

THE MEDIA AND
ENTERTAINMENT
LAW REVIEW

SECOND EDITION

Editor
Benjamin E Marks

THE LAWREVIEWS

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Editor
Benjamin E Marks

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PREFACE

I am pleased to serve as editor and US chapter author of this important survey work on the evolving state of the law around the world as affects the day-to-day operations of the media and entertainment industries.

By any measure, 2020 has been a highly unusual and especially challenging year, particularly for the media and entertainment industries, with large sectors devastated by the effects of the covid-19 pandemic. In many countries, live music, festivals, theatrical performances and sporting events were shut down entirely for much of the year (and, in many cases, remain so), ravaging the businesses that depend on in-person events for their success and the individuals that depend on them for their livelihoods. For other parts of the media and entertainment industries, the results have been uneven. The largest online distributors of books, for example, have generally fared quite well, while many independent bookstores that depend on foot traffic are in dire straits. In the music industry, touring artists, concert promoters, and theatre and venue operators have been particularly hard hit, but most streaming services, music publishers and record companies are continuing to flourish. It remains to be seen which changes to the media and entertainment industries are temporary and which will be permanent.

The pandemic is hardly the only global phenomenon accelerating changes to media and entertainment. We continue to see a rise in challenges to press freedom by repressive government regimes – a phenomenon, it should be noted, that has been testing the strength of free speech traditions in the world's most protective speech regime, the United States. The manifestations include increased censorship, reduced transparency, and more appalling acts of violence against journalists and editors. Around the world, businesses, governments and legal regimes continue to adapt to technological change, with the increased use of artificial intelligence and 'deep fakes' just a few of the examples at the forefront.

This timely survey work provides important insights into the ongoing effects of the digital revolution and evolving (and sometime contrasting) responses to challenges both in applying existing intellectual property laws to digital distribution and in developing appropriate legislative and regulatory responses that meet current e-commerce and consumer protection needs. It should be understood to serve, not as an encyclopedic resource covering the broad and often complex legal landscape affecting the media and entertainment industries but, rather, as a current snapshot of developments and country trends likely to be of greatest interest to the practitioner. Each of the contributors is a subject field expert, and their efforts here are gratefully acknowledged. Each has used his or her best judgment as to the topics to highlight, recognising that space constraints require some selectivity. As will be plain to the reader, aspects of this legal terrain, particularly as relating to the legal and regulatory

treatment of digital commerce, remain in flux, with many open issues that call for future clarification.

This work is designed to serve as a brief topical overview, not as the definitive or last word on the subject. You or your legal counsel properly should continue to serve that function.

Benjamin E Marks

Weil, Gotshal & Manges LLP

New York

November 2020

ESTONIA

*Mihkel Miidla and Kirsi Johanna Koistinen*¹

I OVERVIEW

Estonia is a country that favours free press and the development of its media and entertainment industry. Estonia's media policy is considered to be in line with the European Union media policy, and in 2020 Estonia ranked 14th in the world in the Press Freedom Index.²

Estonia has a growing film industry: Christopher Nolan filmed his latest film, *Tenet*, on the streets of Tallinn in the summer of 2019, and there are plans to build the region's largest film industry centre in Tallinn by 2022.

According to a Tallinn city press release dated 25 November 2019, the Tallinn Film Wonderland project will have three phases. The first phase, to be completed by 2022, will include building three studios and auxiliary spaces on Paljassaare peninsula in north Tallinn. The second phase will comprise an area that is open to the public, as well as spaces for auxiliary services for film production and offices. In the longer term, a new contemporary urban space, along with residential and commercial buildings, will be created.³

Estonia also values its history and cultural heritage. The Ministry of Culture has drawn up an action plan for the years 2020 to 2023 to digitalise Estonia's cultural heritage. This plan is mainly focused on the era from 1900 to 1940. Documents, prints, photos, films, artworks and objects will be digitalised, with an estimated 33 per cent of Estonian cultural heritage being digitalised in total.⁴

In recent years Estonian artists, and especially music artists, have been struggling with the concentration of viewers and listeners onto major digital platforms like Spotify and YouTube. Even though publicly there is no data available on how much Estonian artists are earning from their content from such platforms, some experts estimate that earnings are very low. Artists have a choice to either upload their content onto these platforms, or risk the possibility of not being able to reach any listeners.⁵

1 Mihkel Miidla is a partner and Kirsi Johanna Koistinen is an associate at Sorainen.

2 Reporters Without Borders, 'Data of press freedom ranking 2020', available at <https://rsf.org/en/ranking-table>.

3 <https://www.tallinn.ee/eng/Uudis-The-largest-film-industry-centre-in-the-region-will-be-built-in-Tallinn-by-2022>

4 <https://www.kul.ee/et/digitaalne-kultuuriparand>.

5 <https://kultuur.err.ee/1124077/virgo-sillamaa-estni-muusikast-suurtel-platvormidel-enamus-artiste-ei-teeni-digikanalites-midagi>.

II LEGAL AND REGULATORY FRAMEWORK

Broadcasting and video on-demand is regulated by the Media Services Act (MSA).⁶

The MSA provides the procedure and principles for the provision of audiovisual media services and radio services, and for the issuing of activity licences. The MSA also sets out the principles for the protection of persons who have provided information for journalistic purposes (protection of sources).

The Estonian public service broadcaster, ERR, is regulated by the Public Broadcasting Act (PBA).⁷ The PBA sets out the legal status, objectives, functions, financing and organisation of management and activities of the ERR. The PBA states that public broadcasting must be independent in the production and transmission of programmes, and its objectives are, for example, to support the development of the Estonian language and culture.

