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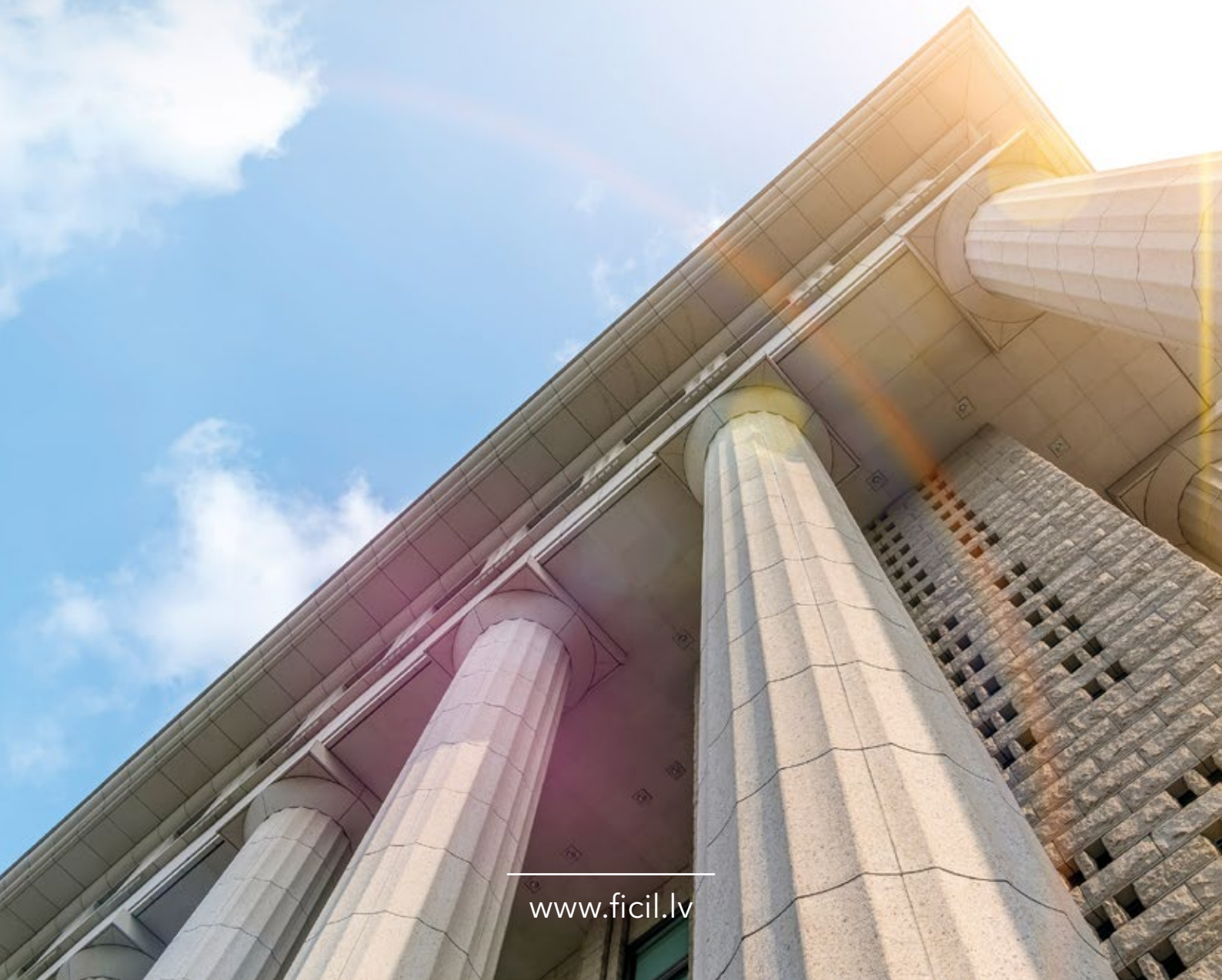
Position paper No 9

Foreign Investors' Council in Latvia Position Paper on the Promotion and Protection of Intellectual Property

16 September 2021



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Executive Summary

Intellectual property rights (IPR) play a large role in the success of the ICT and other science- and technology-heavy industries, which are the fastest growing segments in today's economy. According to the European Union Intellectual Property Office, IPR-intensive industries create around 29% of all jobs in Latvia and amount to 42.7% of the country's economic activity[1]. In 2016, Latvia lagged by 30% compared to European Union averages in terms of gross domestic product (GDP) generated in IPR-intensive industries. According to data from 2019, Latvia has now caught up with the rest of the EU. This is a fast-growing segment of the economy, but the Latvian legal system is still trying to catch up.

