



Assessing Copyright and Related Rights Systems: Unauthorized Use of Copyrighted Works in Physical Form. Report on Piloting in Finland.

This report is the result of the first pilot study implementing Methodology Card 20 – *Unauthorized Use of Copyrighted Works in Physical Form*, one of the 37 indicators constituting a methodology framework for assessing the operation of national copyright and related rights systems. The methodology framework has been developed at the Foundation for cultural policy research (Cupore) in Finland as part of a project financed by the Finnish Ministry of Education and Culture. The pilot study was conducted by Jussi Ilvonen and Ville Toro, students at the Faculty of Law at the University of Helsinki, as part of an internship at the Foundation for Cultural Policy Research between February and June 2013. The work was supervised by Professor Rainer Oesch (University of Helsinki), the steering group of the project, as well as the core project team. The results were first published in February 2014 on the website of Cupore.

A handbook presenting the methodology framework is available on the website of Cupore at www.cupore.fi.

Cupore webpublications 39:34

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Executive summary

This document presents data collected in application of a methodology framework to assess the operation of copyright and related rights systems. More precisely, the information and analysis below correspond to Methodology Card 20 presented in the methodology handbook, titled "Unauthorized Use of Copyrighted Works in Physical Form". The goal of this report is to provide an estimate on the volume of unauthorized use of physical copyrighted works in Finland.

The first information source used in determining the volume of unauthorized use of physical copyrighted works are the annual gallup surveys (*Tekijänoikeusbarometri*) conducted by Lyhty (*Luovan työn tekijät ja yrittäjät*), a co-operation project of the Finnish creative industries. The second source of information is the statistics of customs, providing information on the number of confiscated products as well as the number of exposed copyright infringements. Finally, for the purposes of determining the dimension of the phenomenon, this data is compared to the size of the lawful markets. Between 2009 and 2011, customs retained on average around 800 articles per year on the basis of a potential copyright infringement. Compared to the customs value of imported audiovisual recordings and software, the number of confiscated articles is very small.

The conclusion is that in Finland the volume of unauthorized use of copyrighted works in physical form is very small. However, it is not possible to clearly distinguish between commercial and non-commercial use from the data.

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Introduction

A. CONTEXT OF THE PILOT STUDY

A methodology framework for assessing the operation of national copyright and related rights systems has been developed at the Foundation for cultural policy research (Cupore) in Finland. It is a collection of tools for achieving a systematic assessment of the functioning, performance and balanced operation of national copyright and related rights systems.

In the methodology, the assessment is determined through a framework consisting of so-called description sheets and methodology cards. The description sheets constitute guidelines to produce a comprehensive presentation and description of a country's copyright and related rights system and its operating environment. The methodology cards propose the collection of specific sets of data, either quantitative, descriptive or qualitative, that will be used as indicators of the functioning, performance and balanced operation of the system. Description sheets and methodology cards are accompanied by detailed information on the data to be collected, as well as analysis guidelines that will help connect them to each other.

The methodology framework is meant to be continuously improved through application feedbacks. For more information, see the Cupore website, www.cupore.fi/copyright.php.

This report presents data collected in application of Methodology card 20 of the methodology framework, titled "Unauthorized use of copyrighted works in physical form". It is the result of the first pilot study applying this indicator in Finland¹.

This study was conducted by Jussi Ilvonen and Ville Toro, students at the Faculty of Law at the University of Helsinki, as part of an internship at the Foundation for Cultural Policy Research between February and June 2013. The work was supervised by Professor Rainer Oesch (University of Helsinki), the steering group of the project, as well as the core project team.

B. Presentation of the indicator

The indicator implemented here is part of the third pillar of the methodology framework, "Operational balance of the copyright system", and its fourth area, "Infringement, Opinions and Public Acceptance". It aims to estimate the volume of unauthorized use of copyrighted works in physical form, in order to support the analysis of the operation of the national copyright and related rights system.

In order to define what constitutes 'unauthorized use', the definition of 'use' should be first clarified. In different legal systems the scope of copyright is defined in different ways. In Finnish legislation, the use of copyrighted works is understood only as copying of such works, and making them available to the public. These are the economic rights being under the exclusive competence of an author or a right holder.² This definition is also the basis for the term 'use' in this report.³

¹ The study was conducted based on the draft version of the Methodology Handbook, dated 19.7.2012. This report is modified from the original report to better correspond to the version of the Methodology Handbook dated 20.12.2013.

