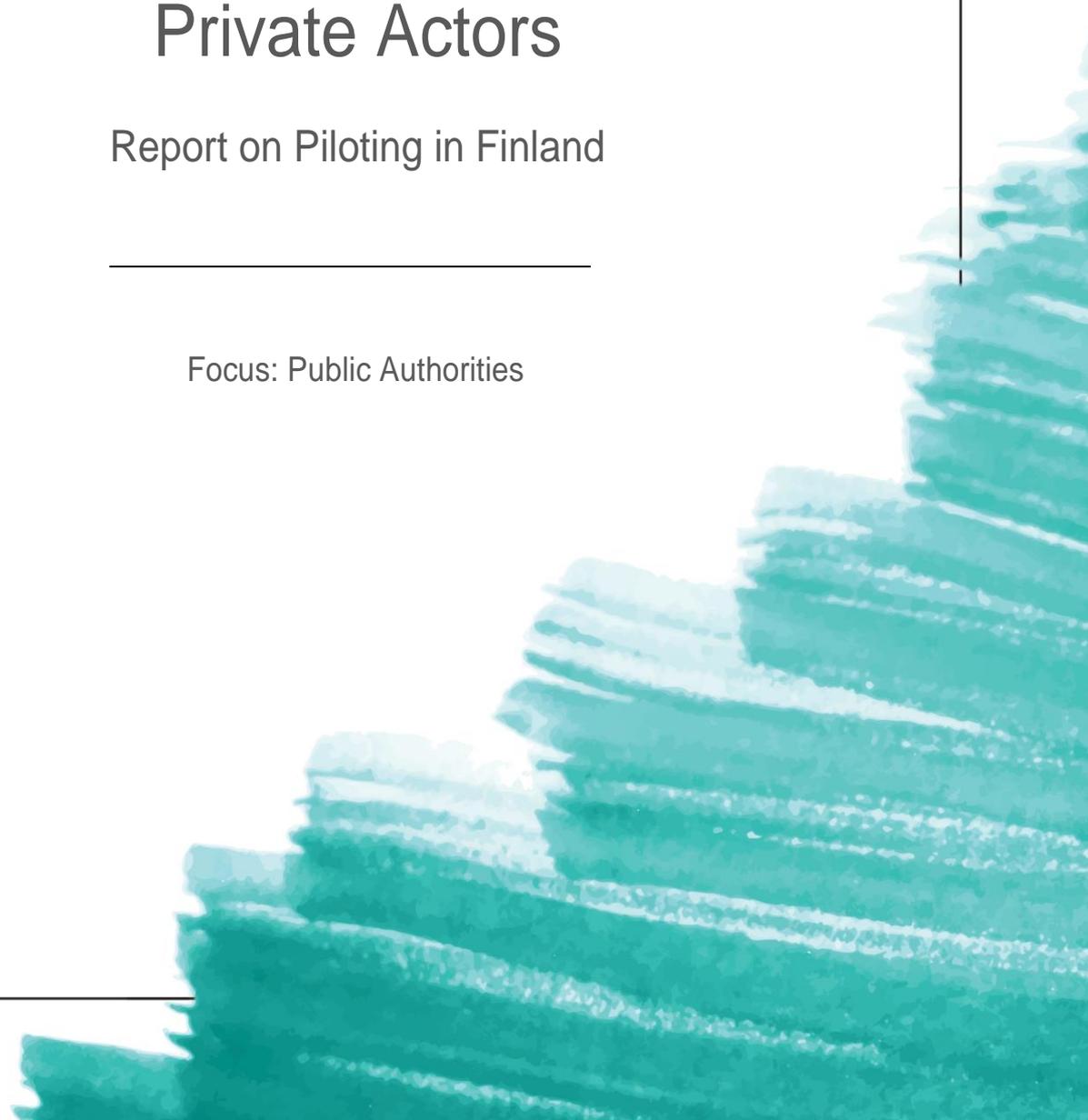


Assessing Copyright and Related Rights Systems

Enforcement by Public and Private Actors

Report on Piloting in Finland

Focus: Public Authorities

A decorative graphic in the bottom right corner consisting of several overlapping, horizontal brushstrokes in various shades of teal and green, creating a textured, layered effect.

The logo for Cupore, consisting of the word "cupore" in a white, lowercase, sans-serif font, centered within a solid red rectangular background.

Assessing Copyright and Related Rights Systems: Enforcement by Public and Private Actors – Focus: Public Authorities. Report on Piloting in Finland.

This report is the result of the first pilot study implementing Description Sheet 8 – *Enforcement by Public and Private Actors*, 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 December 2013 on the website of Cupore.

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

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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 the eighth description sheet presented in the methodology handbook, titled “Enforcement by Public and Private Actors”. The goal of this report is to provide a description of the key actors in the enforcement of copyright, as well as a description of and provisions on enforcement procedures. The focus is on public actors. The country analyzed here is Finland.

The public authorities discussed in the report include the *courts*, the *prosecutor*, the *police* and *customs*. The role of the *Copyright Council* in enforcement of copyright is also assessed.

Civil and criminal cases concerning copyright and related rights have been traditionally handled by the *general courts of justice*. These include the *District Court* as the court of first instance, the *Court of Appeal* as the appellate court and the *Supreme Court* as the highest appellate court.

Since 1 September 2013 new civil cases relating to intellectual property matters, including copyright matters, have been handled in first instance by a special court, the *Market Court*. The objective of the reform was to reduce the current dispersion of handling of intellectual property matters and to ensure the expertise of the court in intellectual property matters.

The main task of the *prosecutor* is to prosecute a case in criminal proceedings. In addition, the prosecutor has a central role in consideration of charges (*syyteharkinta*) and penal order proceedings (*rangaistusmääräysmenettely*). The prosecutor also has certain roles in the course of pre-trial investigations.

The *police* are the primary actors in carrying out pre-trial investigations. During the course of these investigations the police use a variety of investigation methods, such as coercive measures (*pakkokeinot*).

Lastly, the role of the Customs and the Copyright Council are discussed. The latter is not a public supervisory body or an anti-piracy organization but nevertheless plays an important role in copyright enforcement.

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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 of the copyright and related rights system 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 envisaged 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 Description sheet 8 of the methodology framework, titled "Enforcement by public and private actors" with a focus on public enforcement. 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 intended to present one of the copyright system's elements. It is part of the second pillar of the methodology framework, "Functioning and performance of the elements of the copyright system", and its second area, "Enforcement". It is a description sheet which presents the work of public authorities and private actors in copyright enforcement in order support the analysis of the operation of the national copyright and related rights system.

This report focuses on the operation of the public authorities in charge of copyright enforcement (courts, prosecutors, customs, and the police) only. The description sheet also recommends to study and analyse the non-governmental organizations working against copyright infringement (such as anti-piracy centers), international cooperation in the work against piracy and the recent trends in enforcement, but these were left as topics for further studies. A description of copyright enforcement actors and procedures will offer an overview of the responsibilities and tasks of public authorities and their operation.

As explained in the methodology handbook, enforcement is a key aspect to consider when measuring the efficiency of the copyright system as a whole; there is only little impact of copyright law if there is no

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.

enforcement. With growing possibilities for easy exchange of copyrighted works through digital forms, copyright infringement as well as costs of enforcement have increased, and the cases are increasingly difficult to prove². In this context, evaluating the operation of official copyright enforcement procedures is a crucial step in finding solutions for possible updates of the copyright enforcement system.

The act of enforcement covers three steps that follow non-compliance to regulations: first, the search for infractions and information concerning them; second, the search for remedies through court or other methods of dispute resolution; and third, the carrying out of executive or judicial orders. Each step can involve both public authorities (police forces, custom officers, courts, etc.) and private parties (infringers and injured parties, private advisors or arbitrators). Each of these steps also includes costs for the actors involved: public authorities will have to support costs related to the search for infractions and setting up and maintaining law courts while private parties will incur costs when pursuing remedies.

A description sheet presenting the indicator can be found in Appendix A of this report.

C. METHODS

The information collected for this indicator can be found through available national and international information sources. Therefore, the method chosen was desktop studies. The data was complemented by a series of expert interviews.

