

The Interpretation of Licensing Agreements. Time for a Reassessment?★

By LL.D. Petra Sund-Norrgård★★

1. Introduction

In today's society intellectual property rights, especially those in the form of patents and trademarks, are becoming more important.¹ Because intellectual property rights are typically utilised through licensing, the importance of licensing agreements is also increasing.²

Licensing agreements often represent win-win-solutions. The licensor in, for example, a patent license may benefit from his research and development without doing any manufacturing or marketing, while the licensee may outrun his competition by getting hold of new technology and new products without having to invest in research and development.³

A licensing agreement is typically a long-term cooperative arrangement and should be flexible enough to work over time and changing circumstances. However, licensing agreements in Finland are usually drafted with a traditional technique that results in long, detailed contracts with precise wording and little flexibility, which is an issue I criticised in my doctoral dissertation.⁴

* The article is based on a presentation of the author's dissertation held at the Nordic IPR Network Meeting in April 2012 in Grisslehamn, Sweden.

★★ Lecturer at the Helsinki University.

¹ Moore, Charlotte: Managing Intellectual Property Rights – Looking After Your Business Asset, Christina Demetriades (ed.), Intellectual Property Issues in Commercial Transactions, London 2008, p. 175, Salmi, Harri – Häkkänen, Petteri – Oesch, Rainer – Tommila, Marja: Tavaramerkki, 2. uudistettu painos, Helsinki 2008, p. 574, Wolk, Sanna: Arbetstygares immaterialrättigheter. Rätten till datorprogram, design och uppfinningar m.m. i anställningsförhållanden, andra upplagan, Stockholm 2008 p. 19, Schovsbo, Jens – Rosenmeier, Morten: Immaterialret. Ophavsret, patentret, brugsmodelret, designret, varemærkeret, 2. udgave, København 2011 p. 438 et seq., p. 543 (Schovsbo – Rosenmeier 2011).

² Mansala, Marja-Leena: Immaterialoikeuden lisensiointi, Tuomas Mylly (toim.) Immaterialoikeudet kansainvälisessä kaupassa, Helsinki 2001 p. 2, Domeij, Bengt: Technical Warranties in Patent Licenses, NIR 2002 p. 23 (Domeij, NIR 2002), Oesch, Rainer: Interpretation of licensing agreements – new trends under way?, NIR 2005 p. 280 (Oesch, NIR 2005).

³ Sandgren, Claes: Patentlicenser. Studier i licensavtal angående patent, patentansökningar och know-how med särskild hänsyn till amerikansk och tysk rätt, Stockholm 1974 p. 80 (Sandgren 1974), Berkenstock, H. Roy: The Licensing of Intellectual Property Rights, The Federal Lawyer p. 16.

⁴ See the discussion in Sund-Norrgård, Lojalitet i licensavtal, Helsingfors 2011, chapter 4 (Sund-Norrgård 2011).

The focus of this article is the interpretation of licensing agreements rather than contract drafting. My main objective is to highlight the need to bring licensing agreements up to date with modern contract law. In the contemporary literature on Nordic intellectual property law, the approach to contract interpretation remains largely classical.⁵

2. Modern Contract Law

2.1 The Differences Between Classical and Modern Contract Law. In classical contract law, a contract is formed when an offer is accepted. The starting point is freedom of contract as well as *pacta sunt servanda*, which stipulates that a contract is binding in its original form as long as it is not contrary to mandatory law. The parties must, therefore, estimate and minimise their risks in advance through contract clauses. A contract is considered exhaustive, and the parties are viewed as competitors with contradictory interests. Contractual flexibility may even be seen as a threat to *pacta sunt servanda*.⁶ In Grönfors' wording such a contract is concluded in accordance with the "ketchup method": at first you have nothing, then you have everything at once.⁷ Many scholars have noted that today's society requires an updated approach, and we have moved towards a more modern contract law.⁸

According to modern contract law, there is no total freedom of contract. Instead, weaker parties are protected and contracts may be adjusted. Furthermore, the principle of loyalty is recognised. Modern contract law is more dynamic than classical contract law because changes that have occurred *after* the conclusion of a contract may have an impact on its interpretation. The contract is no longer solely a device for risk division between the parties, but a framework for a flexible process of ongoing cooperation. To have a working contract, the parties must be prepared to renegotiate and adjust it during its term.⁹ There may

⁵ The thoughts that are presented here are based on Sund-Norrgård 2011.

⁶ Pöyhönen, Juha: Sopimusoikeuden järjestelmä ja sopimusten sovittelu, Helsinki 1988 p. 211 et seq. (Pöyhönen 1988), Häyhä, Juha: Sopimus, laki ja vakuutustoiminta, Helsinki 1996 p. 217 (Häyhä 1996), Nystén-Haarala, Soili: The Long-Term Contract, Helsinki 1998 p. 4 et seq., p. 17 et seq. (Nystén-Haarala 1998), Annola, Vesa: Sopimuksen dynaamisuus, Vaasa 2003 p. 30, p. 49, Rudanko, Matti: Yritysjuridiikka – kauppaoikeutta vai liiketaloutta?, LM 2004 p. 1230, Haavisto, Vaula: Yhteistoiminnan uudet muodot liikesuhteissa – haaste sopimusoikeudelle, Soile Pohjonen (toim.), Ex ante – ennakoiva oikeus, Helsinki 2005 p. 127 et seq., p. 130, p. 133.