As the role of IPR-intensive sectors increases, it is important to ensure an environment where:

1. The rights of existing investors are well protected and fairly balanced in comparison to other stakeholders.
2. The growth of these industries can be sustained through an internationally competitive legal framework.

Notably, the specialisation sectors included in Latvia's National Industrial Policy Guidelines for 2021-2027 are all IPR-intensive industries[2]. Although the digital economy and technological developments provide new business opportunities, they also pose new challenges to the protection of IPR. Sustainable, long-term development in these industries requires an adequate framework for IPR protection to foster innovation and provide certainty to investors.

In this Position Paper, the Foreign Investors' Council in Latvia (FICIL) outlines four blocks of recommendations. Firstly, the current policy governance over intellectual policy matters is very fragmented. FICIL encourages the government to review this system and centralise the policy-making and accountability over the determined targets. Secondly, the Position Paper lays down recommendations on strengthening the enforcement of IPR through a number of instruments, such as rules on evidence, recovery of lawyers' fees and others. Thirdly, FICIL highlights that Latvia is one of very few countries that do not provide an alternative to court proceedings in cybersquatting cases. FICIL recommends introducing arbitration in this area. Fourthly, the Position Paper advocates for a fair balance between the authors, right-holders and users of copyrighted works. FICIL argues that the 1999 Copyright Law provides an unreasonably wide scope of moral rights to the author, thus negatively impacting certainty over the investment climate in Latvia. The transposition of the Digital Single Market Directive requires attention, as investors fear that the reporting requirements proposed by the Ministry of Culture will unnecessarily burden all Latvian companies whose employees create any type of work, including programming, drafting plans or creating marketing materials.

[1] https://euipo.europa.eu/ohimportal/en/web/observatory/ip-in-europe

[2] https://likumi.lv/ta/id/321037-par-nacionalas-industrialas-politikas-pamatnostadnem-20212027-gadam

Content

Recommendations

Policy governance of intellectual property matters

To promote the creation, protection and commercialisation of works of intellectual property, policy governance of intellectual property matters should be reviewed. Currently, IP is under the purview of the Ministries of Culture, Justice and the Economy. Such fragmentation hampers long-term policy development and execution and ultimately harms Latvia's competitiveness.

