart from the investment. Could we therefore have a single, unified related right, obtainable by one who had, enduring considerable business risk, invested in the creation of an intangible asset?

It may be unrealistic to expect that such a single unified right could be formed at least very quickly. The current system of related rights has been cemented by many international

agreements, EU acts and national laws. Changing the basis of the system is not easy. There are also strong forces that advance the development in the opposite direction: the above mentioned proposals for new related rights illustrate this. However, the importance of investing could be highlighted when developing a related rights system: even in the absence of any single common right, a different investment and risk-taking requirement could be imposed on legislation as a prerequisite for the obtainment of these rights. In that case, jurisprudence could also evolve in the sense that not everything would be given to the protection of related rights, but instead, these rights would require the rightholder to invest in the protected subject matter.

In fact, the actual copyrights themselves would be clarified and the originality threshold harmonized if we were to dispose of the related rights of performing artists and photographers, while copyright would be protected by lowering the originality threshold to an equal level with other types of works.

A more cohesive related right than what currently exists, which would protect intangible investment, could also help solve some of the difficult issues surrounding intellectual property rights. For example, the question of who is entitled to the results of the research carried out by universities and partly funded by a corporation could, to a certain extent, be resolved by protecting the firms' research investment via a related right. In that case, the researchers would be able to retain the rights they need for their research, but the investing company would have rights of access through a related right that would be proportionate to the input it would have made towards the research.

In the future, intangible content, software and information produced by computers will be increasingly important. For example, an innovation engine presented by Nguyen, Yosins, and Clune is able to create original and interesting images.<sup>49</sup> Colombo and others have described a method by which artificial intelligence can compose music.<sup>50</sup> The current discussion on who is the creator if the creator creates a work might be partially ignored by considering whose investment and risk-taking has resulted in the engine's final product. The related right to exploit the machine-created work would belong to that party.

At this point, it is worth recalling the above considerations on how excessively broad rights may be detrimental in the grand scheme of things. As Merges might suggest, emphasis should be placed on the importance of efficiency, elimination, proportionality, and appreciation to ensure effective allocation of rights, the non-violation of the public domain, the ratio of extent of scope of rights to value and significance of the object, and the appreciation of the author. Patents can be modeled on how not any idea can be protected, rather, the invention must be new and essentially separate from everything coming before it. In the same way, a company cannot obtain related rights for any product development investment; rath-

49 A. Nguyen - J. Yosinski - J. Clune: Understanding innovation engines: Automated creativity and improved stochastic optimization via deep learning. *Evol. Comput.* 24, 3, September 2016, pp. 545-572.

50 F. Colombo – S. P. Muscinelli – A. Seeholzer – J. Brea – W. Gerstner: Algorithmic Composition of Melodies with Deep Recurrent Neural Networks. In *Proceedings of the 1st Conference on Computer Simulation of Musical Creativity* (No. EPFL-CONF-221014), 2016.

er, the investment must be significant in relation to the value of the result.

Currently, the system of related or neighbouring rights does not have a consistent subject matter for protection. Primarily, the investment in developing an intangible asset could be subject to such protection. By fostering the system of related rights in the direction of investment protection and by ensuring that the protection is in just proportion to investment, a much clearer model that would also be more sustainable of technological development could be obtained.

**“The system of related or neighbouring rights does not have a consistent subject matter for protection.”**

# 4. SUB-PROJECT II: CURRENT AND EVOLVING CONTRACTUAL PRACTICES

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## 4.1 PURPOSE

The purpose of sub-project II as outlined in attachment 3, section 3 to the Agreement, and as later slightly framed is, inter alia, to collect and analyse IP contracts in the Nordic countries as further defined in phases I-III below:

Phase I is the introductory phase. The purpose of phase I is to collect IP contracts in an offline and in an online industry as further defined below (the IP contracts are selected so that it is possible – to the largest possible extent – to compare ‘apples with apples’):

- The first industry is the TV production industry (offline industry).<sup>51</sup> The IP contracts collected count co-operation agreements from Denmark, Sweden and Finland between a TV station (exploiter) and a producer (assignee). The co-operation agreements count both standard agreements from the relevant organisations in Denmark<sup>52</sup>, Sweden<sup>53</sup> and Finland<sup>54</sup> (hereinafter Paradigms) as well as individually drafted agreements. The former agreements are publicly available, non-mandatory and free to use whereas the latter agreements are confidential. The co-operation agreements collected do not cover those between the original author and a producer (collective agreements) such as the one from Sweden.<sup>55</sup>
- The second industry is the gaming industry (online industry).<sup>56</sup> The IP contracts collected count co-operation agreements from Denmark, Sweden and Finland between two rightholders. No paradigms are available such as the ones in the TV production industry. The collected agreements are confidential.

51 The reason for the TV production industry – and despite that TV is obviously a digital medium – to be addressed as an offline industry is that TV production involve physical locations, physical actors etc.

52 The Danish standard agreement is Standardkontrakt Spillefilm, Det Danske Filminstitut, 2012.

53 The Swedish standard agreement is Normalvillkor (Drama). The agreement, which is not a contract as such but merely lays down the basic principles, which apply between the TV station and the producer, is found here [http://www.svtb2b.se/wp-content/uploads/2012/05/Normalvillkor\\_Drama.pdf](http://www.svtb2b.se/wp-content/uploads/2012/05/Normalvillkor_Drama.pdf) and here [http://www.svtb2b.se/?page\\_id=124](http://www.svtb2b.se/?page_id=124). Both must be supplemented with provisions on, inter alia, transfer of rights, jurisdiction and applicable law.

54 The Finnish standard agreement is YLE Rundradion AB:S Allmänna Avtalsvillkor för Program och Innehållsproduktion YSE, 2017.

55 Film-, TV-, Videoinspelningsaftal, Medieföretagen/Teaterförbundet för Scen och Film, 2016.

56 The reason for the gaming industry to be addressed as an online industry is that gaming does not involve physical locations, physical actors etc.

Sub-project II is strictly limited so that only the IP contracts defined above are included in the analysis in phases II and III. This means – combined with the fact that the number of collected IP contracts are inherently restricted and by no means exhaustive – that the findings listed in phase II are subject to a degree of uncertainty.

Phase II is the intermediate phase. The purpose of phase II is to analyse how the different industries in the Nordic countries as defined in phase I draft their IP contracts substantial law and procedural law wise. The substantial law issues include how the IP contracts in question address, inter alia, scope, exclusivity including creative commons/open source and transfer of rights whereas the procedural law issues include how the IP contracts in question address, inter alia, jurisdiction and applicable law. These findings will provide an overview of similarities and differences in Nordic IP contracts practices as defined in phase I.

Phase III is the final phase. The purpose of phase III is, based on the findings in phase II, to word an IP contractual strategy including what can be considered an IP contractual advantage and disadvantage for the drafter.

Based on phases I-III the expected outcome of sub-project II is that both similarities and differences appear in Nordic IP contract practices.

The reason for possible similarities in Nordic IP contract practices is likely two-fold i.e. that IP law is harmonized to a large extent on EU level<sup>57</sup> where case law from the Court of Justice of the European Union (hereinafter CJEU) plays a significant role and that IP law has traditionally been similar in the Nordic countries.<sup>58</sup>

The reason for possible differences in Nordic IP contract practices is also likely two-fold i.e. that similar IP traditions in the Nordic countries as stated above may nevertheless leave room for different ways to draft IP contracts given that very few provisions in IP law are mandatory and that the offline and online industries as defined in phase I may have different ways to address things.

## 4.2 FINDINGS

A distinction must be drawn between the findings in TV production contracts (section 3.2.1) and the findings in gaming contracts (section 3.2.2).

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<sup>57</sup> See, inter alia, Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (copyrights); Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs (designs) and Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks (trademarks).

<sup>58</sup> Jens Schovsbo, Morten Rosenmeier and Clement Salung Petersen, *Immaterielret, Jurist- og Økonomforbundets Forlag*, 2015, p. 66 and Henry Olsson, *Vennebog til Koktvedgaard*, 1993, p. 12 et seq.