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

² See Gowers Review of Intellectual Property conducted in the UK in 2005–2006: http://www.hm-treasury.gov.uk/gowers_review_index.htm.

Results

SECTION 1. COURTS

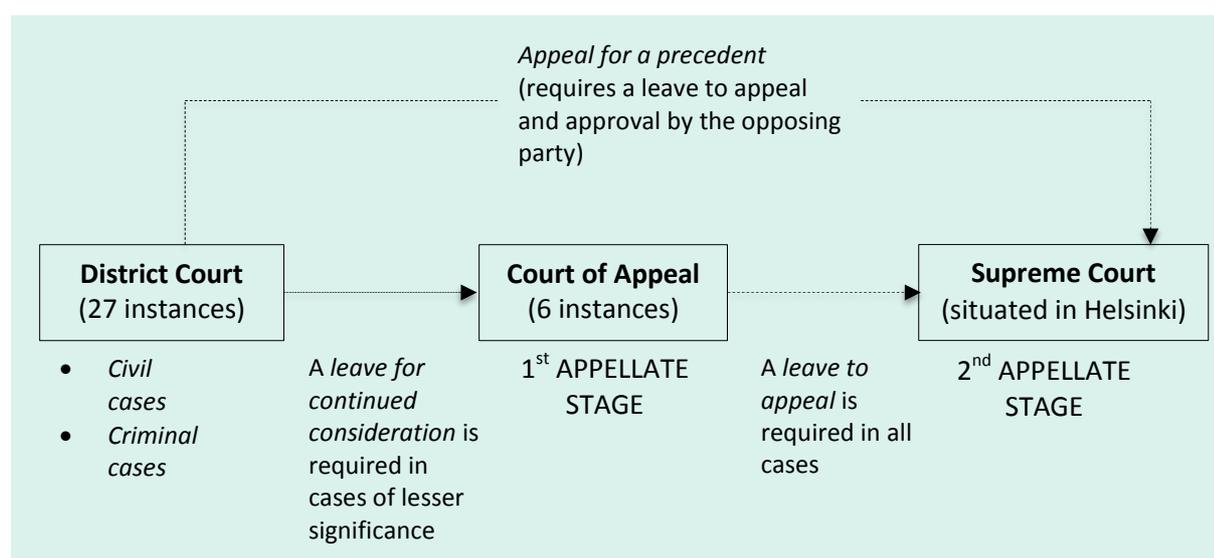
A. OVERVIEW

Until 31 August 2013 both civil and criminal cases concerning copyright and related rights (i.e. cases which concern the application of the Copyright Act and the Criminal Code as well as all contractual disputes and the granting of precautionary measures) were handled by the general courts of justice. These include the District Court as the court of first instance, the Court of Appeal as the appellate court and the Supreme Court as the highest appellate court.³ There are 27 District Courts and six Courts of Appeal in Finland.⁴ The Supreme Court is situated in the capital, Helsinki.

Appealing to the Court of Appeal is generally not restricted. However, in certain less significant cases, a leave for continued consideration is required.⁵ Appealing a decision to the Supreme Court always requires a leave to appeal. A party may also appeal directly to the Supreme Court (*appeal for a precedent*) provided that the opposing party does not resist and the Supreme Court grants a leave to appeal.⁶

In order to appeal a decision of the Court of Appeal, a leave to appeal must be requested from the Supreme Court. A leave may be granted only (1) if it is important to bring the case before the Supreme Court for a decision with regard to the application of the law in other, similar cases or because of the uniformity of legal practice (*precedent basis*); (2) if there is a special reason for this because of a procedural or other error that has been made in the case on the basis of which the judgment is to be reversed or annulled (*reversement or annulment basis*); or (3) if there is another important reason for granting leave to appeal (*other important reason basis*).⁷

Figure 1: The handling of civil and criminal cases concerning copyright pre-reform.



³ Chapter 1, Section 1 of the Code of Judicial Procedure.

⁴ Section 1 of the District Court Act and Section 1 of the Court of Appeal Act.

⁵ Chapter 25 a, Sections 5 and 6 of the Code of Judicial Procedure.

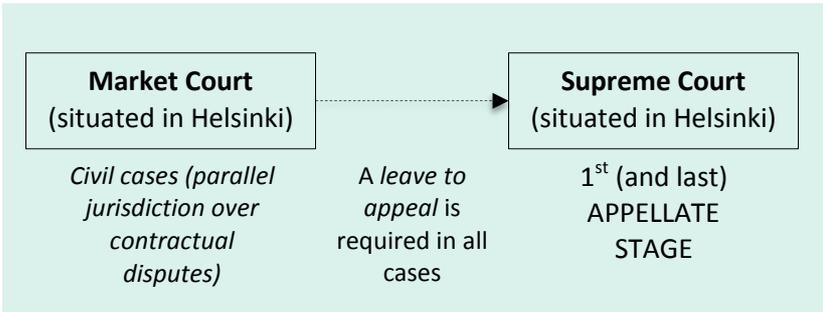
⁶ Chapter 30 a, Section 1 of the Code of Judicial Procedure.

⁷ Chapter 30, Section 3(1) of the Code of Judicial Procedure.

Since 1 September 2013 new civil cases relating to intellectual property matters, including copyright matters, have been handled in first instance by a special court, the Market Court.⁸ Over contractual disputes the Market Court has a parallel jurisdiction with the general courts of justice. All criminal matters still remain within the jurisdiction of the general courts of justice.

A decision of the Market Court in all copyright related matters is appealed directly to the Supreme Court.⁹ A leave to appeal is still required. Thus, under the new regime, the appellate procedure will only have one stage instead of the previous two.

Figure 2: The handling of civil cases concerning copyright post reform.



Currently, the Market Court hears mostly market law, competition and public procurement cases.¹⁰ It is situated in Helsinki. Since the court commenced its activity on 1 March 2002, it has given only three (public) decisions, which have an essential relation to copyright. Two of them concern restraint of competition and one unfair contract terms.¹¹

B. MAIN PRINCIPLES OF COURT PROCEEDINGS

In Finland, every person enjoys equal protection under the law. Section 21 of the Constitution states as follows:

Everyone has the right to have his or her case dealt with appropriately and without undue delay by a legally competent court of law or other authority, as well as to have a decision pertaining to his or her rights or obligations reviewed by a court of law or other independent organ for the administration of justice.

Provisions concerning the publicity of proceedings, the right to be heard, the right to receive a reasoned decision and the right of appeal, as well as the other guarantees of a fair trial and good governance shall be laid down by an Act.

In addition, Finland is bound by international agreements, most notably the European Convention of Human Rights and the UN International Covenant on Civil and Political Rights, which include important provisions on court proceedings. The right to a fair trial is protected under Section 6 of the Convention and Article 14 of the Covenant, respectively.

⁸ Sections 1 and 38 of the Market Court Act 99/2013.
⁹ Chapter 7, Section 4 of the Market Court Proceedings Act 100/2013.
¹⁰ Section 1 of the Market Court Act 2001/1527.
¹¹ Market Court decisions 213/05, 214/05 and 457/10. The decisions of the Market Court are available at Finlex database (in Finnish), www.finlex.fi/fi/oikeus/mao. Last visited on 19 August 2013.

In legal literature, the main principles of court proceedings are often considered to include at least the following:

- the principle of contradiction (*audiatur et altera pars*)
- the principle of openness in court proceedings
- the principle of orality
- the principle of immediacy
- the principle of concentration (i.e. the actual handling of a case is carried out without delay and loss of time in a continuous procedure)
- equality of arms (i.e. all parties have the right to procedural equality)
- judicial independence and
- the availability of legal aid.¹²

The above principles apply both in civil and criminal proceedings. In addition, in civil cases, which can be settled out of court, the principle of party disposition is significant. According to the principle, parties are free to decide whether they want legal protection, to which extent, and the remedies they use. By contrast, in criminal cases and civil cases, which cannot be settled out of court, the principle of judicial investigation is applied. According to the principle, legal protection is given regardless of the will of a private person.¹³

Lastly, it is noteworthy that in criminal proceedings the suspect and the accused have the privilege of protection against self-incrimination (*nemo tenetur se ipsum accusare*). This means that a person has the right to remain silent throughout the whole proceedings. Moreover, if a person wishes to make a comment, he or she is not required not speak the truth.¹⁴

C. TYPES OF PROCEEDINGS

▪ OVERVIEW

Cases in general courts of justice may be divided into two main categories according to their substance matter: 1) civil cases, which are handled in a civil procedure and 2) criminal cases, which are handled in a criminal procedure.¹⁵ Civil cases concern normally a dispute between two or more private parties. In addition, there are certain non-contentious civil cases (*hakemusasia*), in which there is no adverse party.¹⁶ In civil procedure legal protection is generally given for mere private interests.¹⁷ In civil cases, which can be settled out of court, e.g. all copyright matters, parties have the right to decide whether or not to initiate proceedings at all and abandon (*luopua*) or cancel (*peruuttaa*) the action (or the application in non-contentious civil cases) or settle the case at any stage.¹⁸ Criminal procedure, on the

¹² Jokela 2005, p. 73. For descriptions of the above principles in the context of Finnish jurisprudence, see Jokela 2005, p. 69–191.