⁷ Grönfors, Kurt: Avtalsgrundande rättsfakta, Göteborg 1993 p. 33.

⁸ See e.g. Wilhelmsson, Thomas: Standardavtal och oskälige avtalsvillkor, Helsingfors 2008 p. 23 et seq. (Wilhelmsson 2008).

⁹ Taxell, Lars Erik: Om lojalitet i avtalsförhållanden, DL 1977 p. 148 et seq. (Taxell, DL 1977), Taxell, Lars Erik: Om avtalsetik, JFT 1979 p. 488 et seq. (Taxell, JFT 1979), Wilhelmsson, Thomas: Sopimukset keskittyvässä talouselämässä, Oikeus 1985 p. 164, Pöyhönen 1988 p. 211 et seq, p. 231, p. 374, Muukkonen, P. J.: Sopimusoikeuden yleinen lojaliteettiperiaate, LM 1993 p. 1030 et seq., p. 1046 (Muukkonen, LM 1993), Wilhelmsson, Thomas: Sosiaalinen sopimusoikeus ja Euroopan integraatio, Thomas Wilhelmsson – Katariina Kaukonen (toim.), Euroopan integraatio ja sosiaalinen sopimusoikeus, Helsinki 1993 p. 24 et seq., Wilhelmsson, Thomas: Questions for a Critical Contract Law – and a Contradictory Answer: Contract as Social Cooperation, Thomas Wilhelmsson (ed.), Perspectives of Critical Contract Law, England–USA 1993 p. 17 et seq., p. 20 et seq, p. 36 et seq., Grönfors, Kurt: Avtal och omförhandling, Stockholm 1995 p. 22 et seq.

even be a duty to renegotiate when a contract does not include a renegotiation clause; this conclusion may be drawn from the emphasis on cooperation in contract.¹⁰

2.2 The Principle of Loyalty. The role of the principle of loyalty is recognised in modern contract law. In Finnish contract law it has been a subject of debate for decades, and today, most scholars consider it to be a general principle of law.¹¹

The principle of loyalty requires the parties to a contract to consider the interests of the other party. Although it is somewhat unclear what follows from this requirement, its significance increases in long-term agreements in which the parties are financially dependent on one another¹² and for situations where standard terms are used.¹³

Where parties with equal bargaining power conclude a licensing agreement, the principle of loyalty normally requires each party to *act* in a loyal manner towards the other party.¹⁴ This requirement is equivalent to existing court practice and contract law doctrine, according to which the principle of loyalty may, for example, oblige a party to renegotiate a contract¹⁵ or to inform the other party.¹⁶ It may also require a prohibition of competition¹⁷ or a secrecy obligation.¹⁸

A long-term agreement cannot work without adjustment because circumstances change, so the parties must be prepared to renegotiate a contract. Similarly, close cooperation will not work if information is not shared, so the parties

(Grönfors 1995), Häyhä 1996 p. 220 et seq., Häyhä, Juha: Lojaliteettiperiaate ja sopimusoppi, DL 1996 p. 314 et seq., Taxell, Lars Erik: Avtalsrätt. Bakgrund, Sammanfattning, Utblick, Stockholm 1997 p. 65 (Taxell 1997), Rudanko, Matti: Kauppaoikeuden kehityssuuntauksia II. Kaupallisten olosuhteiden teoria, LM 1998 p. 70 et seq.

¹⁰ Nassar, Nagla: Sanctity of Contracts Revisited. A Study in the Theory and Practice of Long-Term International Commercial Contracts, The Netherlands 1995 p. 22 (Nassar 1995).

¹¹ Muukkonen, LM 1993 p. 1033 et seq., p. 1039 et seq., Tolonen, Hannu: Oikeuslähdeoppi, Helsinki 2003 p. 142. As for older literature, see e.g. Taxell, DL 1977 and Muukkonen, P. J.: Yhteistyösopimukset ja lojaliteettivelvollisuus, Juhlajulkaisu Kekkonen, Helsinki 1975 (Muukkonen 1975).

¹² Muukkonen 1975 p. 358, Bygglin, Gustav: Om franchiseavtal och upplösningsfrihet, Oikeustiede 1978 p. 137 (Bygglin, Oikeustiede 1978), Taxell, DL 1977 p. 149, Taxell, JFT 1979 p. 493, Taxell, Lars Erik: Avtalsrättens normer, Åbo 1987 p. 60 (Taxell 1987), Muukkonen, LM 1993 p. 1046, Nicander, Hans: Lojalitetsplikt före, under och efter avtalsförhållanden, JT 1995–96 p. 33 (Nicander, JT 1995–96), Ramberg, Jan – Ramberg, Christina: Allmän avtalsrätt, åttonde upplagan, Stockholm 2010 p. 37 (Ramberg – Ramberg 2010).

¹³ Taxell, DL 1977 p. 151, Wilhelmsson 2008 p. 27.

¹⁴ This differs from e.g. Section 36 in the Contracts Act based on which unfair contract terms may be adjusted.

¹⁵ See e.g. Grönfors 1995 p. 39 and Nystén-Haarala 1998 p. 35.

¹⁶ See e.g. Munukka, Jori: Kontraktuell lojalitetsplikt, Stockholm 2007 p. 154 (Munukka 2007). See also decisions KKO 1993:130, KKO 2007:72, KKO 2008:91 of the Supreme Court, decision 15.8.2000 nr 1992 (S99/1787) of the Helsinki Court of Appeal and decisions NJA 1978 p. 147 and NJA 1990 p. 745 of the Swedish Supreme Court.

