

Copyright and Trademark Crimes in the Nordic Countries

Analysis from the Perspective of the Principle of Legality

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1. Introduction

In the Nordic countries¹, criminalisations must fulfil certain criteria in terms of *criminalisation principles*.² The most significant advantage of criminalisation is general prevention, which is pursued by targeting the criminal law to generally valued

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¹ The concept of 'Nordic countries' includes in this study Finland, Sweden, Norway and Denmark. Iceland has been left out of the study due to procedural, economic, and geographical reasons.

² This article approaches the subject through the disposition generally adopted in the Finnish criminal law of a division into four principles of criminalisation: *the principle of legality, the principle of justified object of protection, the principle of social cost evaluation, and the principle of ultima ratio*. See, e.g., Tapani & Tolvanen, *Rikosoikeuden yleinen osa – Vastuuoppi*. 2nd ed. (Helsinki 2013); Melander, *Kriminalistointiteoria – Rangaistavaksi säätämisen oikeudelliset rajoitukset* (Helsinki 2008); Frände, *Yleinen rikosoikeus* (Helsinki 2012); Tapani & Tolvanen, *Straffrättens ansvarslära* (Helsinki 2016). Some scholars consider the integrity of human dignity (see, e.g., Melander (2008)) or autonomy of an individual (see, e.g., Nuutila, *Rikosoikeudellinen huolimattomuus* (Helsinki 1996)) as a separate criminalisation principle. I consider them as a part of the human rights system, guiding the formation of the entire criminal law system, and don't see any additional value in handling them also as separate principles of criminalisation. This is somewhat similar to Tapani & Tolvanen (2013), p. 77. The position of the other principles is handled later in the text. Although other Nordic countries do not have a corresponding approach, the prerequisites for criminalisation are equitable, and can be outlined using the Finnish model for the purposes of this research.

objects of protection and criminalising behaviour that is generally considered reprehensible.³ The purpose of criminalisation is to indicate the societal blameworthiness of a conduct and to secure order and safety in society, not to pursue the interests of the victim or to function as an instrument of protecting private property interests.⁴ However, criminalisation merely to demonstrate the authority of the government is not acceptable.⁵ Criminalisation principles thereby limit the use and content of criminal law.⁶ The most central principles are the following.

Most fundamentally, criminalisations must be based on the letter of the law (*the principle of legality*).⁷ The principle of legality legitimises criminal legislation by tying it to law enacted by parliament and divides powers by setting the parliament as the sole legislator.⁸ Furthermore, criminalisation shall always have a justifiable object of protection, that is, it should always be designed to safeguard some legitimate protected interest (*the principle of justified object of protection*).⁹ The societal advantages gained with the criminalisation shall exceed the disadvantages caused to both society and to the perpetrator (*the principle of social cost evaluation*).¹⁰ Social costs include limitations on the right of self-determination, control and enforcement costs, un-

³ Melander (2008), pp. 480–484.

⁴ Asp, Ulväng & Jareborg, *Kriminalrättens grunder. Svensk straffrätt I, 2nd ed.* (Uppsala 2013) pp. 34–35; Tolvanen, *Johdatus kriminaalipolitiikan teoriaan* (Joensuu 2005), pp. 141–142.

⁵ Tolvanen (2005), p. 143; Asp, Ulväng & Jareborg, (2013), p. 48. Even though the principle of legality has significant meaning also as justification of the entire criminal law system, I do not consider this to affect its position as a criminalisation principle as well. See, e.g., Tapani & Tolvanen (2013), p. 77.

⁶ Melander (2008), p. 193; Tapani & Tolvanen (2013), p. 76; Asp, Ulväng & Jareborg (2013), pp. 42–43; Andenæs, *Alminnelig Strafferett. 6th ed.* (Oslo 2016), pp. 72–73.

⁷ Melander (2008), pp. 193–194, HE 44/2002 vp. p. 28; Asp, Ulväng & Jareborg (2013), p. 46; Andenæs (2016), p. 106

⁸ Roxin, *Strafrecht: Allgemeiner Teil. Bd 1, Grundlagen – Der Aufbau der Verbrechenslehre* (München 2006), pp. 146–147.

⁹ Nuotio, *Teko, vaara, seuraus. Rikosvastuun filosofisista, kriminaalipoliittisista ja lainopillisista perusteista* (Helsinki 1998), p. 497; Asp, Ulväng & Jareborg (2013), p. 39–40; Greve, *Det straffretlige ansvar* (København 1999), p. 37. These objects of protection are often based on basic and human rights, although no absolute requirement for them to be an expression of basic and human rights system is set. Criminalisations protecting interests derived from other societal needs are also acceptable, but need to be justified from the basic and human rights perspective. Melander 2008, pp. 344–351. Basic rights in the national constitutions get their foundation from international human rights conventions. See FC 731/1999 Chapter 2; SC 1974:152 Chapter 2; and 1991:1469 Chapter 1–3, NC LOV-1814-05-17 Chapter E, DC LOV nr 169 af 05/06/1953 Gældende Chapter VIII, and international conventions European Convention on Human Rights (ECHR), International Covenant on Civil and Political Rights, Charter of Fundamental Rights of the European Union.

¹⁰ Melander (2008), pp. 474–477; Asp, Ulväng & Jareborg (2013), p. 42; Greve (1999), p. 42; and NOU 2002:4 p. 82–84.

desirable societal side effects¹¹, and problems with equality.¹² It is essential to assess both advantages and disadvantages, and to weigh them against each other.¹³

Criminalisation shall also be used only as the last resort in interfering in individuals' lives (*the principle of ultima ratio*). Before making certain behaviour criminal, the usability and functionality of other societal means of reaction, such as civil remedies, should be investigated. Criminalisation is acceptable only if the desired effect cannot be achieved by these other means.¹⁴ Criminalisation shall not be resorted to just to be on the safe side.¹⁵ The *ultima ratio* principle consists of two elements. First, the principle relates the criminal justice system to other parts of the judicial system. It requires consideration of other means for effective societal control before criminalisation is applied. Second, the principle requires the legislator to assess the extent of the current legislation and whether existing offences cover the essential parts of the criminalisation now in question.¹⁶

The position of the principle of legality, which provides the central perspective of this article, is stronger compared to the other principles. First, it is the only principle that is legitimised directly by legislation. In the Nordic countries, it is defined in national laws¹⁷ and has its normative foundation also in European and international human rights conventions.¹⁸ For other principles, there are no specific provisions that define their exact content, although institutional support for them can be derived from other articles in European and international human rights conventions.¹⁹ Second, the principle of legality is also *constitutive* for the entire criminal law system

¹¹ An example of these can be given regarding, e.g., criminalising sexual services. Enacting prostitution as generally punishable might lead to more secretive practices, which could increase the power of pimps and further deepen the dependence of prostitutes. The social exclusion of prostitutes and the threat of abuse would also increase as they would not have an opportunity to choose their customers, while the law-abiding customers would no longer use their services. HE 221/2005 vp., 16-17.

¹² Tapani & Tolvanen (2013), p. 89.

¹³ Melander (2008), pp. 491–492; Asp, Ulväng & Jareborg (2013), pp. 42–43.

¹⁴ Melander (2008), pp. 391–393, 509; Lernestedt, *Kriminalisering. Problem och principer* (Iustus 2003), pp. 19-21; Greve (1999), pp. 42–43; and NOU 2002:4 pp. 82–84.

¹⁵ Tapani & Tolvanen (2013), pp. 91–92,

¹⁶ Melander (2008), pp. 403–407.

¹⁷ In Finland and Norway, the principle of legality is found in both the Constitution FC 731/1999 Chapter 2 Section 8 and NC LOV-1814-05-17 Section 96 and the Criminal Code FCC 39/1889 Chapter 3 Section 1 and NCC LOV-2005-05-20-28 Chapter 3 Section 14. The wordings of these two vary a little, but the content is the same. In Sweden and Denmark, the Criminal Codes define the content of the principle at, respectively, SCC 1962:700 Chapter 1 Section 1; and DCC LBK nr 976 af 17/09/2019 Chapter 1 Section 1. The location of the enactment does not affect the validity or the importance of the principle.

¹⁸ Art. 7 ECHR, Art. 15 International Covenant on Civil and Political Rights; and Art. 49 Charter of Fundamental Rights of the European Union.

¹⁹ Melander (2008), pp. 173–174, 193.

instead of being just a principle affecting the form and content of specific criminal legislation.²⁰ The principle of legality strengthens legal protection of individuals by defining the limits within which the use of criminal law system is justified in the first place.²¹ Regarding individual criminalisations, the principle of legality primarily regulates the form of concrete criminal provisions, whereas the other principles concern the content of criminalisations. However, the principle of legality also affects the wording of criminalisation. It therefore contributes to forming the content by defining how clearly and precisely the criminalised behaviour must be described, and the phrasing and style chosen indicates the scope of the offence.

This article studies criminalisation of intellectual property rights (IPR) infringements. The WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) lays down minimum standards for criminal enforcement of intellectual property rights for its members.²² The TRIPS Agreement enacts mandatory criminal procedures and penalties, at least in cases of wilful trademark counterfeiting and copyright piracy on a commercial scale (Article 61²³).²⁴ According to the TRIPS Agreement, the objective of IPR legislation is not to provide the maximum possible profit to right-holders, but to find the proper balance between private and public interests.²⁵ In the trade context, this means the avoidance of the distortion of the system towards either too much or too little protection, which can in turn lead to inefficiencies in the commercial exploitation of creation and innovation, or enable misappropriation of intellectual property.²⁶ All Nordic countries are members of the WTO and are bound by the TRIPS Agreement. The structures and content of the copyright and trademarks acts in the Nordic countries are similar due to the effects of the TRIPS Agreement, other international conventions, and the intensive Nordic co-operation in this field in

²⁰ Tapani & Tolvanen (2013), p. 77

²¹ Melander (2008), pp. 193-194; HE 44/2002 vp., pp 28-29.

²² Kur & Dreier, *European Intellectual Property Law. Text, Cases & Materials* (Cheltenham/Northampton 2013), p. 29.