## 4.2.1 FINDINGS IN TV PRODUCTION CONTRACTS

The collected TV production contracts count exclusively, and as stated in section 3.1, co-operation agreements between a TV station and a producer. The purposes of the agreements are to define who owns the rights to the produced material. The co-operation agreements cover three publicly available Paradigms from the relevant organisations in Denmark, Sweden and Finland as well as a number of confidential and individually drafted TV production agreements, which to some extent – and sometimes to a large extent – are based on the Paradigms. The following issues have all been addressed in the co-operation agreements i.e. scope, exclusive rights, possible creative commons clauses, possible morale rights clauses, transfer of rights clauses, jurisdiction and applicable law clauses. The references below are exclusively made to the publicly available Paradigms given that the individually drafted agreements are confidential. However, where the latter (individually drafted agreements) differ from the former (Paradigms) this is explicitly mentioned in anonymous terms.

### Similarities

The TV production contracts are similar in scope given that they all apply in regards to national TV production in Denmark, Sweden and Finland<sup>59</sup> where the TV station is nationally based and the producer is either nationally or internationally based.<sup>60</sup> The TV production contracts grant, with one variation<sup>61</sup>, the exclusive rights to the produced material to the TV station.<sup>62</sup> No TV production contract include creative commons clauses. No TV production contract include specific morale rights clauses either, which makes sense given that the legal position – whereas any such rights as a main rule cannot be waived – follow directly from national laws.<sup>63</sup>

"No TV production contract include creative commons clauses."

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59 Standardkontrakt Spillefilm, Det Danske Filminstitut, 2012, Section 1; Normalvilkor (Drama), Produktionsform and YLE Rundradion AB:S Allmänna Avtalsvillkor för Program och Innehållsproduktion YSE, 2017, Section 1.

60 Standardkontrakt Spillefilm, Det Danske Filminstitut, 2012, Section 2; Normalvilkor (Drama) and YLE Rundradion AB:S Allmänna Avtalsvillkor för Program och Innehållsproduktion YSE, 2017, Section 1 and 2.

61 The variation is that YLE Rundradion AB:S Allmänna Avtalsvillkor för Program och Innehållsproduktion YSE, 2017 only implicates the extent of exclusive rights, which are granted to the TV station cf. Section 2 (Rättigheter).

62 Standardkontrakt Spillefilm, Det Danske Filminstitut, 2012, Sections 7 and 8 and Normalvilkor (Drama), Visnings-rättens omfattning.

63 LBK nr. 1144 af 23/10/2014 om ophavsret (Danish Copyright Act) §3; Lag 1960:729 om upphovsrätt till litterära och konstnärliga verk (Swedish Copyright Act) §3 and Tekijänoikeuslaki 8.7.1961/404 (Finnish Copyright Act) § 3.

## Differences

The TV production contracts are different in three aspects. The first one relates to the transfer of rights to third parties. In the Danish Paradigm the TV station cannot do so<sup>64</sup> (unless otherwise agreed upon)<sup>65</sup> whereas the legal position for the producer has not been addressed in the Paradigm<sup>66</sup> (unless otherwise agreed upon).<sup>67</sup> In the Swedish Paradigm the situation has not been addressed<sup>68</sup> and finally in the Finnish Paradigm the TV station is entitled to transfer its rights whereas the producer is not.<sup>69</sup> The second one is that jurisdiction and applicable law points at the drafter's home country in the Danish and Finnish Paradigms<sup>70</sup> whereas it is not addressed in the Swedish Paradigm. The third one is that the term of the license differs between 4-10 years.<sup>71</sup>

## Conclusion

In conclusion the TV production contracts are both similar and different. The similarities relate to scope, exclusive rights and creative commons (no clauses) whereas the differences relate to transfer, jurisdiction, applicable law and the term of the license. The findings in the Paradigms can be illustrated as in the matrix below.

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64 Standardkontrakt Spillefilm, Det Danske Filminstitut, 2012, Section 8.

65 According to a number of individually drafted co-operation agreements in Denmark the TV-station is allowed to transfer his/her rights to a third party.

66 Standardkontrakt Spillefilm, Det Danske Filminstitut, 2012, Section 8.

67 According to a number of individually drafted co-operation agreements in Denmark the producer is not allowed to transfer his/her rights to a third party.

68 Normalvilkor (Drama).

69 YLE Rundradion AB:S Allmänna Avtalsvillkor för Program och Innehållsproduktion YSE, 2017, Section 13.

70 Standardkontrakt Spillefilm, Det Danske Filminstitut, 2012, Section 15 and YLE Rundradion AB:S Allmänna Avtalsvillkor för Program och Innehållsproduktion YSE, 2017, Section 16.

71 The license period in which the TV station is granted exclusive rights is between 4-6 years in Standardkontrakt Spillefilm, Det Danske Filminstitut, 2012, Section 7 and between 7-10 years in Normalvilkor (Drama), Visningsrättsperiod.

	DENMARK	SWEDEN	FINLAND
Paradigme	Standardkontrakt Spillefilm, maj 2012 – Det Danske Filminstitut	Normalvillkor (drama)	Rundradion AB:S Allmänna Avtallsvillkor för Program- och Innehållsproduktion, 2017
Parties	Party I: TV station (DR or TV2) Party II: Producer	Party I: TV station (SVT) Party II: Producer	Party I: TV station (YLE) Party II: Producer
Scope	TV production in Denmark (not restricted to Danish producers)	TV production in Sweden (not restricted to Swedish producers)	TV production in Finland (not restricted to Finnish producers)
Exclusive rights to the TV station	Yes	Yes	Yes
Creative commons clause	No	No	No
Specific morale rights provisions	No	No	No
Transfer of rights to third party	TV station: No, Producer: N/A	N/A	TV station: Yes, Producer: No
Jurisdiction	Arbitration in Denmark, (drafter's home country)	N/A	Arbitration in Finland (drafter's home country)
Applicable law	Danish law (drafter's home country)	N/A	Finnish law (drafter's home country)

## 4.2.2 FINDINGS IN GAMING CONTRACTS

The collected gaming contracts count exclusively, and as stated in section 3.1, co-operation agreements between two rightholders. The purposes of the agreements are to grant, on either a unilateral or mutual basis, a license to use the other party's defined IP including technologies<sup>72</sup> for development and/or integration. The following issues have all been addressed in the co-operation agreements i.e. scope, exclusive rights, possible creative commons/open source clauses, possible morale rights clauses, transfer of rights clauses, jurisdiction and applicable law clauses. No references are made to the co-operation agreements below given that they are confidential.

### Similarities

The gaming contracts are similar given that they all apply in regards to game development and/or integration where the one party is nationally based in Denmark, Sweden or Finland and the other party is either nationally or internationally based. The gaming contracts grant, on either a unilateral or mutual basis, a non-exclusive, non-transferable and worldwide license meaning that each party may grant to other parties a corresponding right to use their own defined IP including technologies; that each party may not transfer the other party's defined IP including technologies to a third party and finally that each party has the whole world as a playground to use the other party's defined IP including technologies. The use of the other party's IP including technologies is broad given that it includes the right to use (use right), the right to reproduce (reproduction right), the right to modify (adaptation right) and the right to market and sell to end users (distribution right). The unilateral contracts are subject to remuneration (royalty) whereas the mutual contracts are usually not (royalty-free or free-of-charge). No gaming contracts include specific morale rights clauses or creative commons/open source clauses. The gaming contracts are all subject to the drafter's home laws.

"The gaming contracts are all subject to the drafter's home laws."

### Differences

The gaming contracts are different in two aspects. The first one is that jurisdiction in a few Danish and Swedish gaming contracts point at civil law litigation whereas the Finnish gaming

72 The term "technologies" refers to the source code.

contracts are subject to arbitration. The second one is that the term of the license differs between approx. 6 months and 2 years.

**Conclusion**

In conclusion the gaming contracts are both similar and different. The similarities relate to scope, exclusive rights, creative commons/open source (no clauses), transfer and applicable law whereas the differences relate to jurisdiction and the term of the license. The findings can be illustrated as in the matrix below.