¹⁷ See e.g. Nicander, JT 1995–96 p. 32 and Holm, Anders: Den avtalsgrundade lojalitetsplikten – en allmän rättsprincip, Linköping 2004 p. 1 et seq. (Holm 2004).

¹⁸ See e.g. Ramberg – Ramberg 2010 p. 39.

must be willing to notify each other of, for example, changed circumstances. Prohibition of competition and secrecy obligations counterbalance this duty to inform, and a party that has provided certain information has a right to expect that it will not be used for purposes other than the agreement at hand.

However, in the interpretation of licensing agreements, it is crucial to understand that the significance of the principle of loyalty depends on the licensing agreement's degree of relationality. This concept originates in the relational contract theory, which is discussed below.

2.3 Macneil's Relational Contract Theory. One type of modern contract, the relational contract, has been the subject of extensive debate, especially in American law. This contract is often a long-term agreement that follows the market and contains open questions that the parties solve by negotiation throughout the term of the agreement. The contract document is only one part of the agreement, and contract negotiations, the conduct of the parties and trade custom are also significant.¹⁹

Relational contract theory criticises classical contract law for failing to give weight to parties' relationships in the interpretation of contracts.²⁰ Finnish and American contract law differ from each other in this respect. At least in principle, American contract law is focused on the written contract document alone (via the four corners rule/the parol evidence rule),²¹ which is why a need for a different theoretical approach has emerged in American law. In contrast, in Finnish contract law, contracts can be adjusted, and the principle of loyalty is considered as part of the law.

Nevertheless, the four corners rule is no longer strictly applied in every situation in the United States, and there are clear differences across states in this respect.²² Additionally, although Finnish law allows for the consideration of more extensive material in contract interpretation, it is not always performed in practice.²³ Moreover, the principle of good faith and fair dealing, which resembles

¹⁹ Goetz, Charles J. – Scott, Robert E.: Principles of Relational Contracts, Virginia Law Review 1981 p. 1091, Nassar 1995 p. 58, Macaulay, Stewart: Relational Contracts Floating on a Sea of Custom? Thoughts about the Ideas of Ian Macneil and Lisa Bernstein, Northwestern University Law Review 2000 p. 786 et seq., Speidel, Richard E.: The Characteristics and Challenges of Relational Contracts, Northwestern University Law Review 2000 p. 823 et seq., Macaulay, Stewart: The Real and the Paper Deal: Empirical Pictures of Relationships, Complexity and the Urge for Transparent Simple Rules, The Modern Law Review Limited 2003 p. 45 et seq.

²⁰ Gudel, Paul J.: Relational Contract Theory and the Concept of Exchange, Buffalo Law Review 1998 p. 769, Lees, Matthew: Contract, Conscience, Communitarian Conspiracies and Confucius: Normativism Through the Looking Glass of Relational Contract Theory, Melbourne University Law Review 2001 p. 82.

²¹ See Huhtamäki, Ari: Luotonantajavastuu, Helsinki 1993 p. 34, p. 37 et seq. and Ramberg – Ramberg 2010 p. 149.

²² Miller, Geoffrey P.: Bargains Bicoastal: New Light on Contract Theory, Cardozo Law Review 2010.

²³ Hemmo, Mika: Sopimus oikeus I, Helsinki 2003 p. 584 (Hemmo 2003a), Annola, Vesa: Yhteistoimintasopimuksen tulkinnan välineet, Oikeustieto 2010 p. 7. See also Ramberg – Ramberg 2010 p. 149.

our principle of loyalty, seems to be quite extensively applied in the United States.²⁴ The differences between Finnish and American contract law are, therefore, not as prominent as they may seem at first glance and do not prevent the application of certain aspects of relational contract theory in Finnish law.

One of the key representatives of relational contract theory is Ian R. Macneil. From his essential contract theory,²⁵ I have taken the idea of the spectrum of contracts, which places contracts on an imaginary axis according to their degree of relationality. The extreme transactional/discrete pole of the axis is represented by a contract that uses limited communication, is a simple economic exchange, has a short agreement process that begins with a clear agreement and is terminated by an equally clear performance, and can be completely and specifically planned in advance. No further cooperation is needed between the parties. The extreme relational pole of the axis is represented by a contract that uses extensive and deep communication, involves social exchange in addition to economic exchange, has a long agreement process that is likely to begin and terminate gradually, and that allows for structures and processes, but not substance, to be extensively planned. The success of the relation depends on cooperation, and the benefits and burdens are shared between the parties. Most contracts fall somewhere between these poles.²⁶

I use this idea below when I present the field of application of the principle of loyalty in the interpretation of licensing agreements.

3. The Interpretation of Licensing Agreements

3.1 General Contract Interpretation. The goal of contract interpretation is to identify the purpose of the contract, which is the common goal of the parties. When this purpose contradicts a contract's wording, the purpose prevails (if it can be identified). The wording of a contract remains, however, the starting point and primary source for interpretation. This convention is natural since parties usually write down their common aim in a contract.²⁷ A clear outcome based on this interpretation is not easily dismissed, especially if the contract does not use standard terms.²⁸

Nevertheless, contracts today should be interpreted as a whole. The focus should therefore be on all of the relevant circumstances and not solely on the written contract document.²⁹ The hierarchy of contract norms in interpretation can be defined as follows: 1. mandatory rules; 2. the parties' agreement; 3. trade

²⁴ See also Munukka 2007 p. 42 et seq.