²³ Article 61 of the TRIPS agreement enacts that: "Members shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale. Remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity. In appropriate cases, remedies available shall also include the seizure, forfeiture, and destruction of the infringing goods and of any materials and implements the predominant use of which has been in the commission of the offence. Members may provide for criminal procedures and penalties to be applied in other cases of infringement of intellectual property rights, in particular where they are committed wilfully and on a commercial scale." Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco on 15 April 1994, available at: https://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm (last accessed 26 October 2020).

²⁴ Taubman, Wager & Watal (eds.), *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (Cambridge 2012), pp. 575–577.

²⁵ Taubman, Wager & Watal (2012), p. 11.

²⁶ Kur & Dreier (2013), pp. 6–7.

the 1960s and 1970s. The EU has also given various directives in this field.²⁷ There are slight differences between the IPR laws, such as some requirements concerning national authorities or the order of sections, but the core of protection is the same.²⁸

IPRs as objects of protection differ from other more traditional property objects due to their intangibility. IPRs cannot be defined as units in a way that traditional movable or immovable property can be defined. They are rights to utilise one's creation economically, in whichever form the creation exists, as long as the creation exceeds certain thresholds for the formation of IPR. Also, the use of IPRs differs from the use of traditional property objects. IPRs can be used simultaneously by many users without one use affecting the other or diminishing the value of the used object.²⁹ This increases difficulties of fitting them into the existing criminal law system, for the system has been created from the perspective of traditional concrete property objects.³⁰ The core ideology in the IPR system is to provide wide and strong protection for products of intellectual creation, with the aim of encouraging creativity. This means approaching the matter from the starting point that the right-holder has the exclusive right to decide about the use of the IPR and that all use without the right-holder's consent is presumptively infringing.³¹ This approach has mitigated over the years; however, traces of this ideology are still visible, e.g., in the crime provisions regarding IPRs.

This article studies copyright and trademark offences in the Nordic countries from the perspective of the principle of legality. There are two main research questions: 1. How do the current Nordic copyright and trademark offences fulfil the requirements of the principle of legality? 2. How could these offences fulfil the requirements of the

²⁷ For more about the effect of the EU directives, see, e.g., Rosén, *De nordiska upphovsrättslagarnas framtida struktur*, *NIR* 6 (2012), pp. 587–597; Schönning, *Ophavsretsudviklingen i Danmark siden 2009*, *NIR* 6 (2012), pp. 538–545; Wallberg, *Varumärken i ljuset av EU-utvecklingen* *NIR* 1 (2005) pp. 85–105; Gundersen, *Varemerket i lys av EU-utviklingen*, *NIR* 1 (2015) pp. 106–119; and Kylhammar, *Varumärken i ljuset av EU-utvecklingen*, *NIR* 1 (2005) pp. 120–131.

²⁸ Olsson, *Copyright – Svensk och internationell upphovsrätt, tionde upplagan* (Stockholm 2018) pp. 34–35; Haarmann, *Immateriaalioikeus, 5th ed.* (Talentum Media 2014) p. 49; and Schovsbo, Rosenmeier & Petersen, *Immateriaret* (København 2018) pp. 688–69.

²⁹ Weckström, *Trademarks in Virtual Worlds: Law, Outlaws or New in-Laws?*, *Journal of International Commercial Law and Technology* 7(2) (2012), pp. 116–117.

³⁰ A good example of the difficulty of the field can be shown using the common theft offence. In common theft of, e.g., a bicycle, the object of protection (the tangible property) is concretely taken away from the owner's sphere of influence when stolen. In IPR 'theft' the object of protection is not lost so to speak, but the 'stealing' is done in parallel to the legal use. This makes it difficult, on the one hand, to separate the lawful and unlawful use and, on the other hand, to define the extent of the infringement and loss, while neither the lawful nor unlawful use actually lessens the value of the IPR. See Weckström (2012), pp. 117–118, especially regarding trademarks.

³¹ Bernitz, Pehrson, Rosén & Sandgren, *Immateriäl rätt och otillbörlig konkurrens. Fjortonde upplagan.* (Stockholm 2017), pp. 8–10, 409–411. Here is a significant difference between the two systems. The criminal law system sanctions acts from the perspective of society. The IPR system evaluates the reprehensibility of acts and harm and damage caused by them from the perspective of the individual right holder.

principle of legality better? The study will show how the phrasing and style of the offences in question in fact cause just such application and legal protection issues that the principle of legality is designed to prevent. In the field of IPRs, the form of the criminal provision should give more specific content to the criminalisation by defining the concrete criminalised conducts and objects of protection more precisely than they do. The unclarity and vagueness regarding the definitions of both objects of protection and infringing activity, combined with the nature of IPRs as property objects, demand more precise essential elements.³² This article suggests the use of civil sanctions as an alternative, in order to enable more specific definitions of criminal conducts.

This article concentrates on three problematic aspects in the field of IPRs: copyrighted work threshold, moral rights, and establishing trademark through use. Other IPR offences are mainly left out of this article. However, many parts of this study may be applied also to those criminalisations, as their essential elements are similar to the essential elements of trademark offences. Discussion of principles of criminalisation other than the principle of legality is left out of this study, although some references to them are made in order to point out their significance in practice.³³ Similarly, this study does not treat the topic of criminalisations of either circumvention of technical protection of copyrighted work or violating electronic docket information on rights, nor the import of pirated goods and trademark licencing.

The following chapters will analyse the problems starting with defining the content of the principle of legality in chapter two. Chapter two also defines the central concepts of copyright and trademark law and exemplifies the issues regarding the principle of legality with them. Chapter three analyses the essential elements of copyright and trademark offences in the Nordic countries. Chapter three also shows the concrete problems in the drafting of the offences and points out which parts of them could fulfil the requirements of the principle of legality better. Chapter four suggests solutions to the problems presented in chapters two and three.

2. The Principle of Legality in the IPR Context

2.1 General Remarks and Central Concepts

In the Nordic countries, the principle of legality directs criminalisations and the use of criminal law. The principle of legality consists of four elements: the requirement of written (criminal) legislation, the prohibition of analogy, the prohibition of ret-

³² The concept of 'essential elements' means the characterisation of the criminalised behavior that is written in a specific crime provision and must be fulfilled (in addition to other grounds for liability) for criminal liability to actualise.

³³ The other principles of criminalisation are not completely overlooked, as they are studied in this context in my other research.

roactivity, and the prohibition of vagueness.³⁴ The purpose of the principle is to ensure the legitimacy of the penal authority of the state and to protect the rights of an accused.³⁵ The use of criminal law must be foreseeable.³⁶ However, the state can, in some situations, execute its power contrary to the principle of legality if the actions and results are in the accused's favour.³⁷

The drafting of the essential elements of the Nordic copyright and trademark offences causes problems from the perspective of the principle of legality, especially regarding clarity and precision. Particularly problematic elements are the multiple internal references and use of the blanket criminalisation technique, combined with the abstractness and inaccurate definitions of the objects of protection, and the attempt to reach exhaustive protection. These problems are particularly evident in the following three areas of copyright and trademark law: *copyrighted work threshold*³⁸ as a prerequisite for copyright protection, the subjective dimension of the *moral rights* of an author, and the conditions for *establishing* trademark protection *through use*. The problem with each of these aspects of the law is that it is impossible to define their existence or content merely based on the legislation—case-specific deliberation is needed. Nevertheless, they form part of the basis for certain IPR criminalisations.

First, the Nordic countries apply a 'copyrighted work threshold' to determine whether a work is independent and original enough to fall under copyright protection.³⁹ In order for a work to cross this threshold it needs to be such that no one else completing the same process would have come up with exactly the same result.⁴⁰ Some EU directives and their interpretation have raised discussion about the position and validity of this requirement.⁴¹ However, in this context the concept of copyrighted work threshold is still a valid instrument to describe the minimum criteria of copyright protection.

³⁴ Melander (2008), pp. 200–204; Asp, Ulväng & Jareborg (2013), p. 46; Langsted, Garde & Greve, *Criminal Law in Denmark, 4th ed.* (Alphen aan den Rijn 2014), pp. 33–38; Matningsdal, *Straffeloven. Alminnelige bestemmelser. Kommentartutgave* (Oslo 2015), pp. 91–95. Additionally, the European Court of Human Rights has validated this division in its case law, e.g., in cases *Kokkinakis v. Greece*, appl. no. 14307/88, 25.5.1993 and *Cantoni v. France*, appl. no. 17862/91, 11.11.1996.

³⁵ Melander (2008), pp. 193–194.

³⁶ Jareborg, *Allmän kriminalrätt* (Iustus 2009), pp. 57–58.

³⁷ NOU 1992:23, p. 72

³⁸ The concept of 'teoskynnys/verkshöjd' is an entirely Nordic phenomenon and translates poorly in English. More specific content of the concept is explained later in the text.

³⁹ Haarmann (2014), pp. 54–56.

⁴⁰ Eidsvold-Tøien, Originalitetskriteriet i EU-retten – ny kurs? *NIR* 4 (2012), p. 403.

⁴¹ Kopp, The Evolvement of a European Concept of the protected Work of Authorship, *NIR* 3 (2012), pp. 248–263; Eidsvold-Tøien (2012), pp. 403–422; and, e.g., cases C-5/08 *Infopaq*; C-393/09 *Ministertvo Kultury*; C-604/10 *Football Dataco*; and C-145/10 *Painer* regarding the originality requirement in the EU. See also, NJA 2015 p. 1129; Rydén, Det upphovsrättsliga originalitetskravet i ljuset av utvecklingen i Europeiska unionens domstol. En kommentar till Högsta domstolens dom den 29 december 2015 (NJA 2015 s. 1129), *NIR* 2 (2016), pp. 205–209; Rt. 2007 p. 1329; and Stenvik, Utviklingen på immaterialrettsområdet i Norge, *NIR* 6 (2008), pp. 549–550.

In evaluating whether a copyright infringement exists or not, one must first evaluate whether the piece of work that is copied exceeds this threshold. The essential elements of a copyright offence cannot be fulfilled if there is not a piece of work that is protected by copyright. The legislation does not define copyrighted work threshold accurately (or at all), and it varies between different types of work.⁴² The court can only retrospectively define and confirm that a piece of work exceeded copyrighted work threshold and was protected by copyright at time at which it was copied.⁴³ This increases the unforeseeability of this area of criminal law. It becomes extremely difficult to determine in advance which type of behaviour by the actor targeted to which type of work will fulfil the essential elements of a copyright offence.