² Haarmann 2005, p. 110–111.

³ The term 'infringement' may be defined as violating the range of protection of an author or a copyright holder, as described in the Copyright Act (404/1961) (Sorvari 2007, p. 1). Altogether, the term 'unauthorized use' may be undestood – on a very abstract level – as an equivalent to 'infringement of copyright'.

However, the relationship between unauthorized use and the liability for an infringement has been seen as a more complicated issue, because liability for copyright infringement may also come in question when someone violates the so-called moral rights of the author or otherwise violates the Copyright Act. More about this, see, e.g., Sorvari 2007, p. 29–32.

In the methodology handbook, the assessment of the level of copyright infringement is divided between physical and digital unauthorized use (presented in Methodology cards 20 and 21). This distinction has been chosen because it allows to present copyright infringement taking place in two different and clearly identifiable realms, and also because the data in these two areas is usually collected with different methods. It could also be interesting to focus on a distinction between illegal activities committed for the purposes of commercial gain and those taking place for other purposes. This distinction proves difficult to make in practice, since it is based on the intent of the infringer. In this report, the amount of unauthorized use that could be related to a commercial purpose has been assessed whenever possible.

Methodology card 20 therefore addresses the volume of unauthorized physical copies as a first indicator to evaluate the level of copyright infringement. This analysis should include the main forms of unauthorized use in physical form: pirate copies, counterfeits and bootlegs.4 The phenomenon could also be described through its evolution with time-series data. Moreover, in order to identify how acute the problem of unauthorized use is for the suppliers of the copyrighted goods, these data should be compared to the size of the lawful markets (information collected using Methodology cards 2 and 3). Information on the confiscations of unlawful products both inside the country as well as at customs will be useful for the purposes of comparison; for example, a large amount of confiscated goods compared to the amount of copyrighted goods imported in the country might be related to a lack of actual court convictions or too low sanctions lacking exemplary effect.

Some possible explanations for a high level of unauthorized use by individuals are a lack of knowledge on copyright rules and difficulties in accessing legal content. Therefore, the data on the volume of pirate copies and the level of unauthorized use indirectly address the functioning of the information activities and education, enforcement, operation of the markets for copyrighted works, and access to copyrighted works. Other crucial factors in stakeholders' behavior are the public acceptance and the perceived legitimacy of copyright rules.

A methodology card presenting the indicator can be found in Appendix A of this report.

C. METHODS

In the case of Finland, perhaps the most important source of information in evaluating the volume of unauthorized use of copyrighted works in physical form is the statistics provided by the Customs. However, other sources, such as past gallup surveys on copyright and unauthorized use, are also part of the analysis. The method chosen was desktop studies and the data was complemented by a series of expert interviews.

Lists of national and international information sources used for this report as well as a list of interviewees and commentators can be found in the Appendices.

⁴ One common way to systematize the unauthorized use in physical form is to divide the infringing products into three categories: a) pirate copies, b) counterfeits and c) bootlegs. The first term is used to describe, e.g., audio records, visual records or games on a tangible platform, which contain unauthorized copies of copyrighted material. The platform may or may not be similar to the original. Counterfeits differ from the first group in that the appearance of a work is also imitated very closely. Bootlegs refer to an unauthorized recording on a tangible platform which contains a live performance, recorded at the location or via television or radio broadcast. A noteworthy issue is that especially in case of counterfeits, other intellectual property rights may also have been simultaneously infringed concerning the same goods, for example trademarks or design patents. However, in this presentation there is no distinction between the three previously mentioned categories, because no such divison exists in the data available.

Results

SECTION 1. TEKIJÄNOIKEUSBAROMETRI: GALLUP SURVEYS ON COPYRIGHT AND UNAUTHORIZED USE

Lyhty (*Luovan työn tekijät ja yrittäjät*), a co-operation project of the Finnish creative industries, has annually published a gallup survey on copyright and unauthorized use (*Tekijänoikeusbarometri*).⁵ The data on 'physical piracy' (*tallennepiratismi*) between 2008 and 2012 is presented in the table below.