Enforcement of intellectual property rights

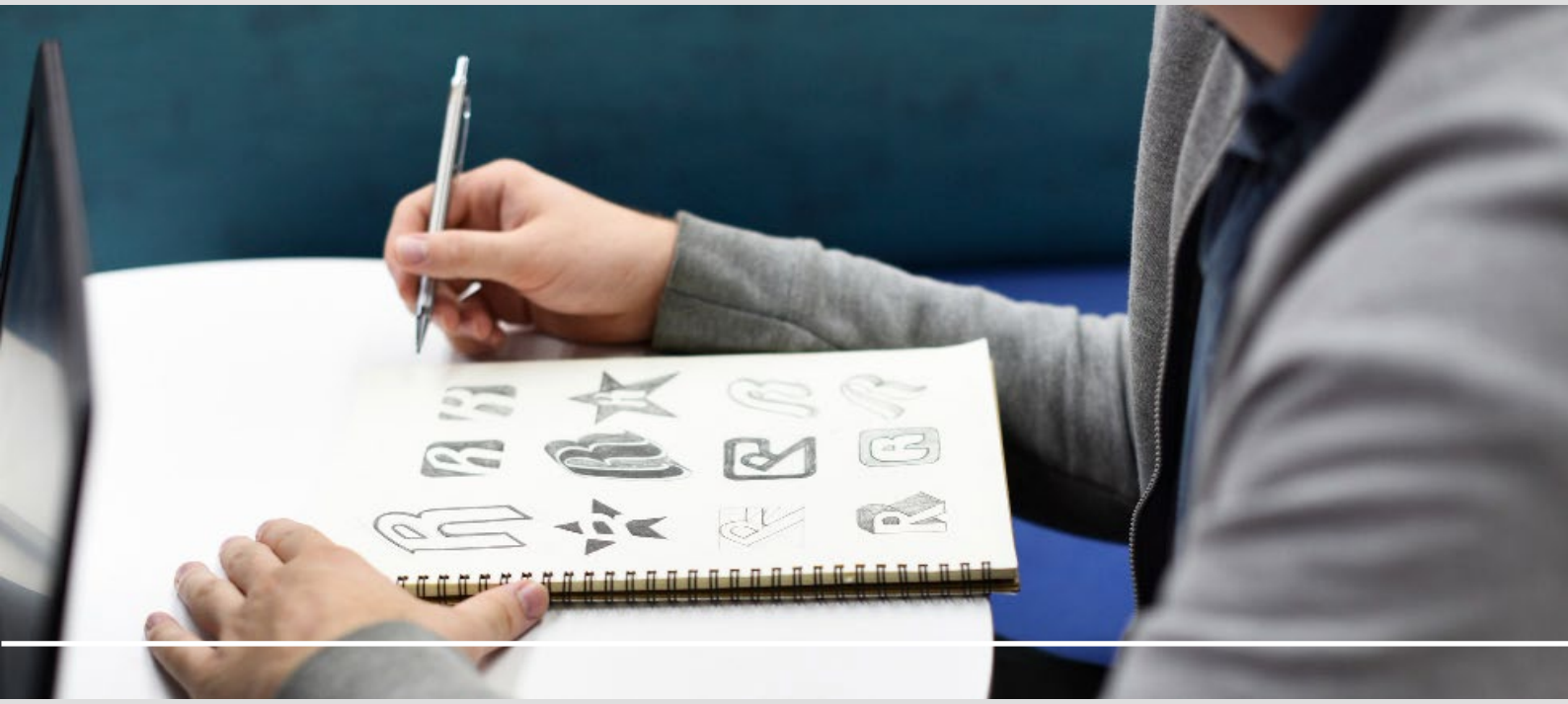
The Code of Civil Procedure needs to be aligned with the real challenges of enforcing intellectual property rights in a just and efficient manner. Latvia's transposition of the IP Enforcement Directive has gaps. In particular, the rules on evidence in IP disputes, especially the right of information, should be revised. Parties and courts now operate without full legal certainty about the rules. A second area of concern is the excessively low limits on recovery of lawyers' fees by the winning party in IP civil disputes. This emboldens determined infringers and contravenes EU law. The third area of improvements concerns interim remedies.

Domain name dispute resolution

Latvia must implement arbitration as a means of addressing cybersquatting disputes concerning the ".lv" top-level domain. Latvia is one of very few countries today to offer only the courts as a venue for right-holders to take action against parties that register domain names in bad faith intending to sell them, to improperly use them to drive web traffic, or for fraudulent schemes. Considering that domain names are registered almost instantly, the court system is ill-matched both in time and in expertise to resolve these disputes. Arbitration is well-established as an efficient, inexpensive and fair alternative.

Amendments to the Copyright Law and transposition of the Digital Single Market Directive

To ensure a healthy balance between authors, right-holders and users of copyrighted works, the Law on Copyright should be amended. In particular, the ambiguous and overbroad scope of personal rights should be clarified. At the moment, the law authorises any author, even if s/he is an employee or producing work according to a contract, to object to any changes or to revoke work completely. This leads to great risk and uncertainty and stifles investment. Latvia's author protection goes far beyond its international commitments and the rules in other European countries. This is harmful to business in general and in particular damages critical sectors such as real estate development, manufacturing and information technology. In addition, Latvia is currently drafting legislation to transpose the provisions of Directive 2019/790 (DSM). FICIL is concerned that certain draft articles contradict the aim of the Directive, as they will not facilitate the settlement of rights, but will significantly complicate them by imposing additional administrative burdens on business.