Second, the criminalisation of the infringement of copyright also includes the infringement of *moral rights* as a form of prohibited conduct in all Nordic countries.⁴⁴ Infringing a right holder's moral rights means, for instance, leaving the name of the author, the work, the performer, or the photographer unmentioned when using the protected material. It also includes changing the work in a way that offends the author's literary or artistic dignity or eccentricity and distributing the work to the public in the above-mentioned offensive form. The evaluation of whether moral rights have been infringed includes right holder-centered viewpoints. In other words, the evaluation is partly based on the right holder's subjective conception of derogatory actions, and what the author perceives to, for instance, harm his reputation, artistic dignity or eccentricity, or the originality or value of the work. General criteria for acts that society considers as violating moral rights do not exist.⁴⁵ This increases the level of abstraction and makes it rather difficult to assess in advance which actions are criminally punishable and which are not.

The third problem concerns trademarks and is comparable to the situation regarding copyrighted work threshold. According to Nordic trademark laws, trademark protection can be *established through use* in addition to registration.⁴⁶ However, the laws do not define specifically either: 1. The procedure through which trademark protection can be established through use ('the how'), or 2. The exact moment when trademark protection is considered to be established through use ('the when'). The

⁴² Haarmann (2014), p. 58; Olsson (2006), pp. 66–68; and Eidsvold-Tøien (2012), p. 403.

⁴³ Tapio, Fair use ja kolmivaiheisesti joustavamman tekijänoikeudellisen sääntelyn mahdollistajina, *Lakimies* 1 (2013), pp. 34–54 at p. 36.

⁴⁴ Kur and Dreier, *European Intellectual Property Law* (Cheltenham/Northampton 2013), p. 21, and Haarmann (2014), p. 149.

⁴⁵ The infringement of moral rights may also have economic impact on the right-holder if, for instance, the loss of reputation affects the sale of the work. See Pihlajarinne, Immateriaalioikeuden yleiset opit ja digitalisoituminen – vertailussa tekijänoikeus ja tavaramerkkioikeus, *Lakimies* 3 (2012), pp. 383–396 at p. 384. However, these types of damages are compensated through civil remedies and mere financial loss to an individual is not enough to justify criminalisation.

⁴⁶ Haarmann (2014), p. 314; Regeringens proposition 2009/10:225 p. 69; and Ot.prp. nr. 98 (2008–2009) pp. 41–42.

court must case-specifically and retrospectively define these two elements before the existence of an exclusive right is clear. As will be shown in the following chapters, this increases the vagueness of trademark offences and the unforeseeability of the outcome of their interpretation and application.

2.2 Problems Regarding the Use of Blanket Criminalisation Technique

The blanket criminalisation technique means that the criminal provision itself includes merely the threat of penalty, and the actual essential elements of the criminal conduct are determined based on other regulation.⁴⁷ In other words, at least two different provisions are needed to define the criminalised behaviour. These provisions can either be enacted in the same statute or two different statutes.⁴⁸ The blanket criminalisation technique itself is not in conflict with the principle of legality, as long as the references between the blanket provision and the regulation defining the content of the criminalisation are clear and precise.⁴⁹ It is also required that the blanket provision should include some kind of characterisation of the criminalised behaviour, even though the actual content of the criminalisation is to be defined based on other regulation.⁵⁰

According to the requirement of written legislation, sentencing someone to a criminal sanction requires that the action in consideration must fulfil the essential elements of an enacted applicable criminal provision.⁵¹ In other words, punishable criminal conduct must be based on the letter of the law.⁵² The requirement of written legislation is fulfilled by defining the punishable conduct in either the criminal provision itself or, when concerning blanket criminalisation, in the regulation that defines the actual content of the criminalisation.

Regarding the requirement of written legislation, the problem is not so much in the blanket criminalisation technique itself, but in making sure that the regulation that defines the actual content of the criminalised behaviour is enacted with the precision required from criminal legislation, and that it together with the blanket norm

⁴⁷ Tapani & Tolvanen (2013), pp. 130–135; Asp, Ulväng & Jareborg (2013) p. 360; Tapani & Tolvanen, *Starfrättens ansvarslära* (Helsinki 2016) pp. 64–65; and NOU 1983:57, p. 125.

⁴⁸ Only one of these regulations needs to be an act, the other can be an act or a lower level statute. For more, see, e.g., Frände, *Yleinen rikosoikeus. 2nd ed.* (Helsinki 2012), pp. 33–40; Lernestedt (2003), pp. 328–332; and NOU 1983:57, p. 125.

⁴⁹ Melander (2008), p. 223

⁵⁰ *Ibid.*

⁵¹ Tapani & Tolvanen (2013), pp. 125–126; Asp & Ulväng & Jareborg (2013), pp. 45–47; Andenæs (2016), p. 101; and Tapani & Tolvanen (2016), p. 63. However, the principle of legality does not prohibit acquittal based on unwritten legislation. Frände (2012), p. 30, Andenæs (2016), p. 123.

⁵² Tapani & Tolvanen (2013), p. 102; Asp, Ulväng & Jareborg (2013), p. 46; Waaben, *Strafferettens spesielle del, 5th ed.* (Thomson-GadJura 1999), p. 72; and Matningsdal (2015), p. 89.

gives content to the criminalisation. Therefore, in evaluating the fulfilment of this requirement, especially regarding blanket criminalisations, it is not enough that the provisions defining the content of the criminalisation are in a document considered as ‘written legislation’, for instance, in a special IP law. These provisions must also actually describe the forbidden behaviour in a way that enables people to tell based on the legislation whether a certain act is punishable or not.

The Nordic countries use the blanket criminalisation technique to criminalise copyright and trademark infringements. This choice of technique is problematic. The different sections of the special laws that should define the limits of criminalised behaviour are in parts so arcane and general that one could argue that the criminalised behaviour is not written in the legislation at all. It is not enough to write several general provisions in laws to fulfil this requirement if concrete actions cannot be defined from them. The problem with Nordic copyright and trademark regulation is that the acts that give content to the blanket criminal provisions enact every possible contradicting act as an infringement and, therefore, as criminally punishable. Also, the blanket provisions themselves do not actually define any *type* of conduct that is punishable. They merely enact as punishable the violation of the right of another without characterising at all what actually is considered as *violating* the right of another (or as *the right* of another for that matter). Here the legislation in theory fulfills the requirements of the principle of legality regarding form; however, the criminalisation does not really get any precise content.

An excellent example of the problem is when reproductions are made of a work that may exceed the copyrighted work threshold. The Nordic copyright legislation defines that copyright protection extends, in addition to written, artistic and other specifically listed forms of works, to works that are expressed in *some other manner*.

The Norwegian Copyright Act includes more specific regulation regarding a work that is protected by copyright than in other Nordic countries. Chapter 1 Section 2 of NCA defines individuality and originality as prerequisites of copyright protection and gives an example list of types of work that fall under copyright protection. The section, however, uses the wording ‘such as’ in front of the list, which could indicate that some other type of work that is not specifically defined in the example list could become protected by copyright. Therefore, I consider the argumentation here valid also regarding Norwegian legislation, even though the wordings vary from those of other Nordic countries.

A work protected by copyright must exceed copyrighted work threshold, that is, be independent and original enough that no one else in a similar situation would come up with the same result. Ultimately, the court defines the threshold for independence and originality for each piece of work separately. These thresholds are not written in the legislation, and case law regarding similar types of work does not guarantee that every piece of that type of work with similar qualities automatically exceeds the copyrighted work threshold (although it helps in the determination). Defining whether a written work (a form of expression which is specifically listed as protected

by copyright) exceeds copyrighted work threshold is often difficult. One may, for example, ask if lecture slides are independent and original enough to be considered as a copyright protected piece of work, or just a summary of common knowledge. Defining whether a work expressed in *some other manner*, a manner which is possibly not yet known and for that reason neither listed in the provision nor evaluated by courts, exceeds copyrighted work threshold, is extremely difficult.

Reproduction of a copyright protected work in violation of copyright law is criminalised in every Nordic country. According to the Nordic copyright legislations, reproduction comprises making copies of the work in whole or in part, directly or indirectly, temporarily or permanently, and *by any means or in any form whatsoever*. The reproduction of a work also comprises the transfer of the work to another device, by which it can be reproduced or communicated. The phrasing ‘by any means or in any form whatsoever’ leads to similar unforeseeability as above regarding copyrighted work threshold. It is very difficult to foresee which types of conduct could infringe the right-holder’s exclusive right to reproduction, as certain types of conduct may not even exist yet. In light of these examples, one could argue that the infringing conducts are actually *not* written in the legislation, at least not precisely enough, as the legislation does not specify any actual way to make copies and reproduce a piece of work.

In addition to the problems described concerning the requirement of written legislation, the above-mentioned examples are also useful to show the problems regarding vagueness. The prohibition of vagueness requires the legislator to enact limited and precise criminalisations.⁵³ This means that the essential elements of a crime must be phrased so that the actual content can be understood from the wording of the criminal provision.⁵⁴ In other words, the limits of the criminalised behaviour must be foreseeable based on the wording of the law.⁵⁵ The problem of the Nordic copyright and trademark offences is that the essential elements in them do not set any accurate limits to criminalised behaviour. The other provisions of the special laws, which should give more precise content to the criminalisations, do not define these limits more clearly either. Without any limits, it becomes very difficult to evaluate which type of behaviour actually is punishable.

⁵³ Matningsdal (2015), p. 91; Langsted, Garde & Greve (2014), pp. 34–35; Jareborg (2009), p. 58; and Tapani & Tolvanen (2013) pp. 135–136.

⁵⁴ PeVL 48/2002 vp, pp. 2–3.

⁵⁵ Melander (2008), pp. 246–250; Tapani & Tolvanen (2013), p. 246; Frände (2012), p. 37; Jareborg (2009) p. 58; and Langsted, Garde & Greve (2014), pp. 34–35. This requirement is often exemplified with the starting point that the description of the criminal conduct and the threat of penalty must be expressed with such clarity that at least a person with legal training will be able tell in advance which actions are criminalised and how severely. However, it is desirable that an average citizen can also, at least on some level, determine based on the law whether a certain behaviour is punishable or not. See, e.g., Tapani & Tolvanen (2013), p. 246; Jareborg (2009), p. 58 and Langsted, Garde & Greve (2014), pp. 34–35.