Table 1. Percentage of studied households in which 'pirated discs, movies or computer games' had been 1) bought in Finland or 2) imported to Finland in the last year. ⁶					
	2008	2009	2010	2011	2012
Pirated recordings bought from Finland	3	1	n/a	2	1
Pirated recordings imported to Finland	5	3	n/a	3	4

As can be noticed from the data, 'physical piracy' is quite rare in Finland. Only in one to five percent of the studied households 'pirated discs, movies or computer games' had been bought or imported. However, the figures have stayed relatively constant during the studied time period. It is likely that the figures provided here indicate the volume of unauthorised use for private use only.

SECTION 2. STATISTICS OF THE CUSTOMS

A. OVERVIEW

Some quantitative data on the volume of unauthorized use of copyrighted works in physical form is provided in the statistics of the Customs. The parameters studied here are the number of confiscated products and the number of exposed copyright offences and violations.

B. Number of confiscated products

■ LEGAL FRAMEWORK

The competence of the Customs to retain goods under the national law is based on Section 14(3) of the Customs Act, often referred to as 'administrative retention' (hallinnollinen haltuunotto). According to the Section, the Customs may 'retain goods exported from or imported to the country, if there is reasonable cause for this in order to prevent or investigate an offence'. The granting of seizure (takavarikko) is decided afterwards separately in another process.

⁵ The gallup surveys concern, *inter alia*, the volume of 'online piracy' (*nettipiratismi*) and 'piracy of physical products' (*tallennepiratismi*) as well as the public opinion on the moral reprehensibility of piracy. They are available (in Finnish) at www.kulttuuri.net/gallupit. Last visited on 19 August 2013.

⁶ Tekijänoikeusbarometri 2008 – 2012, available at Lyhty homepage, http://www.kulttuuri.net/gallupit. Last visited on 19 August 2013.

In certain situations, the measures under European Council Regulation (EC) No 1383/2003 may also come available. A right holder may apply for action by the customs authorities in cases where goods suspected of infringing intellectual property are found. When the Customs observes goods that are suspected of infringing an intellectual property right covered by the application, it must suspend release of the goods or detain them. In cases where such application has not been made, the customs authorities may act *ex officio* and suspend the release of goods or detain them when there are 'sufficient grounds' for suspecting that the goods infringe an intellectual property right. In Finland, the requirement of 'sufficient grounds' has been interpreted broadly; in practice goods are detained whenever there is merely a slight doubt about their genuine character. Where goods are suspended from release or detained under the Regulation, a separate decision for seizure under the national law is not required.

However, the Regulation does not apply to private importation. Article 3(2) of the Regulation states that "[w]here a traveller's personal baggage contains goods of a non-commercial nature within the limits of the duty-free allowance and there are no material indications to suggest the goods are part of commercial traffic, Member States shall consider such goods to be outside the scope of this Regulation".

STATISTICAL DATA

Between 2008 and 2012, on basis of the national law, the Customs retained on average around 800 articles per year because of a potential copyright infringement. The number of retained articles has increased steadily over the studied period. However, it is not possible to evaluate whether the articles retained were intended for commercial or non-commercial use.

On the other hand, interceptions under the Regulation were very few. We were unable to obtain statistics between 2008 and 2010, but according to the interviews with customs officials, interventions on the basis of potential copyright infringement have remained constantly rare. As stated earlier, the Regulation does not apply to private importation and thus, every interception indicates at least a suspicion of unauthorised use for certain 'commercial purposes'. The number of interceptions under the Regulation seems to indicate that unauthorized use of physical products for commercial gain is very rare in Finland.

Table 2. Number of articles retained by the Customs on the basis of potential copyriging infringement. 11			opyright		
	2008	2009	2010	2011	2012
Retention under Section 14(3) of the Customs Act	n/a	759	789	924	n/a
Interception under European Council Regulation (EC) No 1383/2003	n/a	n/a	n/a	0	6

It must be remembered that at least some of the illegal imports most certainly remain unnoticed by the Customs. Moreover, some of the works could be produced (and used) inside the borders of Finland. Such activity does not reflect in the above statistics.

⁷ Article 5(1) of the European Council Regulation No 1383/2003.

⁸ Article 9(1) of the European Council Regulation No 1383/2003.

 $^{^{9}}$ Article 4(1) of the European Council Regulation No 1383/2003.

¹⁰ Juthström – Lilja 2012, p. 480.