¹³ Jokela 2005, p. 74.

¹⁴ Lappalainen 2011, I Johdatus Prosessioikeuteen > 2. Prosessin pääläjit ja tehtävät > Prosessin pääläjit > Rikosprosessi. Other important principles with regard to criminal proceedings include the principle of legality (*nulla poena sine lege*), presumption of innocence, prohibition of retroactive application and the prohibition of *reformatio in peius*. See the homepage of the Supreme Court, available at <http://www.kko.fi/35527.htm>. Last visited on 19 August 2013.

¹⁵ Administrative matters are decided in an administrative procedure (by administrative courts, respectively).

¹⁶ E.g. cases concerning the application of Section 60 a of the Copyright Act (disclosure of contact information) may be classified as non-contentious civil cases.

¹⁷ Jokela 2005, p. 47.

¹⁸ In addition there are certain types of civil cases, which cannot be settled out of court, i.e. cases concerning the confirmation or nullification of paternity, visiting rights and certain guardianship cases.

other hand, may be defined as a “procedure governed by law, in which a criminal liability of the accused is decided ... and further measures due to the crime are confirmed”.¹⁹

In addition to the above general proceedings, there are various types of special proceedings available. These include certain summary proceedings (both civil and criminal) and proceedings concerning the granting of precautionary measures. In the context of copyright and related rights, the most important summary proceeding appears to be the penal order procedure (*rangaistusmääräysmenettely*). Since the penal order is given by the prosecutor instead of the court, the procedure is described in *Section 2. Prosecutors*.²⁰

▪ CIVIL PROCEEDINGS²¹

First, it is important to remark that a dispute concerning intellectual property rights usually commences with an exchange of letters between the parties.²² In the interviews conducted for this research, it was pointed out that, in the context of copyright, sending a single warning letter is often sufficient to make the opposing party to stop the infringing activity. This especially concerns situations where the alleged infringement has been conducted non-negligently. If the parties do not find a solution otherwise, they may choose to initiate court proceedings.²³

Civil procedure in the general courts of justice is governed by the Code of Judicial Procedure. The procedure in a District Court may be divided chronologically into three stages: (1) preparation stage, (2) judgement stage and (3) execution stage.²⁴

A civil case is initiated by a written application for a summons, delivered to the registry of a District Court. The case becomes pending and its preparation begins upon the arrival of the application to the registry.²⁵

By the main principle, a claim against a natural person is considered by the District Court with jurisdiction for the place where he or she has his or her domicile or habitual residence (*forum domicilii*).²⁶ A claim against a legal entity is considered by the District Court with jurisdiction for the place where the legal entity is registered or where the administration of the legal entity is primarily conducted.²⁷ In copyright matters there are two exceptions. Cases concerning licences and remuneration as referred to in Section 54 of the Copyright Act are handled in arbitration procedure or, if a party refuses, in the District Court of Helsinki (until 31 August 2013) or the Market Court (from 1

¹⁹ Jokela 2005, p. 48.

²⁰ The parties may, in place of civil proceedings, also choose court mediation, in which the judge acts as a mediator. Court mediation is regulated under Act on Mediation in Civil Matters and Confirmation of Settlements in General courts. Mediation is also available in certain criminal matters. It is carried out by a voluntary lay mediator and requires consent of the parties. The procedure is regulated under Act on Mediation in Penal and Certain Civil Matters. To our knowledge, mediation in copyright matters, both civil and criminal, is very rarely used, if at all.

²¹ This section concerns civil proceedings in the District Court. However, the procedure in the Market Court is largely similar to that in the District Court; the provisions in the Code of Judicial Procedure apply in most part.

²² Oesch 2000, p. 29.

²³ However, when the matter involves a contractual dispute, the option of court proceedings may be prevented by a dispute resolution clause.

²⁴ Jokela 2005, p. 48.

²⁵ Chapter 5, Section 1 of the Code of Judicial Procedure.

²⁶ Chapter 10, Section 1 of the Code of Judicial Procedure.

²⁷ Chapter 10, Section 2 of the Code of Judicial Procedure. In addition there are numerous alternative forums, which come available under certain circumstances. There include e.g. *forum negotii*, *forum domicilii actoris*, and *forum delicti*. See Chapter 10, Sections 3–10 of the Code of Judicial Procedure.

September 2013).²⁸ In cases involving radio or television transmissions that violate the Copyright Act the competent court is the District Court of Helsinki.²⁹

The action may be dismissed by the court without considering the merits if the application is so incomplete, even after a request for supplementation, that it is not fit to be the basis for proceedings, or dismissed on the merits by a judgment if the claim of the plaintiff is manifestly without a basis.³⁰ Otherwise, the court must issue the summons without delay.³¹

In the summons, the defendant is requested to respond to the action, normally in writing.³² If, in a case amenable to settlement, the defendant does not deliver the response before the deadline or does not present any sufficient grounds for contesting the action, the case is decided without continuing the preparation, i.e. the action is upheld by a judgment by default. On the other hand, if the plaintiff has abandoned the action, it is dismissed by a judgment on the merits.³³

In any other situation, the preparation normally continues orally in a preparatory hearing. In the preparation, the following questions are to be determined: the issues in dispute between the parties, the evidence that is going to be presented and what is intended to be proved with each piece of evidence and the possibility of a settlement.³⁴ In a case amenable to settlement the judge is required to attempt to persuade the parties to settle the case. The judge may also make a proposal to the parties for the amicable settlement of the case.³⁵ A contested case may be decided solely on the basis of written preparation, if none of the parties oppose to this.³⁶ Deciding a case in oral preparation is not possible.

Provided that the case is not concluded in the preparation, it is then transferred to the main hearing. The main hearing is built upon the principles of immediacy, concentration and orality.³⁷ According to the first, the composition of the court must not change during the main hearing. If the court, for lack of quorum, needs to take a new member during the main hearing, a new main hearing must be held.³⁸ Immediacy of the main hearing ensures that a judge is not forced to base his or her decision on evidence that has been presented in his or her absence.³⁹ When passing a judgement, only trial material that has been presented in the main hearing may be taken into account.⁴⁰ Second, the principle of concentration is secured by regulating that a case must be dealt within a continuous main hearing. The main hearing may be interrupted, but only within certain limits.⁴¹ Concentration of the main hearing is considered to ensure the quickness and reliability of the process. Lastly, the main hearing is always oral. By the main

²⁸ Section 54 of the Copyright Act.

²⁹ Section 54 of the Copyright Act.

³⁰ Chapter 5, Section 6 of the Code of Judicial Procedure.

³¹ Chapter 5, Section 8 of the Code of Judicial Procedure.

³² Chapter 5, Section 9 of the Code of Judicial Procedure. Lappalainen 2011, IX Oikeudenkäynti käräjäoikeudessa > 1. Siviilijutun käsittely > Valmistelu > Valmistelun kulku.

³³ Chapter 5, Section 13 of the Code of Judicial Procedure.

³⁴ Chapter 5, Section 19 of the Code of Judicial Procedure. Lappalainen 2011, IX Oikeudenkäynti käräjäoikeudessa > 1. Siviilijutun käsittely > Valmistelu > Valmistelun kulku.