	DENMARK	SWEDEN	FINLAND
<b>Parties</b>	Party I: Rightholder I, Party II: Rightholder II	Party I: Rightholder I, Party II: Rightholder II	Party I: Rightholder I, Party II: Rightholder II
<b>Scope</b>	Game development and/or integration	Game development and/or integration	Game development and/or integration
<b>Exclusive rights</b>	Non-exclusive, (royalty-free) and worldwide license to contracting party to use, reproduce, adapt and distribute IP content	Non-exclusive, (royalty-free) and worldwide license to contracting party to use, reproduce, adapt and distribute IP content	Non-exclusive, (royalty-free) and worldwide license to contracting party to use, reproduce, adapt and distribute IP content
<b>Creative commons/open source clause</b>	No	No	No
<b>Specific morale rights provisions</b>	No	No	No
<b>Transfer of rights to third party</b>	Rightholder I: No, Rightholder II: No	Rightholder I: No, Rightholder II: No	Rightholder I: No, Rightholder II: No
<b>Jurisdiction</b>	Arbitration/civil court litigation in Denmark (drafter's home country)	Arbitration in Sweden (drafter's home country)	Arbitration in Finland (drafter's home country)
<b>Applicable law</b>	Danish law (drafter's home country)	Swedish law (drafter's home country)	Finnish law (drafter's home country)

### 4.3 IP CONTRACT STRATEGY

As stated in section 3.1 – and based on the findings in the TV production and gaming industries – an IP contract strategy must be worded including what can be considered an IP contractual advantage for the drafter (because it decreases his/her time, costs and/or risks) and what can be considered an IP contractual disadvantage for the drafter (because it increases his/her time, costs and/or risks). Given that the latter is the flip coin of the former only the IP contractual advantages for the drafter are hereinafter addressed. To clarify any such IP contractual advantages for the drafter two basic issues can be identified. Issue 1 is litigation and issue 2 is exclusivity.

The two issues are addressed on a general level. The reason is that a specific one size fits all IP contract strategy is not possible to draft given the very different characters of the IP

contracts collected and analyzed in section 3.2, and that therefore due consideration must be taken to the specific industry/parties in question when drafting the specific provisions in the IP contracts. With that explicit limitation the two basic issues below leads, directly or indirectly, to commercial use/value as required in sections 3 and 5 of the Agreement.

### 4.3.1 ISSUE 1: LITIGATION

It follows from the findings in section 3.2 that the question of litigation is, with few exemptions, addressed in the IP contracts and that arbitration is, with few exemptions, the preferred way to litigate. That raises two questions.

The first question is whether it can be considered an IP contractual advantage based on the definition above to in fact include a provision in the IP contracts on where to litigate, and if so:

The second question is whether arbitration (private procedure) can be considered an IP contractual advantage based on the definition above compared to civil court litigation (public procedure).

With respect to the first question – i.e. whether it can be considered an IP contractual advantage to in fact include a provision in the IP contracts on where to litigate – it must be briefly recalled what rules apply if any such provision has not been included. In that case a large number of rules come into play.<sup>73</sup> If the dispute concerns a national IP right different sets of rules apply depending on the domicile of the defendant. If the defendant is domiciled in the EU<sup>74</sup> the Brussels I Regulation applies.<sup>75</sup> If the defendant is domiciled in the EFTA<sup>76</sup> the Lugano Convention applies<sup>77</sup> and finally, if the defendant is either domiciled in the same Member State as the plaintiff or outside the EU/EFTA the Danish Administration of Justice Act<sup>78</sup>, the Swedish Code of Judicial Procedure<sup>79</sup> or the Finnish Code of Judicial Procedure<sup>80</sup> apply. If the dispute does not concern a national IP right but rather a European unitary IP right different sets of rules come into play. In European Union Trade Mark litigation the European Union Trade Mark Regulation applies.<sup>81</sup> In Community Design litigation the Community Design Regulation applies<sup>82</sup> and finally in future Unified Patent litigation the Agreement on a

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73 Torsten Bjørn Larsen, *Intellectual Property Jurisdiction Strategies, Where to Litigate Unitary Rights vs National Rights in the EU*, Edward Elgar Publishing, 2017, Chapter 2.

74 List of Member States by 1 December 2017: Austria, Belgium, Bulgaria, Cyprus, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom i.e. 28 in total.

75 Council Regulation (EC) No 1215/2012 of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (hereinafter Brussels I Regulation).

76 List of Member States by 1 December 2017: Iceland, Liechtenstein, Norway and Switzerland i.e. 4 in total.

77 Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters signed in Lugano on 30 October 2007 (hereinafter Lugano Convention).

78 Bekendtgørelse af Lov om Rettens Pleje no. 1101 of 22/09/2017 (hereinafter Retsplejeloven).

79 Rättegångsbalk 1942:740 as later amended (hereinafter Rättegångsbalken).

80 Oikeudenkäymiskaari 4/1734 as later amended, especially 135/2009 (hereinafter Oikeudenkäymiskaari).

81 Regulation (EU) 2017/1001 of the European Parliament and of the Council on the European Union Trade Mark of 14 June 2017 (hereinafter EUTMR).

Unified Patent Court applies.<sup>83</sup> It follows that six different sets of rules apply in parallel. Common to these sets of rules is that the same, and in practice often used, forum rules apply, inter alia, the defendant's domicile<sup>84</sup>, forum delicti<sup>85</sup>, establishment<sup>86</sup> and exclusive jurisdiction<sup>87</sup> rules. Different, however, is that the forum rules just mentioned a) have been interpreted differently depending on whether the IP right in question is national or EU unitary<sup>88</sup> or whether the infringement accrues in an online or offline context<sup>89</sup> or b) have yet not been interpreted at all.<sup>90</sup> Therefore, and even though the large number of available forum rules give the plaintiff a discretion where to sue, which must be considered an advantage (leading to lower costs and less time), the wide discretion is unfortunately followed up by a considerable degree of uncertainty due to, inter alia, case law and the fact that the defendant may move first and claim non-infringement, which must be considered a disadvantage (leading to higher risks). In sum, it is hardly advisable not to include a provision on where to litigate in the IP contracts.

"It is hardly advisable not to include a provision on where to litigate in the IP contracts."

With respect to the second question therefore – i.e. whether arbitration is an IP contractual advantage compared to civil court litigation – it must be recalled that the vast majority of contracts require the action to be brought at the drafter's home domicile. That must in itself be considered an advantage for the drafter based on the definition above. Firstly, the drafter saves time and costs for travelling and for foreign external counsels provided that any such are hired along with national external counsels, which is often the case. Secondly, the drafter saves time and costs for translation of written submissions and translation of the oral procedure given that the proceedings are conducted in his/her own mother tongue.<sup>91</sup> Having said that, however, the question is whether it can generally be considered more advantageous for the drafter to have the IP dispute decided in (home domicile) arbitration rather than by (home domicile) civil courts. To address that question the differences between the two in IP must be outlined considering the below non-exhaustive list of factors:

82 Regulation (EC) No 6/2002 on Community Designs of 12 December 2001 (hereinafter CDR).

83 Agreement on a Unified Patent Court (2013/C 175/01) of 20 June 2013 (hereinafter AUPC).

84 Art. 4 Brussels I Regulation; art. 2 Lugano Convention; art. 125(1) EUTMR; art. 82(1) CDR and art. 33(1)(b) AUPC.

85 Art. 7(2) Brussels I Regulation, art. 5(3) Lugano Convention; art. 125(5) EUTMR; art. 82(5) CDR and art. 33(1)(a) AUPC.

86 Art. 7(5) Brussels I Regulation, art. 5(5) Lugano Convention; art. 125(1) EUTMR; art. 82(1) CDR and art. 33(1)(b) AUPC.

87 Art. 24(4) Brussels I Regulation, art. 22(4) Lugano Convention; art. 124(d) EUTMR; art. 81(d) CDR and art. 32(1)(e) AUPC.

88 Torsten Bjørn Larsen, *Intellectual Property Jurisdiction Strategies, Where to Litigate Unitary Rights vs National Rights in the EU*, Edward Elgar Publishing, 2017, chapters 5-11.

89 Torsten Bjørn Larsen, *The Place Where the Harmful Event Occurred in Exclusive Rights Litigation*, 2016, *Nordisk Immateriellt Rättsskydd*, 2/2016, p. 105-117.