As described above, the Nordic copyright and trademark criminalisations are enacted by using the blanket criminalisation technique, which itself may cause precision problems and be problematic from the point of view of the requirement of written criminal legislation.⁵⁶ In copyright and trademark offences the blanket criminalisation technique is executed either by referring to the entire special law (using formulations such as ‘who violates the sections of this law shall be sentenced...’) or by listing several other sections of the special law in question, the breach of which actualises criminal liability. Basically, the criminalisation consists of a closed set of norms based on which it should be possible to define the exact limits of the criminalised behaviour.⁵⁷ However, the problem is that some of the central elements affecting the evaluation of whether the exclusive right has been infringed or even exists are not defined in the law, but are rather derived from case law, ‘good practice’ rules, or moral starting points.⁵⁸

An excellent example of the above-mentioned problems in the field of copyright is the Finnish Supreme Court case KKO 2018:21, in which the Supreme Court ended up changing its previous line of interpretation without any notable changes in the copyright legislation. The case concerned the making of a copy of a photograph in the form of a painting, photographing that painting, and distributing this photograph to an audience through sale in a gallery. The Supreme Court, deviating from its previous line of interpretation, held that an infringing copy of a photograph can be created by painting. Unfortunately, the Supreme Court did not state anything regarding the principle of legality; the criminal law evaluation concerned merely the fulfilment of FCC Chapter 4 Section 2, regarding mistake as to the unlawfulness of the act.⁵⁹ I do not find the Supreme Court’s interpretation regarding the FCC section in question satisfactory. The court focused on the perpetrator’s *primary* plea that painting is not a way to manufacture a ‘piece’⁶⁰ of a photograph. The court evaluated whether this plea could be considered as an excusable mistake as to the lawfulness of the act, based on the obtuseness of the law (FCC Chapter 4 Section 2(2)). The court did not find the behaviour excusable based on FCC 4 2(2); however, the Supreme Court did not (at least not explicitly) consider the influence that their own

⁵⁶ See more about the problems of blanket criminalization technique eg. in Melander (2008), pp. 220–230.

⁵⁷ Frände (2012), p. 33.

⁵⁸ Pihlajarinne (2012), p. 384. It is relevant to point out that compared to the core moral concerns of criminal law (e.g., violations of health, freedom and sexual integrity), the moral starting points of IPRs are of different character and are not as easily justifiable with societal morality norms, because of the economical nature of the rights.

⁵⁹ KKO 2018:21, paragraphs 46 and 47. FCC Chapter 4 Section 2 regarding mistake as to the unlawfulness of the act states that:

“If the perpetrator errs in regarding his or her act as lawful, he or she is exempt from criminal liability if the mistake is to be deemed manifestly excusable due to the following factors: (1) the defective or erroneous publication of the law, (2) the particular obtuseness of the contents of the law, (3) erroneous advice by an authority, or (4) another reason comparable to these.”

⁶⁰ The law and the court speak of producing ‘pieces’ of a photograph, rather than ‘copies’.

previous case law may have had on the perpetrator's mistake as to the unlawfulness of the act, which they should have done based on FCC Chapter 4 Section 2(4). The Supreme Court's grounds for the chosen interpretation were unfortunately short. I would argue that this case shows rather well the challenges vague legislation creates to legal security and foreseeability when the previously confirmed line of interpretation can change without any changes in the written legislation.

The situation is fairly similar in the field of trademark law regarding *establishing trademark through use*. The Nordic laws do not define when or how trademark is established through use. The court must define case-specifically and retrospectively the exact moment when the exclusive right started, as well as the extent of the exclusive right covered by the trademark in question. The criminalisation appears not to be enacted with the required precision, as the formation of the exclusive right of trademark cannot be determined from the letter of the law, and therefore its existence is not foreseeable. For instance, if the court does not consider the trademark in question to be established through use, the protected exclusive right does not exist. If there is not an exclusive right, there cannot be an IPR infringement. This leads to a situation in which, prior to the deliberation of the court, an act may either fulfil or not fulfil the essential elements of a crime. Indeed, *any* act whatsoever may or may not fulfil them. Yet, the potential perpetrator should be able to evaluate at the time of conduct whether his behaviour is infringing or not. In this situation, the perpetrator may risk breaking the law, even if they do their best to avoid it.⁶¹ Also, if the formation of the exclusive right to trademark can, for instance, take anything between one week and five years of use (due to the lack of any guidelines from the legislation), criminal liability becomes very unforeseeable. Even though some unclarity is generally accepted,⁶² I would argue that it does not include the law being entirely silent about one of the central foundations for criminal liability regarding trademark infringements (or copyright infringements for that matter), i.e., the existence of the object of protection.⁶³ I would argue that to ensure legal certainty, the legislation should include some guidelines for interpretation regarding the possibility of establishing trademark through use.

2.3 Threats to the Prohibition of Analogy and Prohibition of Retroactivity

The second element of the principle of legality, the prohibition of analogy, forbids the application of criminal law to the detriment of the accused in situations that do not

⁶¹ This is also rather interesting from the point of view of intent and what the perpetrator ought to have known on the time of the conduct. This matter will be analysed further in another article.

⁶² See Melander (2008), p. 248.

⁶³ This can be exemplified by comparison to manslaughter. The criminal provision regarding manslaughter does not specify the way in which the killing of a person must be done in order to be considered manslaughter. What is essential is that a person has died. However, there is no question of whether the object of protection (a person's life) has existed before or been violated by the killing.

fit the wording of the essential elements.⁶⁴ The starting point is that criminal sanctions must not be used unless the conduct in question fits into the wording of the description of a punishable act.⁶⁵ Analogy is forbidden if it widens the scope of criminal liability.⁶⁶ However, drawing the line between forbidden analogy and teleological interpretation is difficult. Applying teleological interpretation such that it widens the sphere of criminalisation should be avoided, especially in interpreting criminal provisions that are already vague, such as IPR offences. The vague criminalisations themselves may lead to unforeseeable outcomes, and teleological interpretation can worsen this problem. However, defining the sphere of criminalisation for copyright and trademark crimes comprehensively is itself extremely difficult, which in turn makes it difficult to say when the interpretation of these crime provisions actually widens the sphere of criminalisation.⁶⁷

For instance, in Finnish case KKO 2003:88 (illegal marketing and selling copyright and trademark protected software products) the Supreme Court considered the interpretation of the concept of 'a device' when judging what constituted illegal distribution of a device for removing a technological measure protecting a computer program. The Supreme Court held that written installation instructions could not be considered as 'a device' without deviating from the wordings of the provision in question in a forbidden way.⁶⁸

It is impossible to determine exactly when an interpretation goes outside the wording of a criminal provision in a forbidden way.⁶⁹ However, in light of what is stated above, I would argue that if the phrasing of a provision does not specify an act at all,

⁶⁴ Asp & Ulväng & Jareborg (2013), pp. 46–47

⁶⁵ Tapani & Tolvanen (2013), pp. 111–112. In Finland, analogy which prejudices the accused is forbidden, but *teleological interpretation* of criminal law is allowed and used. Teleological interpretation means that the person applying the law interpretes the legislation starting from its goals and purposes. See Tolvanen (2005), p. 212. Teleological interpretation is possible for narrowing of the scope of punishable behaviour without any restriction set by the principle of legality. See, e.g., KKO 2016:42 (Finland)

In Denmark, the use of analogy in criminal law is specifically enacted as allowed in the DCC, including analogy that prejudices the defendant, which creates conflicts with the international human rights conventions. Nevertheless, analogy is seldom used in the field of criminal law. The conflicts have been recognised and the courts endeavor to solve complicated situations with other measures than analogy. See Langsted & Garde & Greve (2014), p. 34–35.

⁶⁶ An example of forbidden analogy could be, for instance, when a situation is comparable to the criminalised situation and in some parts even similar to the description in the law, but would not fit in the actual wordings of the law. Another type of forbidden analogy could be a situation in which the general spirit of criminal law and the general sense of justice could support the penalisation of said situation without it having anything to do with the actual criminalisation. See Tapani & Tolvanen (2013), pp. 111–112.

⁶⁷ Tapani & Tolvanen (2016), pp. 55–63; Tolvanen (2005), pp. 212–216; Frände (2005), pp. 56–58.

⁶⁸ See KKO 2003:88 paragraph 2.2.

⁶⁹ Andenæs (2016), p. 112.

it is inevitable that an interpretation will go outside the scope of the written law.⁷⁰ On the other hand, such openly phrased provisions can also be seen as an acceptance of analogy, because they allow basically any act to fall under the application of the provision. In essence, this allows analogy in criminal law even though the principle of legality forbids it.

The principle of legality prohibits open-ended criminalisations. Instead, criminalisations should be enacted clearly and precisely, and be modified and expanded when societal development necessitates it.⁷¹ These types of extensive criminalisations are problematic in the field of copyright and trademark because, as will be shown in the next part, copyright and trademarks infringement criminalisations are written in a way that makes every act that is in violation of the copyright or trademarks acts potentially punishable. Thus, a serious consideration of revising the legislation and more precisely limiting the descriptions of punishable acts is needed.

The problem of using analogy culminates in a situation where people are not able to foresee in advance what type of behaviour is allowed and what is forbidden according to the legislation. If the essential elements of a crime are vague or open, the risk of widening their interpretation and going outside the wording of the law in applying them increases.⁷² This also includes a risk of widening the scope of criminalisation uncontrollably. This is one of the problems of the current Nordic copyright and trademark criminalisations.

The Finnish Supreme Court considered the difficulties regarding the principle of legality, especially the prohibition of analogy and the requirement of written legislation, in connection with the industrial property rights offence provision in case KKO 2018:36. In this case, the perpetrators were accused of illegally copying products that were protected with community trademarks⁷³ and community designs⁷⁴. The Finnish Supreme Court came to the conclusion that, due to the principle of legality, the perpetrators could not be convicted of industrial property rights offences based on FCC Chapter 49 Section 2, because the wording of this criminal provision does not specifically forbid violations of community trademark and community design. The Supreme Court based its argumentation on the lack of specific references to community trademark and community design in the national legislation regarding corresponding national exclusive rights. However, the Supreme Court did not consider

⁷⁰ Andenæs (2016), p. 121.