³⁵ Chapter 5, Section 26 of the Code of Judicial Procedure. In addition, the settlement may be confirmed by the Court as provided in Chapter 20 of the Code of Judicial Procedure.

³⁶ Chapter 5, Section 27 a of the Code of Judicial Procedure.

³⁷ Lappalainen 2011, IX Oikeudenkäynti käräjäoikeudessa > 1. Siviilijutun käsittely > Pääkäsittely > Pääkäsittelyn välittömyys, keskitys ja suullisuus.

³⁸ Chapter 6, Section 1 of the Code of Judicial Procedure.

³⁹ Jokela 2005, p. 157.

⁴⁰ Chapter 24, Section 2 of the Code of Judicial Procedure.

⁴¹ Chapter 6, Section 5 of the Code of Judicial Procedure.

rule, a party may not read out or submit a written statement to the court or otherwise make his or her case in writing.⁴² Orality of the main hearing is thought to ensure a proper dialogue between the members of the court and the parties as well an efficient and continuous handling of the matter.⁴³

The presentation of evidence takes place normally in the main hearing.⁴⁴ The plaintiff must prove the facts that support the action. If the defendant presents a fact in his or her favour, he or she must also prove it.⁴⁵ After having carefully evaluated all the facts that have been presented, the court must decide what is to be regarded as the truth in the case.⁴⁶ Thus, the free evaluation of evidence applies. In the context of copyright and related rights, especially the damage that has been caused by infringement of moral rights is often hard to prove.⁴⁷ If no evidence is available or it can only be presented with difficulty, the court may assess the quantum of damages ‘within reason’.⁴⁸

As may be observed from the table below, most of the cases concerning the application of the Copyright Act are concluded in the preparation stage. In only a small percentage of the cases a main hearing is arranged. However, it is important to note that the figures include cases concerning the application of Section 60 a of the Copyright Act (disclosure of contact information). For example, in 2012, in the District Court of Helsinki, 85 of such cases were concluded.⁴⁹ These are rather non-contentious civil cases (*hakemusasia*) than disputes (*riita-asia*), and thus a main hearing is rarely, if ever, required. All in all, in actual copyright disputes, a main hearing is likely to be much more common than the figures would seem to indicate.

Table 1. Number of conclusions in civil cases concerning the application of the Copyright Act in the District Court by the stage of procedure.⁵⁰					
	2008	2009	2010	2011	2012
Written preparation	29	54	71	101	94
Oral preparation	3	1	1	0	1
Main hearing	5	7	4	4	6
Total	37	62	76	105	101

The court’s deliberations must be held immediately after the conclusion of the main hearing or, at the latest, on the following weekday. In an extensive or difficult case, the judgment may be made available at the court registry within fourteen days of the conclusion of the main hearing or, if not possible for a

⁴² Chapter 6, Section 3 of the Code of Judicial Procedure. A party may, however, read out from a document his or her claims, direct references to case-law, to legal literature and to such documents that would be difficult to understand if presented only orally. In addition, he or she may rely on written notes as memory aids.

⁴³ Jokela 2005, p. 142.

⁴⁴ Chapter 17, Section 8 a of the Code of Judicial Procedure.

⁴⁵ Chapter 17, Section 1 of the Code of Judicial Procedure.

⁴⁶ Chapter 17, Section 2 of the Code of Judicial Procedure.

⁴⁷ Oesch 2000, p. 33.

⁴⁸ Chapter 17, Section 6 of the Code of Judicial Procedure.

⁴⁹ Henri Huhtinen of the District Court of Helsinki. Most of the cases concerning the application of Section 60 a of the Copyright Act are handled by the District Court of Helsinki since the large telecommunications companies – namely Elisa, TeliaSonera and DNA – have a registered office in Helsinki (DNA since 2012).

⁵⁰ Statistics Finland. Statistics Finland place all civil cases concerning the application of Copyright Act under the category ‘copyright disputes’, which is rather misleading.

special reason, as soon as possible.⁵¹ The judgment may be then executed in accordance to the Execution Code.⁵²

In the Court of Appeal and the Supreme Court cases are normally decided in a written procedure. However, a main hearing has become gradually more common in the Court of Appeal.⁵³

▪ CRIMINAL PROCEEDINGS

Criminal procedure is governed by the Criminal Procedure Act.⁵⁴ Similarly to the civil procedure, the criminal procedure may be divided chronologically into three stages: (1) preparation stage, (2) judgement stage and (3) execution stage. In its wide meaning, criminal procedure also includes preliminary investigation and the consideration of charges before the actual court proceedings.⁵⁵

By the main rule, the prosecutor is to bring a charge by delivering a written application for a summons to the registry of the district court. A criminal case becomes pending when the application for a summons arrives at the registry.⁵⁶ A charge for an offence is generally heard by the court of the place of commission of the offence (*forum delicti*).⁵⁷

If the case is not dismissed at once due to procedural obstructions, the court is to issue a summons without delay.⁵⁸ In the summons, the accused is requested to respond to the demands made against him or her, either in writing within a deadline or orally at a hearing. As part of the protection against self-incrimination, the accused has the right to remain silent - at this stage and throughout the whole proceedings. The summons, the application for a summons and a possible civil claim by the plaintiff or other eligible party must be served on the defendant as provided in the Code of Judicial Procedure on Service of Notices.⁵⁹

A preparatory hearing may be arranged, if deemed necessary for a special reason in order to secure the immediacy of the main hearing.⁶⁰ Otherwise, the parties are summoned straight to the main hearing.⁶¹ As with civil proceedings, the main hearing in criminal proceedings is also built upon the principles of immediacy, concentration and orality. Again, the presentation of evidence takes normally place at the main hearing. In criminal procedure, however, the presentation of evidence rests heavily on the presumption of innocence of the accused; the burden of proof is always on the prosecutor. Furthermore, a case which is unclear must be decided in favor of the accused (*in dubio pro reo*). Free evaluation of evidence applies, however. A conviction requires that the culpability of the accused must be 'beyond reasonable doubt'.⁶²

⁵¹ Chapter 24, Section 8 of the Code of Judicial Procedure.

⁵² Chapter 1, Section 1 of the Execution Code.

⁵³ Lappalainen 2011, X Muutoksenhaku > 1. Valitus hovioikeuteen > Hovioikeusmenettelyn kehityksestä > Suullisia käsittelyjä.

⁵⁴ In addition, the Code of Judicial Procedure applies secondarily (Chapter 12, Section 1 of the Criminal Procedure Act).

⁵⁵ Jokela 2005, p. 48.

⁵⁶ Chapter 5, Section 1 of the Criminal Procedure Act.

⁵⁷ Chapter 4, Section 1 of the Criminal Procedure Act

⁵⁸ Chapter 5, Section 8 of the Criminal Procedure Act.

⁵⁹ Chapter 5, Section 8 of the Criminal Procedure Act.

⁶⁰ Chapter 5, Section 1 of the Criminal Procedure Act. In the Government Proposal 82/1999, broad cases concerning white-collar crimes or drug offences are mentioned as an example. See Government Proposal 82/1999, p. 69.

⁶¹ Chapter 5, Section 1 of the Criminal Procedure Act.

⁶² Lappalainen 2011, I Johdatus prosessioikeuteen > 4. Periaatteet prosessioikeudessa > Muita periaatteita > Ratkaisuperiaatteet.

The judgment is to be handed down after the conclusion of the main hearing or, at the latest, on the following weekday. In an extensive or difficult case, the judgment may be made available in the court registry within fourteen days of the conclusion of the main hearing or, if not possible for special reason, as soon as possible.⁶³ The execution of criminal punishments falls under the responsibility of the Criminal Sanctions Agency.⁶⁴

As with the civil procedure, cases in the Court of Appeal and the Supreme Court are normally decided in a written procedure, even though a main hearing in the Court of Appeal has become more common.⁶⁵

D. COMPOSITION OF THE COURT

The composition of the court depends on the subject matter of the case. At the District Court level, there are three options available:

- 1) The composition of one legally trained member.
- 2) The composition of three legally trained members.
- 3) The 'lay member composition' (*lautamieskoonpano*), i.e. a legally trained member as the chairman and three lay members. This composition, which is only available in criminal matters, may be augmented by a second legally trained member or a fourth lay member.⁶⁶

The general qualification requirements differ slightly based on the position of a judge. However, every judge must be "a righteous Finnish citizen who has earned a Master's degree in law and who by his or her previous activity in a court of law or elsewhere has demonstrated the professional competence and the personal characteristics necessary for successful performance of the duties inherent in the position".⁶⁷ Every judge must also be at least 18 years of age and have a proficiency in Finnish and Swedish.⁶⁸ Lay members of the district court are governed by different general requirements; most notably, a law degree is not required.

