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# Assignment or Licence?

## Regulating Authors' Economic Rights in Public Contracts

**Abstract.** This article analyses the allocation of authors' economic rights in public contracts under EU and Estonian law, with particular focus on the choice between assignment and licensing of copyright in public procurement. EU public procurement law does not harmonise the regulation of intellectual property rights, leaving contracting authorities wide discretion and resulting in divergent contractual practices. Drawing on doctrinal analysis and a case study of Estonian public contracts concluded between 2022 and 2024, including design contests and innovation partnerships, the article examines how economic rights are regulated in practice.

The analysis shows a strong preference for assignment of economic rights, frequently combined with contractual clauses characteristic of licensing. This hybrid approach enables contracting authorities to secure extensive control while shifting legal and financial risks onto tenderers and authors, particularly in relation to remuneration, liability, and third-party infringement. The article argues that such practices are often inconsistent with the legal logic of copyright assignment. It concludes that licensing, especially exclusive licensing, can in many procurement contexts provide a more proportionate and legally coherent alternative, ensuring functional control, fair remuneration, and balanced risk allocation.

**Keywords:** public procurement; public contracts; copyright; authors' economic rights; assignment; licensing; intellectual property rights; innovation procurement

## 1. Introduction

Intellectual property<sup>\*1</sup> rights (IPRs) constitute a valuable asset in public procurements, influencing the participation of tenderers, including innovators.<sup>\*2</sup> Despite this, public procurement policies across the European Union (EU) lack a harmonised approach to IPR regulation.<sup>\*3</sup> The European Commission (EC) has encouraged Member States to adopt a strategic perspective on IPRs in public procurement, especially concerning research and development services, studies, and software.<sup>\*4</sup> However, public procurement

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<sup>1</sup> Intellectual property is defined as “rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields”. – Convention Establishing the World Intellectual Property Organization (as amended on September 28, 1979) <[https://www.wipo.int/wipolex/en/text/283854#P50\\_1504](https://www.wipo.int/wipolex/en/text/283854#P50_1504)> accessed on 1 April 2025.

<sup>2</sup> European Commission, Commission notice — Guidance on Innovation Procurement (6 July 2021) [2021] C 267/47, point 4.1.7.

<sup>3</sup> European Commission, Economic benefits of leaving IPR ownership rights in public procurements with the suppliers instead of the procurers (28 March 2017) <<https://ec.europa.eu/newsroom/dae/items/56812/en>> accessed on 1 April 2025; Section 3 on IPR regimes in public procurement in countries across Europe in the following EC survey to Member States (conducted through DG GROW's Member State committee on public procurement), 2010 <[http://ec.europa.eu/newsroom/dae/document.cfm?doc\\_id=49648](http://ec.europa.eu/newsroom/dae/document.cfm?doc_id=49648)> accessed on 1 April 2025.

<sup>4</sup> European Commission, Commission notice — Guidance on Innovation Procurement (n 2), point 4.1.7.

directives<sup>\*5</sup> do not provide guidance on how IPRs should be divided between contracting authorities and tenderers,<sup>\*6</sup> leaving Member States with varying legal frameworks.<sup>\*7</sup> The absence of uniform regulations creates challenges in balancing innovation incentives with financial and legal considerations in public contracts. Contracting authorities must proactively define IPR allocation within tender documents, balancing competing interests such as innovation promotion, cost-efficiency, and legal certainty.<sup>\*8</sup>

Existing research on IPRs in public procurement highlights the importance of intellectual property protection for fostering innovation and economic growth.<sup>\*9</sup> Studies have demonstrated that procurement policies that allow tenderers to retain IPR ownership can drive technological progress and commercialisation.<sup>\*10</sup> Since the late 1980s, European public procurement frameworks have been increasingly designed to encourage innovation, enabling governments to leverage their purchasing power and to stimulate new technological developments.<sup>\*11</sup> Additionally, the EC's 2020 Intellectual Property Action Plan<sup>\*12</sup> underscores the significance of improving the EU's intellectual property framework, ensuring that firms can capitalise on their innovations while simultaneously benefiting the broader economy and society at large.<sup>\*13</sup> Despite the growing academic interest in innovation procurement, legal research on IPR allocation in public contracts remains scarce. Little research has been conducted on the decision-making process regarding the assignment or licensing of authors' economic rights in EU public contracts. While studies on patent rights in procurement exist, the treatment of copyright, particularly in the context of public procurement, is underexplored. Existing research has not provided comprehensive guidance on whether to assign or license economic rights. The present study contributes to the emerging discussion by analysing how assignment and licensing mechanisms are reflected in actual public contracts and by evaluating whether the contractual techniques used by contracting authorities correspond to the legal logic of these mechanisms. In doing so, the article links doctrinal interpretation with empirical evidence and provides a structured basis for assessing the coherence of current procurement practice.

This article examines how authors' economic rights should be allocated in public contracts and offers recommendations for contracting authorities when choosing between assignment and licensing. In doing so, it contributes to the broader discourse on intellectual property management in public procurement. The analysis proceeds from the assumption that licensing can, in many procurement contexts, offer a more proportionate balance between functional control and fair risk distribution.

<sup>5</sup> Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC Text with EEA relevance [2014] OJ L 94/65; Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC Text with EEA relevance [2014] OJ L 94/243; Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts Text with EEA relevance [2014] OJ L 94/1.

<sup>6</sup> Article 42 of Directive 2014/24/EU and Article 60 of Directive 2014/25/EU. Article 42(1) third section states that "the technical specifications may also specify whether the transfer of intellectual property rights will be required".

<sup>7</sup> European Commission, Economic benefits of leaving IPR ownership rights in public procurements with the suppliers instead of the procurers (n 3).

<sup>8</sup> European Commission, Commission notice — Guidance on Innovation Procurement (n 2), point 4.1.7; European Commission, Communication from the Commission — Framework for State aid for research and development and innovation [2014] IO C 198, 27.6.2014, point 33(b).

<sup>9</sup> Albert Sanchez-Graells, *Public Procurement and the EU competition rules* (2nd edition, Hart Publishing 2015) 102; Dacian C. Dragos and Bianca Racolta, 'Comparing Legal Instruments for R&D&I: State Aid and Public Procurement' (*EPPL*, 19 December 2017) 3 <<https://ssrn.com/abstract=3143447>> accessed on 1 April 2025.

<sup>10</sup> Oishee Kundu, Andrew D. James, and John Rigby, 'Public procurement and innovation: a systematic literature review' (2020) 47(4) *Science and Public Policy* 490; Robert Dalpé, 'Effects of Government Procurement on Industrial Innovation' (1994) 16(1) *Technology in Society* 65–83; Charles Edquist and Leif Hommen, 'Systems of Innovation: Theory and Policy for the Demand Side' (1999) 21(1) *Technology in Society* 63–79. – Doi: 10.1016/S0160-791X(98)00037-2; John A. Alic, 'A Weakness in Diffusion: US Technology and Science Policy after World War II' (2008) 30(1) *Technology in Society* 17–29. – Doi: 10.1016/j.techsoc.2007.10.005.