Rationale for the recommendations

Policy governance of intellectual property matters

To promote the creation, protection and commercialisation of works of intellectual property, policy governance of intellectual property matters should be revamped. Currently, IP is under the purview of the Ministries of Culture (copyright), Justice (patents, trademarks, designs) and Economics (innovation). Such fragmentation hampers the execution of long-term policies.

The Latvian Government has repeatedly stated its policy goals to improve IP creation, protection and commercialisation, most recently for the period 2015-2020[3]. An innovative and eco-efficient economy is a priority of the Sustainable Development Strategy of Latvia – 2030[4]. To answer the question of how to bring about such a fundamental shift, the World Intellectual Property Organisation prepared an expert report on Latvia's IP governance in 2017[5]. The report proposed the creation of a unified government institution that would have primary responsibility for all types of intellectual property with a remit including policy-making and not just issuing registrations. At the time, the Cabinet of Ministers rejected this proposal, preferring instead to preserve the status quo and make modest changes, such as renaming the Patent Library.

Over the past decade, recognising the challenge of creating and commercialising IP and the economic necessity to do so in an increasingly competitive market, other countries in Europe have created unified IP offices. Some examples are Belgium, Croatia, Hungary, Liechtenstein, Malta, and Slovenia. Beyond Europe, the United Kingdom and Singapore have also created unified IP offices. Additionally, even in those European countries that have not unified their IP offices, in more than half of the EU countries, intellectual property is

[3] https://likumi.lv/ta/id/293578-par-konceptualo-zinojumu-par-intelektuala-ipasuma-aizsardzibas-un-parvaldibas-sistemu-latvijas-republika

[4] https://www.pkc.gov.lv/sites/default/files/inline-files/LIAS_2030_en_0.pdf

[5] https://likumi.lv/ta/id/293578-par-konceptualo-zinojumu-par-intelektuala-ipasuma-aizsardzibas-un-parvaldibas-sistemu-latvijas-republika

under the remit of the ministry responsible for economy and trade, reflecting the importance of IP to economic activity and growth.

FICIL invites the government to act decisively to improve the governance of intellectual property in Latvia. The business community, inventors and authors would greatly benefit from a "one-stop shop" to receive information about all forms of intellectual property and to secure registrations to protect their innovations. Such an institution would support private-sector innovation and also help harness the commercial potential of Latvia's considerable state-owned research and innovation capacity. An intellectual property policy must be created within an institution that has the authority and knowledge to steer Latvia into the future. Intellectual property is the key to Latvia's competitive position within the knowledge-based economic future and the institutional arrangements must reflect this.

Enforcement of intellectual property rights

In 2021, the Working Group on the Protection of Intellectual Property of FICIL surveyed lawyers currently active in the field of intellectual property. The total number of the respondents was 16. FICIL concurs with these findings and urges the government to take steps to redress the balance, which currently strongly favours those who infringe the rules and those who ignore court orders.

According to the results of the survey, 64,29% of the respondents have encountered difficulties in intellectual property protection cases requesting to secure the evidence or requiring evidence. Only 35,71% of the respondents have not faced difficulties. A relatively common obstacle indicated was the reluctance of courts to grant requests for evidence or requests for information due to the opposing party's allegation of trade secret protection. In particular, this obstacle was evident with regard to information requests about the suppliers of the infringer or the distribution chain. Additionally, respondents stated that lenient procedural sanctions emboldened some defendants to ignore court orders to provide information. Other related challenges that were mentioned include: Slow and cumbersome communication with the courts, difficulties defining exactly what financial data should be required and determining the period for which the data should be requested, and the inability to control the data selection of the other party prior to submission.