The qualification requirements do not include any provisions that would guarantee special expertise of a judge on a certain area of law, e.g. copyright matters or intellectual property matters in general. In the interviews it turned out that a lack of expertise in copyright matters was sometimes seen a problem, especially in the courts of smaller judicial districts, where there are very few, if any, copyright matters annually. The lack of expertise may have sometimes even led to a decision of not to initiate proceedings at all.

In civil matters, the composition of one judge has become the most common option in the main hearing.⁶⁹ As noted earlier, most copyright cases (of which the majority are non-contentious civil cases) are concluded in the preparatory stage and thus, a main hearing is rarely arranged. However, as may be seen from the table below, when a main hearing is arranged, the composition of one legally trained member is the most common.

⁶³ Chapter 7, Section 1 of the Criminal Procedure Act.

⁶⁴ Section 3 of the Criminal Sanctions Agency Act.

⁶⁵ Lappalainen 2011, X Muutoksenhaku > 1. Valitus hovioikeuteen > Hovioikeusmenettelyn kehityksestä > Suullisia käsittelyjä.

⁶⁶ Chapter 2, Section 2 of the Code of Judicial Procedure.

⁶⁷ Section 11 of the Act on Judicial Appointments.

⁶⁸ Sections 8 of the Public Official Act and Section 13 of the Act on Judicial Appointments.

⁶⁹ Lappalainen 2010, II Tuomioistuimet > 1. Yleiset tuomioistuimet > Käräjäoikeudet > Käräjäoikeuden kokoonpano.

Table 2. Number of main hearings in civil cases concerning the application of the Copyright Act in the District Court by the composition of the court⁷⁰					
	2008	2009	2010	2011	2012
One legally trained member	4	6	2	4	5
Three legally trained members	1	1	2	0	1
Total	5	7	4	4	6

In criminal matters, the composition of the chairman and three lay members has been traditionally the most used. However, the reform of the Code of Judicial Procedure in 2008 has considerably reduced the role of lay members and increased the possibilities of deciding a case with only the chairman present. The composition of three legally trained members is reserved for the handling of the legally or otherwise most challenging cases.⁷¹

In relation to criminal infringements of copyright, we were not able to obtain statistics on the composition of the court. However, in all intellectual property offences between 2009 and 2012, only the composition of one legally trained member was used in the main hearing.⁷² Therefore it is safe to conclude that the lay member composition in (criminal) copyright matters seems to be rarely, if ever, used.

The Court of Appeal has a quorum normally with three members present, both in civil and criminal cases.⁷³ The Supreme Court has a quorum with five members present. Matters concerning a leave to appeal are considered and decided in a section consisting of two or three members.⁷⁴ In both instances, the regular composition may be extended if needed. This might become necessary, for example, if the general opinion when considering the decision of the case is different from the previous interpretation of law.⁷⁵

E. CENTRALISATION OF INTELLECTUAL PROPERTY MATTERS TO THE MARKET COURT

▪ OVERVIEW

Since 1 September 2013 new civil cases relating to copyright and related rights have been handled in first instance by the Market Court.⁷⁶ The centralisation concerned all intellectual property matters: patents, utility models, trademarks, trade names, designs, integrated circuits, plant variety rights, as well as copyright and related rights.⁷⁷ Criminal cases are not handled by the Market Court, they are still heard by the general courts of justice only.

In brief, the Market Court has jurisdiction over copyright related matters, which concern

- the application of the Copyright Act

⁷⁰ Statistics Finland.

⁷¹ Lappalainen 2010, II Tuomioistuimet > 1. Yleiset tuomioistuimet > Käräjäoikeudet > Käräjäoikeuden kokoonpano. See Government Proposal 85/2008, p. 17-18.

⁷² Statistics Finland.

⁷³ Chapter 2, Section 8 of the Code of Judicial Procedure.

⁷⁴ Chapter 2, Section 9 of the Code of Judicial Procedure.

⁷⁵ Section 8 of the Court of Appeal Act, Section 13 of the Court of Appeal Ordinance and Section 7 of the Supreme Court Act.

⁷⁶ Sections 1 and 38 of the Market Court Act 99/2013.

⁷⁷ Chapter 1, Section 4 of the Market Court Proceedings Act.

- the granting of precautionary measures in accordance with Chapter 7 of the Code of Judicial Procedure and
- the protection of evidence in accordance with the Protection of Evidence in Industrial Property and Copyright Related Civil Cases Act.⁷⁸

In addition, the Market Court has jurisdiction over “other civil matters, if a plaintiff brings an action against the same defendant or other defendants in tandem, and the actions are substantially based on the same ground”. The Market Court may also hear a counterclaim brought by the defendant against the plaintiff, if it relates to the subject matter of the original action.⁷⁹ In both situations, the jurisdiction of the Market Court runs parallel with the general courts of justice.

Procedure in the Market Court in dispute and non-contentious civil cases is largely similar to that in the District Court; the provisions in the Code of Judicial Procedure apply in most part.⁸⁰

▪ OBJECTIVES OF THE REFORM

One of the main objectives of the reform was to reduce the current dispersion of handling of intellectual property matters. Under the new regime, right-holders are able to seek protection of various types of intellectual property in the same instance and in the same process. It is hoped that this will make the system more efficient as a whole and eventually reduce the duration of the processes.⁸¹

Second, the reform pursues to guarantee the expertise of the court in intellectual property matters. This is ensured by centralizing all the matters to a single instance along with specific rules on the composition of the court and conditions of the eligibility of the personnel. The expertise is hoped to increase trust of the parties towards the decision making process. Ultimately, the quality and the predictability of the decisions will likely reduce the willingness to appeal.⁸²

▪ COMPOSITION OF THE MARKET COURT

By default, the Market Court has a quorum with three legally trained members present.⁸³ In some situations, including certain non-contentious cases, the preparation of the case, the admittance of evidence outside the main hearing and a separate hearing on precautionary measures, the Court has a quorum with only one legally trained member present.⁸⁴ A composition of two legally trained members is also available in certain limited matters.⁸⁵

The general qualification requirements of a judge are the same as in the general courts of justice. However, it is required that he or she is acquainted with, *inter alia*, matters concerning competition law, market law, industrial rights or copyright.⁸⁶ This is a significant change to the previous situation. The provision reflects one of the main objectives of the reform, i.e. ensuring the expertise of the court in intellectual property matters.

⁷⁸ Chapter 1, Section 4 of the Market Court Proceedings Act.

⁷⁹ Chapter 1, Section 5 of the Market Court Proceedings Act.

⁸⁰ Chapter 4, Section 17 of the Market Court Proceedings Act.

⁸¹ Government Proposal 124/2012, p. 21.

⁸² Government Proposal 124/2012, p. 21.

⁸³ Section 13 of the Market Court Act 99/2013.

⁸⁴ Section 16 of the Market Court Act 99/2013.

⁸⁵ Section 15 of the Market Court Act 99/2013. In addition, there are special rules on the composition of the court in matters concerning patents, utility models and integrated circuit designs. A member with special expertise is often included. See Section 14 of the Market Court Act 99/2013.

⁸⁶ Section 4 of the Market Court Act 99/2013.