¹¹ Maria Damlin and Lasse Ryyttäri of the Finnish Customs.

■ LEGAL FRAMEWORK

In Finland, there are two main forms of punishable copyright infringements: 1) *copyright offence*, which is regulated under the Criminal Code and 2) a less severe *copyright violation*, which is regulated under the Copyright Act.¹² The essential elements of a copyright offence require that the infringement is conducted

- willfully,
- with intent to profit and
- in a manner conducive to causing considerable detriment or damage to the person holding a right.¹³

If one or more of these requirements are not fulfilled, the infringement may still be punishable as a *copyright violation*. Importation as well as bringing for transit is prohibited under both provisions.¹⁴

■ STATISTICAL DATA

As may be noted from the table below, copyright offences exposed by the Customs are very few; at most there have been 3 cases per year. On the other hand, copyright violations are much more common. However, their number has decreased significantly during the studied time frame.

Table 3. Number of copyright offences and violations that have come to knowledge of the Customs. 15					
	2008	2009	2010	2011	2012
Copyright offence	3	0	1	0	0
Copyright violation	56	38	27	15	13
Total	59	38	28	15	13

For the purposes of studying the level of commercial piracy, the number of copyright offences is perhaps the most informative parameter. This is because a copyright offence, as an act, must involve *intent to profit* on behalf of the offender in all cases except infringements that occur in an online environment. Again, the data provided seems to indicate that unauthorized use of physical copyrighted works is rather rare in Finland, especially for 'commercial purposes'.

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¹² Chapter 49, Section 1 of the Criminal Code and Section 56 a of the Copyright Act.

¹³ With regards to infirngements in an online environment an intent to profit is not required.

¹⁴ For more information on copyright offence and violation, see pilot reports applying Description sheet 9 – Sanctions and remedies for copyright infringement and Methodology Card 7 – Application of sanctions and remedies for copyright infringement.

¹⁵ Saila Soini of the Finnish Customs.

Section 3. Reference information: the size of the lawful markets

The table below presents figures concerning the imported audiovisual recordings¹⁶ and software. Their customs value has decreased steadily over the studied time frame. This is most likely because of the gain in popularity of online marketplaces and services, such as iTunes and Spotify, and the expansion of online piracy. The number of customs clearances varied between 6234 in 2009 and 2896 in 2012. The data can be useful as reference information even though no articles produced in Finland are included.

Table 4. Imported audiovisual recordings 17 and software by customs value and number of customs clearances. 18				ustoms	
	2008	2009	2010	2011	2012
Customs value €	n/a	14 058 854	12 235 897	11 815 427	n/a
Number of customs clearances	n/a	6 234	4 680	4 625	2 896

We were unable to obtain neither the value of confiscated copyrighted works nor the total number of imported articles and thus, a precise comparison between the sizes of lawful and unlawful markets is not possible here. However, judging from the number of confiscated articles and the customs value of imported audiovisual recordings and software, it may be concluded cautiously that the size of the unlawful markets of physical copyrighted works is only marginal in comparison to the size of the lawful markets.

¹⁶ The definition of audiovisual recordings used by the Finnish Customs includes all types of audio and visual recordings, such as music, motion picture and video recordings.

¹⁷ Including all types of audio and visual recordings

¹⁸ Maria Damlin of the Finnish Customs. The figures are calculated by summing up the corresponding data on CN codes 8523405100, 8523495100, 8523403900 and 8523493900.

Conclusions

A. ANALYSIS AND SUMMARY OF THE RESULTS

The research demonstrated the availability of information on the amount of unauthorized use of copyrighted works in physical form. Some of the data could also be interpreted to deduce the part of this unauthorized use that had commercial purposes.

The gallup surveys conducted by Lyhty (*Luovan työn tekijät ja yrittäjät*) confirm that 'physical piracy' is quite rare in Finland. In the surveys conducted between 2008 and 2012, one to five percent of the studied households had bought in Finland or imported to Finland 'pirated discs, movies or computer games' in the last year.

Between 2008 and 2012, the Customs retained on average around 800 articles per year because of a potential copyright infringement on the basis of the national law. Interceptions under the European Council Regulation (EC) No 1383/2003 (European Council Regulation concerning customs action against goods suspected of infringing certain intellectual property) were very few. The Regulation does not apply to private importation and thus, every interception indicates at least a suspicion of unauthorized use for certain 'commercial purposes'. The number of interceptions under the Regulation seems to indicate that unauthorized use for the purpose of commercial gain is very rare in Finland.