<sup>11</sup> Mehmet Akif Demircioglu and Roberto Vivona, 'Positioning public procurement as a procedural tool for innovation: an empirical study' (2021) 40(3) *Policy and Society* 382–383; Ole Helby Petersen, Veiko Lember, Walter Scherrer, and Robert Ågren, 'The role of private actors in public sector innovation' in Jacob Torfing and Peter Triantafyllou (eds), *Enhancing public innovation by transforming Public Governance* (Cambridge University Press 2016) 211; Max Rolfstam, 'Public procurement as an innovation policy tool: the role of institutions' (2009) 36(5) *Science and Public Policy* 349.

<sup>12</sup> European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions — Making the most of the EU's innovative potential. An intellectual property action plan to support the EU's recovery and resilience (25 November 2020) COM(2020) 760 final.

<sup>13</sup> *Ibid*, section 1 para 5.

Although public procurements may involve other forms of intellectual property – most notably patents, designs, and database rights – this article focuses exclusively on the author's economic rights protected under copyright law. References to other IPRs are used only for contextual or comparative purposes.

For the purposes of this paper, public contracts refer to agreements as defined by Directives 2014/24/EU and 2014/25/EU, which describe them as contracts for pecuniary interest, established in writing between one or more economic operators and one or more contracting authorities, concerning the execution of works, the supply of products, or the provision of services.<sup>\*14</sup> This study focuses on copyright, particularly the economic rights of authors, which in public procurement can be assigned to contracting authorities or licensed<sup>\*15</sup>. The EC recommends keeping IPR ownership with tenderers to foster innovation and market development.<sup>\*16</sup>

While some Member States provide guidelines on IPR allocation in public procurement, Estonia has not issued specific recommendations beyond the general advice from the EC. Although Estonia has published the Guidance on Innovation Procurement<sup>\*17</sup>, it lacks explicit strategies for IPR distribution. Despite the EC urging a more strategic approach to IPRs in procurement since 2021,<sup>\*18</sup> Estonia has yet to implement targeted policies, making it a relevant case study for this research. Furthermore, copyright, though crucial in intellectual property protection, has received less attention in legal studies compared to patents,<sup>\*19</sup> warranting further examination of its role in public procurement.

The study employs a doctrinal legal approach, analysing EU law, the Estonian public procurement framework, and relevant public contracts to identify best practices in allocating authors' economic rights. It includes a case study of publicly available Estonian public contracts to provide empirical insight into current practices, focusing on design contests and innovation partnerships between 2022-2024. The empirical component focuses on contractual language relating to economic rights, remuneration, liability, and warranties, providing a factual basis for assessing how copyright is operationalised in procurement practice.

Under § 128(1) of the Estonian Public Procurement Act, contracting authorities may organise design contests either with the aim of awarding a contract to the winner based on the submitted design or solely to obtain a conceptual design. Under § 48(2), contracting authorities may establish innovation partnerships when the need for innovative supplies, services, or works cannot be met through existing market offerings. The partnership aims to develop and subsequently procure innovative outputs that meet the agreed performance levels and costs. Since innovation partnerships have only been implemented in Estonia on seven occasions, this study analyses all of them. It also reviews design contest contracts from the past three years, as these procedures prominently engage copyright issues requiring explicit contractual provisions on IPR regulation.

The geographical focus of the study is Estonia, given its lack of national guidelines on IPR allocation. Nevertheless, findings are contextualised within the broader EU legal framework to ensure wider relevance. The research centres on copyright and the author's economic rights, which remain underexamined compared to patents, despite their growing importance in digital and creative industries.

By analysing these aspects, the study formulates recommendations for contracting authorities to optimise their intellectual property strategies in public procurement. The findings aim to advance legal scholarship and inform policy-making by providing practical insights into the regulation of copyright in public contracts. Ultimately, a well-designed IPR allocation framework can ensure that public procurement

<sup>14</sup> Directive 2014/24/EU art 2 para 5; Directive 2014/25/EU art 2 para 1.

<sup>15</sup> Lionel Bently, Brad Sherman, Dev Gangjee, and Phillip Johnson, *Intellectual property law* (5th edition, Oxford University Press 2018) 134; Dominik Skauradszun, 'Approaching or overtaking: transferring copyright in Germany and in the UK' (2011) 6(9) *Journal of Intellectual Property Law & Practice* 651.

<sup>16</sup> European Commission, Economic benefits of leaving IPR ownership rights in public procurements with the suppliers instead of the procurers (n 3).

<sup>17</sup> *Innovatsiooni hankija käsiraamat* [Innovation Procurement Handbook] <<https://innohangetekasiraamat.eis.ee/intellektuaalomandikaitse/>> accessed on 1 April 2025.

<sup>18</sup> European Commission, Commission notice – Guidance on Innovation Procurement (n 2), point 4.1.7.

<sup>19</sup> Elad Harison, *Intellectual Property Rights, Innovation and Software Technologies. The Economics of Monopoly Rights and Knowledge Disclosure* (Edward Elgar 2008) 9; Zvi Griliches (ed), *R & D, patents, and productivity* (University of Chicago Press 1984); Bronwyn Hall, Christian Helmers, Mark Rogers, and Vania Sena, 'The choice between formal and informal intellectual property: a review' (2014) 52(2) *Journal of Economic Literature* 375–423; Reinhilde Veugelers and Cédric Schneider, 'Which IP strategies do young highly innovative firms choose?' (2018) 50 *Small Bus Econ* 114.

serves not only as a mechanism for acquiring goods and services but also as a strategic instrument for promoting innovation and economic growth across the EU.

This analysis complements recent research on IPRs in innovation-oriented procurement, which has shown that the allocation of rights plays a decisive role in ensuring the accessibility and reusability of publicly funded outputs.<sup>\*20</sup> While that work examined IPR ownership in the context of open data and broader innovation policy, the present study addresses the more specific doctrinal question of how authors' economic rights should be allocated in procurement contracts. Clarifying the legal consequences of assignment and licensing, therefore, provides an essential foundation for understanding how copyright regulation interacts with wider data governance and innovation objectives.

Although the study relies on a combination of doctrinal analysis and empirical examination, the evidentiary structure differs from traditional legal scholarship. Doctrinal sections are supported by references to legislation, case law, and academic literature, whereas the empirical analysis is grounded in the direct interpretation of contractual materials. Because contract analysis proceeds through the scrutiny of the documents themselves, extensive citation is neither necessary nor methodologically appropriate in those sections. The article therefore adopts a two-part structure: a theoretical framework that sets out the relevant legal principles, followed by an empirical examination of procurement contracts evaluated against that framework. An explicit clarification of this approach helps to account for the relative scarcity of references in the empirical chapters and underscores the methodological coherence of the study.

## **2. Components of Copyright Provisions in Public Contracts**

### **2.1. Case Study Findings**

This article is based on a case study of Estonian public contracts, undertaken to provide empirical evidence on how copyright is allocated in practice. The case study focuses on design contests and innovation partnerships. Between January 2022 and December 2024, 74 design contests were published in Estonia. The study also analyses seven innovation partnership contracts. Since innovation partnerships have only been used in Estonia on seven occasions, this study examines all those cases.

The study focuses on how copyright is regulated in these contracts, particularly the treatment of the author's economic rights. The findings are grouped into five categories: (1) copyright fees, (2) damages, (3) risk allocation, (4) transfer and scope of rights, and (5) warranties against third-party infringement. Across the sample, approximately 94% of contracts opted for assignment of economic rights. The rest opted for licensing or contained a hybrid mix of both.