▪ **APPEALING A DECISION OF THE MARKET COURT**

Under the new regime, a decision of the Market Court in intellectual property disputes and non-contentious matters is appealed directly to the Supreme Court. A leave to appeal is still required.⁸⁷ The exclusion of the Court of Appeal was justified by the purpose of shortening the total duration of the process and reducing party expenses. Also, appealing a decision of the Market Court, a special court with expertise in the field of intellectual property, to a general court of justice was seen unreasonable.⁸⁸

According to the Government Proposal 124/2012, the new regime does not interfere with obligations under the TRIPS Agreement, by which Finland is bound as a WTO member state. Article 41(4) of the TRIPS Agreement requires that “[p]arties to a proceeding shall have an opportunity for review by a judicial authority ... of at least the legal aspects of initial judicial decisions on the merits of a case”. According to the Proposal, this does not mean that the decision of the court of first instance must always be capable of appeal to a higher court, where the court re-examines the case and gives a decision on the merits of the case. In addition, as emphasised in the Proposal, Article 41(4) of the TRIPS agreement states that the requirement is “... subject to jurisdictional provisions in a Member's law concerning the importance of a case”.⁸⁹

SECTION 2. PROSECUTORS

A. OVERVIEW

▪ **ORGANIZATION AND GENERAL DUTIES OF THE PROSECUTION SERVICE**

The essential provisions on the organization and the duties of the prosecutor are regulated under the Act on the Prosecution Service.⁹⁰ The prosecutors in Finland are organised in two tiers. The prosecution service consists of the Office of the Prosecutor-General (located in Helsinki) and of 13 local prosecution offices. Within the authority of the local prosecution offices there are also 25 service bureaus, which function as subsidiary offices.⁹¹

Most criminal matters are dealt with by the local prosecution units. At the local level, each office includes a chief district prosecutor, possible deputy chief prosecutors and district prosecutors. In addition, some prosecution offices also have junior prosecutors, who are training for the profession of a prosecutor. All of the above are so-called ‘general prosecutors’, i.e. prosecutors who have jurisdiction to prosecute all cases which are not specifically assigned to other types of prosecutors.⁹² The district prosecutors handle most criminal cases. Altogether, the Finnish prosecution service has a personnel of 528 people, 391 of which are prosecutors.⁹³

⁸⁷ Chapter 7, Section 4 of the Market Court Proceedings Act.

⁸⁸ Government Proposal 124/2012, p. 27–28.

⁸⁹ Government Proposal 124/2012, p. 28.

⁹⁰ See the unofficial translation by the Ministry of Justice, Finland, available at <http://www.finlex.fi/en/laki/kaannokset/2011/en20110439.pdf>. Last visited on 19 August 2013.

⁹¹ [Http://oikeus.fi/17691.htm](http://oikeus.fi/17691.htm). Last visited on 19 August 2013.

⁹² The term ‘general prosecutor’ is not defined specifically in legislation, whereas the term ‘prosecutor’ is. Term ‘public prosecutor’ in turn refers to the nature of the prosecutor’s role in proceedings as the representative of public interest. Compare Chapter 1, Section 2 of the Criminal Procedure Act (689/1997) and Section 4 of the Act on the Prosecution Service (439/2011). Also, see Virolainen – Pölönen 2004, p. 29.

⁹³ [Http://www.vksv.oikeus.fi/Etusivu/Suomensyttajalaitos?lang=en](http://www.vksv.oikeus.fi/Etusivu/Suomensyttajalaitos?lang=en). Last visited on 19 August 2013.

According to Section 6 of the Act on the Prosecution Service, the prosecutor's duties are as follows: "It is the duty of a prosecutor to see to the realisation of criminal justice in a case being considered by him or her impartially, promptly and economically in a manner consistent with the legal safeguards of the parties and the public interest. In addition, the duties of a prosecutor are subject to what is separately provided in respect of them." In addition to these general duties, the prosecutors have certain significant roles at different stages of criminal proceedings. These roles are further discussed below in subsection C.

Since the year 2000, the Prosecutor General has designated 'key prosecutors' in areas that require special expertise. It is not a separate position *per se*; the duties are managed by District Prosecutors who specialize in certain crimes, usually along with their other tasks. The duties of key prosecutors consist of prosecuting demanding cases in their area of expertise, guidance of other prosecutors, educating tasks, taking part in international tasks and developing cooperation with interest groups.⁹⁴ It should be noted, however, that currently no such key prosecutors are being designated in the area of intellectual property.⁹⁵

▪ PROSECUTOR'S JURISDICTION

According to Section 7(2) of the Act on the Prosecution Service, a prosecutor has jurisdiction throughout the country, and it reaches out to all public courts (District Courts, Courts of Appeal and the Supreme Court). However, the location where the offence took place also determines the court where the charges are being examined.⁹⁶

The Prosecutor General may use discretion in deciding who will represent the prosecutor in the Supreme Court.⁹⁷ All 'general prosecutors' mentioned above have the competence to bring charges for all criminal offences (and violations) that are committed within their jurisdiction, with some rare exceptions.⁹⁸ In addition, a transfer of jurisdiction for carrying out a specific task is possible. According to Section 7(3) of the Act on the Prosecution Service, "a prosecutor who has pursued a prosecution in a District Court may transfer to another prosecutor, subject to his or her consent, the task of appealing a District Court's decision, responding to an appeal, appearing in a main hearing or performing a measure relating to an appeal if, taking into account the nature of the matter, this is appropriate". Furthermore, in cases where an offence has been committed outside Finland, the Prosecutor General has the authority to give an order for prosecution.⁹⁹

B. PROSECUTOR'S ROLE AND DUTIES DURING CRIMINAL PROCEEDINGS

The main duties of the prosecutor in the course of criminal proceedings include 1) deciding whether or not to press charges in a criminal matter, and 2) if applicable, proceed with charges, i.e. prosecute in criminal cases in the public courts.¹⁰⁰ In addition, the prosecutor has a certain role during 3) pre-trial investigation and 4) in a summary 'penal order proceedings' (*rangaistusmääräysmenettely*) as well.¹⁰¹

⁹⁴ Virolainen – Pölönen 2004, p. 113.

⁹⁵ Kankaala 2011, available online at IPR University Center's website: http://www.iprinfo.com/julkaisut/iprinfo-lehti/lehtiarkisto/2011/IPRinfo_1-2011/fi_FI/IPRrikosjuttuja_harvoin_vireille/. Last visited on 19 August 2013.

⁹⁶ Virolainen – Pölönen 2004, p. 110. Also, see Chapter 4, Section 1(1) of the Criminal Procedure Act (689/1997).

⁹⁷ Sections 7(2) and 10 of the Act on the Prosecution Service (439/2011). Also, see Virolainen – Pölönen 2004, p. 114.

⁹⁸ [Http://oikeus.fi/17692.htm](http://oikeus.fi/17692.htm). Last visited on 19 August 2013.

⁹⁹ Virolainen – Pölönen 2004, p. 80. Also, see Chapter 1, Section 12 of the Criminal Code.

¹⁰⁰ Virolainen – Pölönen 2004, p. 32.

¹⁰¹ Note: the term 'penal order proceedings' is taken from the Ministry of Justice's unofficial translation of the Criminal Code of Finland.

As a side note, the term ‘summary penal fee’ (*rikesakko*) must be kept terminologically separate from ‘penal order fine’ (*rangaistusmääräysmenettelyssä annettu sakko*), for the first mentioned fine is not a day-fine but a less severe form of fine, and not applicable to copyright related crimes.¹⁰²

▪ PROSECUTOR’S ROLE IN THE PRE-TRIAL INVESTIGATION

First of all, it should be noted that the primary law governing pre-trial investigation, the current Pre-Trial Investigation Act (449/1987), will be replaced by a new one (805/2011) entering into force on 1 January 2014.¹⁰³ This presentation is based on the legislation currently in force.¹⁰⁴ As the pre-trial investigation is for a large part conducted and led by the police, the investigation process itself is described a bit more specifically in the ‘Police’ section (Section 3) of this report.