Similarly, 60% of respondents have encountered difficulties in intellectual property protection cases involving damages. These respondents indicated problems regarding the calculation and onerous burden to prove the amount of losses incurred. A lack of unified criteria and guidelines for calculation were mentioned as the main cause. Additionally, in the opinion of respondents, the courts themselves operate with no clear and unified criteria for the calculation of losses. Additionally, it was pointed out that the amount of work

required to prove losses is not worth the compensation ultimately awarded. The Working Group considers that the law must provide greater protection to the harmed party in cases of wilful infringement of IPR. In such cases, for example, in addition to the licence fee, unfair profits made by the infringer should be compensated.

Monetary fines or even criminal liability for the non-fulfilment of a court decision ordering a party to provide evidence should be introduced in IPR cases. There is precedent in the law for this. For example, Article 250.70 of CPL provides a monetary fine up to EUR 140 000 in competition law matters if a party fails to provide evidence requested by the court.

Another obstacle for claiming damages is the extremely low statutory limitations on lawyers' fees recovered by the winning party in IPR cases. Under Section 44(d) of the CPL, only EUR 2850 may be recovered in typical IPR infringement cases, but the actual lawyers' fees may be tens (or even hundreds) of thousands of euros. 76,92% of respondents stated that these statutory limits are disproportionate and inappropriate. Furthermore, 0% of the respondents believed that the statutory limitations should be kept as they are or increased. Rather, 69,23% of the respondents believed the losing party should pay all the fees actually incurred by the winning party. 30,77% proposed that recoverable lawyers' fees should be doubled or tripled in cases of intentional IPR infringement. 15,38% suggested other solutions, such as linking the amount of recoverable lawyers' fees to the amount of losses claimed/recovered, introducing limitation categories by type of case, and reimbursing the fees of professional patent lawyers (currently, not recoverable at all).

Additionally, respondents were asked to indicate other issues that should be improved in the regulation of IPR enforcement. Respondents proposed issues regarding the enforcement procedure of the court's judgement or decision which is caused by unclear and limited powers of the bailiffs, including lenient sanctions for default. Also, respondents indicated the provision of a simpler and faster procedural framework at least for certain categories of cases (e.g. cancellation of trademark registrations for non-use), and provision for direct appeal of the Board of Appeal's decision in the court.

Domain name dispute resolution

To control the manipulative and bad faith registration of domain names, Latvia must implement arbitration as a means of addressing disputes concerning the ".lv" top-level domain. Latvia is one of a shrinking minority of countries today to offer only the courts as a venue for right-holders to take action against parties that register domain names in bad faith[6].
Domain names are very important as business identifiers. However, under the procedures adopted by the Internet Corporation for Assigned Names and Numbers, domain name registration is on a "first come, first-served" basis. Domains are registered at a low cost and very quickly. As a result, "cybersquatting" occurs when actors register domains in bad faith that are identical or confusingly similar to the trademarks, business names or personal names of others. The reasons for doing this may be to sell the domain to the trademark owner, to perpetuate phishing or other criminal schemes, or to interfere with the business of a competitor.

Recognising this risk, in 1999 ICANN adopted the Uniform Domain Name Dispute Resolution Policy[7], or UDRP, which requires domain-name disputes for generic top-level domains (such as .com, .biz., .org) to be decided by ICANN-approved arbitration centres. There are six such centres around the world, and they settle approximately 5,000-7,000 cases each year. UDRP proceedings deliver an outcome within 2-3 months of filing a complaint, at a moderate cost. Domain registries are required to cooperate with UDRP proceedings and implement decisions (to transfer or cancel a domain) instantly.

ICANN left the governance of country-code top-level domains (such as .lv, .ee, .lt, .eu) up to a trustee in each country. In 1999, the World Intellectual Property Organisation (a United Nations agency) published a Best Practices Report[8] recommending arbitration, and over 80% of European countries have done so. Latvia is one of only five European countries with no non-court option to resolve domain disputes. Of the other non-ADR countries, Germany offers a robust dispute procedure within its domain registrar. Latvia does not offer any such proceedings. If a cybersquatter targets a .lv domain, the affected owner of the trademark, business name, or personal name therefore has no alternative but to raise full civil court proceedings. Instead of a few thousand euros and a three month sentence, the litigant is faced with spending five or six years in the courts, at his or her cost. It follows, therefore, that most .lv disputes end in a settlement, which is basically a form of extortion.