90 Torsten Bjørn Larsen, *Rules of Jurisdiction in the Agreement on a Unified Patent Court*, *Nordisk Immateriellt Rättsskydd*, 4/2014, p. 357-373.

91 Torsten Bjørn Larsen, *Intellectual Property Jurisdiction Strategies, Where to Litigate Unitary Rights vs National Rights in the EU*, Edward Elgar Publishing, 2017, chapter 1.

- Factor 1 is the judges. In arbitration the judges are specialized IP judges, which is also the case in civil court litigation where IP disputes are settled in specialized IP courts with specialized IP judges in both Denmark<sup>92</sup>, Sweden<sup>93</sup> and Finland.<sup>94</sup>
- Factor 2 is appointment of the judges. In arbitration the parties in an IP dispute appoint the arbitrators themselves (usually 1-3) whereas in civil court litigation the courts appoint the judges (usually 3).
- Factor 3 is confidentiality.<sup>95</sup> In arbitration confidentiality is met as a starting point. However, a number of exemptions apply, inter alia, if the validity of the IP right is challenged in which event the courts mentioned supra notes 42-44 come into play; if the dispute raises a question which requires the European Court of Justice to address it on a preliminary basis in which event the same courts come into play or if enforcement is later requested by a party in which event the civil courts come into play. In civil court litigation the starting point is the exact opposite due to the open door principle in Nordic civil procedure law.<sup>96</sup> However, as an exemption the doors can be closed in full or in part in cases concerned with trade secrets – which may not rarely be the situation in an IP dispute<sup>97</sup> – in both Denmark<sup>98</sup>, Sweden<sup>99</sup> and Finland.<sup>100</sup>
- Factor 4 is costs. In arbitration the parties bear the costs to set up the court, to the arbitrators and to the attorneys whereas they shall not pay any court fee or any appeal costs cf. factor 7 below. In civil court litigation the parties shall not pay any costs to set up the court or to the judges but shall pay attorney costs, court fees and possible appeal costs. In both arbitration and civil court litigation the costs may be reimbursed to the winning party if the court rules to that effect.
- Factor 5 is speed. In arbitration the IP dispute, and despite any available statistics, tends to follow specific timelines leading to quicker awards where, however, arbitrator caseload is often a decisive factor.<sup>101</sup> In civil court litigation the IP dispute is – and with

92 The specialized IP court in Denmark is the Maritime and Commercial Court (Sø- og Handelsretten). The court is exclusively competent in cases concerned with, inter alia, trademark, design and patent law cf. the Danish Administration of Justice Act (Retsplejeloven) § 225(2)(4). The court is also competent if a district court, following a request by a party, refers a case concerned with copyright law to the court cf. § 227(2).

93 The specialized IP court in Sweden is the Patent and Market Court (Patent- och Marknadsdomstolen). The court is exclusively competent in cases concerned with, inter alia, trademark, design, patent and copyright law cf. lag (2016:188) om patent- och marknadsdomstolar § 4.

94 The specialized IP court in Finland is the Market Court (Markkinaoikeus). The court is exclusively competent in cases concerned with, inter alia, trademark, design, patent and copyright law cf. Laki oikeudenkäynnistä markkinaoikeudessa 100/2013 as later amended.

95 In IP disputes confidentiality obviously does not relate to existence and ownership of the IP rights given that any such information is publicly available. Rather, confidentiality relates to, inter alia, exploitation, licensing and infringement of the IP rights.

96 Ulrik Rammeskov, Bang Petersen and Lasse Højlund Christensen, *Den Civile Retspleje*, Pejus, 2015, p. 97 et seq. with references.

97 See e.g. decision from the Danish Eastern High Court published in *Ugeskrift for Retsvæsen* 2009, page 903.

98 Danish Administration of Justice Act (Retsplejeloven) § 29(1)(3).

99 Swedish Code of Judicial Procedure (Rättegångsbalken) § 5(1)(2).

100 Finnish Act on the Publicity of Court Proceedings in General Courts (Laki oikeudenkäynnin julkisuudesta yleisissä tuomioistuimissa) 370/2007, § 10 and § 15.

the reservation that a non-exhaustive list of factors may effect the processing time, inter alia, pending preliminary questions brought before the European Court of Justice, pending decisions before national<sup>102</sup> and international<sup>103</sup> offices, pending decisions before national and international courts and pending expert opinions – generally decided in approximately 25 months in Denmark<sup>104</sup> and in 7 months in Finland<sup>105</sup> whereas statistics is yet not available from the Swedish Patent and Market Court taking into account that it was established on 1 September 2016.

- Factor 6 is flexibility. In arbitration the process is subject to a high degree of flexibility which is due to less stringent rules meaning, inter alia, that the parties may adapt the process as to what the IP dispute requires and that the arbitrator may include the evidence he/she considers relevant and receive a award based on commercial considerations and/ or perceptions of fairness (less predictability). In civil court litigation the court process is subject to very little flexibility which is due to stringent rules<sup>106</sup> meaning, inter alia, that the parties may not adapt the process since the procedural rules are detailed and mandatory and that the judge may prevent evidence from being considered and receive a decision which is in accordance with the state of law (more predictability).
- Factor 7 is appeal. In arbitration the award is final unless the parties agree otherwise, which they rarely do, whereas in civil court litigation the decision decided by the courts mentioned supra notes 42-44 can be appealed in both Denmark<sup>107</sup>, Sweden<sup>108</sup> and Finland.<sup>109</sup> In Finland, however, appeal to the Supreme Court is not always possible since it requires their permission, which is not always given meaning that in most cases the Market Court's decision is final.
- Factor 8 is recognition and enforcement. In arbitration recognition and enforcement of IP awards is possible both in and outside the EU/EFTA due to the New York Convention<sup>110</sup> which has been ratified by more than 160 states whereas recognition and enforcement of civil court decisions is less expanded outside the EU/EFTA as it is in the EU/EFTA due to

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101 Other factors include – and as also mentioned in factor 3 – if the IP dispute raises a question, which requires the European Court of Justice to address it on a preliminary basis in which event the courts mentioned supra note 42-44 come into play.

102 Examples include decisions from the Danish Patent and Trademark Office (DKPTO), the Swedish Patent- och registreringsverket (PRV) and the Finnish Patent and Registration Office (PRH).

103 Examples include decisions from the European Union Intellectual Property Office (EUIPO) and the European Patent Office (EPO).

104 Latest statistics from 2015 from the Danish Maritime and Commercial court (Sø- og Handelsretten) is found here: [www.soeoghandelsretten.dk/soeoghandelsretten/Documents/embedsregnskaber/Embedsregnskab%202015.pdf](http://www.soeoghandelsretten.dk/soeoghandelsretten/Documents/embedsregnskaber/Embedsregnskab%202015.pdf).

105 Latest statistics from 2013 from the Finnish Market Court (Markkinaoikeus) is found here: [http://www.kho.fi/material/attachments/kho/sectorikertomukset/62EsM2nNB/Verksamhetsberattelse\\_2013.pdf](http://www.kho.fi/material/attachments/kho/sectorikertomukset/62EsM2nNB/Verksamhetsberattelse_2013.pdf).

106 Supra notes 28-30.

107 Danish Administration of Justice Act (Retsplejeloven) § 368(4).

108 Lag (2016:188) om Patent- och Marknadsdomstolar § 3.

109 Laki oikeudenkäynnistä markkinaoikeudessa 100/2013 as later amended, 7:4.

110 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958 (hereinafter New York Convention).

the Brussels I Regulation<sup>111</sup> and the Lugano Convention.<sup>112</sup>

It follows that arbitration and civil court litigation have different characteristics in IP cf. the matrix below. However, when it comes to issues such as the judges, which are also specialized in civil court litigation (leading to lower risks); confidentiality, which to some extent can also be met in civil court litigation (leading to lower risks); costs, which in IP disputes where either the amount of money is modest or where the problem is less complex civil court litigation is more economical (leading to lower costs); speed, which in Finnish and possibly in Swedish civil court litigation is rather fast (leading to less time) and finally predictability, which is higher in civil court litigation (leading to lower risks), it might turn out – and contrary to the findings in section 3.2 – that civil court litigation may sometimes, and generally speaking, be an IP contractual advantage for the drafter.