²⁵ Macneil, Ian: *Relational Contract Theory: Challenges and Queries*, Northwestern University Law Review 2000 p. 892 et seq.

²⁶ Macneil, Ian: *The Relational Theory of Contract: Selected Works of Ian Macneil*, David Campbell (ed.), London 2001 p. 194, p. 199 (Macneil 2001).

²⁷ Hemmo 2003a p. 604 et seq., Saarnilehto, Ari: *Sopimusoikeuden perusteet*, Helsinki 2009 p. 149 (Saarnilehto 2009), Ramberg – Ramberg 2010 p. 131 et seq.

²⁸ Hemmo 2003a p. 584 et seq., p. 607 et seq.

²⁹ See e.g. decision KKO 2001:34 of the Supreme Court. See also Article 5:102 in PECL and DCFR II.-8:102.

custom and practice that the parties have mutually established; 4. optional provisions.³⁰

General methods of contract interpretation and general principles of law also apply to licensing agreements.³¹ However, when a licensing agreement between parties with equal bargaining power is interpreted, mandatory rules, which mainly apply to consumer contracts, are not useful. In addition, rules on licensing agreements are scarce in the legislation, and the existing rules are mainly optional.³²

3.2 The Interpretation of Licensing Agreements According to the Literature. As a result, the literature on Nordic intellectual property law widely recommends that contract interpretation should focus on wording.³³ The grounds for this from the viewpoint of patent licensing are the following. First, it is unclear whether there are any trade customs on which to rely.³⁴

Some fields have available model agreements, such as ORGALIME's model for an international technology licensing agreement. According to the literature, it is unclear whether standard terms of this kind constitute a trade custom, and standard terms are generally perceived as fairly important in the copyright field.³⁵ PECL and Unidroit Principles can be described as principles similar to trade custom and DCFR may belong

³⁰ Hemmo 2003a p. 564 et seq. See also Saarnilehto 2009 p. 148. Observe also Adlercreutz, Axel: Avtalsrätt II, Femte upplagan 2001, Lund 2004 p. 16, p. 18, who specifically places practice that the parties have mutually established ahead of trade custom.

³¹ Bernitz, Ulf – Karnell, Gunnar – Pehrson, Lars – Sandgren, Claes: Immaterialrätt och otillbörlig konkurrens, elfte omarbetade upplagan, Stockholm 2009 p. 372 (Bernitz et al. 2009), Rognstad, Ole-Andreas (i samarbete med Birger Stuevold Lassen): Opphavsrett, Oslo 2009 p. 343 (Rognstad 2009).

³² Karnell, Gunnar: Inledning till den internationella licensavtalsrätten, Stockholm 1985 p. 20 (Karnell 1985), Schovsbo, Jens: Immaterialretsavtaler, København 2001 p. 64 (Schovsbo 2001), Oesch, Rainer: Technologialisenssien ongelmakohtia, DL 2004 p. 918 (Oesch, DL 2004), Oesch, NIR 2005 p. 279, p. 283 et seq., Haarmann, Pirkko-Liisa: Immateriaalioikeus, 4. uudistettu painos, Helsinki 2006 p. 177 (Haarmann 2006), Rosén, Jan: Upphovsrättens avtal. Regler för upphovsmäns, artisters, fonogram-, film- och databasproducenters, radio- och TV-bolags samt fotografers avtal, Stockholm 2006 p. 108 (Rosén 2006), Oesch, Rainer – Pihlajamaa, Heli: Patentioikeus, Helsinki 2008 p. 169, p. 172 (Oesch – Pihlajamaa 2008), Bernitz et al. 2009 p. 372. See also NU 1963:6. Nordisk utredningsserie. Nordisk patentlovgivning, Pohjoismainen patenttilainsäädäntö – Betenkning angående nordisk patentlovgivning. Avgitt av samarbetende danske, finske, norske og svenske komitéer p. 286 (NU 1963:6).

³³ Karnell 1985 p. 66, Domeij, NIR 2002 p. 23 et seq., Oesch, DL 2004 p. 924, Oesch, NIR 2005 p. 282, Rosén 2006 p. 108 et seq., Oesch – Pihlajamaa 2008 p. 169 et seq., Levin, Marianne: Lärobok i immaterialrätt. Upphovsrätt, patenträtt, mönsterrätt, känneteckensrätt – i Sverige, EU och internationellt, Tionde upplagan, Stockholm 2011 p. 502 (Levin 2011), Schovsbo – Rosenmeier 2011 p. 519.

³⁴ Domeij, NIR 2002 p. 23 et seq., Domeij, Bengt: Patentavtalsrätt. Licenser, överlåtelse och samägande av patent, andra upplagan, Stockholm 2010 p. 20 et seq. (Domeij 2010).