Arbitration is well-established as an efficient, inexpensive and fair alternative. There is no need to reinvent the wheel: seven EU countries (Sweden, the Netherlands, Spain, Ireland, Cyprus, Romania and Poland), and the

[6] https://www.wipo.int/amc/en/domains/cctld_db/

[7] https://www.icann.org/resources/pages/help/dndr/udrp-en

[8] https://www.wipo.int/amc/en/domains/bestpractices/bestpractices.html

.eu domain, entrust their domain disputes to the WIPO domain name centre, which already offers arbitration services to more than 80 countries worldwide. There is no cost to the country to do so, and no need to change the laws. The cost of using the WIPO centre is borne by the parties to the dispute. Domain name registration is a right based on a contract: the registration agreement between the registrar (NIC.LV) and the registrant. Therefore, implementing arbitration requires only that the registration agreement be amended accordingly. Parties who wish to use the courts may, of course, continue to do so.

In theory, amending the .lv registration agreement should be a painless and quick exercise. The national registrar, NIC.LV, is the trustee for the Latvian national domain name. However, it is not so simple. Unlike the overseeing mechanisms instituted in Estonia and many other countries for their domain registries, NIC.LV is not subject to an overseeing body. It is nominally part of the University of Latvia, but FICIL is not aware of any role played by the University, the government, or industry in its governance. The stated goal of the Latvian government is to offer a transparent, fair, and predictable business environment. FICIL encourages the government to engage in a dialogue with the NIC.LV registry so that domain-name dispute-resolution procedures in Latvia become speedy, cost-efficient, and fair.

Amendments to the Copyright Law and transposition of the Digital Single Market Directive

In Latvia, the Copyright Law provides the author with an unreasonably wide scope of moral rights, which puts an unjustified burden on the user of the work, as well as raising doubts regarding the validity and fulfilment of contracts that transfer or waive these rights. In addition to the required author protection laid down in the Berne Convention for the Protection of Literary and Artistic Works, the Latvian Copyright Law adds two more rights (disclosure and revocation rights), as well as unreasonably extends the right to inviolability of a piece of work and the right to be indicated as an author on all copies of the work. These rights should be reconsidered due to the changing ways in which works are being used, especially in the ICT industry, where the works are typically created by many authors.

According to the National Industrial Policy Guidelines 2021-2027, ICT has been defined as one of the key directions for specialisation. The goal of the Guidelines is to ensure strong economic growth and to double the export amount over the next seven years. However, the current copyright regulation negatively affects the competitiveness of Latvia, as the users of works in Latvia are disadvantaged in comparison to users in other EU countries, which have not extended the scope of the regulation beyond what is required by EU acts or the Berne Convention. In order to improve the situation and provide a better and more predictable business environment, it is necessary to reasonably narrow the scope of authors while still maintaining the scope laid down in the Berne Convention and other international acts. Please refer to Annex 1 to see FICIL's proposal for amendments to the Copyright Law.

In order to avoid imposing onerous administrative burdens on business, the transposition of the Digital Single Market Directive 2019/790 (DSM) must be urgently reviewed. The Ministry of Culture proposes introducing a requirement for additional remuneration for authors of works created in an employment relationship. FICIL believes this should be reconsidered. It is not reasonable (and goes far beyond the DSM requirements) to require all companies to provide all authors (employees) each year with comprehensive information on the use of their works, the company's profits and the additional remuneration due to the author. Given that the DSM Directive provides authors with the right to withdraw their work in the event of non-use, the current unrestricted personal right to withdraw their work should be deleted from Latvian Copyright Law.