"Civil court litigation may sometimes, and generally speaking, be an IP contractual advantage for the drafter. "

However, if the drafter would like a long-term relationship with the contracting party arbitration may turn out to be a wiser choice given than arbitration is often felt less conflicting. The findings can be illustrated as in the matrix below.

	ARBITRATION	CIVIL COURT LITIGATION
Judges	Specialized in IP	Specialized in IP
Appointment of judges	The parties	The courts
Confidentiality	Main rule: Yes Exemption: No	Main rule: Yes Exemption: No
Costs	Setting up court: Yes Court fee: No Judges: Yes Attorneys: Yes Appeal: No (unless parties agree) Reimbursement: If court decides	Setting up court: No Court fee: Yes Judges: No Attorneys: Yes Appeal: Yes Reimbursement: If court decides
Speed	Main rule: Fast Exemption: Slow (arbitrator caseload)	Denmark: Slow Sweden: N/A Finland: Fast
Flexibility	Yes	No
Appeal	Main rule: No Exemption: If the parties agree	Main Rule: Yes Exemption: In Finland Supreme Court's premission is required
Recognition and enforcement	In EU/AFTA: Yes Outside EU/EFTA: Yes	In EU/AFTA: Yes Outside EU/EFTA: Yes

111 Brussels I Regulation, Chapter III.

112 Lugano Convention, Title III.

### 4.3.2 ISSUE 2: EXCLUSIVITY

It follows from the findings in section 3.2 that the question of exclusivity has been addressed in every IP contract but that the extents/impacts of any such exclusivity varies from TV production (offline industry) to gaming (online industry). That raises the question whether full exclusivity or partly exclusivity is an IP contractual advantage for the drafter based on the definition above.

If the rightholder has full exclusivity as seen in, inter alia, TV production contracts in section 3.2, he/she retains the IP to him/herself, which include, the right to reproduce, display, distribute and make adaptations of the work as well and the rights of attribution and integrity (copyright law)<sup>113</sup>; the right to exploit the invention commercially (patent law)<sup>114</sup>; the right to use the design in the course of trade (design law)<sup>115</sup> and finally the right to use any non-confusingly similar sign in the course of trade (trademark law).<sup>116</sup> Full exclusivity is followed up by the right to remuneration.

If the rightholder has partly exclusivity he/she relinquishes his/her IP to a smaller/larger extent by way of a license. A distinction must be drawn between relinquishing the IP to a contracting party or to third parties as a whole.

With respect to the former – i.e. relinquishing the IP to a contracting party – any such, as seen in gaming contracts in section 3.2, is worded as a worldwide and non-exclusive license<sup>117</sup> where the unilateral contracts are subject to remuneration (royalty) whereas the mutual contracts are usually not (royalty-free or free-of-charge).

With respect to the latter – i.e. relinquishing the IP to third parties as a whole as not seen in any of the IP contracts addressed in section 3.2 – a subdistinction must be drawn between different kinds of material.

The first kind of material is works protected by copyright (e.g. game art) or a neighbouring right (e.g. performing artists).<sup>118</sup> Such works can be subject to an enforceable creative commons – in short (CC) – license<sup>119</sup> any which purpose is to let third parties use and

113 LBK nr. 1144 af 23/10/2014 om ophavsret (Danish Copyright Act) §§2-3; Lag 1960:729 om upphovsrätt till litterära och konstnärliga verk (Swedish Copyright Act) §§2-3 and Tekijänoikeuslaki 8.7.1961/404 (Finnish Copyright Act) §§2-3.

114 LBK nr. 221 af 26/02/2017 om patenter (Danish Patent Act) §39; Patentlag 1967:837 (Swedish Patent Act) §39 and Patenttilaki no. 550 of December 15, 1967 (Finnish Patent Act) §39.

115 LBK nr. 219 af 26/02/2017 om designs (Danish Design Act) §9; Mönsterskyddslag 1970:485 (Swedish Design Law) §5; Mallioikeuslaki no. 221 of 12 March 1971 (Finnish Design Act) §5 and art. 19 CDR.

116 LBK nr. 223 af 26/02/2017 om varemærker (Danish Trademark Act) §4; Varumärkeslag, 2010:1877 (Swedish Trademark Act) §10; Tavaramerkkilaki No. 7 of 10 January 1964 (Finnish Trademark Act) §6(2) and art. 9 EUTMR.

117 For at definition of the different terms see supra section 3.2.2.

118 Jens Schovsbo, Morten Rosenmeier and Clement Salung Petersen, *Immaterielret, Jurist- og Økonomforbundets Forlag*, 2015; Marianne Levin, *Lärobok i Immaterielrätt*, Wolters Kluwer, 2017 and Pirkko-Liisa Haarmann, *Immateriaalioikeus*, Alma Talent, 2014.

119 European case law include, inter alia, SGAE v. Fernandez, District Court of Badajoz, Spain, 17 February 2006; Adam Curry v. Audax, District Court of Amsterdam, The Netherlands, 9 March 2006; Julien Allard et al. v. L'asbl Festival de Theatre de Spa, District Court of Nivelles, Belgium, 28 September 2010; Gerlach v. DVU, District Court of Berlin, Germany, 8 October 2010 and Spirit, District Court of Hamburg, Germany, 18 November 2016.

share the creator's work. The license is overall worded as a worldwide, non-exclusive, royalty-free and irrevocable license.<sup>120</sup> As for the specific impact, the license allows the creator a discretion to apply up to four predefined factors to his/her work where the first one is mandatory and the remaining three are optional.<sup>121</sup> The first factor is Attribution – in short (BY) – and require third parties to credit the creator when-ever the work is used and shared any which is equivalent to the paternity right in copyright law.<sup>122</sup> The second factor is Non-Commercial – in short (NC) – and prohibits non-commercial use of the creator's work. The third factor is No-Derivatives – in short (ND) – and prohibits sharing adaptations of the work. The final, and fourth factor, is ShareAlike – in short (SA) – and require adaptations of the work to be released under the same license as the original one. The four factors can be combined in 6 different ways varying from relinquishing the work to third parties to a small degree (meaning free use of the work to a little extent)<sup>123</sup> up to relinquishing the work to third parties to a large degree (meaning free use of the work to a large extent).<sup>124</sup>

The second kind of material is software. Such material should not be subject to a creative commons license.<sup>125</sup> There is at least two reasons for that: One reason is that software may sometimes be cumulatively protected under the European Patent Convention<sup>126</sup> and another reason is that creative commons licenses do not address distribution of source codes, which is essential to adapt software. Rather, at least four other options are available varying from relinquishing the material to third parties to a small degree (meaning free use of the software to a little extent) up to relinquishing the material to third parties to a large degree (meaning free use of the software to a large extent). The first option is Freeware licenses, which usually gives third parties free access to the software for a non-fixed period. They cannot make and share copies of the software. The creator/inventor retains all IP including the source code meaning that Freeware is proprietary software (least free). The second option is Shareware licenses, which usually gives third parties free access to the software for a fixed period, usually 30 days. They can make and share copies of the software. The creator/inventor retains all IP including source code meaning that Shareware is also proprietary software (more free). The third option is Free Software, which usually gives third parties a worldwide and non-exclusive license to use, share and adapt the software (source code is made available) meaning that Free Software is not proprietary software (even more free). The fourth option is Open Source, which usually gives third parties a worldwide, non-exclusive and royalty-free license to use, share and adapt the software (source code is made available) meaning that Open Source is not proprietary software (most free).

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120 For at definition of the different terms see supra section 3.2.2.

121 See [creativecommons.org](https://creativecommons.org) for more information.

122 LBK nr. 1144 af 23/10/2014 om ophavsret (Danish Copyright Act) §3; Lag 1960:729 om upphovsrätt till litterära och konstnärliga verk (Swedish Copyright Act) §3 and Tekijänoikeuslaki 8.7.1961/404 (Finnish Copyright Act) §3.

123 An example would be a (BY)-(NC)-(ND) license requiring third parties to credit the creator whenever the work is used and shared. The work cannot be used commercially and cannot be adapted.