³⁵ Schovsbo 2001 p. 62 et seq., p. 270, Välimäki, Mikko – Laine, Juha: Vastuunrajoituksista kolmannen osapuolen immateriaalioikeusväitteille ohjelmistotoimituksissa, DL 2004, p. 902, p. 905, Oesch – Pihlajamaa 2008 p. 172, Bernitz et al. 2009 p. 372, Schovsbo – Rosenmeier 2011 p. 531 et seq.

to the same group. According to the literature, PECL and Unidroit Principles are significant for international agreements on intellectual property rights, even where the parties have not referred to them.³⁶

Second, the applicable optional provisions in the legislation are scarce and offer little guidance.³⁷ Third, patent licenses are viewed as contracts *sui generis*, wherefore conclusions *ex analogia* from other types of contracts cannot be drawn.³⁸

There has nonetheless been a discussion in the literature of the possibility of relying upon the Sale of Goods Act when interpreting licensing agreements. The conclusion drawn from this discussion is that the Sale of Goods Act has not been perceived as useful.³⁹

Fourth, court practice on the interpretation of licensing agreements is scarce.⁴⁰ Domeij even suggests an interpretation of patent licenses in accordance with *caveat emptor* (let the buyer beware)⁴¹; this view probably is based on the classical idea of licensing agreements as instruments for risk division.⁴²

It is true that a licensing agreement can generate certain risks. It follows from the demand for absolute novelty in patent law that the parties cannot know with certainty that a patent is valid. A patent can be revoked if the invention is opposed. If a contract is concluded in the application stage, the parties cannot know for sure that a patent will be granted. There might also be uncertainty as to the economic value of the object of the contract. A competitor's innovation might transform the market, there might be no demand for a product, or manufacturing costs could turn out to be too high. It might also be in the interest of the licensee to claim that the contractual object does not exist. For this reason,

³⁶ Schovsbo 2001 p. 63 et seq.

³⁷ Schovsbo 2001 p. 64, Haarmann 2006 p. 177, Oesch – Pihlajamaa 2008 p. 169, p. 171, Domeij 2010 p. 16. See also Sections 43 and 44 in the Patents Act, as well as NU 1963:6 p. 286.

³⁸ Sandgren 1974 p. 116 et seq., Schovsbo 2001 p. 288, Domeij, NIR 2002 p. 23 et seq., Oesch, DL 2004 p. 919, Domeij, Bengt: Patenträtt. Svensk och internationell patenträtt, avtal om patent samt skyddet för växtsorter och företagshemligheter, Uppsala 2007 p. 137 (Domeij 2007), Bernitz et al. 2009 p. 377, Domeij 2010 p. 17.

³⁹ Plesner, Mogens: Nogle problemer i forbindelse med frivillig overdragelse af udnyttelsesretten af patentrettigheder, Juristen 1955 p. 205 (Plesner, Juristen 1955), Kockvedgaard, Mogens: Om købelovgivningens anvendelse på overdragelse af immaterialrettigheder, Tidsskrift for Rettsvidenskab 1965 p. 576 et seq., p. 581, Nordell, Per Jonas: Rätten till det visuella, Stockholm 1997 p. 294 et seq., Renman Claesson, Katarina: Övergång av upphovsrätt och närstående rätt och de sakrättsliga konsekvenserna, Annina H. Persson m.fl. (red.), Immaterialrätt & sakrätt, Stockholm 2002 p. 161, Oesch, DL 2004 p. 919, p. 925, Rosén 2006 p. 110 et seq., Liin, Birgit: Misligholdelse af immaterialretsaftaler, København 2009 p. 58, Domeij 2010 p. 17 et seq., Levin 2011 p. 513 et seq.

⁴⁰ Domeij 2007 p. 137.

⁴¹ Domeij, NIR 2002 p. 35, Domeij 2010 p. 187. See also, e.g., Kivimäki, T. M. – Ylöstalo, Matti: Lärobok i Finlands civilrätt, Allmän del, Helsingfors 1961 p. 328 for information on the content of *caveat emptor*.

⁴² Karnell 1985 p. 36.

it may be wise for a contract to include a no challenge clause, according to which the licensee may not challenge the validity of the licensed intellectual property right.⁴³ From the point of view of a licensor, there is also a risk that the licensee alone might benefit from the invention and possible improvements that he made to it. Therefore, it may be wise for a contract to also include a grant back clause.⁴⁴

Risks of this kind might support the notion that licensing agreements should be exhaustive and cover “everything” and that they should be interpreted narrowly according to their wording. However, my view is that a licensing agreement often is a more long-term and close form of cooperation, making it a modern contract. Such a contract should be flexible and interpreted in accordance with modern contract law. Therefore, the principle of loyalty should be given importance.

In the Nordic literature on intellectual property law the rights owners seem to be favoured over licensees when licensing agreements are interpreted. The principle of narrow interpretation of copyright transfers, for example, is largely accepted. This is established according to the *travaux préparatoires* of the Copyright Act,⁴⁵ court practice,⁴⁶ and the literature. The agreement is then interpreted in favour of the author and when it is unclear, only the rights specifically stated in the written contract are considered as transferred.⁴⁷ According to some scholars, the principle of narrow interpretation apply also to patent transfers.⁴⁸ Domeij, in contrast, finds that in patent law there is no general need to protect a weaker licensor against hasty transfers.⁴⁹ Some Nordic scholars are nonetheless of the opinion that transfers involving all kinds of intellectual property rights should be narrowly interpreted,⁵⁰ and according to Oesch, this principle is a key one in the transfer of intellectual property rights.⁵¹

The literature also presents the opposite view; according to some scholars, it is unclear that even transfers of copyright should be interpreted narrowly. Because the protection of the weaker party is the rationale, it cannot be automati-

⁴³ See e.g. Sandgren 1974 p. 112 et seq. See also Bernitz et al. 2009 p. 364 and Sund-Norrgård 2011 p. 173 et seq.

⁴⁴ See e.g. Sund-Norrgård 2011 p. 176 et seq.