Taken together, the contracts reveal a consistent pattern: contracting authorities secure broad and durable rights of exploitation while shifting most legal and financial risks onto the designers and artists. This arrangement ensures clarity and legal certainty for public sector use but underscores an asymmetrical distribution of copyright burdens in favour of the contracting authority. This pattern reflects the same structural asymmetry identified in previous research: contracting authorities rely on assignment for legal certainty but incorporate clauses that presuppose residual author obligations typical of licensing.

The following chapters examine these findings in greater detail, showing how each contractual category contributes to this allocation and how it shapes the balance between public interests and the rights of designers and artists. The contracts reveal several recurring structural features – most notably the predominance of assignment, the coexistence of assignment with clauses modelled on licensing, and an uneven distribution of financial and legal risks. These patterns frame the thematic analysis that follows.

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<sup>20</sup> Gerli Helene Gritsenko and Aleksei Kelli, 'Innovation by Design: Strategic Public Procurement and the Normative Case for Public Ownership of IPRs in Open Data Policy' (2025) 19 *Journal of the University of Latvia. Law*.

## 2.2. Financial Considerations in the Transfer of Economic Rights

Based on the case study findings, the regulation of financial considerations emerges as one of the core components of copyright provisions in public contracts. This is unsurprising, since the determination of fees for copyright directly affects both the allocation of costs and the fairness of remuneration between contracting authorities and authors.

The legal framework under both Estonian and EU law emphasises the need for fair remuneration of authors. Copyright law seeks not only to protect exclusive rights but also to guarantee that creators are adequately compensated for their intellectual contributions.<sup>\*21</sup> Articles 18 and 20 of the DSM Directive<sup>\*22</sup> codify this principle by mandating fair and proportionate compensation and by providing authors with the right to additional remuneration where the initially agreed fee proves disproportionately low compared to revenues generated.<sup>\*23</sup> The Estonian law reflects these principles, with § 49 (2) of the Copyright Act recognising a right to seek additional remuneration in such circumstances. In parallel, the European Commission has observed that contracting authorities in innovation procurements often assume entitlement to all results on the basis that they fund 100% of the costs.<sup>\*24</sup> This perception is reinforced by the sheer scale of public procurement: over 250,000 contracting authorities in the EU allocate around 14% of GDP annually (approximately 2 trillion euros) to the acquisition of services, works, and supplies.<sup>\*25</sup> In Estonia, the volume is 4-5 billion euros per year, underscoring the market power and responsibility of public bodies when spending taxpayer resources.<sup>\*26</sup>

Against this backdrop, contracting authorities face a fundamental choice: whether to acquire economic rights through assignment or to rely on licensing. Licensing is generally more cost-effective, as it allows contracting authorities to acquire only the rights necessary for a project. Assignment is typically understood to entail higher costs because it transfers full economic control; however, the case study contracts do not reveal explicit price differentiation, making it difficult to verify this assumption empirically. While an assignment may appear administratively simpler, it often results in higher procurement costs and inflated tender prices. In principle, therefore, the decision should be guided by case-specific considerations such as the intended use of the work, its long-term value, and the broader procurement objectives.

The public contracts analysed, however, show a clear preference for assignment, with limited evidence of nuanced financial assessments. In most public contracts, the author's fee is treated as being included in the overall project cost, with no separate payment for copyright. A rare exception is a contract that explicitly provided for an additional fee covering both the transfer of economic rights and an exclusive licence to exercise moral rights.<sup>\*27</sup> Typically, economic rights pass from the author to the tenderer, either contractually or under statutory provisions, and from there to the contracting authority. In employment contexts, copyright in works created in the course of employment generally vests in the employer (the Copyright Act § 32 (1)), with remuneration limited to salary.<sup>\*28</sup> For an employer to be the copyright owner, it is necessary to show that the work was made by an employee, the work was made in the course of employment, and there is no agreement to the contrary.<sup>\*29</sup> As a result, the transfer of rights to the contracting authority occurs without direct engagement with the author and without identifiable copyright fees.

This practice raises concerns. On the one hand, the absence of explicit copyright remuneration provisions creates uncertainty as to whether authors are adequately compensated. On the other hand, it can be argued that remuneration is implicitly embedded in the overall project fee. The reality is obscured by the lack of contractual clarity: without a clear breakdown, it is impossible to assess whether fair remuneration

<sup>21</sup> Kerstin Bäcker and Ursula Feindor-Schmidt, 'The destruction of copyright—are jurisprudence and legislators throwing fundamental principles of copyright under the bus?' (2021) 16(1) *Journal of Intellectual Property Law & Practice* 44.

<sup>22</sup> Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L 130/92.

<sup>23</sup> Kerstin Bäcker and Ursula Feindor-Schmidt (n 21) 44.

<sup>24</sup> European Commission, Commission notice — Guidance on Innovation Procurement (n 2), point 4.1.7.

<sup>25</sup> European Commission, Public procurement <[https://single-market-economy.ec.europa.eu/single-market/public-procurement\\_en](https://single-market-economy.ec.europa.eu/single-market/public-procurement_en)> accessed on 13 December 2024.

<sup>26</sup> Rahandusministeerium [The Ministry of Finance of Estonia], Kasulik teave. Riigihangete strateegia <<https://www.fin.ee/riigihanked-riigiabi-osalused/riigihanked/kasulik-teave#riigihangete-stratee>> accessed on 1 April 2025.

<sup>27</sup> See public procurement no 267776 public contract p 8 <<https://riigihanked.riik.ee/rhr-web/#/>>.

<sup>28</sup> *Innovatsiooni hankija käsiraamat* (n 17).

<sup>29</sup> Bentley, Sherman (n 15) 134.



has been achieved. For legal certainty, contracts should ideally specify not only that the agreed fee includes copyright, but also indicate, numerically or proportionally, the part of the fee attributable to copyright. While this may not alter the contractual outcome, it would provide transparency and help authors and tenderers decide whether to submit tenders on an informed basis.

The case study also reveals contractual provisions with balancing effects. Some contracts stipulate that if the contracting authority makes substantial modifications or additions beyond the original agreement, additional compensation must be negotiated. Others require that pricing for such modifications remain within prevailing market rates. A further example is a contract limiting the use of copyrights to a specific project, requiring separate negotiation and compensation for additional use or resale. These provisions show some recognition of the principle that financial contribution should be proportionate to the scope of rights. Yet, in the context of an assignment, such clauses are redundant. If rights are fully transferred, the contracting authority does not need permission to use or modify the work, nor is additional remuneration legally required. By contrast, in a licensing model, such provisions are highly relevant and would offer a fairer balance by tying financial obligations to the actual use of the work.

From the contracts analysed, it cannot be determined with certainty whether assignment or licensing is financially more advantageous for contracting authorities. Presumably, as noted by the European Commission, assignment is more costly, as tender prices tend to be higher when full transfer of rights is required. The contracts indicate that copyright fees are generally treated as a one-time, all-inclusive payment. However, in the absence of clear breakdowns, it remains impossible to assess whether fair remuneration for copyright is actually ensured. The lack of transparency leaves tenderers in a weak position as they are unable to verify whether fair remuneration has been achieved.