The ERR also has an ethics adviser that, according to the PBA, monitors the conformity of the operation of the ERR with the professional ethics and good practices of journalism.

The ethics adviser is appointed by the management board with the approval of the supervisory board of the ERR. The function of the ethics adviser and its independence have at times fallen under criticism, as the adviser is a body operating under the broadcaster and, therefore, may be looking out for the interests of the ERR, rather than being an authority outside of the organisation that could be an unbiased arbitrator for both sides. A draft to change the legislation to make the ethics adviser's position obsolete, with a suggestion of creating a new third-party adviser that would be independent from the ERR, was submitted to the Estonian parliament at the end of 2016, but the law was not passed.

Other relevant legislation governing the media and entertainment industry are:

- a* the General Part of the Economic Activities Code Act, which regulates general conditions and procedures for exercising economic activities;
- b* the Advertising Act, which sets out the general rules of advertising (specific overriding terms are found under the MSA);
- c* the Child Protection Act;
- d* the Consumer Protection Act; and
- e* the Medicinal Products Act.

There are also specific legal acts for certain sectors, such as gambling and state-funded theatres.

Media policies are devised by the Estonian Ministry of Culture, and the most relevant supervisory authority is the Consumer Protection and Technical Regulatory Authority. Under the Ministry of Culture, an expert committee has also been established to regulate the dissemination of works that contain pornography or promote violence or cruelty.

6 Available in English at <https://www.riigiteataja.ee/en/eli/511012019003/consolide>.

7 Available in English at <https://www.riigiteataja.ee/en/eli/501042019011/consolide>.

III FREE SPEECH AND MEDIA FREEDOM

i Protected forms of expression

According to the Constitution of Estonia, everyone has the right to freely disseminate ideas, opinions, beliefs and other information by word, print, picture or other means.⁸ This right may be restricted by law to protect public order, public morality, and the rights and freedoms, health, honour and good name of others. Restrictions may also occur regarding public servants employed by the national government and local authorities to protect state secrets.

The most frequently emerging issue in the Estonian media has been finding a balance between freedom to disseminate ideas and protecting a person's family and private life.

The Supreme Court of Estonia has stated that a person who is regarded as a public figure is not fully extended this protection as he or she must endure a higher amount of public scrutiny due to the position he or she holds in society.⁹

Interpreting this statement has become somewhat problematic, as in certain cases it can be difficult to determine whether the person in question is a public figure or not. Furthermore, to scrutinise the personal life of a public figure, there needs to be actual public interest for the matter as well.

When the previous President of Estonia, Toomas Hendrik Ilves, was about to marry Ieva Ilves (née Kupce), a press statement was released by the Office of the President announcing that, after marrying the President, Ieva would not become a public figure. The Supreme Court has stated that a person cannot be regarded as a public figure simply because of their relationship to a public figure (e.g., through marriage).¹⁰ For Ieva Ilves, this, of course, was not a possibility since the President's spouse is also regarded a state representative in Estonia.

There have also been times when journalism has overstepped the line with persons that are not public figures. For example, prior to the 2019 parliamentary elections, one of the biggest newspapers in Estonia published a story about one particular party and its members who had been criminally convicted.¹¹ Some of the people on the list were not actively participating in politics and were just enlisted as party members: therefore, they could not have been regarded as public figures and there was no actual overriding public interest to announce the criminal convictions of these people. What is more, some of the members' convictions had already expired from the Criminal Records Database, so, according to the law, they had already been given a clean slate.

Other forms of expression that are restricted are advertising, commercial communications and hate speech, the latter of which is prohibited.

Commercial communications are a form of expression restricted by the MSA, the Electronic Communications Act and the Information Society Services Act.

Commercial communications broadcast by a media service provider must be clearly recognisable and distinguishable from the other part of its programme service; surreptitious commercial communication is not allowed.

Furthermore, a media service provider must establish a code of conduct by means of self-regulation regarding inappropriate audiovisual commercial communication that

8 Available in English at <https://www.riigiteataja.ee/en/eli/521052015001/consolide>.

9 Supreme Court of Estonia, 13 May 2005, case 3-2-1-17-05.

10 Supreme Court of Estonia, 26 August 1997, case 3-1-1-80-97.

11 Joosep Tiks, 'Praegused ja endised kriminaalid Eesti 200-s. Kaks visati välja, üks lahkus ise, ülejäänutele andestatakse', *Eesti Päevaleht*, 16 January 2019.

would accompany or be included in children's programmes. This concerns commercial communications regarding foods and beverages containing nutrients and substances with a nutritional or physiological effect, in particular those such as fat, trans-fatty acids, salt, sodium and sugars, excessive intake of which in the overall diet is not recommended for children. If a media service provider fails to establish a self-regulating code of conduct, a regulation will be established by the minister responsible for the area instead.

The above-mentioned Acts also regulate television and radio advertising and teleshopping, information regarding sponsorship and product placement, which, with certain exceptions, is prohibited.

ii Newsgathering

There are very few legal acts that specifically regulate newsgathering, and in most cases the general legal framework applies.