⁷¹ Melander, Rikosoikeudellinen laillisuusperiaate ja rikosoikeudellinen tulkinta, *Defensor Legis* 4 (2015), pp. 644–661, at p. 650.

⁷² Melander (2015), p. 649.

⁷³ Regulation (EU) 2017/1001 on the European Union trade mark.

⁷⁴ Council Regulation (EC) No. 6/2002 on Community designs.

the position of the TRIPS Agreement regarding the matter,⁷⁵ nor did it specify the purpose of the protection that the industrial property rights crime provision pursues, define what is the core substance of the crime at hand, or contemplate whether an opposite result would have been reasonably foreseeable.⁷⁶

The prohibition of retroactivity means that it is not permissible to apply criminalisations to acts committed before the criminalisation was in force or to harden the threat of penalty in a way that has retroactive effects.⁷⁷ In pursuance of this principle, when legislation has changed between the time of conduct and the time of proceedings, what legislation is applicable must be determined based on the leniency of the result it would provide, in favour of the defendant.⁷⁸ This part of the principle of legality seems fairly clear, for the defendant either has committed the crime during the time at which the legislation was in force, or has not. This element does not have as much room for interpretation as the other three.

However, the application of this principle has had significant effects on perpetrators' sentences, e.g., in Finnish case KKO 2010:47 (Finreactor), in which the perpetrators were merely convicted of a copyright misdemeanour and fined, because the act did not fulfil the essential elements of the copyright crime of that time. Distributing files in information networks and data systems was not criminalised in Finland as copyright crime with the threat of penalty of imprisonment at the moment of the conduct (29 August – 14 December 2004)⁷⁹, but the criminalisation was added to FCC in 2006.⁸⁰ Therefore, the judgement does not handle the matter as copyright crime at all, but as copyright misdemeanour. The copyright misdemeanour provision was revised accordingly.⁸¹ The Supreme Court applied the older legislation because the application of the 2006 copyright misdemeanour provision would not have led to a more lenient

⁷⁵ Interestingly, the Supreme Court stated that the TRIPS Agreement does not apply in the situation, for the national legislation has not been changed based on said agreement. However, the Supreme Court did not give any guidelines on how to approach alignment of the legislator in implementing the TRIPS Agreement to national legislation. Tammenlehto, KKO 2018:36. Teollisoikeusrikossäännöksen soveltuminen yhteisön tavaramerkin ja yhteisömallin loukkauksiin, in Timonen (ed.), *KKO:n ratkaisut kommentein 2018:I.*, (Alma Talent 2018), p. 289. The legislator specifically stated in implementing the TRIPS Agreement that the legislation in force (including the industrial property rights crime provision) fulfils the requirements of the TRIPS Agreement, that is, provides similar protection to other IPRs as the national ones. HE 296/1994 vp., pp. 23–24, 104, HE 119/1999 vp, p. 2.

⁷⁶ Tammenlehto (2018), pp. 288–289. Here must be pointed out that the Finnish Trademarks Act was renewed after this ruling and specific references to community trademarks were added to it, so the significance of this ruling regarding similar cases in the future may not be very substantial. However, the interpretative elements, which the Finnish Supreme Court did not take into consideration, mostly remain inspite of the renewed legislation.

⁷⁷ See, e.g., case KKO 1999:115 (Finland).

⁷⁸ Tapani & Tolvanen (2013), pp. 138–139 and Langsted, Garde & Greve (2014), p. 35

⁷⁹ See KKO 2010:47.

⁸⁰ HE 28/2004 vp., p. 73.

⁸¹ HE 28/2004 vp., p. 131–133.

result than the application of the copyright misdemeanour provision in force at the time of the offence.⁸²

Interestingly, at nearly the same time in Sweden (in the Finnish case the time of the conduct was 29 August – 14 December 2004 and in the Swedish case 1 July 2005 – 31 May 2006), the perpetrators were convicted of a copyright offence with up to ten months of imprisonment for a similar type of conduct as in KKO 2010:47.⁸³ Another interesting point was that the Swedish court convicted the perpetrators of aiding and abetting in a copyright offence without recognising the actual main offender. In the Finnish case KKO 2010:47, the accused were found guilty of the similar (although petty) crime as offenders. Both cases were about maintaining a file sharing service platform. These types of differences in sentencing may encourage the perpetrator to weigh different possibilities in choosing the place of the crime.

3. Analysis of the Essential Elements of Nordic Copyright and Trademark Offences

The essential elements of a crime are the most important components in defining the content of criminalised behaviour.⁸⁴ In assessing the fulfilment of the essential elements of a crime, the starting point is to define the object of legal protection, whether it has been violated in the situation at hand, and how severely.⁸⁵ To apply the essential elements of copyright or trademark offences in the Nordic countries, one must determine whether the object of protection exists—in this situation, either an exclusive right to exploit the piece of work financially (i.e., copyright) or an exclusive right to exploit a trademark. This is done by determining whether the piece of work in question is protected by copyright (i.e., exceeds copyrighted work threshold) or, in the case of trademarks, whether the sign is either registered as a trademark or trademark protection is established through use. In the field of copyright, this leads to a situation in which actors (often ordinary people without legal training) must be able to evaluate whether the piece of work in fact exceeds the generally undefined copyrighted work threshold in order to foresee whether their actions might violate copyright and lead to criminal sanctions. Regarding trademarks, the situation is clear if the sign in question is registered as a trademark. However, in the case of trademarks that are *established through use*, the actor must be able to determine if the sign in question has been in use for so long and is so well known in the field of business in question that the requirements of establishing trademark through use are fulfilled.

⁸² KKO 2010:47 paragraph 8.

⁸³ See case SH 4041-09 Pirate Bay.

⁸⁴ Asp, Ulväng & Jareborg (2013), p. 58; Tapani & Tolvanen (2013), pp. 100–101, 103–104.

⁸⁵ Waaben (1999), pp. 50–51

Similar difficulty is detectable in the infringement of an author's *moral rights* of copyright. In violating the author's literary or artistic dignity or eccentricity, the perpetrator ought to be able to evaluate beforehand what this specific author will see as a violation. However, criminal responsibility for this type of behaviour does *not* require the perpetrator to know who the actual right-holder is.⁸⁶ It is inconsistent that the perpetrator, without knowing *who* this right-holder is, is expected to be able to evaluate the right-holder's subjective conceptions of derogatory actions regarding his moral rights. Similar elements of subjective conceptions are included in other forms of criminal conduct, for instance, defamation and sexual harassment. In these crimes, however, the identity of the victim is usually known and there are clearer societal behavioural norms to be followed.⁸⁷ Also, the act is targeted directly at the victim and not at an inanimate creation of the victim.

The technical realisation of the essential elements of Nordic copyright and trademark offences, i.e., the form of the offences, varies somewhat between different countries. In Sweden, Norway and Denmark, copyright and trademark crime provisions are located in special laws. Both the copyright acts and trademark acts include a specific section regarding criminal liability (in Sweden SCA (1960:729) Chapter 7 Section 53 and STA (2010:1877) Chapter 8 Section 1; in Norway NCA (LOV-2018-06-15-40) Chapter 5 Section 79 and 80, and NTA (LOV-2010-03-26-8) Chapter 8 Section 61; and in Denmark DCA (1144 af 23/10/2014) Chapter 7 Section 76 and DTA (LBK nr 88 af 29/01/2019) Chapter 6 Section 42). In Finland, the crime provisions regarding both copyright and industrial property rights crimes are in the FCC (39/1889) Chapter 49 Section 1 and 2, whereas pettier offences are made punishable by misdemeanour provisions in special laws (FCA (404/1961) Section 56a, FTA (544/2019) Section 74). The crime provisions describe the starting points that should help specify the actual criminalised conducts. In the copyright acts, several specific sections follow the general description of the criminalisation, the breach of which actualises the liability. Common to all countries is that the acts criminalise the breach of both economic and moral rights.⁸⁸ The criminal provisions themselves do

⁸⁶ HE 94/1993 vp. pp. 213–215 (government proposal).

⁸⁷ In both defamation and sexual harassment, the victim's experience of the violation is essential in considering the fulfilment of the offence, in addition to generally accepted societal norms that define the limits of forbidden behavior. Even though the objects of protection are different in defamation and sexual harassment than in infringement of moral rights of copyright, the evaluation of personal experience in all of them can be equated to each other. However, there are not similar societal norms concerning the line between acceptable and unacceptable behaviour regarding infringement of moral rights of copyright as there are regarding defamation and sexual harassment. It seems that society has clearer conception of what is considered to be an insult or a sexual act than what is considered, for example, to be the violation of artistic integrity by changing and distributing a piece of work. Therefore, even though the inclusion of these types of subjective conceptions in the evaluation of the fulfilment of a crime can be perfectly acceptable, when regarding moral rights they become unacceptably vague and unforeseeable because of the lack of societal norms, and the possible ignorance of the identity of the victim.

⁸⁸ Olsson (2009), pp. 308–309.

not contain any actual specific descriptions of acts, which is typical for the blanket criminalisation technique. If one takes a closer look at the crime provisions, it becomes obvious that the provisions ought to be clearer.

Regarding copyright infringement criminalisations, the essential elements are most clearly defined in Sweden and most ambiguous in Finland. The current Swedish copyright offence (SCA Chapter 7 Section 53⁸⁹) is phrased rather simply compared to other countries' provisions, as it only includes a couple of cross-references to other sections and does not define any aggravating circumstances that might affect the evaluation of a situation. The Swedish IPR legislation is, however, in transition.⁹⁰ The IPR offences in each special law, including the copyright and trademark legislation analysed in this article, are now supplemented with aggravated forms of intentional acts. The new law defines four alternative elements, the existence of which may lead to the infringing action being evaluated as aggravated. These elements are: particular premeditation of the act, the act being done as a part of organised crime, the act being particularly wide, and the act being otherwise especially dangerous in nature. The new legislation came into force on 1st July 2020.⁹¹ This change in legislation slightly complicates the Swedish IPR offences, but it can still be argued that they remain the clearest compared to other Nordic criminalisations.