Based on these findings, the following recommendations can be made. First, contracting authorities should state explicitly that the agreed fee includes compensation for transferred or licensed economic rights. Second, for legal clarity and fairness, contracts should specify the portion of the fee attributable to copyright. This would reduce the risk of claims under the DSM Directive or Estonian law for additional remuneration. Third, contracting authorities should consider licensing as a viable alternative to assignment, particularly where they do not need long-term or comprehensive control. Licensing, with provisions for additional remuneration for modifications or extended use, would better reflect proportionality and encourage cooperation between authors and contracting authorities. Fourth, where assignment is used, redundant provisions on modifications and usage limits should be avoided, as they create confusion and legal inconsistency.

In conclusion, financial considerations are a decisive factor in regulating the transfer of economic rights in public contracts. Current practice reveals a strong bias towards assignment and a lack of transparency about remuneration. Unless clearer provisions are adopted, authors risk under-compensation and contracting authorities risk legal challenges. A more transparent, proportionate, and legally consistent approach, anchored in fair remuneration, would better align contractual practice with copyright law and EU policy objectives.

### **2.3. Transfer and Scope of Economic Rights**

Based on the case study findings, the transfer and scope of economic rights constitute a core dimension of copyright regulation in public contracts. This is logical, since the contracting authority's ability to use, adapt, and manage the author's work depends directly on the legal configuration of rights.

The Estonian Copyright Act provides a flexible framework for the transfer and licensing of economic rights. Under the Estonian Copyright Act § 46 (3), assignment or licensing may be restricted by reference to specific rights, purpose of use, duration, territory, extent, means, and methods of exploitation. The author's economic rights may be transferred individually or as a bundle, for consideration or free of charge (Copyright Act § 11 (3)). Thus, contracting authorities have wide discretion in determining whether to demand all economic rights or only some, and under what financial arrangements.

The Estonian legal framework recognises two principal forms of licensing: the non-exclusive licence and the exclusive licence. A non-exclusive licence allows the licensor to continue using the work and to grant licences to others (Estonian Law of Obligations Act § 370 (1)), while an exclusive licence gives the licensee the right to use the work within the agreed scope and excludes the licensor and third parties from

such use (Law of Obligations Act § 370 (2)). Sub-licensing is only possible with the author's prior consent (the Copyright Act § 47).

When a contracting authority opts for an assignment, it obtains full control over the economic rights and may exercise all remedies available to rights holders. In contrast, licensing, whether non-exclusive or exclusive, preserves ownership with the author and narrows the contracting authority's powers to the scope of the licence. Although exclusive licences can approximate assignment in practice, licensing still leaves residual ownership and remedies with the author.

The case study shows that public contracts overwhelmingly prefer assignment. The contracts adopt a comprehensive approach that ensures the contracting authority acquires broad and durable control over the works produced. In design contracts, the transfer of economic rights extends to project documentation and digital models, covering their use for construction, procurement, and later modifications. The rights typically pass to the contracting authority upon acceptance and payment of the work. In artistic commission contracts, the assignment is even broader: rights of reproduction, distribution, public display, and making the artwork available are transferred in full to the contracting authority, usually for the entire statutory term of copyright protection. While authors retain their moral rights as required by law, these do not limit the use of the economic rights, which are framed to enable unrestricted long-term use.

Design contests also illustrate this trend. Contracting authorities ensure that if they initially require a construction project and later intend to use it for building, they retain the right to use the project freely. Public contracts explicitly state that the contracting authority is entitled to use the project as the basis for organising public procurement for construction works, including the right to distribute the project to interested parties within the relevant public procurement procedure. Additionally, some contracts stipulate that the contracting authority retains the right to modify the project if the procurement documents set an upper limit for execution costs, and this limit is exceeded. Public contracts also emphasise that the contracting authority is not required to involve the original designer or project author in subsequent design phases, such as the preparation of execution drawings. Exceptions to this provision apply in fields such as architecture, interior architecture, and landscape architecture, where coordination may be necessary.

Taken together, these provisions show that contracting authorities seek to secure the broadest possible control, but they also reveal an overregulation problem. Once all economic rights have been assigned, clauses granting the contracting authority the right to reproduce, distribute, or use the work in procurement are redundant. Similarly, stipulations that the contracting authority may freely use the work in later construction phases are unnecessary. In practice, however, such provisions are routinely included, reflecting either caution or lack of alignment with the logic of assignment. Comparable inconsistencies were noted in the regulation of other copyright components, indicating a drafting culture that combines the benefits of assignment with fragments of licensing obligations. This hybridity complicates the interpretation of rights and responsibilities.

More delicate issues arise around modification rights and later project phases. Under the Copyright Act § 12 (1) 3), authors hold the moral right of integrity, including the right to object to alterations that harm the work or their reputation. Contractual clauses that grant the contracting authority a right to modify works may therefore interfere with moral rights. Such provisions illustrate that economic rights alone cannot determine the limits of permissible modifications; the non-transferable nature of moral rights introduces independent constraints that remain relevant even where economic rights are comprehensively assigned. Since this article focuses on economic rights, moral rights fall outside the scope of analysis, but it is important to note that these risks persist in practice.

In summary, the study shows that contracting authorities strongly favour the assignment of economic rights, but contract drafting often overregulates by repeating rights already inherent in the assignment. Licensing, particularly through exclusive licences, could provide a legally consistent and practically sufficient alternative, but it is rarely used. Where a full assignment is chosen, detailed contractual provisions are redundant; where a partial transfer is intended, contracts must clearly specify which rights are being assigned.

Based on these findings, the following recommendations can be made. First, contracting authorities should align contract drafting with the legal consequences of assignment. If all economic rights are transferred, it suffices to state this under the Copyright Act § 13, without repeating the individual rights. Second, where only some rights are needed, contracts must enumerate them precisely to avoid ambiguity. Third, licensing, especially exclusive licensing, should be considered as a flexible tool that grants functional

control without unnecessary overregulation. Fourth, clauses on modification and later project phases should be carefully reviewed to avoid encroaching on moral rights, which remain with the author.

The regulation of transfer and scope of rights is indeed a pivotal element of copyright provisions in public contracts. Yet current practice reveals a cautious but legally inconsistent drafting culture: contracting authorities secure assignment but continue to insert provisions that only make sense under licensing. A clearer, more consistent approach, anchored in the legal framework of the Copyright Act, would create a better balance, reduce redundancy, and provide legal certainty for both contracting authorities and tenderers.

Doctrinally, assignment entails a transfer of ownership and enforcement powers to the assignee, whereas licensing preserves author ownership and imposes continuing protective duties on the licensor. The contractual materials examined frequently blur this distinction, combining the legal effects of assignment with obligations characteristic of licensing, thereby generating inconsistency in the allocation of rights and responsibilities.

## 2.4. Regulation of Damages

Based on the case study findings, the regulation of damages emerges as a central component of copyright provisions in public contracts. This is unsurprising, as it directly determines how financial risks are allocated between contracting authorities and tenderers.