In addition to laws, the Estonian Newspaper Association has established a code of ethics for the Estonian press.¹²

Journalists cannot enter anyone's property without their permission, or conduct covert surveillance or electronic eavesdropping or obtain information in any other unlawful way. Filming and taking photos in public places is allowed, as long as the processing of personal data rules, which come from the Personal Data Protection Act¹³ (PDPA) and the General Data Protection Regulation,¹⁴ are followed. The PDPA states that permission from a data subject for audio or visual recording need not be obtained if, instead, the data subject is notified of the recording in a manner that allows him or her to understand the fact of the recording and is given the opportunity to prevent the recording if he or she so wishes. The notification obligation does not apply in the case of public events, the recording of which for the purposes of disclosure may be reasonably presumed.

Under the PDPA, personal data may be processed and disclosed in the media for journalistic purposes without the consent of a data subject; in particular, personal data may be disclosed in the media if there is public interest thereof and this is in accordance with the principles of journalism ethics. Disclosure of personal data must not cause excessive damage to the rights of any data subjects.

A method in investigative journalism known as the 'journalistic experiment' can be used as a last resort when all other recognised methods have been exhausted yet the public interest on the matter remains high.

There is no recent case law against journalists using the journalistic experiment method. The last case where there was a mention of a journalistic experiment being used is found in a 2012 judgment of Harju County Court, where a man was sentenced to imprisonment for a year and three months for trying to persuade what he thought was an 11-year-old girl in an online chat room to meet with him and perform sexual acts with him. The girl was actually an adult journalist, performing a journalistic experiment.¹⁵

12 Available in English at <http://vana.meedialit.ee/code.html>.

13 Available in English at www.riigiteataja.ee/en/eli/523012019001/consolide.

14 <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1569416590419&curi=CELEX:32016R0679>.

15 Harju County Court, 17 December 2012, case 1-12-11607/4.

iii Freedom of access to government information

The freedom to access government information is regulated by the Public Information Act.¹⁶ Public information is information that is recorded and documented in any manner and on any medium and that is obtained or created upon performance of public duties provided by law or legislation issued on the basis thereof.

Holders of public information are required to ensure access to the information in their possession under the conditions and pursuant to the procedure provided by law in the quickest and easiest manner possible.

The law outlines the basis upon which a request for information can be refused by a holder (e.g., if the person requesting the information has not made evident enough which information the request has been made for).

The head of an agency that is a holder of public information may establish a restriction on access to information and classify information as information intended for internal use.

Case law on the matter includes a recent ruling from the Tallinn Administrative Court where a journalist requested documentation from the Estonian Social Security Agency (SSA) about the discontinuance of special pension payments to a person who had been accused of committing treason.¹⁷ The journalistic interest behind this request was to find out whether the current legislation is sufficient to enable the discontinuance of the distribution of the state's budget to traitorous persons.

The SSA denied the request, stating that while treason itself does not per se provide a basis for the discontinuation of pension payments, there are other legitimate bases for that. Nevertheless, making public the pension information of a specific data subject would not be necessary for that type of analysis. In addition, the SSA did not find an exception for the request under the PDPA to grant the journalist access to the personal data of this certain data subject.

The journalist filed a complaint to the Estonian Data Protection Agency, and afterwards, a lawsuit against both government agencies to the Tallinn Administrative Court. The complaint claimed that if the SSA's decision to deny the requested information was based on insufficient reasoning on the journalist's part, the SSA should have provided guidelines about which grounds would enable such information to be released. The Administrative Court ruled that the holder of such information is not responsible to provide this type of guidance.

Other legislation that regulates access to government information is the Response to Memoranda and Requests for Explanations and Submission of Collective Proposals Act, which stipulates that the state or local government authorities shall provide explanations free of charge to questions concerning the legislation and drafts thereof prepared by such authorities, the legislation that is the basis for the operation thereof, and their competence and legislative activities. The Archives Act governs the activities of the National Archives and access thereto.

16 Available in English at <https://www.riigiteataja.ee/en/eli/529032019012/consolide>.

17 Tallinn Administrative Court, 22 February 2019, case 3-18-544.

iv Protection of sources

The MSA gives protection to sources of information, stating that a person who is processing information for journalistic purposes shall have the right not to disclose information that would enable identification of the source of information. Furthermore, consent of the source is required to disclose any information that would enable identification of the aforementioned.

This requirement is dismissed if a source has knowingly provided false information. In this case, a journalist and a source are seen as having a contractual relationship, and if one of the parties breaches his or her duties, the other one is no longer bound by his or hers, either.

The Code of Criminal Procedure¹⁸ provides certain grounds for a journalist to be obligated to disclose information about his or her sources.

Estonia does not have any relevant case law on the matter.

v Private action against publication

Case law in Estonia awards claimants with non-patrimonial damages, but in most cases the awarded amounts are quite low.

The Estonian Law of Obligations Act¹⁹ states that, in the case of a violation of personality rights, including defamation of a person, the aggrieved person shall be paid a reasonable amount of money as compensation for non-patrimonial damage.

When interpreting this reasonable amount, the Supreme Court has repeatedly stated that the amount of non-patrimonial damage has to reflect and be in accordance with the general wellbeing of society.²⁰ Therefore, rewarded amounts have remained rather low, as general income rates in Estonia are low compared with other western countries.