⁸⁹ SCA Section 53:

“Den som beträffande ett litterärt eller konstnärligt verk vidtar åtgärder, som innebär intrång i den till verket enligt 1 och 2 kap. knutna upphovsrätten eller som strider mot föreskrift enligt 41 § andra stycket eller mot 50 §, döms, om det sker uppsåtligen eller av grov oaktsamhet, till böter eller fängelse i högst två år.

Den som för sitt enskilda bruk kopierar ett datorprogram som är utgivet eller av vilket exemplar har överlåtits med upphovsmannens samtycke, skall inte dömas till ansvar, om förlagan för kopieringen inte används i näringsverksamhet eller offentlig verksamhet och han eller hon inte utnyttjar framställda exemplar av datorprogrammet för annat ändamål än sitt enskilda bruk. Den som för sitt enskilda bruk framställer exemplar i digital form av en offentliggjord sammanställning i digital form skall under de förutsättningar som nyss nämnts inte dömas till ansvar.

Vad som sägs i första stycket gäller också, om någon till Sverige för spridning till allmänheten för in exemplar av verk, där exemplaret framställts utomlands under sådana omständigheter att en sådan framställning här skulle ha varit straffbar enligt vad som sägs i det stycket.

Den som har överträtt ett vitesförbud enligt 53 b § får inte dömas till ansvar för intrång som omfattas av förbudet.

För försök eller förberedelse till brott som avses i första och tredje styckena döms till ansvar enligt 23 kap. brottsbalken. Lag (2005:360).”

⁹⁰ The changes in legislation have been followed until May 2020, when the final version of the article was accepted for publication.

⁹¹ Draft Law Council proposal, published 27 november 2019: <https://www.regeringen.se/rattsliga-dokument/departementsserien-och-promemorior/2019/11/skarpta-straff-for-de-allvarligaste-fallen-av-immaterialrattsintrang/> (last accessed 26 October 2020), pp. 1, 4, 13, SOU 2018:6

The Norwegian (NCA Chapter 5 Sections 79 and 80⁹²) and Danish (DCA Chapter 7 Section 76⁹³) copyright offences are more complicated than the Swedish ones, as they include more internal references to other sections of the law, the breach of which actualise and give content to criminal liability. They also include a list of aggravating circumstances that may increase the sanction. They do not, however, include any unambiguous statement of whether all these requirements must be met before the conduct is considered to be of aggravated form, or that one of these requirements is enough to fulfil the essential elements of the aggravated crime.

The state of the law is most ambiguous in Finland, because the criminal provisions are in two different laws, the FCA and the FCC, with internal references to each other and to several other sections of the FCA. The copyright crime provision in the

⁹² NCA Section 79:

“Den som begår inngrep i en annens rett eller på annen måte overtrer §§ 3, 5, 13, 16, 20 til 24, 59, 60, 99 til 107 og 108 siste ledd, straffes med bøter eller fengsel inntil ett år. Det samme gjelder den som overtrer forbud nedlagt etter § 62 eller § 108, eller bestemmelser gitt av opphaver etter § 75 andre ledd. Det samme gjelder også den som innfører eksemplarer av åndsverk eller av arbeider og opptak som nevnt i §§ 16, 20, 22, 23 og 24 i den hensikt å gjøre dem tilgjengelige for allmennheten, når eksemplarene er fremstilt utenfor landet under slike forhold at en tilsvarende fremstilling her i landet ville vært i strid med denne loven.

Den som unnlater å oppgi opplysninger som nevnt i § 61 andre ledd eller unnlater å påføre opplysninger som nevnt i § 112 på et verk vedkommende forestår trykkingen av, straffes med bøter.’

NCA § 80: ‘Den som begår grovt inngrep i en annens rett etter §§ 3 første og andre ledd, 5, 16, 20, 22 til 24, straffes med bøter eller fengsel inntil tre år.

Ved vurderingen av om grovt inngrep foreligger, skal det særlig legges vekt på den skade som er påført rettighetshaveren og andre, herunder skade på rettighetshaverens anseelse og kommersielle omdømme, den vinning som inngriperen har oppnådd, og omfanget av inngrepet for øvrig.”

⁹³ DCA Section 76:

“Med bøde straffes den, som forsætligt eller groft uagtsomt

- 1) overtræder § 2 eller § 3,*
- 2) overtræder §§ 65, 66, 67, 69, 70 eller 71,*
- 3) overtræder § 11, stk. 2, § 60 eller §§ 72-75,*
- 4) undlader at fremsende opgørelse eller oplysninger efter § 38, stk. 7,*
- 5) undlader at lade sig anmelde eller undlader at meddele oplysninger til fællesorganisationen efter § 41, stk. 1, § 42, stk. 6, og § 46, 1. pkt., eller undlader at føre eller opbevare regnskaber i henhold til § 45 eller*
- 6) overtræder forskrifter, der er givet efter § 61, stk. 2.*

Stk. 2. Er en overtrædelse af de i stk. 1, nr. 1 og 2, nævnte bestemmelser begået ved forsætligt og under skærpende omstændigheder at gengive de af bestemmelserne omfattede værker eller frembringelser eller blandt almenheden at sprede eksemplarer heraf, kan straffen stige til fængsel i 1 år og 6 måneder, medmindre højere straf er forskyldt efter straffelovens § 299 b. Skærpende omstændigheder anses navnlig for at foreligge, hvis overtrædelserne sker erhvervsmæssigt, hvis der fremstilles eller blandt almenheden spredes et betydeligt antal eksemplarer, eller hvis værker og frembringelser gengives på en sådan måde, at almenheden får adgang til dem på et individuelt valgt sted og tidspunkt, jf. § 2, stk. 4, nr. 1, 2. led.”

FCC specifies the object of the exclusive right,⁹⁴ the violation of which is punishable, but the exact definition of the object of protection as well as the content of the actual criminalised behaviour must be defined through the FCA. As regards the object of protection, this includes both the economic (FCA Section 2) and moral rights (FCA Section 3) of the copyright owner, which are not defined in the FCC but only in the FCA. As regards the content, the FCC criminalises the violation of the right of another to the specific works, but the FCA fails to specify what types of action actually are infringements. It does not define, for instance, *manufacturing* a copy of a work or *distributing* a copy of a work to the audience.

The provision also adds two requirements to be fulfilled before the act can be considered a copyright crime: that the act is executed with an aim to make profit, and that the act is executed in a manner conducive to causing considerable detriment or damage to the person holding a right. However, if the act is committed by using computer networks or computer systems, the aim to make profit is not required for the act to be considered a copyright crime. This exclusion results from different characteristics of violations conducted in computer networks and computer systems compared to other copyright infringements. It is typical that illegal music and video recordings are distributed in computer networks without the distributors gaining any financial profit, but this still causes considerable damage to companies doing business in the field. Because of the requirement of aim to make profit, the digital operations mentioned above were previously punishable only as copyright misdemeanours, the maximum penalty for which did not allow the police to use sufficient coercive measures in investigating the infringements. Consequently, the infringements in question have almost without exception been left unpunished. Due to this, it was considered necessary to include these acts in the copyright offence provision by leaving out the requirement of aim to make profit.⁹⁵

These latter two requirements—the aim to make profit and that the act is executed in a manner conducive to causing considerable detriment or damage to the person holding a right—are equatable to the Norwegian and Danish aggravating cir-

⁹⁴ These are the rights of another to:

- 1) a literary or artistic work,
- 2) the performance of a literary or artistic work or of national heritage,
- 3) a record or other device on which sound has been recorded,
- 4) a film or other device on which moving images have been recorded,
- 5) a television or radio broadcast,
- 6) a register, table, program or another similar work referred to in the Copyright Act and containing the compilation of a considerable amount of information, or a database the compilation, verification or presentation of which has required considerable effort, or
- 7) a photograph (FCC Chapter 49 Section 1).

⁹⁵ HE 28/2004 vp., pp. 72–73.

cumstances, with the difference being that in Finland all of them must be met in order for the essential elements of the copyright offence to be fulfilled. The FCA misdemeanour provision (FCA Chapter 7 Section 56a⁹⁶) criminalises the making of a copy of a work or making a work available to the public contrary to the provisions of the Copyright Act. This means that in order to find out what is actually punishable, one must interpret all Sections of the FCA even vaguely related to the above-mentioned actions. The drafting of the copyright misdemeanour provision is equatable to the Norwegian and Danish offences. The same style continues for the part concerning the infringement of moral rights, and at the end of the provision there is a general clause making punishable any action that ‘otherwise violates a provision protecting copyright in the Copyright Act’. There are also specific sections mentioned, as in other Nordic countries, the breach of which may actualise criminal liability.

As for trademark infringement criminalisation in Sweden⁹⁷, the situation is not as complicated as in evaluating copyright offences. The same can be said of both-

⁹⁶ FCA Section 56a (Tekijänoikeusrikkomus):

“Joka

- 1) *tahallaan tai törkeästi huolimattomuudesta valmistaa teoksesta kappaleen tai saattaa teoksen yleisön saataviin tämän lain säännösten vastaisesti tai rikkoo 3 §:n säännöksiä moraalista oikeuksista,*
 - 2) *muuten rikkoo sellaista tämän lain säännöstä, jolla suojataan tekijänoikeutta, taikka toimii vastoin 41 §:n 2 momentin nojalla annettua määräystä, 51 tai 52 §:n säännöstä taikka 53 §:n 1 momentissa tai 54 b §:n 1 momentissa tarkoitettua kieltoa, taikka*
 - 3) *tuo maahan tai Suomen alueelle edelleen kolmanteen maahan kuljetettavaksi teoksen kappaleita, joiden hän tietää tai joita hänellä on perusteltua syytä epäillä valmistetuiksi ulkomailla sellaisissa olosuhteissa, että valmistaminen Suomessa olisi ollut rangaistavaa tämän lain mukaan,*
- on tuomittava, jollei teko ole rangaistava rikoslain 49 luvun 1 §:ssä tarkoitettuna tekijänoikeusrikoksena, tekijänoikeusrikkomuksesta sakkoon.*

Tekijänoikeusrikkomuksena ei pidetä muutaman kappaleen valmistamista yksityistä käyttöä varten sellaisesta tietokoneella luettavassa muodossa olevasta tietokoneohjelmasta tai tietokannasta, joka on julkaistu taikka jonka kappaleita on tekijän tai tietokannan valmistajan suostumuksella myyty tai muutoin pysyvästi luovutettu, taikka teoksesta 11 §:n 5 momentin vastaisesti.”