The Estonian Copyright Act § 81 (7) provides authors with a broad set of civil remedies in cases of unlawful use of their works. Authors may claim both pecuniary and non-pecuniary damages, demand cessation of infringements and prevention of future violations, and seek restitution of unjust enrichment obtained through the unlawful exploitation of their work. If a work has been unlawfully disclosed, reproduced, distributed, or altered, rights holders may further require restoration of the work to its original form, modification of infringing copies by specific means, or the destruction of pirated copies. The latter two remedies are not available for architectural works, where only restoration is possible.

When a contracting authority opts for an assignment of economic rights, it takes over these remedies. This means that the contracting authority itself may seek damages and other corrective measures if a third party unlawfully uses the work. By contrast, under licensing arrangements, the legal situation is more limited and nuanced. A licensee may bring claims in respect of infringements of its own contractual rights, including against the licensor for breach of the licence agreement. Exclusive licensees are often recognised as having standing to pursue infringement claims, similarly to rights holders.<sup>\*30</sup> Furthermore, where the licensor grants a conflicting licence in breach of exclusivity, the licensee may demand termination of the unlawful licence and/or claim compensation for resulting damages.<sup>\*31</sup> In such scenarios, the contracting authority's rights as licensee are clearly narrower than those it would hold as an assignee.

Thus, the law establishes that assignment provides the contracting authority with the full scope of remedies under the Estonian Copyright Act § 81 (7), while licensing offers only partial protection and usually requires reliance on contractual remedies against the licensor. When licensing, the contracting authority may invoke remedies in three distinct scenarios: first, where the tenderer breaches the contract and thereby causes loss to the contracting authority; second, where a third party infringes the licensed IPRs and the contracting authority suffers resulting damage; and third, where the tenderer violates exclusivity by granting further licences in contradiction with the terms of the contract.

The case study reveals a significant divergence between the legal framework and contractual practice. In public contracts, the allocation of liability for damages is consistently asymmetrical. Two principal approaches to regulating damages can be identified. First, public contracts often stipulate that the tenderer must compensate the contracting authority for any damages or costs arising from copyright enforcement or restrictions imposed by the project author(s). Conversely, the contracting authority is typically liable only for damages resulting from the improper use of copyrighted materials beyond the agreed scope, and such liability is usually capped at the contract value. Secondly, contracts impose reciprocal obligations requiring both parties to refrain from actions that could compromise the other's copyrights and interests. Yet, in

<sup>30</sup> Paul Varul, Irene Kull, Villu Kõve and others (eds), *The Law of Obligations Act II. Commentary* (Juura 2019) § 373, comment 3.2.2. a).

<sup>31</sup> *Ibid.*, § 373 comment 3.1. c).



practice, this reciprocity is unevenly applied: while the contracting authority's liability remains limited, designers and artists assume extensive responsibilities.

For instance, in design contracts, the designer must indemnify and compensate the contracting authority for damages stemming from copyright disputes that restrict the use of project documentation, including third-party claims and legal costs. Designers are also liable for design errors that lead to additional construction costs, demolition, reconstruction, or delays, and such liability is not contractually capped. In artistic commissions, the asymmetry is equally clear. The artist guarantees that the commissioned work does not infringe third-party rights and must cover the full cost of any damages, including settlements, legal fees, and court-ordered compensation. If disputes escalate to litigation, the artist must also bear the contracting authority's legal expenses. In both cases, contracting authorities are required to compensate only for damages arising from copyright misuse beyond the contractually agreed scope.

A further approach assigns project authors responsibility for damages arising from third-party intellectual property claims. Here, the author must defend—or arrange for the defence of—the contracting authority against such claims and cover any associated damages, costs, and expenses.

Taken together, these provisions demonstrate that, although public contracts formally impose reciprocal obligations, the practical effect is a framework in which designers and artists predominantly carry the financial burden of copyright-related damages, while contracting authorities enjoy significantly narrower and capped liability. Additionally, a notable aspect of these contractual provisions is that, in all cases, the contracting authority has opted for the assignment of economic rights rather than licensing.

This practice raises several concerns. First, many of the indemnification clauses are inconsistent with the consequences of assignment. Once economic rights are assigned, the contracting authority itself becomes the rights holder and has standing under the Estonian Copyright Act § 81 (7) to enforce its rights. It is therefore questionable why designers or artists, who no longer own the rights, should be obliged to cover damages resulting from third-party infringements. Such provisions may only make sense in the context of licensing, or in relation to moral rights, which remain with the author. This is particularly pronounced where the individual author is not a party to the procurement contract, yet the tenderer remains liable for copyright-related risks arising from the author's acts or omissions. Yet, the public contracts do not explicitly specify whether the provisions are intended to regulate moral rights, leaving the clauses legally ambiguous.

Second, clauses that cap the contracting authority's liability but leave the tenderer's liability unlimited create a manifest imbalance. If liability caps are used, they should apply equally to both sides in order to ensure fairness and predictability in public contracts. Otherwise, the structure of these contracts exposes tenderers to disproportionate financial risks that may deter participation in public procurements.

Third, the requirement that designers indemnify the contracting authority for damages caused by copyright disputes is particularly problematic. Where rights have been assigned, it is the contracting authority that should bear responsibility for enforcing its own rights against third parties. Placing this burden on the tenderer, who no longer owns the rights, is inconsistent with the legal framework and results in a shifting of litigation costs that cannot be justified under the logic of assignment. Additionally, in practice, the tenderer is typically a legal person (often a company), and the individual designer, i.e. the author, is not even a party to the public contract. Assigning uncapped liability to the tenderer under such circumstances is both legally incoherent and commercially unreasonable.

Fourth, in artistic commissions, the situation is similarly unbalanced. Artists are obliged to guarantee non-infringement of third-party rights and to cover all related damages. This places the entire litigation risk on the artist, while the contracting authority, who owns the rights after assignment, remains shielded by capped liability. Such provisions again suggest that contracting authorities are not genuinely pursuing assignment as envisaged under copyright law, but rather a hybrid model in which they obtain the benefits of assignment while pushing the burdens of licensing back onto tenderers.

Finally, the uncapped liability for design errors, leading to reconstruction or demolition, is "extreme" and undermines the principle of balanced contracting. These risks should be subject to reasonable caps. Otherwise, they may result in situations where a tenderer assumes liability far beyond the financial value of the contract, which is incompatible with the proportionality requirement.

In summary, the analysis shows that the regulation of damages in Estonian public contracts does not align well with the legal framework and creates an uneven distribution of risk. While the law distinguishes clearly between the consequences of assignment and licensing, in practice, public contracts combine the

benefits of assignment for contracting authorities with clauses more appropriate to licensing, shifting litigation costs and extensive liability onto tenderers.

Based on these findings, the following recommendations can be made. First, clauses requiring tenderers to indemnify the contracting authority should explicitly state that they concern moral rights in cases of assignment. If not, those clauses are suitable for licensing arrangements. If assignment is chosen, such provisions are redundant and legally inconsistent. Second, where damages are capped, the cap should apply to both parties. Leaving tenderers exposed to unlimited liability while contracting authorities enjoy capped exposure undermines fairness and proportionality. Third, if contracting authorities wish to retain broad powers to enforce rights and claim damages, assignment is the proper model. If they want tenderers to remain responsible for infringement risks, licensing should be chosen instead. Hybrid approaches should be avoided. Fourth, provisions that make tenderers liable for third-party infringements after assignment should be revised or eliminated, as they contradict the contracting authority's position as rights holder under the Estonian Copyright Act § 81 (7).