When patrimonial damages are awarded, the aim is to place the aggrieved person in a situation as close as possible to that which the person would have been in had the damage not occurred. For non-patrimonial damages, the bases regarding the amount of damages that can be awarded are the gravity and scope of a violation, the conduct and attitude of the person who caused the damage and the need to exert influence upon the person who caused the damage to avoid causing further damage.²¹

The Supreme Court has stated, in a case concerning two plaintiffs who had filed a lawsuit against a publisher asking for damages for breach of their private lives, that the burden of proof lies on the plaintiff, and the court needs to be able to determine that some sort of moral damage has occurred, the damage has been caused unlawfully, no circumstances overruling the unlawfulness have occurred and the defendant is at fault for causing the damage.²²

In this case, the Court stated that where a newsgatherer has unlawfully breached someone's privacy, to determine the amount of non-patrimonial damages to be awarded the scope of the violation should first be analysed: for example, whether the information was published only in a paper edition of a publication or also on the internet needs to be taken into account, as the news is more likely to reach a bigger audience through the internet. The Court also stated that in these types of cases where the defendant is a journalistic publisher,

18 Available in English at <https://www.riigiteataja.ee/en/eli/ee/518052020007/consolide>.

19 Available in English at <https://www.riigiteataja.ee/en/eli/515012020004/consolide>.

20 For example, Supreme Court of Estonia, 25 September 2013, case 3-2-1-80-13.

21 <https://www.riigiteataja.ee/en/eli/515012020004/consolide>, Section 134.

22 The Supreme Court of Estonia, 26 June 2013, case 3-2-1-18-13.

persons need to be protected from a forced commercialisation of their lives and the motive for publishing needs to be determined, since someone's privacy cannot be violated simply with the aim of making a profit.

Noteworthy in this case was also the fact that one of the plaintiffs was a minor, and neither one of the plaintiffs had given his or her permission to publish the story. In their suit, they asked the court of the lowest instance to award a fair amount of damages. Both plaintiffs were awarded damages in an amount of €2,500, so the defendant had to pay damages of €5,000 in total. The plaintiffs appealed the decision, stating that, given the circumstances, this was not a fair amount, and that the fact that the defendant was a business was not fairly taken into account. The Court of Appeal and the Supreme Court did not change the ruling and found the damages fair and reasonable.

vi Government action against publication

No government action against publication has been initiated in Estonia. Sputnik, a pro-Russian propaganda publisher, has been condemned by the government, and politicians are not allowed to give interviews to the publisher, but no other examples can be found at this time.

IV INTELLECTUAL PROPERTY

i Copyright and related rights

According to the Estonian Copyright Act,²³ literary, artistic and scientific works are protected by copyright. Works protected by copyright are an original result in an objective form, and can be perceived and reproduced in this form either directly or by means of technical devices. A work is original if it is the author's own intellectual creation. Works are protected by copyright regardless of the purpose, value, specific form of expression or manner. This also means that the registration or deposit of a work or completion of other formalities is not required for the work to be protected by copyright. Copyright in a work is created in the moment of expression of the work in any objective form that allows the perception and reproduction of the fixation of the work. Content of copyright is constituted by moral and economic rights. Authors' moral rights are inseparable from an author's person and, therefore, are non-transferable. Economic rights, however, can be transferred as a single right or as a set of rights for a charge or free of charge. There are some forms of works that are not protected by copyright under Estonian law, such as:

- a* ideas, images, notions, theories, processes, systems, methods, concepts, principles, discoveries, inventions and other results of intellectual activities that are described, explained or expressed in any other manner in a work;
- b* works of folklore, legislation and administrative documents (acts, decrees, regulations, statutes, instructions, directives, etc.) and official translations thereof;
- c* official symbols of the state and insignia of organisations (flags, coats of arms, orders, medals, badges, etc.);
- d* news of the day;
- e* facts and data; and
- f* ideas and principles that underlie any element of a computer program.

23 Available in English at <https://www.riigiteataja.ee/en/eli/504042019001/consolide>.

The term of copyright is the life of the author and the 70 years after his or her death, irrespective of the date the work is lawfully made available to the public.

Jill Greenberg filed an action against Estonian political party Keskerakond and against non-profit organisation Vaba Ajakirjandus with a claim of indemnification of monetary loss of €37,500 and non-patrimonial damage of €20,000. Jill Greenberg is a notable portrait and animal photographer in the United States whose most famous work is the photo series End Times, containing 32 photo portraits depicting toddlers crying. A newspaper, *Kesknädal*, used a banner from 31 August 2011 to 30 September 2011 on its website illustrated with one of Jill Greenberg's crying toddler photos without any reference to the photographer. Furthermore, the photo had been cropped, flipped and modified without her prior authorisation. To top it all, the newspaper banner was reproduced as a screen caption to the political party's Facebook page. Therefore, the moral and economic rights belonging to Jill Greenberg had been breached by the newspaper and by the political party.

Keskerakond argued that it was not obliged to indemnify Jill Greenberg because it merely reposted the newspaper's banner and this did not constitute a new breach. The newspaper argued that the plaintiff had not substantiated the sum of her claim. Obtaining a photo similar to the plaintiff's photo online would not cost more than €20, therefore the licence fee using the plaintiff's photo would not have been as high as the plaintiff claimed it to be. In addition, Estonian case law does not recognise indemnification for non-patrimonial damage in relation to such breach. The Supreme Court found that the defendants' argument that a similar photo could have been obtained for €20 was not a valid argument, because only the value of the specific piece is relevant when calculating the hypothetical licence fee. With regard to indemnification for non-patrimonial damage, the Supreme Court stated that according to Estonian law non-patrimonial damage can, indeed, be indemnified. However, in terms of an intellectual property breach, non-patrimonial indemnification requires a culpable act by the breaching party. The mere breach is a sufficient basis for indemnification. Indemnification for non-patrimonial damage, on the other hand, is based on a culpable act. The Supreme Court sent the case back to lower courts for a review, but no judgment was necessary as a settlement was reached.²⁴

ii Personality rights

Personality rights are rights that are acknowledged in the legal system of many states. In these legal systems, an individual's name, likeness or other indication of identity are recognised as publicity rights, a type of property interest (i.e., intellectual property) that can be assigned or licensed.²⁵ In Estonia, however, personality rights do not belong in the sphere of intellectual property law. Rather, personality rights have remained where they originated – in the sphere of privacy rights.