124 An example would be a (BY) license requiring third parties to credit the creator whenever the work is used and shared. The work can be used commercially and can be adapted.

125 See [creativecommons.org](https://creativecommons.org) for more information.

126 Jens Schovsbo, Morten Rosenmeier and Clement Salung Petersen, *Immateriellret, Jurist- og Økonomforbundets Forlag*, 2015; Marianne Levin, *Lärobok i Immateriellrätt*, Wolters Kluwer, 2017 and Pirkko-Liisa Haarmann, *Immateriaalioikeus*, Alma Talent, 2014.

The third kind of material is signs. Such material should not be subject to a creative commons license.<sup>127</sup> The reason is that signs – even though they may sometimes be cumulatively protected under Nordic copyright laws<sup>128</sup> – are subject to trademark law having the purpose to distinct the goods and/or services of one undertaking from those of another and that therefore a creative commons license to allow third parties to use and possibly adapt a sign under copyright law would work against the underlying purpose of trademark law.

## "Full exclusivity or partly exclusivity."

Based on the above characteristics the question is whether it can generally be considered more advantageous for the drafter to have full exclusivity or partly exclusivity over his/her IP.

To address that question the drafter must take into consideration the below non-exhaustive list of factors:

- Factor 1 is making money. If the rightholder has full exclusivity over his/her IP he/she is entitled to full remuneration whenever the IP is used commercially<sup>129</sup> (conservative money making). If the rightholder has partly exclusivity over his/her IP in the various ways described above he/she is usually not entitled to remuneration given that the use of the IP is often royalty-free. However, the rightholder can make money anyway e.g. a) by promoting the work on the social media like Youtube, Vimeo, Wikimedia Commons and Flickr with possible advertising revenues; b) by applying a Non-Commercial (NC) condition to the work thereby maximizing distribution while still maintaining commercialization; c) by using a Shareware license thereby maximizing distribution while making money after a fixed period or d) by selling add-ons such as physical copies or maintenance/support services, which provide additional value to the basic content, which is free<sup>130</sup> (modern money making).
- Factor 2 is promotion costs. If the rightholder has full exclusivity over his/her IP the rightholder usually bears the promotion costs him/herself, inter alia, for marketing, advertising, trade shows etc. (high costs). If the rightholder has partly exclusivity over his/her IP in the various ways described above third parties promote the material for the rightholder by sharing it while attributing him/her at the same time (low costs).

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127 See [creativecommons.org](https://creativecommons.org) for more information.

128 Jens Schovsbo, Morten Rosenmeier and Clement Salung Petersen, *Immaterielret*, Jurist- og Økonomforbundets Forlag, 2015; Marianne Levin, *Lärobok i Immaterielrätt*, Wolters Kluwer, 2017 and Pirkko-Liisa Haarmann, *Immateriaalioikeus*, Alma Talent, 2014.

129 Jens Schovsbo, Morten Rosenmeier and Clement Salung Petersen, *Immaterielret*, Jurist- og Økonomforbundets Forlag, 2015; Marianne Levin, *Lärobok i Immaterielrätt*, Wolters Kluwer, 2017 and Pirkko-Liisa Haarmann, *Immateriaalioikeus*, Alma Talent, 2014.

130 See [thepowerofopen.org](https://thepowerofopen.org) for more information.

- Factor 3 is control. If the rightholder has full exclusivity over his/her IP he/she has hands on what the IP is used for (control). If the rightholder has partly exclusivity over his/her IP in the various ways described above the rightholder cannot always – even though he/she must be attributed, which is a basic feature of copyright law<sup>131</sup> and which also follows from e.g. a (CC)(BY) license – control how the material is used if the users abide by the license terms and conditions. A number of situations can trigger any such lack of control e.g. a) where a creative commons license applied to material in format 1 is later used in format 2 since that can be done without infringing the underlying copyright; b) where published material in whatever form is used by webscrapers being people re-publishing that material in order to direct people to their own websites to make money on advertising or c) where the licenses are irrevocable (less control).
- Factor 4 is collective societies. If the rightholder has full exclusivity over his/her IP distribution of royalty is controlled by Koda in Denmark, Stim in Sweden and Teosto in Finland (easy distribution). If the rightholder has partly exclusivity over his/her copyright in the various ways described above the rightholder can waive his/her right to royalties but only when it comes to non-commercial use any which usually requires an agreement with the collective societies (difficult distribution).

It follows that full exclusivity and partly exclusivity have different characteristics cf. the matrix be-low. When it comes to making money (leading to lower costs) and third party promotion (leading to less time and lower costs) partly exclusivity may – even in the most extensive of ways and contrary to the findings in section 3.2 – sometimes, and generally speaking, be an IP contractual advantage for the drafter. When it comes to control, however, full exclusivity is likely an advantage given the control is high (leading to lower risks). The findings can be illustrated as in the matrix below.

	<b>FULL EXCLUSIVITY</b>	<b>PARTLY EXCLUSIVITY</b>
<b>Making money</b>	Yes	Yes
<b>Promotion costs</b>	High	Low
<b>Control</b>	More	Less
<b>Collective societies</b>	Easy	Difficult

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131      Supra note 72.

## 4.4 CONCLUSION

The purpose of sub-project II named “current and evolving contractual practices in the Nordic creative and innovative industries” has been to collect IP contracts in the Danish, Swedish and Finnish TV production and gaming industries (phase I). The selected IP contracts have been compared substantial and procedural law wise (phase II). Based on those findings the task has been to identify IP contractual advantages for the drafter (phase III). Only the IP contracts defined below have been included in the analysis. This means, combined with the fact that the number of collected IP contracts are inherently restricted and by no means exhaustive, that the findings listed below are subject to a degree of uncertainty.

With respect to the Danish, Swedish and Finnish TV production industries – which for the purpose of the present study is defined as offline industries given that TV production involves physical locations, physical actors etc. – the collected IP contracts count standard co-operation agreements (Paradigms) and individually drafted co-operation agreements between a TV station and a producer. The purposes of the agreements are to define who owns the rights to the produced material. The former agreements are publicly available whereas the latter agreements are confidential. The findings show that the agreements are both similar and different. The similarities relate to scope, exclusive rights and creative commons (no clauses) whereas the differences relate to transfer, jurisdiction, applicable law and the term of the license.

"Arbitration is, with few exemptions,  
the prefer-red way to litigate."

Based on the above findings the task has been to word an IP contractual strategy defined as the IP contractual advantages, which decreases the drafter’s time, costs and/or risks. To clarify any such IP contractual advantages two basic issues have been identified. The issues have both been addressed on a general level. The reason is that a specific one size fits all IP contract strategy has not been possible to draft given the very different characters of the IP contracts collected and analyzed and that therefore due consideration must be taken to the specific industry/parties in question when drafting the specific provisions in the IP contracts.

Issue 1 is litigation. It follows from the findings above that the question of litigation is, with few exemptions, addressed in the IP contracts and that arbitration is, with few exemptions, the prefer-red way to litigate. That has raised two questions. The first one has been to address whether it can be considered an IP contractual advantage to in fact include a provision in the IP contracts on where to litigate and if so the second question has been to

address whether arbitration can be considered an IP contractual advantage compared to civil court litigation based on the definition above. With respect to the first question the analysis has shown that it is hardly advisable not to include a provision on where to litigate in the IP contracts due to the considerable risks of not doing so. With respect to the second question the analysis has shown that when it comes to issues such as the judges, confidentiality, costs, speed and predictability civil court litigation may some-times, and generally speaking, be an IP contractual advantage for the drafter.

Issue 2 is exclusivity. It follows from the findings above that the question of exclusivity has been addressed in every IP contract but that the extents/impacts of any such exclusivity varies from TV production to gaming. That has raised the question whether full or partly exclusivity is an IP contractual advantage for the drafter based on the definition above. The analysis has shown that when it comes to issues such as making money and promotion partly exclusivity may, even in the most extensive of ways, sometimes, and generally speaking, be an IP contractual advantage for the drafter. When it comes to control, however, full exclusivity is likely an advantage.

The above findings, which to some extent are contrary to the ways the collected IP contracts have been drafted, leads, directly or indirectly, to commercial use/value as required in sections 3 and 5 of the Agreement.