Damages regulation is indeed a crucial element of copyright-related provisions in public contracts. However, current practice reflects a mismatch between copyright law and contractual drafting. Unless contracting authorities revise their approach, public contracts will continue to expose tenderers to disproportionate risks and legal uncertainty. A more balanced, transparent, and legally consistent framework is needed to ensure fair allocation of rights and responsibilities in copyright regulation. Given the above recommendations, a fair balance can be achieved.

## 2.5. Allocation of Risks

Based on the case study findings, risk allocation between the tenderer and the contracting authority emerges as another central component of copyright provisions in public contracts. This is unsurprising, as risk allocation, like damages regulation, directly determines how financial burdens are distributed and how parties' responsibilities are structured.

The distinction between licensing and assignment plays a crucial role in shaping risk allocation. Licensing allows authors to retain ownership while granting limited rights of use, thereby keeping certain risks with the author. Assignments, by contrast, transfer the entirety of ownership rights to the assignee, who becomes the new rights holder while the author relinquishes all claims. In principle, an assignment should shift copyright-related risks to the contracting authority, since it assumes both the benefits and the burdens of ownership. Licensing, conversely, leaves risks more evenly distributed, as authors retain residual rights and responsibilities.

The practice of Estonian public contracts, however, reveals a clear divergence from this legal logic. The allocation of copyright-related risks in public contracts consistently shifts responsibility toward the contractor or author, thereby insulating the contracting authority.

In design and architectural contracts, the author's economic rights in project documentation, including models and related materials, are transferred to the contracting authority upon acceptance of the works and payment, thereby ensuring subsequent use in other procurements and construction processes. In addition, ownership rights in documents and materials created during performance of the contract also pass to the contracting authority. Although the author's moral rights are not expressly regulated, they are implicitly curtailed through provisions treating necessary modifications, corrections, or adaptations as non-infringing acts. Such provisions further illustrate how economic and moral rights are intermixed without clear conceptual separation, a theme consistent with the financial and damages provisions analysed earlier.

Designers, thus, carry the primary risk burden: they are obliged to secure all necessary IPRs, correct defects at their own expense, and indemnify the contracting authority against third-party infringement claims. Contracts further reinforce this allocation of risk by requiring contractors to compensate the contracting authority for damages and expenses arising from the author's exercise of rights or restrictions imposed on the contracting authority's use of the project. Compensation must be paid within thirty days of receiving a written demand. The contracting authority's own liability, by contrast, is limited to damages caused by its improper use of copyright, also subject to a thirty-day settlement period.

Artistic commission contracts adopt a similar yet distinct approach. Here, the artist's economic rights, covering reproduction, distribution, public display, and other forms of exploitation, are comprehensively

assigned to the contracting authority for the entire duration of copyright protection. While moral rights remain vested in the artist under statutory rules, contractual provisions expressly restrict their exercise, permitting restoration, maintenance, and certain adaptations without constituting infringement.

Across both categories, however, the balance of risks is unequivocal: contracting authorities secure extensive economic rights, impose indemnification duties, and limit the effective exercise of moral rights, with the result being that the burden of copyright risk falls predominantly on the contractor or author.

The comparison with the damages regulation highlights significant similarities. Both domains reflect a consistent asymmetry: tenderers assume extensive obligations, often uncapped, while contracting authorities retain only narrow and capped liability. In both cases, public contracts create a hybrid model in which contracting authorities claim the benefits of assignment but leave tenderers with liabilities more appropriate to licensing. The difference lies primarily in emphasis: while damages regulation specifies financial consequences and compensation mechanisms, risk allocation more broadly defines the distribution of ownership, control, and responsibility throughout the contractual relationship. Yet both mechanisms converge in practice to produce a framework in which tenderers disproportionately carry copyright-related risks.

This practice raises several concerns. First, the shifting of risk back onto authors and contractors after assignment contradicts the logic of copyright law. Once economic rights are transferred, the contracting authority should bear the attendant risks, particularly those arising from third-party infringements. Second, the limitation of the contracting authority's liability, combined with the broad indemnification obligations imposed on tenderers, creates a structural imbalance similar to that observed in damages regulation. Third, the curtailment of moral rights through contractual provisions is only partially transparent and risks undermining statutory protections afforded to authors.

Based on these findings, several recommendations follow. First, contracting authorities should adopt a clearer distinction between assignment and licensing in contractual drafting. If assignment is chosen, risks relating to infringement and enforcement should lie with the contracting authority as rights holder. Second, any indemnification provisions imposed on tenderers should be proportionate and explicitly limited to areas where they retain rights or responsibilities, such as moral rights. Third, liability caps should be applied symmetrically to both parties in order to ensure fairness and legal certainty. Finally, provisions that restrict moral rights should be carefully tailored to avoid undermining statutory protections and to preserve the integrity of artistic and design works.

In summary, the allocation of risks in Estonian public contracts mirrors the asymmetry already observed in the regulation of damages. In both domains, contracting authorities combine the advantages of assignment with the burdens of licensing, creating a hybrid approach that leaves tenderers exposed to disproportionate legal and financial risks. Unless rebalanced, this framework may discourage participation in public procurements and undermine the principle of fair contractual relations.

## 2.6. Warranties Against Third-Party Infringements

Based on the case study findings, warranties against third-party infringements emerge as another central component of copyright provisions in public contracts. This is unsurprising, as such warranties, like damages regulation and risk allocation, directly determine how financial risks and legal responsibilities are distributed between contracting authorities and tenderers.

Under the Estonian Law of Obligations Act § 373, a licensor owes a protective duty to the licensee in cases of third-party interference. If a third party hinders or infringes the licensee's use of rights under a licence agreement, the licensee must promptly notify the licensor. The licensor is then obliged to take all necessary measures to remove the obstruction and terminate the violation, while the licensee is required to cooperate to the necessary extent. This statutory framework places responsibility on licensors to ensure that licensees can effectively exercise the rights granted under a licence. The duty of protection thus complements the licensor's core obligation to grant use rights and underscores the principle that licensing carries with it continuing obligations of defence.

Third-party conduct may hinder a licensee in exercising the rights arising from a licence agreement or otherwise frustrate the objectives of the contract. A primary example is the unlawful use of IPRs by third parties, which may significantly undermine the economic benefit expected from the licence. Such obstacles are particularly problematic for exclusive licensees, but they may also arise in cases where the licensor has

breached contractual restrictions on granting further licences to other parties. Interference can also take the form of litigation, for example, when a third party files a claim or requests interim relief that prevents or restricts the licensee's ability to use the licensed rights.

The Estonian Law of Obligations Act § 373 therefore imposes on the licensor a duty to take immediate and effective measures to remove third-party obstacles and to bring infringements of the licensee's rights to an end. This protective duty supplements the licensor's primary obligation to grant the licensee the right to use the intellectual property in question. For the licensee, the provision creates a corresponding right to demand that the licensor take such measures. At the same time, the licensee bears notification and cooperation duties: once aware of an obstacle or infringement, the licensee must promptly inform the licensor, providing all relevant information, and cooperate reasonably with the licensor in removing the hindrance. Such cooperation may include assisting in the collection of evidence or even testifying in court if necessary.<sup>32</sup>

This theoretical framework demonstrates that warranties are inherent to licensing relationships, ensuring that the licensee can, in practice, enjoy the rights promised under the licence. The logic of assignment is different. Once economic rights are assigned, the contracting authority becomes the rights holder and must itself enforce those rights against third parties. In such a scenario, the assignor has no continuing protective obligations, as ownership, and the corresponding duty of defence, rests with the assignee. Accordingly, the statutory regime clearly distinguishes between the warranty duties of licensors in licensing arrangements and the absence of such duties under assignments.