Under Estonian law, copyrights protect the work or intellectual creation of an author. Since a person's name, identity and image are not a creation or a work, these traits are not protected as intellectual property. This does not, however, mean that an individual possesses no control of his or her name, identity, etc. Indeed, protection regarding personality rights is regulated under tort law. Unjustified use of a person's name or image, or a breach of the inviolability of his or her private life, are torts under Estonian regulation. This means that

24 <https://www.err.ee/968038/korb-joudsime-fotovaidluses-kokkuleppele>.

25 B Beebe, et al. *Trademarks, Unfair Competition, and Business Torts*. Aspen Publishers, 2011, Chapter 3.

commercialising someone's identity without his or her authorisation can bring about an action for compensation for damage and a claim to stop the behaviour causing the breach of personality rights.

The other tort considered as a breach of personality rights is the disclosure of incorrect information by incomplete or misleading disclosure of factual information concerning a person or his or her activities. This regulation can be enforced in a situation where, for example, a product is promoted with a claim that a certain famous person endorses the product in question. In such case, that certain famous person has the right to demand the refuting or correction of such information.²⁶

There have been two interesting cases where personality rights were breached in the realm of film production.

Magnus was a film made about a young man who had committed suicide in 2000. The mother of the young man who had committed suicide filed an action with the court to prohibit any public screening of the film in Estonia and, in 2007, the screening of the film was prohibited in Estonia. Regardless, the film was entered into the Cannes Film Festival in the same year. In 2008, the court prohibited any public screening in any country for seven years. Nevertheless, the film was screened in some Estonian cinemas. Due to the breach of the prohibition, a new proceeding was commenced, with a potential 30-year-long screening prohibition on the film.²⁷ A circuit court ruling came into force on 27 April 2010 that prohibits any screening or any publication of the film globally until 2025.²⁸

The publication of the film was prohibited because the event and persons in the film were too easily traceable to the real-life persons, especially because the role of the protagonist's father was played by the boy's actual biological father, who was engaged in the events that led to the boy's suicide. Since the courts ruled that the film was intruding on the personal life of the mother and causing her mental damage, the release of the film was prohibited.²⁹

In another case, however, the courts ruled in favour of the director and producer of the film.³⁰ *Sangarid*, a film telling the story of four young men escaping from Soviet Estonia to Sweden, was produced and screened in Estonia. Since the film was loosely based on the lives of actual real-life persons, three of them filed an action with a claim of €25,000 for non-patrimonial damage for breach of their privacy. The courts ruled that the plaintiffs were insincere and wished to profit from the director's intellectual property. In addition, the courts found that the events in the film relating to the life of the plaintiffs were too ambiguous and unspecific to be traced back to these plaintiffs, arguing that many Estonians in that era led similar lives and experienced similar destinies. Moreover, the film was mainly composed of fictitious events and details, therefore the plaintiffs were not identifiable, and the average audience was unable to tell which events could have been based on real-life events and which events were fictitious.³¹

26 P Varul, et al. *Võlaõigusseadus III. Kommenteeritud väljaanne* (Law of Obligations Act III. Commented edition). Juura, 2009, p. 664.

27 Estonian Film Database's article about *Magnus*, available at www.efis.ee/et/filmiliigid/film/id/775/huvitavat-lugemist.

28 "Magnus" keelu all 2025 aastani, *Eesti Päevaleht*, 28 April 2010.

29 D Hanschmidt, 'Kohus keelas filmi "Magnus" näitamise seitsmeks aastaks', *Postimees*, 13 May 2008.

30 R Ernits, 'Mängufilmi "Sangarid" tegijad said riigikohtus võidu', ERR news, 18 June 2019.

31 Tallinn Circuit Court, 9 January 2019, decision 2-16-16730.

iii Unfair business practices

The most common unfair business practices in intellectual property law are related to unlawful reproduction of someone's work (intellectual property) and failure to pay authors remuneration when using someone else's works. The following are some noteworthy cases regarding these problems.

Sanoma Baltics v. Eesti Ajalehed and Delfi

Sanoma Baltics owns the web platform www.auto24.ee, where users can upload advertisements for selling vehicles. The defendants reproduced the advertisements from the plaintiff's website to advertise the same vehicles on their own websites. Sanoma Baltics filed an action against Eesti Ajalehed and Delfi for unlawful reproduction of the advertisements, demanding €9,600 for loss of licence fees. The plaintiff stated that, even though photos and advertisements are created by users, the users transferred the copyright to the plaintiff when they agreed with the plaintiff's terms of service. The plaintiff owned the copyrights to the objects created on the basis of his investment: the database, the software and the graphic design of the website, and the photos for which copyright was assigned to him by users. The plaintiff held that it was both a database protected as an original work (including a collective work) and a database with *sui generis* protection.