⁴⁵ Komiteanmietintö 1953:5, Ehdotus laiksi tekijänoikeudesta kirjallisiin ja taiteellisiin teoksiin, Helsinki 1953 p. 63, Statens Offentliga Utredningar 1956:25, Upphovsmannarätt till litterära och konstnärliga verk. Lagförslag av Auktorrättskommittén p. 277.

⁴⁶ Decisions KKO 1984 II 26, KKO 2005:92 and KKO 2011:92 of the Supreme Court.

⁴⁷ Oesch, Rainer – Vesala, Juha: Ohjelmistolisenssit ja tekijänoikeuden raukeaminen, DL 2004 p. 257, Harenko, Kristiina – Niiranen, Valtteri – Tarkela, Pekka: Tekijänoikeus. Kommentaari ja käsikirja, Helsinki 2006 p. 288 (Harenko et al. 2006), Rosén 2006 p. 151 et seq., Nordell, Per Jonas: Tolkningsprinciper i upphovsrättsavtal, NIR 2008 p. 313 et seq. (Nordell, NIR 2008), Rognstad 2009 p. 343 et seq., Levin 2011 p. 505 et seq., Schovsbo – Rosenmeier 2011 p. 521 et seq.

⁴⁸ Plesner, Juristen 1955 p. 204, Stenvik, Are: Patenträtt, Oslo 2006 p. 455 (Stenvik 2006).

⁴⁹ Domeij 2010 p. 137.

⁵⁰ Schovsbo 2001 p. 257 et seq., Levin 2011 p. 506, Schovsbo – Rosenmeier 2011 p. 521.

⁵¹ Oesch, DL 2004 p. 925.

cally applied when there is no weaker party to protect, such as when the contract is concluded between two companies.⁵²

The principle of narrow interpretation has also been described as a development of the general contract law principle *in dubio contra stipulatorem*,⁵³ which has not proven useful for contracts that are the result of negotiations and may contain intentional gaps and ambiguities.⁵⁴

Licensing agreements should be interpreted as a whole, which means that also the interests of the licensee and other relevant circumstances should be considered. The principle of narrow interpretation cannot be the automatic starting point simply because the object of interpretation is a copyright license.⁵⁵ In contrast, sufficient weight should be given to the principle of loyalty to strike a balance between the interests of the licensor and those of the licensee. This approach also holds when a licensing agreement is terminated, which will be discussed below.

4. Interpreting Licensing Agreements of Different Degrees of Relationality

4.1 The Application of the Principle of Loyalty. A licensing agreement's degree of relationality is important in the application of the principle of loyalty because it helps to identify the field of application for this principle. When a licensing agreement is close to the relational pole of the imaginary axis discussed above, the principle of loyalty has real impact and can even alter contract terms. In contrast, if a licensing agreement can be placed close to the discrete/transactional pole, the importance of the principle is limited.⁵⁶

Different factors can be used to determine a licensing agreement's degree of relationality and can be found outside the contract or through an analysis of it. One example of the former is the degree of interdependence between the parties. If they depend on one another economically, for example, they require cooperation based on loyalty and trust because they are more vulnerable. In such a situation, it is likely that their agreement's degree of relationality is high.

An example of the latter is the contractual technique. A contract can be considered a framework for cooperation, or it can be a more precise document that covers most, or even all, aspects of a transaction. It is unlikely that parties who distrust each other would enter a non-exhaustive type of contract with explicit gaps. Therefore, such an agreement is likely to be relational. Distrusting parties who focus on division of risk often feel the need for an exhaustive and precise

⁵² Harenko et al. 2006 p. 289, Røynås, Ingjerd: Spesialitetsprinsippet i opphavsretten – et relativt prinsipp, Aase Gundersen og Are Stenvik (red.), *Aktuell immaterialrett*, Oslo 2008 p. 304 et seq. (Røynås 2008), Rognstad 2009 p. 345 et seq.

⁵³ Nordell, NIR 2008 p. 328, Bernitz et al. 2009 p. 373, Rognstad 2009 p. 346.

⁵⁴ Taxell 1987 p. 75, Ramberg, Jan: Medveten otydlighet som avtalsrättsligt problem, JT 1992–93 p. 359. See also Votinius, Sacharias: Varandra som vänner och fiender. En idékritisk undersökning om kontraktet och dess grund, Stockholm 2004 p. 214.

⁵⁵ See also Røynås 2008 p. 311 et seq.

⁵⁶ For more information, see Sund-Norrgård 2011, chapters 6 and 7.

agreement. Therefore, such an agreement is likely to be more transactional.⁵⁷ In my view, the parties can, in their use of a classical contracting technique, significantly hinder the impact of the principle of loyalty in the interpretation of their agreement.