Contractual practice, however, diverges from this legal logic. In copyright-related provisions of public contracts, warranties and third-party infringement liability are consistently structured to place responsibility on the contractor or artist, regardless of whether economic rights have been assigned. In design contracts, the designer warrants that all IPRs necessary for the performance and subsequent use of the project are valid and transferable. Should a third party allege infringement, the designer must resolve the dispute at their own expense, indemnify the contracting authority, and cover all resulting costs, including legal fees and compensation. Similarly, in artistic commission contracts, the artist guarantees that the commissioned work does not infringe third-party rights and assumes full liability for any claims, including the obligation to reimburse the contracting authority for litigation expenses and damages. Contracting authorities, by contrast, are structurally insulated from such risks: their role is limited to respecting the agreed scope of copyright use, while the contractor bears both the warranty obligation and the financial exposure for third-party claims.

Public contracts further ensure that tenderers bear liability for third-party claims against contracting authorities. If a claim is filed against the contracting authority for alleged copyright infringement during project execution, the contractor must take all necessary measures to resolve the dispute and assume responsibility for any resulting damages. Additionally, the contractor is obligated to ensure that no third-party copyrights or other IPRs are infringed during the execution of the project. The contracting authority, in turn, is required only to notify the contractor and cooperate as needed. This contractual allocation mirrors the statutory structure of licensing under the Estonian Law of Obligations Act § 373, even though, in practice, contracting authorities systematically opt for assignment of economic rights.

This creates a structural inconsistency. The result is a set of obligations that resemble the protective duties of a licensor under Estonian contract law, even though the contracting authority acquires the status of assignee. If the contracting authority is the owner of economic rights after assignment, it should itself bear responsibility for defending those rights against third-party claims. Nevertheless, contractors should guarantee that there are no third-party claims. Placing continuing warranty obligations on contractors, who no longer own the rights, is logically incoherent. Such provisions make sense in licensing, but not in assignment. The only interference that could persist post-assignment would arise from the author's moral rights, yet public contracts do not explicitly differentiate between economic and moral rights in their warranty clauses. At the same time, it is reasonable that the tenderer must warrant that all IPRs necessary for the performance and subsequent use of the project are valid and transferable. Where later problems arise specifically from this obligation, the tenderer should appropriately bear the risks and compensate the damages. However, this obligation should remain limited to that narrow warranty and should not extend to all third-party claims more broadly.

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<sup>32</sup> Ibid, § 373 comment 3.3.



The comparison with damages and risk allocation reveals striking similarities. As with damages, warranties are structured to impose broad indemnification duties on tenderers while shielding contracting authorities from liability. As with risk allocation, public contracts combine the advantages of assignment (ownership and control of economic rights) with the protective obligations more appropriate to licensing, thereby producing a hybrid model that disproportionately burdens tenderers. The difference lies in emphasis: damages provisions regulate financial consequences, risk allocation governs the distribution of ownership and responsibility, while warranties impose ongoing guarantees of non-infringement. Yet all three categories converge on the same outcome: contracting authorities are structurally insulated, while tenderers assume disproportionate and sometimes legally inconsistent obligations.

This practice raises several concerns. First, warranty clauses that impose obligations on contractors after assignment contradict the logic of copyright law, which assigns enforcement powers to rights holders. Second, the failure to distinguish clearly between economic and moral rights risks creating legal uncertainty in the enforcement of warranty provisions. Third, the blanket transfer of third-party infringement risks to tenderers, often without caps, replicates the imbalance already observed in damages and risk allocation.

Based on these findings, several recommendations can be made. First, public contracts should distinguish explicitly between assignment and licensing. Warranty obligations of the type set out in the Estonian Law of Obligations Act § 373 are appropriate only in licensing contexts. If assignment is chosen, the contracting authority, as rights holder, should assume responsibility for third-party enforcement. Second, warranty clauses should be tailored to the author's moral rights, which remain with the author and may still interfere with the contracting authority's use of the work. Third, warranty liability should be confined to ensuring that the IPRs necessary for project performance and subsequent use are valid and transferable. Broader liability for all third-party claims should be removed, as it imposes disproportionate and legally inconsistent burdens on tenderers. Fourth, any indemnification obligations imposed on tenderers should be proportionate and, where appropriate, capped in order to prevent excessive liability. Finally, if contracting authorities wish to avoid the burdens of enforcement, they should consider opting for licensing instead of assignment, as this would align both with statutory logic and with their practical concerns about third-party claims.

In summary, warranties against third-party infringements in Estonian public contracts, like damages and risk allocation, are structured in a manner that systematically shifts risk onto tenderers. By imposing warranty obligations even in the context of assignment, contracting authorities obtain the benefits of ownership without assuming the corresponding responsibilities. Unless reformed, such provisions will continue to generate legal inconsistency and disproportionate liability for tenderers. A more balanced approach would require clear differentiation between assignment and licensing, and fairer distribution of third-party infringement risks.

### 3. Risk of Vendor Lock-in in Public Procurement

One important consideration, drawn from practice and CJEU case law rather than the case study itself, is the risk of vendor lock-in.

The adverse consequences of vendor lock-in can be illustrated by the following example. A contracting authority initiates a public procurement procedure to replace the radar module of a marine traffic control system. In the original public procurement procedure, however, the contracting authority failed to specify ownership and management of IPRs. Consequently, when preparing the new tender documents, it could not provide the necessary interface specifications for integration with the existing system. The contracting authority, therefore, had no choice but to engage the original tenderer to perform the integration. Aware of this dependency, the tenderer charged a fee equal to the entire public procurement budget, effectively doubling the project's cost of replacement.<sup>33</sup> This scenario demonstrates a consequence directly connected to deficient copyright regulation: when the initial procurement fails to clarify rights, operational continuity becomes contingent on the original supplier.

<sup>33</sup> Procurement of Innovation Platform, Introduction to intellectual property rights in Public Procurement of Innovation 3 <<https://innovation-procurement.org/implementing-innovation-procurement/>> accessed on 19 October 2025.



On 9 January 2025, the CJEU delivered a landmark judgment in Case C-578/23.<sup>34</sup> The Court clarified the circumstances under which contracting authorities may rely on negotiated procedures without prior publication under EU procurement directives. The case concerned the Czech Ministry of Finance, which had awarded IBM a contract in 1992 to develop an information system for tax authorities. In 2016, the Ministry's successor, the General Finance Directorate (GFD), again awarded IBM a maintenance contract through a negotiated procedure, citing technical continuity and IBM's exclusive copyright on the source code. The CJEU held that such procedures are exceptional and must be interpreted strictly. Contracting authorities cannot rely on exclusivity that results from their own prior actions or omissions. In this case, IBM's exclusivity was attributable to the Ministry's conduct, and, therefore, the use of a negotiated procedure was unjustified. The judgment thus resonates with the broader conclusions of this study: failure to regulate copyright proactively not only undermines legal certainty but may also distort competition.