# 5. SUB-PROJECT III: METRICS AND INDICATORS OF VALUE CREATION – FROM EMOTIONS TO BEHAVIOR

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Understanding customer experience is one of the great challenges of firms today<sup>132</sup> and most of the focus is around how to measure experience.<sup>133</sup> Hence it is of great interest to both industry and research to have a coherent method for measuring experience. At the same time as it is not until now it is actually possible to have the tools to capture experience. In the present project we have been developing methods that can be used to capture customer experience with focus on emotions and sensory reactions.

Customer relationships with a service organization are formed over time through multiple service encounters. During these encounters customers are influenced by the “smells, sounds, sights, tastes and textures” of their experiences in the service scape.<sup>134</sup> These elements are known in research as experience clues. Marketing thought leaders have emphasized that all experience clues are embedded (more broadly) within a customer’s journey towards a goal. Insight into experience clues are critical in order to capture customer experiences in customer journeys but very difficult to explore in a physical servicescape. Traditionally, a survey is administered to customers – asking them to report on scales how they feel. However, advances in neurosciences now allow to unveil consumer emotions by studying physiological changes i.e., reactions in the body.

"State of the art equipment to move the lab into to wild."

Physiological changes are indeed what differentiates affect from cognition. Emotions are first physiologically experienced (e.g., heart rate acceleration, sweat secretion); as the mind perceives physiological changes, the individual becomes aware of his/her emotion. Therefore, studying physiological changes can enable to detect emotions. Of particular relevance is electrodermal activity (EDA), a psychophysiological measurement of emotional

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132 Lemon, K. N., & Verhoef, P.C. (2016). Understanding customer experience throughout the customer journey. *Journal of Marketing*, 80(6), 69-96.

133 Morales, A. C., Amir, O., & Lee, L. (2017). Keeping It Real in Experimental Research—Understanding When, Where, and How to Enhance Realism and Measure Consumer Behavior. *Journal of Consumer Research*, 44(2), 465-476.

134 Bitner, M. J. (1992). Servicescapes: The impact of physical surroundings on customers and employees. *the Journal of Marketing*, 57-71.

arousal. The most readily available method of measuring this physiological change is to in a lab environment attach sensors to the parts of the body with highest concentration of sweat glands. The present work takes this further and uses state of the art equipment to move the lab into to wild and explore the emotional reactions of customers while they are making every day decisions and interactions with all the elements of the in-store environment.

A major challenge with the use of EDA measurement in marketing is that EDA indicates not only emotional arousal, but also attention and cognitive processing. Therefore, studies of emotional arousal must be designed in such a way as to control for these other processes. In the present project we have implemented eye-tracking into the research broaden the empirical platform and give deeper insight into the interplay between emotional arousal, attention and cognition.

However, the combination of the tools has shown to be a great challenge as both produce tremendous amount of data that can be analyzed at several different levels. Each eye-tracking recording for a customer journey consist of about 30 minutes of recording with about 20-30 decision points and multiple social interactions. Each point can be explored in great detail and compared to EDA outcome to analyze the relationship between emotions and multitude of attention measures. In the present project we have developed methods and tools that can harness the potential that lies within the combination of EDA and eye-tracking. To track emotions simultaneously as the decision-making processing is ongoing and to pinpoint event and alternatives that trigger the onset of choice can be an interesting path for future research. This is the first research project to combine these tools in the field.

The present project has been divided in three operative steps. First, the focus has been on evaluating and testing tools to measure EDA in relation to visual attention in the field. Second, to conduct a field study to test the potential of the tool and develop procedure and methods for analysis of the data. Third, to develop tools to analyze the data that is produced using EDA and visual attention.

In the first part of the project we evaluated several different options. Two options were chosen for further piloting. We then pilot tested two manufacturers that had high potential in succeeding in the field. This was based on accuracy and precision in relation to intrusiveness and robustness in the fast-moving consumer goods context. The results of the pilot test showed that the best equipment for this purpose was the Empatica E4. This was later used in the field study to collect arousal data.



Image 1: The Empatica E4 wrist band used for EDA measurements

The field study was conducted at ICA Maxi with 120 participants that were recruited during their regular shopping trip. The equipment was mounted and the participants could then start their journey. Their visual attention and arousal was measured during the whole shopping trip. The field study resulted in great amount of data in form of video recordings with eye-tracking overlay (image 1) and several million measurement points of visual attention and EDA. The video recordings were combined in a coding scheme that later was used in the analysis process together with the EDA data and eye-tracking raw data.

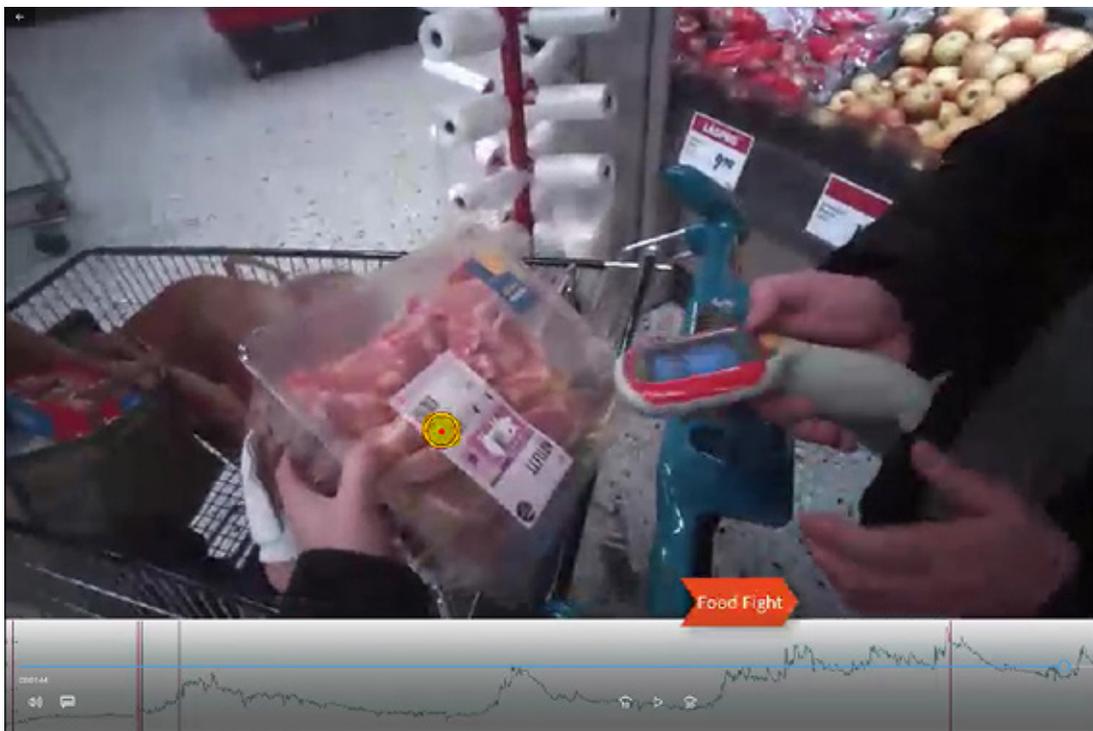


Image 1: Image showing eye-tracking overlay (yellow circle with red dot) on top of video when a product is scanned.

"The biggest challenge in working with EDA and eye-tracking in the field was to synchronize and combing the data streams."

The biggest challenge in working with EDA and eye-tracking in the field was to synchronize and combing the data streams. In the project we used professional programmers that wrote specific programs that could synchronize the data streams using accelerometer data. This resulted in well synced data that could be divided into chunks and connected to specific events (Image 2). Event coding was the next big challenge as all the data needed to be broken down into specific event such as when a participants interacted with pother customers or touched a product (Image 2). Each recording takes about five hours to code for events. The time it takes to code the events is mostly related to the length of the recording.