Annex 1 - FICIL's proposal for amendments to the Copyright Law

Current edition	FICIL proposal
Section 12. Author of a Work Created in the Course of Employment (1) If an author has created a work performing his or her duties in an employment relationship, the moral and economic rights to the work shall belong to the author, except for the case specified in Paragraph two of this Section. The economic rights of the author may be transferred, in accordance with a contract, to the employer. (2) If a computer program has been created by an employee while performing a work assignment, all economic rights to the computer program so created shall belong to the employer, unless specified otherwise by contract.	*Section 12. Author of a Work Created in the Course of Employment* (1) If an author has created a work performing his or her duties in an employment relationship, the economic rights to the work shall belong to the employer unless specified otherwise by contract.
Section 13. Author's Contract for a Commissioned Work (1) If an author's contract has been entered into for a commissioned work, the author must perform the commissioned work in accordance with the provisions of the contract and must provide the work for use by the commissioning party, within the term specified and according to the procedures indicated in the contract.	*Article 13. Contract for Commissioned Work* (1) If a contract regarding the creation of work has been entered into, the author shall ensure the creation of the work ordered for him in accordance with the terms of the contract and shall transfer it to the commissioning party in accordance with the term and procedures specified therein. Where a contract for the creation of a work has been concluded with a legal person, the legal person shall ensure that, in accordance with the contract, the appropriate right to use the work is obtained from the authors of the work.
Section 14. Moral Rights of an Author (1) The author of a work has the inalienable moral rights of an author to the following: 1) authorship - the right to be recognised as the author; 2) a decision whether and when the work will be disclosed; 3) the revocation of a work - the right to request that the use of a work be discontinued, with the provision that the author compensate the losses which have been incurred by the user due to the discontinuation; 4) name - the right to require his or her name to be appropriately indicated on all copies and at any public event associated with his or her work, or to require the use of a pseudonym or anonymity; 5) inviolability of a work - the right to permit or prohibit the making of any transformations, changes or additions either to the work itself or to its title. 6) legal action (also unilateral repudiation of a contract without compensation for losses) against any distortion, modification, or other transformation of his or her work, as well as against such an infringement of an author's rights as may damage the honour or reputation of the author. (2) None of the rights mentioned in Paragraph one of this Section may be transferred to another person during the lifetime of the author.	*Section 14. Moral Rights of an Author* (1) The author of a work has the inalienable moral rights of an author to the following: 1) authorship - the right to be recognised as the author; 2) name - the right to require his or her name to be appropriately indicated on all copies and at any public event associated with his or her work, to the extent that it is not disproportionately cumbersome due to the type of work involved, or requires anonymity; 3) legal action - the right to object to the distortion, misrepresentation, other modification or violation of the rights of the author, which may harm the dignity, honour or reputation of the author. (2) None of the rights mentioned in Paragraph one of this Section may be transferred to another person during the lifetime of the author, but the author may agree with the holder of the work on the nature and extent of the exercise of his personal rights or refuse to use them.
Section 16. Transfer of the Rights of an Author (1) The right to disclose and to use a work and to receive remuneration for the permission to use a work, and for the use of the work shall pass to the heirs of the author. The heirs of an author have the right to protect the moral rights of the author. (2) Only the rights specified in Section 15, Paragraphs one, two, and three of this Law may be transferred to other successors in title (including legal persons).	*Section 16. Transfer of the Rights of an Author* (1) The rights to utilise the work and receive remuneration for the permit to utilise the work, as well as for the utilisation of the work shall transfer to the author's heirs. The author's heirs have the right to protect the personal rights of the author, observing the regulation of Section 14, Paragraph two of this Law. (2) Only the economic rights of the author may be transferred to other successors (including legal persons). If another person is granted the exclusive right to use the work in any or specified form, that person has the right to protect the rights transferred, including by prohibiting third parties from using the work in the appropriate ways, the right to receive remuneration for the use of the work, as well as the right to transfer the work for other users.

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FICIL is a non-governmental organisation that unites 38 largest foreign capital companies from various industries, 10 foreign chambers of commerce in Latvia, French Foreign Trade Advisers and Stockholm School of Economics in Riga. The goal of FICIL is to improve Latvia's business environment and overall competitiveness in attracting foreign investment, using the experience and knowledge of its members to provide recommendations to Government and state institutions.

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