In Finland, there are two main forms of punishable copyright infringements: 1) copyright offence, which is regulated under the Criminal Code and 2) a less severe copyright violation, which is regulated under the Copyright Act. Copyright infringements exposed by the Customs were mostly copyright violations. The number of copyright violations has decreased significantly during the studied time frame. Exposed copyright offences were very few. For the purposes of studying the level of unauthorized use for commercial purposes, the number of copyright offences exposed by the Customs is perhaps the more informative parameter. This is because a copyright offence, as an act, must involve intent to profit on behalf of the offender in all cases except infringements that occur in an online environment. Again, the data seems to indicate that unauthorized use of physical copyrighted works is rather rare in Finland, especially for 'commercial purposes'.

B. METHODOLOGICAL FINDINGS

LIMITATIONS

- It is not possible to clearly distinguish between a *pirate copy*, a *counterfeit* and a *bootleg* from the data.
- Some of the infringements remain unnoticed by the Customs.
- The statistics of the Customs only cover works that are imported to or exported from Finland. Works that are made and used within the borders do not show in their statistics.

■ Guidelines for future research

- Currently, the compilation of statistics on IPR enforcement is not centralized within the Finnish Customs. This means that gathering sufficient data for the purposes of this indicator is very difficult. However, one of the Customs officials mentioned during the interview that a new data system for the compilation of statistics on IPR enforcement is under development. Thus, it is possible that somewhere in the near future the data will be more easily accessible.

-	The time necessary for studying the level of unauthorized use of copyrighted works in physical form will highly depend on the availability of statistics and other relevant information. Once the data is collected, the analysis and reporting is estimated to take approximately one month.

Appendices

A. METHODOLOGY CARD

Methodology card as presented in the Methodology Handbook, version 20.12.2013.

Aspect: Infringement, opinions and public acceptance	Methodology	card 20. Unauthorized use of copyrighted works in physical form				
Key question	What is the vol	ume of unauthorized use of copyrighted works in physical form?				
Type of data	objective data					
Description	physical pirate Possible subject Phonogra Films (DV Games	Estimation of the volume of unauthorized use of copyrighted works in physical form (such as physical pirate copies, counterfeits and bootlegs). Possible subject matter to consider: Phonograms (CDs, discs, cassettes, etc) Films (DVDs, blu-rays, VHS cassettes, etc) Games Computer programs (on physical supports)				
Parameters to measure	 Estimation of the amount of unlawful products (pirate copies, counterfeits and bootlegs, in physical form) confiscated at customs, compared to the amount of copyrighted goods imported in the country Estimation of the amount of unlawful products (pirate copies, counterfeits and bootlegs, in physical form) confiscated inside the country, compared to the amount of copyrighted goods legally produced in the country 					
Definitions	Unauthorized physical copy	A copy made or distributed on physical carriers without the permission of the rights owner(s).				
	Counterfeit	Recording made without required permission, which is packaged to resemble the original as closely as possible and is likely to mislead the consumer into believing that they are buying a genuine legitimate product ¹⁹				
	Bootleg	Unauthorized recording of live or broadcast performance duplicated and sold without the permission of the artist, composer or record company ²⁰				
Guidelines for data collection	The information can be collected as a desktop study through available national international information sources. It can be complemented by expert interviews. The data should be collected over a period allowing meaningful analysis and calculatio averages, for example: 1, 5 or 10 years. Information on the size of the lawful markets and imports used for comparison is collected application of Methodology cards 1 and 2.					
Limitations of the indicator	 The results will depend on the amount of effort and resources that is put into work against piracy at customs. It might not always be possible to clearly distinguish between a pirate copy, a counterfeit and a bootleg from the data. Some of the infringements remain unnoticed by the customs and the police. If the compilation of statistics on IPR enforcement is not well developed or centralized, gathering sufficient data for the purposes of this indicator might be difficult. 					

¹⁹ Idem.

²⁰ Idem.