The ruling highlights that contracting authorities must actively prevent vendor lock-in. This risk is particularly acute in the IT sector, but it can also arise elsewhere, such as in hospitals procuring medical equipment.

Avoiding vendor lock-in requires careful regulation of copyright in public contracts. Vendor lock-in can occur when copyright is left unregulated or where licensing arrangements are too restrictive. If the author's economic rights remain with the tenderer, the contracting authority may become dependent on that tenderer for future modifications or maintenance, leading to financial and operational constraints.

To mitigate this risk, contracting authorities should, where appropriate, require the assignment of the author's economic rights. Alternatively, if a licensing model is used, the licence should explicitly allow the authority to grant sub-licences to third parties for system updates or maintenance. The judgment thus underscores that proactive regulation of copyright is crucial not only for safeguarding legal certainty but also for preventing market structures in which contracting authorities become dependent on a single supplier due to incomplete rights management.

## 4. Conclusion

This paper examined the allocation of the author's economic rights in public contracts within the framework of EU and Estonian law, focusing on how copyright is regulated in practice and how current contractual approaches correspond to the principles of fairness, proportionality, and promotion of innovation. Combining doctrinal analysis with an empirical case study of Estonian public contracts, comprising design contests and innovation partnership agreements, the study provided insight into how contracting authorities address copyright and manage the competing interests of legal certainty, cost-efficiency, and the protection of creative labour.

The analysis revealed a clear and consistent preference for the assignment of economic rights, with licensing being almost entirely absent. While assignment provides contracting authorities with extensive and durable control, it also leads to overregulation and redundant drafting. Contracts frequently restate rights that are already inherent in an assignment, such as the right to reproduce, distribute, and modify works, suggesting a limited understanding of the legal consequences of such transfers. More importantly, the predominance of assignment reflects an institutional bias towards administrative convenience and risk avoidance, rather than a context-sensitive assessment of actual needs. Licensing, by contrast, would often suffice to achieve functional control, offer greater flexibility, and reduce costs, yet it remains underutilised.

Financially, the study found little evidence of transparent remuneration for copyright. Most contracts include the author's fee within the overall project cost without specifying the share attributable to the transfer or license of economic rights. This practice obscures whether remuneration is fair and proportionate as required under the DSM Directive and the Estonian Copyright Act. The absence of clear financial breakdowns prevents both tenderers and contracting authorities from assessing the adequacy of compensation. It is therefore recommended that public contracts should expressly state that the agreed fee covers the transfer or license of economic rights and indicate, at least proportionally, the portion allocated to copyright. Such transparency would safeguard fair remuneration, prevent disputes, and strengthen compliance with EU copyright principles.

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<sup>34</sup> C-578/23 *Česká republika - Generální finanční ředitelství* ECLI:EU:C:2025:4.

The analysis of liability, damages, and risk allocation demonstrated a further imbalance. Contracting authorities consistently secure extensive economic rights while shifting legal and financial risks onto tenderers through broad indemnification duties and uncapped liability. These provisions contradict the logic of copyright assignment, under which the assignee, as the rights holder, should bear the responsibility for enforcement and third-party infringements. By combining the advantages of assignment with the burdens typical of licensing, contracting authorities create hybrid contractual structures that lack coherence and disproportionately expose tenderers to risk. To address this, it is recommended that contracting authorities ensure that liability caps apply symmetrically to both parties and that indemnification obligations are proportionate and confined to areas where tenderers retain rights, such as moral rights. Where assignment is used, redundant or inconsistent clauses should be avoided, and the contracting authority should assume full responsibility for rights enforcement. Where licensing is used, warranties and indemnities should follow the structure of the Estonian Law of Obligations Act, ensuring clarity in the parties' respective duties.

A similar imbalance was observed in the treatment of warranties against third-party infringements. Public contracts often require designers and artists to defend the contracting authority against infringement claims even after rights have been assigned, effectively imposing obligations that belong to the rights holder. This inconsistency underlines the need for clearer differentiation between assignment and licensing models. Warranties should be limited to ensuring that the IPRs necessary for project performance are valid and transferable, and broader liability for third-party claims should be excluded. Contracting authorities that wish to avoid enforcement burdens may instead adopt licensing arrangements, which legally and practically correspond to such obligations.

Beyond the contractual analysis, the paper addressed the systemic risk of vendor lock-in, drawing on CJEU case law to illustrate how insufficient regulation of copyright can leave contracting authorities dependent on a single supplier. The judgment in Case C-578/23 confirmed that reliance on exclusivity created by a contracting authority's own omissions cannot justify the use of negotiated procedures without prior publication. To avoid similar dependencies, contracting authorities must regulate copyright proactively. This may involve acquiring the author's economic rights through assignment when long-term control is necessary, or ensuring that licences permit sub-licensing. Proper intellectual property management thus serves not only legal certainty but also market competition and efficient use of public resources.

To address the abovementioned problems, the paper recommends a more coherent and balanced approach to the allocation of authors' economic rights. Contracting authorities should distinguish clearly between assignment and licensing and select the model that best matches their functional needs. Licensing should be preferred when only limited rights of use are necessary, as it allows for cost-effective and flexible arrangements that maintain incentives for creativity and innovation. Where assignment is genuinely required, contracts should be simplified by avoiding redundant clauses and aligning the wording with the legal effects of full transfer. To ensure fairness and compliance with EU principles, remuneration for copyright should be explicitly stated and proportionate to the scope of rights acquired, and both parties should benefit from symmetrical liability caps. Indemnification and warranty obligations should be limited to areas where tenderers retain residual rights or responsibilities, particularly moral rights. Finally, to mitigate the risk of vendor lock-in, contracting authorities should ensure that licences allow sub-licensing, thereby maintaining competition and long-term flexibility.

Taken together, the findings support the view that licensing often provides a more proportionate and coherent framework than assignment in many procurement contexts. Licensing supports fair remuneration, equitable risk distribution, and long-term cost-efficiency, while aligning with the broader policy objectives of EU copyright and procurement law. The prevailing reliance on assignment in Estonian public contracts, while administratively convenient, undermines these principles by producing contracts that are inconsistent in form and inequitable in effect.

Four elements appear central to improving contractual coherence. First, contracting authorities should articulate a clear *ex ante* choice between assignment and licensing that reflects the functional needs of the procurement. Second, remuneration for copyright should be expressly identified and proportionate to the scope of the rights acquired. Third, liability and indemnification clauses should be symmetrical and confined to areas where tenderers retain residual obligations. Fourth, warranty provisions should be aligned with the chosen rights model and should not impose post-assignment duties that contradict the allocation of ownership.

The analysis is limited to publicly available contracts, yet the consistency of their structure allows meaningful conclusions to be drawn about prevailing procurement practice. In conclusion, the study demonstrates that the current approach to copyright in Estonian public procurement prioritises control and certainty at the expense of balance and fairness. A shift toward a more strategic and transparent use of licensing, accompanied by clear remuneration structures and proportionate liability rules, would better serve the goals of public procurement as a policy instrument for innovation, fair competition, and responsible management of intellectual property.

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