However, the prosecutor has some competence during the pre-trial investigation phase. The duties of a prosecutor at this stage are mainly connected to controlling and leading the pre-trial investigation. Even though the prosecutor does not lead the investigation, he or she has the duty to follow, monitor and guide its course, in order to secure a proper basis for further phases in the criminal proceedings.¹⁰⁵ The police must also, e.g., conduct more investigations if the prosecutor so requests.¹⁰⁶ Furthermore, the prosecutor may order the investigation to be wholly or partly stopped, or even never initiated in the first place, if it is clear that charges could not be brought,¹⁰⁷ although even in such conditions an autonomous decision of the prosecutor is not possible without the motion of the investigation leader.¹⁰⁸

Another bottom line is that the prosecutor’s right to press charges in a criminal case is limited if the suspected crime is a so-called ‘complainant offence’ (*asianomistajarikos*). The term ‘complainant offence’ means an offence on which the prosecutor may not press charges against a suspect without the complainant’s claim for punishment (*asianomistajan rangaistusvaatimus*).¹⁰⁹ Complainant offences, and their procedural effects are a significant issue in the context of criminal enforcement of copyrights, because most copyright related criminal violations are in fact complainant offences.¹¹⁰

In terms of coercive measures, which are typically carried out during pre-trial investigations, a prosecutor has also certain competence: according to the Coercive Measures Act (450/1987), a prosecutor – among many other State officials – is authorized to make a decision on the execution of a coercive measure (under Chapter 1, Section 6), or to annul seizure under Chapter 4, Section 14.¹¹¹ However, in practice it is unclear how often a prosecutor is responsible for these actions as statistical data on this matter does not appear to exist.

¹⁰² This is due to the limited scope of applicability of such fees; see Chapter 2a, Section 8 of the Criminal Code.

¹⁰³ Note: also Coercive Measures Act, which is in some respects connected to the pre-trial investigation, will be partly renewed at the same time (806/2011). More specifics on these law reforms, see, e.g., Government Proposal 14/2013.

¹⁰⁴ However, as the reforms may have some effects also in the context of copyright enforcement, follow-up studies regarding the post-reform legal development are advised by the writers of this report.

¹⁰⁵ Virolainen – Pölönen 2004, p. 32 and p. 41; see also Sections 3, 4 and 14 of the Pre-trial Investigation Act.

¹⁰⁶ Section 15(2) of the Pre-trial Investigation Act.

¹⁰⁷ Virolainen – Pölönen 2004, p. 33; see also Section 4(3) of the Pre-trial Investigation Act.

¹⁰⁸ Virolainen – Pölönen 2004, p. 33 and 44; see also Section 4, Subsections 3–4 of the Pre-trial Investigation Act.

¹⁰⁹ See Section 3(1) of the Pre-trial Investigation Act.

¹¹⁰ See Chapter 49, Section 6 of the Criminal Code, and Section 62 of the Copyright Act.

¹¹¹ More specifically about coercive measures, see the section ‘Police’ in this report (Section 3).

▪ PROSECUTOR AND PENAL ORDER PROCEEDINGS

The prosecutor's role in penal order proceedings is substantial: the prosecutor is the authority affirming the penal order (*rangaistusmääräys*), whereas, e.g., the police or the customs are the authority imposing the request for penal order (*rangaistusvaatimus*). The penalty imposed as result of penal order proceedings may be a fine (normal 1–120 day fines) and/or a forfeiture worth 1000€ at maximum.¹¹² Penal order proceedings are relatively often used in criminal enforcement of copyright as most copyright violations are sanctioned via these proceedings.¹¹³

The (essential) conditions for the use of penal order proceedings are as follows: first of all, the request for penal order must be in written form, signed by the suspect, and a concise pre-trial investigation (*suppea esitutkinta*) must be conducted prior to imposing the request upon the suspect.¹¹⁴ After this, the request must be handed over to the prosecutor for affirmation. Secondly, it should be noticed that the prosecutor may not autonomously affirm the penal order, when, e.g., either the defendant or the suspect objects to it, or if the crime in question (which according to the penal scale may be punished by a maximum of 6 months' imprisonment or a fine) is a complainant offence.¹¹⁵

▪ CONSIDERATION OF CHARGES

The prosecutor's central role in criminal proceedings begins when the competent pre-trial investigation authority (usually the police) reports a 'cleared' offence (or a violation) to the prosecutor in the form of pre-trial investigation documents. Consideration of charges (*syyteharkinta*) is regarded as the most essential and demanding duty of a prosecutor.¹¹⁶ The main rules on the prosecutor's consideration of charges (as well as on many other aspects of criminal procedure) are in the Criminal Procedure Act (689/1997).

The consideration of charges may start already during the pre-trial investigation, but in that case, the prosecutor is bound by certain rules which seek to ensure a fair trial.¹¹⁷ In addition, the prosecutor may have to amend, limit or even cancel charges as late as during the actual trial (but obviously not after the court's deliberations). These aspects suggest that the consideration of charges may be seen as a rather flexible phase, which is not strictly bound to take place between the pre-trial investigation and court proceedings.¹¹⁸

The consideration of charges consists of various separate phases. First of all, the prosecutor must independently evaluate whether the action fulfills the essential elements of a specific crime (offence or violation). Then he or she must evaluate whether sufficient proof exists regarding the suspect's culpability of the crime in question. After that, the prosecutor must consider whether there are grounds for not charging the suspect because of the pettiness of the crime or because of some other lawful reason. Altogether, the fulfilment of the above requirements forms the ground for criminal liability.¹¹⁹

¹¹² Sections 1(1), 3 and 9 of the Penal Order Proceedings Act (692/1993). Note: also this Act is being reformed, and the new legislation (754/2010) will enter in force on a not yet confirmed time.

¹¹³ For statistics on the use of penal order fines, see the pilot report on Methodology Card 7, Section 2.

¹¹⁴ See further: Sections 4-5 of the Penal Order Proceedings Act.

¹¹⁵ See closer: Sections 1(1), 2 and 11 of the Penal Order Proceedings Act.

¹¹⁶ Virolainen – Pölönen 2004, p. 33. Also, see also the section "Police" in this report for more details about pre-trial investigations.

¹¹⁷ See closer: *ibid.*

¹¹⁸ Virolainen – Pölönen 2004, p. 33.

¹¹⁹ Virolainen – Pölönen 2004, p. 49–50. For a closer examination of the grounds for criminal liability, see the pilot report on Methodology Card 7, Section 2.

All in all, the consideration of charges must result either in 1) pressing charges or 2) not pressing charges. The latter may occur in a situation where an offence is considered not to have happened, where the offence is barred by the statute of limitations, or when the prosecutor's consideration competence under the Criminal Procedure Act applies.¹²⁰ In the following subsection, the authority to press (or 'bring') charges is discussed.

▪ PROSECUTOR'S RIGHT TO BRING CHARGES

As previously stated, as most copyright related crimes are complainant offences, the prosecutor has no authority to prosecute the suspect in those situations without a request for prosecution from the complainant (*asianomistaja*).¹²¹ The term complainant must not be understood as an exact synonym for a 'party' (*asianosainen*) or a 'plaintiff' (*kantaja*); only a victim of a crime may be a complainant.¹²² Once the prosecutor has gained the consent of a complainant to prosecute, he or she may proceed in pressing charges normally according to the rules governing the criminal procedure (foremost according to the Criminal Procedure Act). However, it should be noted that in cases where multiple suspects are accused of a crime, the prosecutor may nevertheless still charge them all, even if the complainant has initiated proceedings against only one of them.¹²³

▪ PROSECUTOR'S ROLE DURING COURT PROCEEDINGS

In criminal court proceedings, the prosecutor acts as a party, not as a representative in a case; the complainant and the prosecutor represent the same party in a criminal case. The prosecutor's role as a representative of a party begins after the charges are being pressed; during the phase of consideration of charges the prosecutor acts only as an official with no such status. In pre-trial investigations the prosecutor has certain legally determined tasks as well (as previously described), but no status of a leader of the investigation or a status of a party.¹²⁴

It should be noticed that the rights, obligations and actions of a complainant are not thoroughly assessed in this report, as the complainant's point-of-view is not a part of the research parameters of indicator DS 9. However, some general rights should be pointed out to show contrast to the competence of the prosecutor. Along with the right to bring charges and take part in the pre-trial investigation in the stages prior to court proceedings,¹²⁵ the complainant's rights consist of, e.g., the right to take part in court proceedings as a party, the right to claim damages which have been caused by the crime in question, the right to have a council or a support person for the duration of the proceedings and the right for the prosecutor's help when the complainant wants to bring a particular type of civil damages claim during criminal proceedings. However, even in the case of complainant offences, the complainant cannot proceed (prosecute) in the case alone without the prosecutor, unless the prosecutor has dropped charges in that case; in such situation the complainant has a secondary right to press charges alone.¹²⁶

It is also possible that multiple complainants are represented in the same trial (subjective cumulation of cases) or that the same complainant has multiple separate (criminal or civil) demands towards the defendant during the course of the same trial (objective cumulation). The opposite side in a criminal

¹²⁰ Chapter 1, Sections 6–8 of the Criminal Procedure Act.