Nonetheless, it should be kept in mind that freedom of contract is limited by the principle of loyalty and not the other way round. For example, the principle of *good faith and fair dealing* in Article 1:201 in PECL, Article 1.7 in Unidroit Principles and in DCFR III.–1:103 is mandatory and may not be excluded or limited by contract. The contract law literature has also stated that the purpose of the judicial system cannot be to protect disloyal behaviour. The principle of loyalty is therefore a prescriptive norm that always applies.⁵⁸ Nevertheless, my view is that this is mainly true for the moral foundations of the principle of loyalty⁵⁹ because the contract also has an impact on the content of the principle of loyalty. This is true also for PECL and DCFR.⁶⁰

Therefore, when I state that the importance of the principle of loyalty depends on the licensing agreement's degree of relationality, I imply that the content of the contract should also be taken into consideration. Although the principle of loyalty cannot and should not be avoided, the content of a contract concluded between parties of equal bargaining power can have an impact on what, in their case, is to be considered loyal behaviour.⁶¹

4.2 The Example of Termination. In Finland, as in other Nordic countries, a party may, as the main rule, terminate a (long-term) open-ended contract at any time by giving a reasonable period of notice, as long as this right is not limited in the law or in the agreement. An agreement with no fixed term is normally considered to be open-ended.⁶²

Nevertheless, Domeij and Stenvik find it unlikely that a patent license that is not concluded for a fixed term can be terminated by a reasonable period of notice.⁶³ Similarly, Bernitz finds that the right to terminate a publishing contract is

⁵⁷ For more information on factors that can be used to determine a licensing agreement's degree of relationality, see Sund-Norrgård 2011, chapter 6.

⁵⁸ Holm 2004 p. 18.

⁵⁹ See also Nazarian, Henriette: *Lojalitetsplikt i kontraktsforhold*, Oslo 2007 p. 136 (Nazarian 2007).

⁶⁰ *Principles of European Contract Law, Parts I and II*, Ole Lando – Hugh Beale (ed.): The Netherlands 2000 p. 116, *Draft Common Frame of Reference (DCFR) Full Edition Volume 1*, Christian von Bar – Eric Clive (ed.), Munich 2009 p. 677.

⁶¹ See also Nazarian 2007 p. 137.

⁶² Hemmo, Mika: *Irtisanomisvapaus ja pitkäkestoiset liikesopimukset*, DL 1996 p. 328 et seq. (Hemmo, DL 1996), Hemmo, Mika: *Sopimusoikeus II*, Helsinki 2003 p. 376 et seq. (Hemmo 2003b), Hedwall, Mattias: *Tolkning av kommersiella avtal, andra upplagan*, Stockholm 2004, p. 187, Bernitz, Ulf: *Uppsägning av förlagsavtal*, NIR 2009 p. 349 (Bernitz, NIR 2009), Norros, Olli: *Vahingonkorvaus kestopimusten oikeudettoman irtisanomisen perusteella*, DL 2009 p. 633 et seq. (Norros, DL 2009). See also decisions KKO 2010:69 and KKO 1982 II 1 of the Supreme Court, Article 6:109 in PECL and DCFR III.–1:109.2.

⁶³ Stenvik 2006 p. 456, Domeij 2010 p. 368, p. 371.

unclear because the publisher's need to reduce his economic risk taking competes with the right to terminate.⁶⁴

It is clear that a patent license will not stay in force for longer than the patent itself, which is 20 years at the most.⁶⁵ However, a licensing agreement that is not concluded for a fixed term must, contrary to the view presented above, be observed as open-ended, which makes the starting point the right to terminate the agreement with reasonable (i.e., sufficiently long) notice of termination. I am not alone in my view.⁶⁶ However, there is an impact on the outcome if the contract is an exclusive patent license and if the license fee is paid in the form of a one-time payment. This would be in accordance with the reasoning in the literature for computer programs, where the right to terminate might not exist if the computer program is paid for with a one-time payment.⁶⁷ Such an agreement is essentially a transactional type of agreement (a sale of goods) and not an on-going form of cooperation. Therefore, it cannot be terminated with a reasonable period of notice.

The contract law literature has questioned the right to terminate an on-going contract in situations where it is particularly important for one of the parties for the contract to stay in force. This situation may arise if a party has made large investments that will become useless if the contract is terminated, especially if he made the investments on the request or order of the terminating party. The investing party might, in other words, have a right to assume that the contract will stay in force until his investments have been covered.⁶⁸ In particular, patent licenses have been described as cooperative agreements by nature that, therefore, should not be easily terminated.⁶⁹ It has also been stated that the period of notice and the grounds for termination should be viewed as a whole; a short period of notice demands objective grounds for termination.⁷⁰

The function of the period of notice is to protect the "innocent" party. In a situation where the parties have cooperated closely for a long period of time and large investments are involved, a long period of notice might be required.

⁶⁴ Bernitz, NIR 2009 p. 361 et seq. See also decision 2008-04-03, T-1512-07 by Skåne and Blekinge Court of Appeal (Sweden).

⁶⁵ Schovsbo – Rosenmeier 2011 p. 550. Observe the possibility for additional protection for pharmaceuticals, see Domeij, Bengt: Läkemedelspatent. Patent på läkemedel i Europa ur ett rättsvetenskapligt och rättsekonomiskt perspektiv, Stockholm 1998 p. 425 et seq., Domeij 2007 p. 127 et seq. and Norrgård, Marcus: Patentin loukkaus, Helsinki 2009 p. 31 et seq.

⁶⁶ See Grönfors 1995 p. 25 and Vuorijoki, Jari: Yhteistoimintasopimukset – Lisenssisopimus, Ari Saarnilehto (toim.), Varallisuusoikeus, Oikeuden perusteokset, Helsinki 2001 p. 1187.

⁶⁷ Takki, Pekka: IT-sopimukset, käytännön käsikirja, Helsinki 2003 p. 179, Domeij 2010 p. 371.

⁶⁸ Bygglin, Oikeustiede 1978 p. 138 et seq., Hemmo, DL 1996 p. 331 et seq., Hemmo 2003b p. 385 et seq., Halila, Heikki – Hemmo, Mika: Sopimustyytit, Helsinki 2008 p. 275 et seq. (Halila-Hemmo 2008).