Table A1. Percentage of studied house games' had been 1) bought in Finla			•		•
	2008	2009	2010	2011	2012
Pirated recordings bought from Finland	3	1	n/a	2	1
Pirated recordings imported to Finland	5	3	n/a	3	4

Table A2. Number of articles retained by the Customs on the basis of potential copyright infringement. ²²			copyright		
	2008	2009	2010	2011	2012
Retention under Section 14(3) of the Customs Act	n/a	759	789	924	n/a
Interception under European Council Regulation (EC) No 1383/2003	n/a	n/a	n/a	0	6

Table A3. Number of copyright offences and violations that have come to knowledge of the Customs. ²³				nowledge	
	2008	2009	2010	2011	2012
Copyright offence	3	0	1	0	0
Copyright violation	56	38	27	15	13
Total	59	38	28	15	13

Table A4. Imported audiovisual recordings ²⁴ and software by customs value and number of customs clearances. ²⁵				customs	
	2008	2009	2010	2011	2012
Customs value €	n/a	14 058 854	12 235 897	11 815 427	n/a
Number of customs clearances	n/a	6 234	4 680	4 625	2 896

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²¹ Tekijänoikeusbarometri 2008 – 2012, available at Lyhty homepage, http://www.kulttuuri.net/gallupit. Last visited on 19 August 2013.

²² Maria Damlin and Lasse Ryyttäri of the Finnish Customs.

²³ Saila Soini of the Finnish Customs.

²⁴ Including all types of audio and visual recordings

 $^{^{25}}$ Maria Damlin of the Finnish Customs. The figures are calculated by summing up the corresponding data on CN codes $8523405100,\ 8523495100,\ 8523493900$ and 8523493900.

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D. CONSULTED PARTIES

- Rainer Oesch, Professor of Commercial Law at the University of Helsinki, Faculty of Law; Expert Instructor in piloting of this indicator (February – June 2013)
- Maria Damlin, Senior Inspector at the Finnish Customs, National Risk Analysis Centre / IPR (30 April 2013)
- Kristiina Harenko, Referendary Counsellor of the Supreme Court (29 May 2013)
- Anniina Huttunen, Senior Advisor, Legal Affairs at the Ministry of Education and Culture (22 April 2013)
- Jari Javanainen, Detective Sergeant at the Eastern Uusimaa police department (23 April 2013)
- Ismo Kallioniemi, Specialist Councel at Attorneys-at-Law Juridia Ltd. (17 April 2013)
- Martti Kivistö, Director, Regulatory and Policy Affairs at Teosto (8 April 2013)
- Antti Kotilainen, Managing Director at the Copyright Information and Anti-Piracy Centre (CIAPC) (14 March 2013)
- Teemu Laakkonen, Lawyer at the Copyright Information and Anti-Piracy Centre (CIAPC) (14 March 2013)
- Asko Metsola, Assisting lawyer at the Copyright Information and Anti-Piracy Centre (CIAPC) (14 March 2013)
- Antti Miettinen, Senior Judge of the Court of Appeal of Helsinki (9 April 2013)
- Jaana Pihkala, Deputy Director, Senior legal adviser at at the Copyright Information and Anti-Piracy Centre (CIAPC) (14 March 2013)
- Lasse Ryyttäri, Senior Inspector at Finnish Customs (2 April 2013)
- Sakari Salonen, Senior Associate at Attorneys-at-Law Juridia Ltd. (17 April 2013)
- Sami Sunila, Senior Associate at Roschier, Attorneys Ltd. (22 April 2013)
- Pekka Tarkela, Partner at Attorneys at law Borenius Ltd. (11 April 2013)
- Anna Vuopala, Senior Advisor, Legal Affairs at the Ministry of Education and Culture (8 May 2013)
- Ari Wiren, District Judge at the District Court of Helsinki (2 May 2013)



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Cupore webpublications 39:4	Macroeconomic Importance of Copyright Industries. Report on Piloting in Finland.
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Cupore webpublications 39:6	Volume of Domestic Production of Copyrighted Products and Services. Report on Piloting in Finland.
Cupore webpublications 39:7	Volume of Exported and Imported Copyrighted Products and Services. Report on Piloting in Finland.
Cupore webpublications 39:8	Development of Digital Business Models and Income Based on Digital Distribution. Report on Piloting in Finland.
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Cupore webpublications 39:13	Public Administration of Copyright. Report on Piloting in Finland.
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