The defendants argued that the database was not protected with copyright because of its lack of originality. They found that it was an objective collection of data, lacking any decision-making or one person's personal style. They further argued that the database did not fall within the scope of *sui generis* protection because compiling such data did not need any significant investments from the plaintiff. The Supreme Court ruled that the website was to be deemed as an original work and, therefore, it was protected with copyright, and that in addition the website constituted a database with *sui generis* protection. The Court found that the determining factor for ruling that the database was an original work was the fact that www.auto24.ee users had transferred the copyright to the plaintiff, and this fact was uncontested by the defendants. The database was protected with *sui generis* protection because the Court found that creating such a website, maintaining the servers for the advertisements and the effort of the staff put into servicing the website were to be considered a significant investment.³²

Estonian Authors' Association v. Viasat

The Estonian Authors' Association, the EAÜ, filed an action against Viasat to either refrain from retransmitting the Estonian TV channels (ETV, ETV2, Kanal2, TV and Kanal11) or pay an author's remuneration of €285,346 to the EAÜ for satellite retransmissions of these channels.

The EAÜ stated that Viasat unlawfully retransmitted Estonian broadcasters' TV shows to Latvian audiences.

Viasat argued that it does not commit any act deemed as communicating work to the public (i.e., transmission), and that it merely provides technical solutions as a service to broadcasters who transmit their signal via Viasat's satellite using microwave technology. The first and second instance courts ruled in favour of the EAÜ. The Supreme Court, however, dismissed the former rulings and sent the case back to circuit court for a review. In the end,

32 The Supreme Court, 6 June 2012, decision 3-2-1-71-12.

the courts ruled in favour of Viasat, arguing that the input of TV programmes' signals is under the control of broadcasters and, therefore, it is broadcasters that communicate the channels to the end-users. According to the Estonian Copyright Act, only persons who communicate a work to the public are obligated to pay an author's remuneration. Therefore, the courts found that Viasat, as a technical service provider, is not obliged to pay an author's remuneration to the EAÜ for the retransmission of the Estonian TV channels.³³

EAÜ v. City of Tartu

The EAÜ filed an action against the city of Tartu with a claim to pay remuneration of €81.55 to an author. A Tartu municipal secondary school held a concert where the students, alumni and employees of the school performed different songs but did not pay the standard fee that is required for publicly performing songs created by someone else. The city of Tartu built its case on the fact that using authors' works in the direct teaching process in educational institutions by teaching staff and students is not prohibited. The problem was, however, that the concert was held outside the school's premises. In addition, tickets for the concert were sold publicly. Therefore, the courts ruled in favour of the EAÜ and found that the city of Tartu was obliged to pay the author's remuneration of €81.55.³⁴

V COMPETITION AND CONSUMER RIGHTS

During the past few years, some prominent mergers of large and medium-sized media companies operating in Estonia took place.

The merger control of Estonian entities is carried out by the Estonian Competition Authority (ECA) unless the threshold established under EU law³⁵ is reached and, in this case, the competent authority for merger control is the European Commission. The mergers of nine media companies, which took place between September 2018 and September 2019, were inspected by the ECA, and all were cleared without any additional conditions.

The reasons for media companies' merger and acquisition (M&A) transactions are diverse. For instance:

- a* an aspiration to enter the media market, as was the case for the Alexela Varahalduse AS and its parent company Alexela Group OÜ. The group operates in the field of energy, real estate, metalworking and financial investment administration, and has now acquired control over the newspaper publishing company AS Õhtuleht Kirjastus;³⁶
- b* the termination of business activity, as was the case for Osähing Põlva Koit, which sold its intellectual property to a huge media company, AS Postimees Grupp;³⁷
- c* when the telecommunications, radio and printed media company AS Eesti Meedia acquired the advertisement company Baltic Media Services OÜ, it justified the transaction with a simplification of workflow processes since the acquired company had already been providing radio advertisement services to the buyer;³⁸

33 The Supreme Court, 29 May 2013, decision 3-2-1-50-13.

34 The Supreme Court, 27 February 2017, decision 3-2-1-159-16.

35 Council Regulation (EC) No. 139/2004, Article 1.

36 Competition Authority, 19 June 2019, decision 5-5/2019-031.

37 Competition Authority, 14 June 2019, decision 5-5/2019-030.

38 Competition Authority, 18 October 2018, decision 5-5/2018-065.

- d* AS Eesti Meedia acquired the majority stake in (at that time yet-to-be-established) Eesti Audiovisuaalse Kultuuriparandi OÜ, with the intention of bringing various classic Estonian TV series and films to the Estonian viewer;³⁹
- e* the desire to expand businesses within, or into, whole new markets in the media and marketing communications sectors;
- f* the intention to contribute more to local film industry development; and
- g* to instigate sector-based financial investments.

In August 2020 it was announced that AMC Entertainment Holdings Inc had made an agreement to sell all of its cinemas in the Baltics to UP Invest. The transaction is awaiting approval from local competition authorities.

The increasing trend of M&A transactions in the media and telecommunications sector shows the interest of both Estonian and foreign media companies in investing in the sector and, therefore, provide better quality media, entertainment and advertisement content to Estonian viewers. The Estonian television and motion picture industry is developing rapidly, with more quality and high-budget pieces of entertainment emerging every year. Hence, the continuing growth in investments and M&A transactions can be expected in the future.

Considering the media and entertainment sector in Estonia is still relatively small, no major or remarkable regulations in respect of consumer rights have emerged in the past few years. Estonia is an avid supporter of net neutrality; hence, no consumer disputes have arisen on that ground and no significant advancements have taken place. The ECA has, nevertheless, expressed its view on plans to establish the 5G network and regulatory matters that entail its establishment.⁴⁰ Once available, the 5G network will without doubt influence how Estonians consume media and entertainment, which, in turn, will precipitate developments in these sectors. Auction of the first 5G frequency permits has been significantly delayed due to disputes and the government's decision to change the auction rules. At the time of writing, no 5G frequency permits have yet been issued in Estonia and the relevant auction has not started.