⁹⁷ STA Chapter 8 Section 1:

“Gör någon intrång i rätten till ett varukännetecken (varumärkesintrång) och sker det uppsåtligen eller av grov oaktsamhet, ska han eller hon dömas till böter eller fängelse i högst två år. Den som har överträtt ett vitesförbud enligt 3 § får inte dömas till ansvar för intrång som omfattas av förbudet.

För försök eller förberedelse till brott enligt första stycket döms till ansvar enligt 23 kap. brottsbalken.

Åklagaren får väcka åtal för brott som avses i första eller andra stycket endast om målsäganden anger brottet till åtal och åtal av särskilda skäl är motiverat från allmän synpunkt.”

See above about the upcoming changes in legislation.

Norway⁹⁸ and Denmark.⁹⁹ The trademark crime provisions in all of these countries make punishable, with slight variation in wording, the infringement of a registered trademark. Even though the concept of a registered trademark is not defined in the criminal provisions, the registration requirement itself clarifies the situation. This, however, is not the case with trademarks that are established through use, which raise the same uncertainty regarding the existence of the object of the exclusive right as do copyright crimes. None of the Nordic trademark crime provisions contain any specific references to other sections of the acts, but the actual content of the exclusive right must be determined based on other parts of the acts (for instance, which types of signs can be registered as trademarks, and so on). The acts in these countries do not set any other requirements, such as causing financial loss to the right-holder, for the essential elements to be fulfilled.

⁹⁸ NTA Section 61:

“Den som begår varemerkeinngrep straffes med bøter eller fengsel i inntil ett år.

Dersom det foreligger særlig skjerpene omstendigheter, er straffen bøter eller fengsel inntil tre år. Ved vurderingen av om særlig skjerpene omstendigheter foreligger skal det særlig legges vekt på den skade som er påført rettighetshaveren, herunder skade på rettighetshaverens kommersielle omdømme, den vinning som inngriperen har oppnådd, og omfanget av inngrepet for øvrig.

For overtredelse av denne bestemmelsen kan påtale unnlates hvis ikke allmenne hensyn tilsier påtale, jf. straffeprosessloven § 62 a. Ved inngrep i fellesmerke anses bare merkehaveren som fornærmet.”

⁹⁹ DTA Section 42:

“Med bøde straffes den, som forsætligt eller groft uagtsomt krænker en varemærkeret, der er stiftet ved registrering, ved brug, jf. § 3, stk. 1, nr. 3, eller i henhold til EU-varemærkeforordningen.

Stk. 2. Er overtrædelsen begået forsætligt og under skærpene omstændigheder, kan straffen stige til fængsel indtil 1 år og 6 måneder, medmindre højere straf er forskyldt efter straffelovens § 299 b. Skærpene omstændigheder anses navnlig at foreligge, hvis der ved overtrædelsen tilsigtes en betydelig og åbenbart retsstridig vinding.

Stk. 3. Der kan pålægges selskaber m.v. (juridiske personer) strafansvar efter reglerne i straffelovens 5. kapitel.

Stk. 4. Overtrædelser, som omfattes af stk. 1, påtales af den forurettede. Overtrædelser, som omfattes af stk. 2, påtales kun efter den forurettedes begæring, medmindre almene hensyn kræver påtale.”

In Finland, trademark offences are punishable according to Chapter 49 Section 2 of the FCC,¹⁰⁰ while the FTA includes the secondary trademark misdemeanour provision.¹⁰¹ The legislation technique regarding the FCC crime provision is the same as in copyright offences, including the internal references and the requirement of the act to be conducive to causing considerable financial loss to the right-holder.¹⁰² However, the commission of an industrial property rights offence (a category that includes

¹⁰⁰ FCC Chapter 49 Section 2 (Teollisoikeusrikos):

“Joka tavaramerkkilain (544/2019), patenttilain (550/1967), mallioikeuslain (221/1971), yksinoikeudesta integroidun piirin piirimalliin annetun lain (32/1991), hyödyllisyysmallioikeudesta annetun lain (800/1991), kasvinjalostajanoikeudesta annetun lain (1279/2009), Euroopan unionin tavaramerkistä annetun Euroopan parlamentin ja neuvoston asetuksen (EU) 2017/1001 tai yhteisömallista annetun neuvoston asetuksen (EY) N:o 6/2002 säännösten vastaisesti ja siten, että teko on omiaan aiheuttamaan huomattavaa taloudellista vahinkoa loukatun oikeuden haltijalle, loukkaa

- 1) tavaramerkkilain 3–9 §:n mukaista yksinoikeutta tavaramerkkiin käyttämällä samaa, samankaltaista, sekaannusvaaran aiheuttavaa tai olennaisilta ominaisuuksiltaan erottamattomissa olevaa merkkiä ilman tavaramerkin haltijan suostumusta tai tämän kiellon vastaisesti tai muulla tähän rinnastettavalla tavalla,
- 2) Euroopan unionin tavaramerkistä annetun Euroopan parlamentin ja neuvoston asetuksen (EU) 2017/1001 mukaista yksinoikeutta EU-tavaramerkkiin käyttämällä samaa, samankaltaista, sekaannusvaaran aiheuttavaa tai olennaisilta ominaisuuksiltaan erottamattomissa olevaa merkkiä, tunnusta tai merkintää ilman EU-tavaramerkin haltijan suostumusta tai tämän kiellon vastaisesti tai muulla tähän rinnastettavalla tavalla,
- 3) yhteisömallista annetun neuvoston asetuksen (EY) N:o 6/2002 mukaista yksinoikeutta yhteisömalliin käyttämällä mallia hyväksi ilman yhteisömallin haltijan lupaa tai muulla tähän rinnastettavalla tavalla,
- 4) patentin tuottamaa yksinoikeutta,
- 5) mallioikeuslain 1, 5, 5 a–5 c ja 6 §:n mukaista mallioikeutta, käyttämällä mallia hyväksi ilman mallioikeuden haltijan lupaa tai muulla tähän rinnastettavalla tavalla,
- 6) oikeutta piirimalliin,
- 7) hyödyllisyysmallioikeutta tai
- 8) kasvinjalostajanoikeutta,

on tuomittava teollisoikeusrikoksesta sakkoon tai vankeuteen enintään kahdeksi vuodeksi.”

¹⁰¹ FTA Section 74:

“Joka tahallaan loukkaa 3–9 §:n mukaista yksinoikeutta tavaramerkkiin tai EU-tavaramerkkiasetuksen mukaista yksinoikeutta EU-tavaramerkkiin käyttämällä samaa, samankaltaista, sekaannusvaaran aiheuttavaa tai olennaisilta ominaisuuksiltaan erottamattomissa olevaa merkkiä, tunnusta tai merkintää ilman tavaramerkin tai EU-tavaramerkin haltijan suostumusta tai tämän kiellon vastaisesti tai muulla tähän rinnastettavalla tavalla, on tuomittava, jollei teko ole rangaistava rikoslain (39/1889) 49 luvun 2 §:ssä tarkoitettuna teollisoikeusrikoksena, tavaramerkkirikoksesta sakkoon.”

¹⁰² HE 94/1993 vp. pp. 219–220 (government proposal) and Nuotio, RL 49 luku: Eräiden aineettomien oikeuksien loukkaamisesta in Lappi-Seppälä et al, *Rikosoikeus*, (Juva 2009). p. 1344. Industrial property rights do not contain moral rights, so intangible damages are not compensable in relation to industrial property rights offences accordant to HE 94/1993 vp. p. 220 (government proposal). Decrease in the goodwill value of a trademark may, however, be compensable as economic loss in some situations. See Nuotio (2009), p. 1358.

trademark offences) does not require the aim to make profit, because it is characteristic to industrial property rights that they are exploited specifically on a commercial scale. Therefore, adding the requirement of aim to make profit to the essential elements of the industrial property rights offence has been seen as unnecessary. The approach in question has been justified with the fact that the target of protection of an exclusive right protected by industrial property rights legislation is, e.g., a trademark, an invention, a model, a layout-design of an integrated circuit or a plant variety that is utilised in business activity and, therefore, the exclusive right does not include exploitation that is not conducted professionally. The criminal provision in question protects merely the right-holder's financial interests and, therefore, the nuisance and suffering caused by the wilful infringement of one's exclusive right do not fulfil the essential elements of the crime.¹⁰³ In Finland, as in other Nordic countries, the content of the exclusive right does not become clear merely based on the criminal provisions.

In theory, the Nordic copyright and trademark offences fulfil the requirements set for the blanket criminalisation technique, that is, the actual essential elements of the criminal conduct are determined based on other regulation than the criminal provision itself. However, as stated above, I would argue that the other sections of the laws do not actually define the criminalised acts with the clarity and precision required of criminal legislation, which is also exemplified in cases KKO 2018:21 and KKO 2018:36. Therefore, I also argue that the criminalisations altogether do not fulfil the requirements of the principle of legality as well as is expected.

In the field of copyright, the theoretical starting point is that copyright is a wide exclusive right with a flexible, constantly expanding purview. As new fields of art are developed, they fall automatically into copyright protection.¹⁰⁴ This is very problematic from the perspective of the principle of legality, because the principle requires accurately defined and limited criminalisations. If the theoretical starting points of copyright are applied also to copyright infringement criminalisations, the field of punishable behaviour widens uncontrollably every time a new form of art is created. This increases unforeseeability.

4. Suggested Solutions

The problems specified above in chapters two and three could partly be solved by narrowing the sphere of criminalisation. In the field of copyright, this would mean criminalising only the most aggravated forms of acts that infringe the types of work

¹⁰³ HE 94/1993 vp. p. 220 (government proposal). One interesting element of the punishability of the industrial property rights offence is that, even though industrial property rights are specifically considered to be an essential part of business life, corporate criminal liability as a consequence of their infringement is not possible in Finland.

¹⁰⁴ Tapio (2013), p. 36.

that are known typically to exceed copyrighted work threshold. As new forms of art are created and new forms of acts are developed, the criminal provisions should be modified and extended to cover them, if considered necessary. The starting point should not be to criminalise every possible form of infringing act, but to criminalise known unwanted behaviour that targets known types of work. Narrowing the sphere of criminalisation does not remove the problems regarding accuracy entirely, but it would enable more specific descriptions of acts, and hence increase the foreseeability of criminal law.