⁶⁹ Sandgren 1974 p. 80 et seq.

⁷⁰ Bygglin, Oikeustiede 1978 p. 137 et seq., Hemmo, DL 1996 p. 330 et seq., Runesson, Eric M.: Rekonstruktion av ofullständiga avtal. Särskilt om köplagens reglering av risken för ökade prestationskostnader, Stockholm 1996 p. 360, Hemmo 2003b p. 385 et seq., Halila – Hemmo 2008 p. 11, p. 276 et seq.

However, in the opposite situation, it might be plausible to terminate a contract immediately.⁷¹

Let us take an imaginary patent license as an example and assume that the licensor wants to terminate it. According to the wording of the license, the period of notice is three months, and no special grounds are needed for termination. If this licensing agreement stipulates long-term, close cooperation, which makes it a contract with a high degree of relationality, it is plausible that the licensor, with reference to the principle of loyalty, may *not* have a right to terminate it with three months' notice without grounds. The termination clause might, in this situation, generate a disloyal, unbalanced result, especially if the licensee has made large investments on the request or order of the licensor that become useless after termination.

Parties to a long-term cooperative agreement normally strive for something more than short-term profit. For this reason, they cooperate and focus on the principal aims of the contract instead of keeping track of its minor details.⁷² Because the parties depend on one another, it is usually in both their interests to keep the agreement in force. Therefore, they do not address problems by contemplating termination; it is more logical for the parties to solve their problems through discussion and negotiation.⁷³

However, it is usually difficult to keep a contract in force against the will of one of the parties. The result is rarely a strong relationship.⁷⁴ Thus, although the hypothetical licensing agreement in our example could be described as a contract with a high degree of relationality, which protects cooperation and prioritises the continuance of the contract,⁷⁵ the starting point cannot be that the parties have no termination right. Surely a party is allowed to pursue a profit, and sometimes circumstances change in such a manner that termination is legitimate.⁷⁶

Although the right to terminate is an important part of such an agreement, it is more rational for the parties to first attempt to solve problems through renegotiation. The duty to renegotiate might also follow from a renegotiation clause in the contract. The willingness to renegotiate can, however, be demanded of a party also with reference to the principle of loyalty, even when the contract does not include a clause of this kind. In the example, it is therefore likely that the right to terminate must be preceded by genuine renegotiations whether

⁷¹ Hemmo, Mika: *Sopimusoikeuden oppikirja*, Helsinki 2008 p. 528 et seq., Norros, DL 2009 p. 634.

⁷² Nassar 1995 p. 218 et seq., Grönfors 1995 p. 22 et seq.

⁷³ See e.g. Pöyhönen 1988 p. 211 et seq., Nassar 1995 p. 218 et seq., Taxell 1997 p. 39, Nystén-Haarala 1998 p. 8, p. 27, p. 35, Macneil 2001 p. 2001.

⁷⁴ Eisenberg, Melvin A.: *Why There Is No Law Of Relational Contracts*, *Northwestern University Law Review* 2000 p. 819. See also Hemmo, DL 1996 p. 342.

⁷⁵ Macneil 2001 p. 196 et seq.

⁷⁶ See also decisions 09.06.2005 no 640 and 09.06.2005 no 641 of the Kouvola Court of Appeal on the franchisee's right to terminate a franchising agreement that is no longer profitable.

the contract includes a renegotiation clause or not. It is also likely that the period of notice should be longer than three months.

The outcome can be different if the licensee in the example has behaved disloyally towards the licensor, which broke the trust between them. In this case, the licensor may have the right to terminate the agreement with three months' notice (unless it is within his right to terminate with immediate effect) because it is unfair to expect him to continue to closely cooperate with a party he does not trust.⁷⁷

Let us now assume that the example licensing agreement focuses on division of risk instead of long-term cooperation. Perhaps the parties have not made any large investments, and perhaps the agreement is supposed to be in force for a short period of time. In such a case, it is possible that the agreement is exhaustive because the circumstances are not likely to alter. Furthermore, such an agreement does not include a renegotiation clause but may include a merger clause that declares the contract to be the complete and final agreement between the parties, thereby excluding previous agreements or negotiations. It might also include a written modification clause stating that amendments to the contract must be in writing, thereby excluding oral statements and the like after the conclusion of the contract.⁷⁸ The degree of relationality for such a licensing agreement is low, and the principle of loyalty has little impact on its interpretation. The contract should, in other words, be interpreted according to its wording.

5. Concluding Remarks

This article discussed the interpretation of licensing agreements to highlight that the approach to contract interpretation in the Nordic intellectual property law literature continues, to a great extent, to follow classical contract law, which focuses solely on contract wording. In my view, there is not sufficient reason to maintain such an approach because licensing agreements often take the form of long-term cooperation for a common goal. However, a licensing agreement can also sometimes be a more discrete agreement. For this reason, a licensing agreement should be interpreted as a whole, and the principle of loyalty should be given sufficient importance for the case at hand. In other words, a balance needs to be struck between freedom of contract and relational needs. The idea of different degrees of relationality of contracts is helpful in systematising the field of application of the principle of loyalty.

⁷⁷ Hemmo, DL 1996 p. 335, Domeij, Bengt: Teknikreglering i forsknings- och utvecklingsavtal – särskilt vid stamcells forskning, NIR 2004 p. 232.

⁷⁸ See e.g. Sund-Norrgård 2011 p. 178 et seq.