VI DIGITAL CONTENT

The requirements for information society service providers, and the organisation of supervision and liability that lies upon them, are set forth in the Information Society Services Act.⁴¹ In practice, this Act concerns apps and other service providers, including those in the media and entertainment sectors. The Act implements the rules on advertising, notification obligations, data transmission and disclosure for such services. Pursuant to the Act, a service provider is not obliged to monitor information upon mere transmission, provision of access or temporary storage in cache memory, or at the request of the recipient of the service; nor is the service provider obliged to actively seek facts or circumstances indicating illegal activity. In respect of the Act, one court case has been tried in the Supreme Court of Estonia.⁴² The plaintiff in the case filed a lawsuit against an internet forum for disclosing false data about

39 https://www.konkurentsiamet.ee/sites/default/files/koondumise_luhikokkuvote_eesti_audiovisuaalse_kultuuriparandi_ou.pdf.

40 Competition Authority, 10 July 2019, decision 5-5/2019-035.

41 Available in English at www.riigiteataja.ee/en/eli/515012019001/consolide.

42 Supreme Court of Estonia, 6 June 2018, case 2-16-14655.

the person who allegedly posted insulting commentaries about the plaintiff on that respective forum. This resulted in a dismissed court case against that person, therefore causing not only non-patrimonial damage to the plaintiff as a result of such commentaries, but also patrimonial damage (i.e., procedural costs of the ‘false’ defendant that the plaintiff had to bear). While the plaintiff did not use the Information Society Services Act as the basis for her claim, the Supreme Court expressed that, in theory, it could be a basis for similar claims.

Another case concerning the Act took place at the Tallinn Circuit Court,⁴³ where the Court sought a preliminary ruling from the European Court of Human Rights⁴⁴ for the definition of information society service in the context of IP law. The most famous court case in connection with the liability of a website – in particular, a news portal – is the *Delfi* case, which has made its way to the European Court of Human Rights. This landmark case found that Estonia has acted in compliance with the law for holding Delfi liable for defaming comments posted on its news portal and has since been cited in several other court cases that followed.⁴⁵

No other remarkable case law developments have taken place recently. It can be anticipated, however, that with the upcoming implementation of European Union law,⁴⁶ new case law and regulatory provisions will be initiated.

VII CONTRACTUAL DISPUTES

In the Estonian jurisdiction, the majority of disputes related to the media and entertainment sector are non-contractual disputes rather than contractual disputes. These disputes usually relate to the unlawful reproduction of authors’ work and trademark issues. Another notable segment in case law regarding the media and entertainment sector are breaches of advertisement law; however, these breaches are processed in administrative proceedings.

VIII YEAR IN REVIEW

The year 2020 has certainly been exceptional.

The government declared a nationwide state of emergency due to covid-19, which was in force from 12 March until 17 May. During this period, cinemas and other public places of entertainment were forced to close.

Regardless of Estonia no longer being in a state of emergency, due to health and safety measures, most public gatherings such as concerts and festivals that were scheduled for 2020 have been cancelled or rescheduled for 2021.

In April, the government approved a €25 million aid package as a measure to alleviate the possible damage caused by the covid-19 pandemic in the culture, arts and sports sectors.

43 Tallinn Circuit Court, 26 November 2018, case 2-14-6942.

44 European Court of Human Rights, 10 October 2013, *Delfi AS v. Estonia* (Application No. 64569/09).

45 Columbia University Global Freedom of Expression, *Delfi AS v. Estonia* (case significance), available at <https://globalfreedomofexpression.columbia.edu/cases/delfi-as-v-estonia/>.

46 For example, Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services. Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L0770&from=EN>.

People and organisations that work in this sector can apply for monetary support to alleviate their economic distress caused by the pandemic. Mainly, the support is aimed at museums, theatres, music, sports, film and design industries.⁴⁷

On another note, the government is finally taking steps to reform the outdated legislation concerning the ‘empty cassette remuneration’. The problem with Estonia’s outdated legislation from 2006 is that, according to the current legislation, manufacturers and importers of empty cassettes such as DVDs and VHS tapes are charged an empty cassette fee.⁴⁸ The idea is to collect the fees from different authors’ societies and reimburse owners of copyright for their creation (film, music video, song, etc.) being recorded for personal use by buyers of empty cassettes. However, people no longer buy DVDs or VHS tapes, but the creators’ empty cassette fee system has remained the same, while users have moved on to more modern media and platforms (apps such as Spotify). Estonian artists initiated a claim against the government for a loss of profit of €38 million for the years from 2014 to 2018.

According to the EAÜ, the Tallinn Circuit Court rendered a judgment on 30 June 2020 ordering the state to pay compensation to the artist associations in an amount of €3.5 million.

According to the Circuit Court, Estonian authors are entitled to compensation of €0.45 per capita. However, a final judgment has not been rendered, as the author’s associations have filed an appeal with the Supreme Court, as according to the applicable laws the compensation should be around €46 million. However, as pointed out above, the legislation is outdated and can be applied to the empty cassette fee.