Narrowing the sphere of criminalisation is not the only option. Elaborating the existing offence descriptions such that they describe the object of protection and unwanted behaviour in more detail could also have the desired effect. However, such elaboration would also lead to narrowing the sphere of criminalisation, as it is not possible to cover not-yet-existent forms of acts accurately enough until they first appear. Therefore, it should be accepted that criminalisations that target fields of rapid and constant technical development are continuously under re-evaluation and require modification due to this development. From the perspective of legal security, unforeseeable criminalisations can be seen as a bigger flaw than that some new forms of acts and types of work are momentarily left out of the criminalisation.

In the field of trademark, the situation is altogether clearer, because the target of the criminalised infringement is often a registered trademark—although the definition of a registered trademark is not clarified in the actual criminal provisions. As pointed out above, in all Nordic countries trademark protection can also be established through use, and the laws do not define specifically *when* existence of the exclusive right begins and *how wide* the exclusive right is if a trademark is established through use. Therefore, the same problem of knowledge of the existence of the exclusive right occurs regarding trademarks as in the field of copyright. This may lead to situations where the actor is not able to foresee the possibility of criminal sanctions following his actions, even with the help of a legal professional.

The same solution of elaborating the existing descriptions of acts or narrowing the sphere of criminalisation altogether could also be beneficial in the field of trademark law. Clarifying the situation from the perspective of the principle of legality necessitates the inclusion of more accurate definitions in the legislation regarding establishing trademark through use. This would require at least a definition of the procedure by which trademark protection is established through use, and guidelines regarding the exact moment when trademark protection is considered to be established. The starting point should be the same as suggested for copyright: the criminalisation should only target the known and most reprehensible activity, and the need for case-specific evaluation should be narrowed to a minimum.

It is important to point out that copyright and trademark infringements are also sanctioned with civil remedies. These include damages, compensation and remuneration, which can be awarded without an actual description of the infringing act in the law, unlike criminal punishments which always require a specific criminal provi-

sion.¹⁰⁵ Civil remedies ensure an actual compensation to the right-holder and enable the stopping and inhibiting of infringing activity. Civil remedies protect the interests of the right-holder, and thereby serve the purposes of the right-holder better than criminal sanctions, which is often more relevant to the right-holder than actually punishing the perpetrator.

The existence of rather extensive civil enforcement systems in the field raises the question of the necessity of wide criminalisations. This necessity should be evaluated from the perspective of need to point out the disapproval of society rather than from the perspective of the right-holder's needs. This relates also to the principle of social cost evaluation. This line of argument applies not only to the problems regarding copyrighted work threshold, but also to those regarding moral rights. Based on the argumentation regarding strengthening the position of civil remedies in ensuring the compensation for right-holders and preserving criminalisations for the most blameworthy behaviour, I might even argue that the infringements of merely *moral rights* should be left outside the criminalisation. To my knowledge, infringements of merely moral rights are rather rare, which also speaks to the lack of for criminalisation. Usually, the infringement of moral rights exist together with the infringement of economic rights. This being the situation, the infringement of moral rights could still serve as an aggravating circumstance in the evaluation of a criminal conduct. I consider the subjective elements of moral rights offences to increase the inaccuracy of the criminalisations unnecessarily. I would argue first that the conduct of leaving the author's name unmentioned is not of such gravity that it requires society's reaction in the form of criminalisation. Second, I consider that the existing legislation could answer the need for societal disapproval for the most severe violations of a person's artistic dignity or eccentricity and reputation through the criminalisation of defamation. The principles of *ultima ratio* and social cost evaluation also support this argumentation.¹⁰⁶

The Norwegian legislation includes a possibility to impose an administrative fine in certain cases of breach of law, which could also work in the field of IP law as an alternative for criminal sanctioning.¹⁰⁷ Using the administrative law system instead of the civil law system would help guarantee the legal security of the defendant due to public officials working under public liability being involved in the process. The payment would also be directed to the state instead of the right-holder, which would enable imposing a monetary sanction the amount of which exceeds the harm or damage caused to the right-holder. However, the administrative law system would not acknowledge the right-holder's interests as widely as the civil law one. On the other hand, compared to the criminal law system, the standard of proof is not as high

¹⁰⁵ Andenæs (2016), pp. 104–105.

¹⁰⁶ The application of these principles in this context will be analysed further in separate research.

¹⁰⁷ Lov om behandlingsmåten i forvaltningssaker (forvaltningsloven), LOV-1967-02-10, Chapter 9. An administrative fine is equivalent to a criminal sanction as criminal sanctions are defined in the European Convention of Human Rights, Chapter 9 Section 43.

in the administrative procedure, and the procedure itself is usually more rapid.¹⁰⁸ More effective usage of civil or administrative sanctioning systems would enable more precise formation of the crime provisions without limiting the sphere of sanctionability. Even though moving a conduct from one sanctioning system to another is a choice more easily justified by other principles of criminalisation, I would argue that it would also improve the execution of the principle of legality regarding these crime types. If more forms of conduct are sanctionable with civil or administrative remedies, the criminal provisions can be enacted more clearly and precisely.

5. Conclusions

This article studied copyright and trademark infringement criminalisations in the Nordic countries from the perspective of the principle of legality. The main research questions were: 1. How do the current Nordic copyright and trademark offences fulfil the requirements of the principle of legality? 2. How could these offences fulfil the requirements of the principle of legality better? The study focused on the phrasing and style of the essential elements of the criminal provisions. It recognised the main problem-causing elements to be the multiple internal references and blanket criminalisation technique combined with inaccurate definitions of the objects of protection. These were exemplified through three examples from the fields of copyright and trademark: *copyrighted work threshold* as a prerequisite for copyright protection, *establishing trademark through use* as a requirement for the formation of an exclusive right, and subjective dimensions of *moral rights* as a basis for punishable behaviour. Common to all these example situations was that the laws do not define their content precisely enough. In the first two, it is ultimately determined by the court whether the existence of an exclusive right can be verified. The last is based on the (potentially unknown) right-holder's subjective conceptions and experiences.

This article showed that the Nordic copyright and trademark infringement criminalisations could fulfil the requirements of the principle of legality better, for it seems extremely difficult to define the limits of punishable behaviour merely based on the essential elements of the offences. The descriptions of acts are not precise and the use of the blanket criminalisation technique in the field makes the provisions vague, which increases the unforeseeability of criminal law. The article pointed out the problems regarding the requirement of written legislation, the prohibition of analogy, and the prohibition of vagueness. The article showed that the phrasings of the offences do not satisfactorily specify the actual descriptions of the criminalised conduct, and are partly so arcane and general that it can be questioned whether the descriptions of the acts are actually written in the legislation at all.

¹⁰⁸ The usability and difficulties regarding the use of civil or administrative sanctioning systems cannot be analysed here thoroughly but will be revisited in a separate article.

As a result, forbidden analogy may turn out to be inevitable in two situations. First, if the phrasing of a provision does not specify an act at all, the interpretation going outside the written law cannot be prevented. Second, if the specification of the provision is open and, therefore, so wide that basically any act would fall under its application, it allows the application of criminal law also in other situations than those specified in the criminal provision. The article argues that the Nordic copyright and trademark offences should be rephrased in such a way that concrete actions could be better defined based on them.

This article suggested that in order to fulfil the requirements of the principle of legality better, the Nordic copyright and trademark offences should be revised and simplified, and more specific descriptions of acts should be included in them. This could be realised by narrowing the sphere of criminalisation to cover only the most aggravated forms of acts. The starting point of defining these acts could be the TRIPS Agreement requirement of criminalising at least wilful trademark counterfeiting or copyright piracy on a commercial scale. At the very least, this would require more specific legal definitions for types of behaviour that are considered counterfeiting and piracy on a commercial scale, or equatable to them. The article also suggested that criminalisations should only involve known behaviour and known objects of protection. The article recognised that narrowing the sphere of criminalisation does not necessarily remove the problems regarding accuracy entirely, but argued that it will enable more specific descriptions of acts and hence increase the foreseeability of criminal law.

Narrowing the sphere of criminalisation only to the most aggravated forms of acts was not seen as the only option to improve the fulfilment of the principle of legality. Elaborating the existing descriptions of acts could also serve as a way to clarify the legal state. This involves the inclusion of more accurate definitions of necessary legal concepts in the legislation. However, in order to optimally fulfil the requirements of clarity and precision, the existing descriptions of acts should be modified to cover only the known forms of acts and known forms of creation. This would also lead to somewhat narrowing the sphere of criminalisation, for the current criminalisations cover also yet unexisting acts and unexisting forms of the object of protection. Modifying the criminal provisions to cover only known forms of acts would enable enacting them with the required precision, and it would increase the foreseeability of criminal law in these crime types.

In all of the Nordic countries, the legislation regarding copyright and trademark offences is complicated and the scope of criminalisation is extremely wide. It appears to be very difficult, if not in some situations impossible, to say merely based on the crime provisions, or even based on the entire special law, what is actually punishable and how severely. In addition to the difficulties from the perspective of the principle of legality, this is also problematic from the point of view of legal security. Criminal liability should not come as a surprise to an actor—the actor should be able to foresee the possible consequences of his actions at the moment of the conduct. In

other words, the use of criminal law should not be unforeseeable. In fields that are under rapid and constant technical development, the possibilities to enact both extensive and sufficiently precise criminalisations are rather thin. Therefore, the article suggested that in order to both successfully fulfil the requirements of the principle of legality and guarantee legal security, the legislator should concentrate on enacting limited, clear and precise criminalisations along with modifying and expanding them when necessary, instead of attempting to cover every future scenario in current legislation.

Finally, the article suggested that, going forward, focus should be moved more towards civil or administrative remedies, whether or not the sphere of criminalisations is narrowed. Civil remedies are the correct tool to ensure a fair compensation for the right-holder and stop the infringing activity, as they are designed to serve the purposes of the right-holder. They also include an element of coercion—the perpetrator must, for instance, pay damages, which the perpetrator may feel as a punishment. More effective use of the other enforcement systems would support the idea of preserving criminal sanctions for the most severe situations, in which there are specific grounds for criminalisations. In this way, the criminal provisions will become more precise and the use of criminal law more foreseeable.