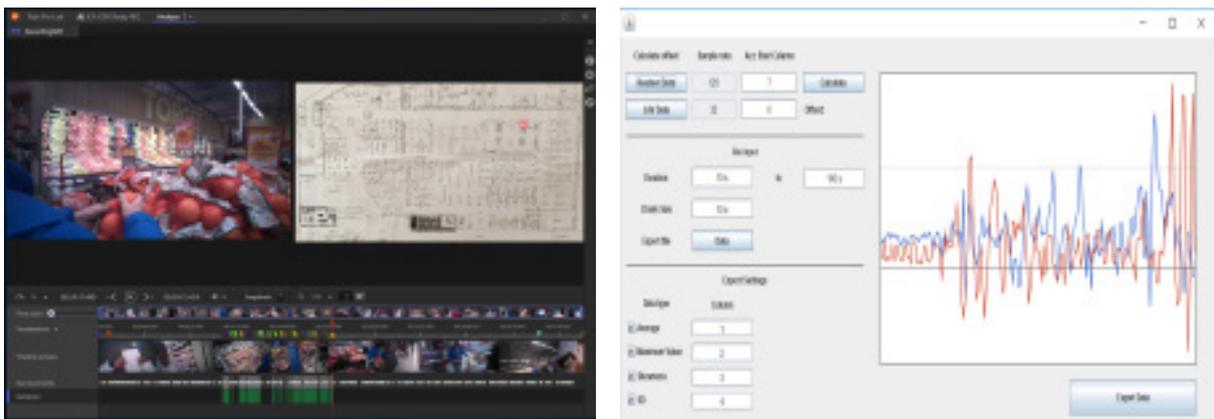


Image 2: The image to the left depicts the event coding method used and at the bottom of the image you can see each individual event coded on a timeline. The image to the right depicts the software that was developed for synchronizing the eye-tracking data with the EDA data.

One important aspect of the service scape is the music played in the service environment. This is known in past research to have great influence on customer experience.<sup>135</sup> It is also in the music landscape that there are great opportunities for innovation in the music industry. Artist have the opportunity to compose music that will influence customer towards different behavior. On such example that has been studied in the past has been how music can influence customers' movement trough the store.<sup>136</sup> However, not much is known about how music can influence the emotions and arousal levels in-store. This has mainly been due to the lack of measurement instruments that can help researcher to understand this part of the customer journey. Hence, in the future this can be an opportunity for musicians to com-

135 Andersson, P. K., Kristensson, P., Wästlund, E., & Gustafsson, A. (2012). Let the music play or not: The influence of background music on consumer behavior. *Journal of retailing and consumer services*, 19(6), 553-560.

136 Milliman, R. E. (1982). Using background music to affect the behavior of supermarket shoppers. *The journal of Marketing*, 86-91.

pose material that is niched towards the retail experience with emotional components and distinct influence connected to the composed material and the shopping behavior. Similar approaches have been used with scents with great success (Morrin and Ratneshwar, 2003).<sup>137</sup> Companies have specialized in developing scents that are custom-made for a hotel chain or a magazine. Hence, working with multiple sensory inputs in the marketing efforts to increasing the impact on the customer experience. Similarly, the music industry can produce music with certain influence on customer behavior when including the emotional aspects and measuring arousal levels in relation to the experience.

In conclusion, EDA in combination with eye-tracking measurement provides new opportunities for marketing practitioners and scholars interested in studying emotional arousal and its influence on behavior. It enables to record moment-to-moment arousal. It allows to rule out cognitive biases by which self-reports may be affected. It captures arousal even when it is unconsciously experienced. Nevertheless, it should not be seen as a mere replacement of self-reports of arousal. Rather, the role of physiologically measured arousal vis-à-vis self-assessed arousal is an avenue for future research.

"The role of physiologically measured arousal vis-à-vis self-assessed arousal is an avenue for future research."

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137 Morrin, M., & Ratneshwar, S. (2003). Does it make sense to use scents to enhance brand memory?. *Journal of Marketing Research*, 40(1), 10-25.

# 6. POLICY RECOMMENDATIONS

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Based on our studies in the Scalable Consumer Content in the Future Digital Environment project, we recommend that:

- The Nordic Countries will harmonize their Intellectual Property Laws and Licensing policies further than the European Union has been able to do so far. It should be noted that in some areas of creative industries, especially in movie and TV productions, the traditional business models and funding are based on selling rights for different geographical areas, but that does not require that those areas have different legal systems. Even for a movie producer, similar laws would bring smoother operations in the future common markets of the Nordic Countries, even if the rights will still be sold separately for different areas. Especially, we recommend that
  - The copyright threshold should be harmonized not only in legislation but also in court practices. Even though originality is the only criterion,<sup>138</sup> there are notable differences, how much originality the courts in different jurisdictions require to determine the eligibility for copyright protection. For example, in Sweden, the Supreme Court has determined that Swedish copyright law protects useful arts, e.g. the design of a flash lamp without any special requirements on copyright threshold,<sup>139</sup> while in Finland, it has traditionally been significantly more difficult to get useful arts copyrighted.<sup>140</sup> For businesses operating in several Nordic Countries, it would be beneficial to have similar copyright threshold in each of these jurisdictions. Something to consider: a Unified IPR Court, which had a jurisdiction over all the Nordic Countries to harmonize interpretations.
  - The complex and fragmented system of the related or neighbouring rights in the Copyright Law would be developed in the direction of industrial investment protection and by ensuring that the protection is in just proportion to investment, a much clearer model that would also be more sustainable of technological development could be obtained.
- In licensing, the creative industries can learn from the best practices form other creative areas. Especially we recommend that
  - the INDUSTRY considers the advantages (a list of factors are made available) to settle some of its IP disputes in the civil courts rather than by arbitration;
  - the INDUSTRY considers the advantages (a list of factors are made available) to waive some of its IP and put the work/invention out in open rather than sticking to full exclusivity; and
  - the POLICY MAKERS support the INDUSTRY in these regards.
- The Nordic Countries will remove unnecessary differences in their age ratings in the creative areas. It harms businesses to cope with different age restrictions in different countries. Especially,
  - The EU's new General Data Protection Regulation (GDPR) allows Member States to decide how old a child, between 13 and 16 years, may consent to processing personal data (Art. 8). It would be essential for businesses that provide information society services to

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138 ECJ C-5/08 "Infopaq".

139 Högsta domstolen, T 1421-07, Mag Instrument Inc. v IKEA.

140 For example, Copyright Councils opinions TN 2004:12, TN 2005:1, TN 2007:11, TN 2012:12, TN 2017:9. Conversely e.g. TN 2012:7 and TN 2013:15.

children in the Nordic Countries that there are no different age restrictions in different jurisdictions, but the services can use the same logic to acquire consent in every Nordic Country.

- movies and TV programs should have equal age ratings in different countries. Games already have PEGI system that provides a harmonized ground for age ratings in Europe, but unfortunately that is not the case with movies and TV programs. For example, in Sweden, the State Media Council (Statens medieråd) reviews and sets the age limit for movies shown on the cinema. A movie may be allowed for children or it may have an age limit of 7, 11 or 15 years. In Finland, on the other hand, the corresponding limits are 7, 12, 16 and 18 years. In Denmark, the classification board of the Media Council (Medierådet) classifies films in accordance with a rating system that has 4 age categories: allowed, 7, 11, and 15 years. In Norway, an audiovisual programme must be assigned by Medietilsynet one of the following age limits: All, 6 years, 9 years, 12 years, 15 years, or 18 years. In Iceland, the age limits are All, 6 years, 9 years, 12 years, 16 years and 18 years. To remove unnecessary obstacles in this field, age ratings should be streamlined and harmonized in the Nordic Countries.
- Humans instinctively act on impulses from the primal cord. These impulses generate various reactions such as arousal which in turn affects how active/passive we are and how we feel. Music (or any noise), together with scent, is one of very few impulses humans can protect themselves from that will have a direct effect on human well-being. It should be important for the music industry to understand that.
- Apply a more scientific approach to understand how music affects people in real life settings where the impact of music competes with all the other sensory experiences humans have in real life, eg. Scents, other people and physical environments
- In retail settings, a pleasant customer experience is key for survival. Customers do enjoy going into a physical store compared to shopping on-line. However, anything that can re-enforce a pleasant customer experience is key. It is important for the music industry to help accomplish this.
- Music can be used to shape behaviour in a good way, eg. more healthy living. Applying more scientific methods to accomplish this is beneficial for society.