Regardless of that, the Authors’ Association deems such remuneration low, as for the past years authors’ fees around the world have been on the rise and in 2015, the average remuneration in the Member States of the European Union for copying works for personal use was €1.42 per capita.⁴⁹

A draft concerning the Copyright Act was submitted to the Estonian parliament for discussion on 3 September 2020. One of the main objectives of the draft is to ensure compensation for the producers of the first fixation of a film, which the current applicable regulations does not guarantee. In addition to the above, the draft transfers some of the functions of the Estonian Ministry of Justice in the field of copyright and related rights to the Estonian Patent Office (EPO). The draft corresponds to the programme of the Estonian Ministry of Justice for 2020 to 2023, which envisages the transformation of the EPO into a modern competence centre for intellectual property rights and considers it necessary to consider expanding the competence of the aforementioned authority in the field of copyright.

An additional aim of the amendment is to establish an updated empty cassette fee system that would allow rightsholders to receive fair compensation. This includes remuneration for people copying authors’ works and other objects of rights for personal use. Adopting the new regulation will also ensure the Estonian legislation’s compliance with the Information Society Directive.⁵⁰

In addition to the entertainment sector, controversy has risen between one public and several private broadcasters. The Estonian Association of Media Enterprises (EML) submitted a complaint to the European Commission against the ERR on 7 September 2020.

47 <https://www.kul.ee/et/kriisiabi>

48 www.riiigiteataja.ee/akt/129122011156.

49 <https://www.eau.org/uudised/kopeerimishuvitise-vaidlus-estivi-valitsusega-jatkub-loomeinimesed-vaidlustasid-kohtuotsuse/>.

50 <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32001L0029&from=EN>.

According to the EML's statement, the funding of ERR's online news via the state budget harms fair competition. ERR is strongly expanding its online media with the support of state financing, but the private sector will never be able to compete with the state at such a level. The European Commission has yet to make an announcement regarding the complaint.⁵¹

IX OUTLOOK

This year, two amendments to the Estonian legislation are nearing completion: the draft on amendments to the MSA and related regulations⁵² and the draft on amendments to the Copyright Act (the amendment of the empty cassette fee system and the extension of the functions of the EPO).⁵³

As of October 2020, the government is still processing the draft act to amend the MSA and related regulations. With this draft, the revised Audiovisual Media Services Directive is planned to be transposed into Estonian legislation.

In the coming year, the main issues and legal developments in Estonia will be adopting two new directives into legislation by 2021: the Directive on Copyright in the Digital Single Market⁵⁴ and the Directive laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes.⁵⁵

Discussions on how the government shall adopt the Directives into Estonian legislation have started according with the legislative plan of the ministries. The public draft to transpose the Directives shall be available at the beginning of 2021.⁵⁶ Furthermore, adopting the Directive on Copyright in the Digital Single Market may prove to be a challenge for Estonia, as many politicians have openly opposed it, and during the vote in the European Parliament, Estonia remained impartial, with only one of its members of the European Parliament voting for the Directive.

51 <https://news.err.ee/1132328/private-media-enterprises-file-err-complaint-with-european-commission>.

52 <http://eelnoud.valitsus.ee/main/mount/docList/04de3b98-fa6a-4413-86ff-039d529993a7#3RUKgII2>.

53 <http://eelnoud.valitsus.ee/main/mount/docList/f67f0976-91f7-459b-8f46-d0201871b36d?activity=1#9uVss55U>.

54 <https://eur-lex.europa.eu/eli/dir/2019/790/oj>.

55 https://eur-lex.europa.eu/legal-content/EN/TEXT/?uri=uriserv%3AOJ.L_.2019.130.01.0082.01.ENG.

56 https://www.just.ee/sites/www.just.ee/files/ministeeriumide_seadusloomeplaanide_ulevaade_2020.pdf.

ABOUT THE AUTHORS

MIHKEL MIIDLA

Sorainen

Mr Mihkel Miidla is a partner and head of the regional technology, media and telecommunications sector group at Sorainen, as well as head of the information technology and data protection practice in Estonia. He advises clients in all IT and telecoms-related matters. As a specialist in IT law, Mr Miidla provides outstanding support in cases where IT and IP are closely related.

Mr Miidla is one of Estonia's leading experts on data protection with his extensive experience in advising clients on personal data protection matters and as a visiting lecturer on privacy and data protection issues at the University of Tartu. He advises on all aspects of data protection, including the implementation of the General Data Protection Regulation, cybersecurity, online privacy and data breach response strategies.

Mr Miidla is passionate about novel technologies and disruptive innovation. He advises clients on regulatory matters relating to launching innovative services and products in Estonia.

Mr Miidla also has significant experience in the field of service and trade contracts, including agency, supply and distribution arrangements. He has assisted many local and international businesses in trade deals, as well as in setting up trade operations in Estonia and abroad. He has valuable experience in product and service-related issues ranging from advertising and labelling requirements to complex industry-specific regulatory and competition (e.g., automotive industry, energy and utilities) issues.

KIRSI JOHANNA KOISTINEN

Sorainen

Ms Kirsi Johanna Koistinen is an associate in the competition and regulatory practice group at Sorainen. Ms Koistinen works in a broad spectrum of areas, such as information technology and data protection, distribution and trade and intellectual property.

Ms Koistinen holds a master's degree in international commercial law from the University of Groningen and is passionate about working with innovative entrepreneurs and contributing to the development of the Estonian economy.

Ms Koistinen started her career as an intern in Sorainen and previously worked as a lawyer in a medium-sized firm, where she gained experience on providing legal advice to foreign clients looking for business opportunities in Estonia.

SORAINEN

Kawe Plaza, 7th floor

Pärnu mnt 15

10141 Tallinn

Estonia

Tel: +372 6 400 900

Fax: +372 6 400 901

mihkel.miidla@sorainen.com

kirsi.koistinen@sorainen.com

www.sorainen.com

an LBR business

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