¹²¹ Chapter 49, Section 6 of the Criminal Code, and Section 62 of the Copyright Act.

¹²² Virolainen – Pölönen 2004, p. 153–154.

¹²³ Section 3(1) of the Criminal Procedure Act. Also, see Virolainen – Pölönen 2004, p. 416.

¹²⁴ Virolainen – Pölönen 2004, p. 30.

¹²⁵ Ibid, p. 154.

¹²⁶ Ibid., p. 188. Also, see Section 14(1) of the Criminal Procedure Act. Note: the complainant's secondary right to press charges applies also in situations, where a police has decided to end pre-trial investigation.

case is called the defendant. The term 'defendant' is used instead of 'suspect' from the moment when the prosecutor decides to press charges against the suspect.¹²⁷

A prosecutor has nowadays a role in the criminal proceedings which can be described as 'accusatory'; making sure that a case proceeds is no longer the sole duty of the court. This is because of the many legislation changes since the 1960s, which have gradually changed the prosecutor's role towards its current state. The accusatory role is especially reflected in the prosecutors' exclusive authority to limit and formulate charges, which are then used as the basis in a trial.¹²⁸

SECTION 3. POLICE

A. OVERVIEW

The provisions governing the Police organizations are included in the Police Administration Act (110/1992) and the Police Administration Decree (158/1996). The Police organization's administration in Finland is based on three tiers, consisting of national level authorities (Ministry of the Interior, National Police Board), regional authorities (Regional State Administrative Agencies) and local authorities (Police Departments).¹²⁹ According to some expert interviewees, the National Bureau of Investigation (NBI) and the Local Police are the key Police authorities in terms of copyright enforcement in Finland.¹³⁰ In addition, it was pointed out that the Helsinki Local Police is different from all other Local Police Departments because it handles even the most demanding investigations by itself, whereas the other Departments apparently transfer such cases to the NBI. It seems that this is foremost a question of resources.¹³¹

The general duties of the Police are regulated under the Police Act. According to Section 1, the general duty of the Police Forces is to secure the rule of law, maintain public order and security, investigate crimes and submit cases to prosecutors for consideration of charges.¹³² Since this report's focus is on enforcement matters, only certain investigative duties are brought under further examination.

B. PRE-TRIAL INVESTIGATION AND COERCIVE MEASURES BY THE POLICE

■ PRE-TRIAL INVESTIGATION

The police's investigation of crimes takes place in the form of a pre-trial investigation. The investigation methods are restricted by law, especially by Pre-trial Investigation Act. As stated previously in this

¹²⁷ Ibid., p. 255.

¹²⁸ More specifically: see *ibid.*, p. 62-64.

¹²⁹ Virolainen – Pölönen 2004, p. 2-3. For more information on the administrative structure of the Police in Finland, see the official Police website, available at <http://www.poliisi.fi/poliisi/home.nsf/pages/51AB1EDFFA353429C2256BB8003F8663?opendocument>. Last visited on 19 August 2013.

¹³⁰ Stakeholder organization interview, March 2013; Police expert interview, April 2013.

¹³¹ However, it should be noticed, that the enforcement actions of the NBI or most Local Police Departments are not reviewed in this report. There seems to be no written information on these authorities' enforcement actions in copyright enforcement, and the potential police interviewees were rather difficult to contact, which lead into a situation where only one expert from the police, specializing in computer crimes, was interviewed; three selected persons were contacted altogether.

¹³² See also http://www.poliisi.fi/poliisi/home.nsf/pages/index_eng. Last visited on 21 April 2013.

report, the Pre-trial Investigation Act is being reformed, and the new legislation (805/2011) will enter into force on 1 January 2014.

The purpose of the pre-trial investigation is to investigate crimes, including different circumstances concerning the crime and the damage and benefit caused by it. The complainant's civil damages claim may also be investigated under certain conditions.¹³³ The pre-trial investigation is normally conducted by the police and the investigation is usually led by an 'investigation leader', i.e., a certain official who is authorized to make an arrest. In the case of a pre-trial investigation, this authority is usually a police official.¹³⁴ The investigation is usually initiated by a request for investigation by the complainant. However, the complainant status is not specifically required for the competence to initiate criminal investigation unless the crime in question is a so-called complainant offence¹³⁵; as stated earlier in this report, copyright related offences are almost exclusively complainant offences. The key requirement is that the complainant must demand a punishment for the suspect.¹³⁶

Despite this restriction for the pre-trial investigation, the police may initiate an investigation of a complainant offence without the complainant's initiative if the complainant clearly does not yet know of the crime and the investigation cannot be delayed without compromising its execution. In these situations the complainant must be notified of the investigation as soon as possible, and furthermore the investigation must be stopped if the complainant does not demand punishment towards the suspect after this notice. Even this rule has some, presumably very rarely applicable exceptions.¹³⁷ The pre-trial investigation, if carried through, ends when the investigation material is sent to the prosecutor for a consideration of pressing charges against the suspect(s).¹³⁸

▪ COERCIVE MEASURES: OVERVIEW

In the context of copyright related crimes, coercive measures (*pakkokeinot*) are the most relevant method of police investigation, and among them, seizure and home search are particularly common.¹³⁹ However, coercive measures are not strictly restricted to pre-trial investigation nor for the exclusive use of the police.¹⁴⁰ Coercive measures are regulated under the Coercive Measures Act.¹⁴¹ They are enforcement measures linked to criminal proceedings in its wide meaning; their purpose is to ensure that the trial may be commenced as their use is connected to solving crimes by securing evidence.¹⁴² However, their use does not require a permit or a judgment of a court.¹⁴³ Instead, a coercive measure (a seizure or a home search) is ordered by an official authorized to make an arrest.¹⁴⁴

¹³³ See closer: Section 5 of the Pre-trial Investigation Act.

¹³⁴ See closer: Sections 13–14 of the Pre-trial Investigation Act.

¹³⁵ See Sections 2 and 3(1) of the Pre-trial Investigation Act.

¹³⁶ Section 3(1) of the Pre-trial Investigation Act.

¹³⁷ See closer: Sections 3(2)–3(4) of the Pre-trial Investigation Act.

¹³⁸ See closer (e.g., exceptions): Section 43 of the Pre-trial Investigation Act.

¹³⁹ Note: this conclusion is drawn partially from the writings of Sorvari (2007), p. 405–407, partly from a police expert interview (April 2013), in which the expert stated that according to his personal work experience, house searches, along with, e.g., seizing computer hard drives, are a typical course of action in using coercive measures in online piracy situations. However, these pieces of information do not yet tell much about the amount of coercive measures in comparison to, e.g., online piracy related cases. This sort of detail does not seem to show in the statistical data either (see Methodology Card 7). One of the reasons for this is that the 'online copyright offence' provision (Chapter 49, Section 1(3) of the Criminal Code) is not separated in the statistics of Statistics Finland regarding the court cases and the coercive measures.

¹⁴⁰ See, e.g., Chapter 1, Section 1 and Chapter 4, Sections 5–6 of the Coercive Measures Act (450/1987).

¹⁴¹ Note: as stated in the previous Section of this report, the Coercive Measures Act is going through a reform, due to enter into force in 1 January 2014.

¹⁴² Chapter 4, Section 1(1) and Chapter 5, Section 1(1) of the Coercive Measures Act.

¹⁴³ For more details see Section "Criminal Proceedings" in this chapter.

¹⁴⁴ Chapter 4, Section 5 and Chapter 5, Section 3 of the Coercive Measures Act.

To our understanding, in the context of copyright enforcement in Finland, these measures typically come in question in cases where the infringement is committed via a computer network, i.e. in so-called online piracy situations.¹⁴⁵ Furthermore, according to our interviews, there seems to be a great trust in the efficiency and expertise of the Police in the use of coercive measures (and to some extent, in the pre-trial investigation as well). However, it remains unclear how evenly this expertise is spread throughout the country. It seems that at least in cases of very demanding investigations, the division on the organizational level is two-fold: apparently the National Bureau of Investigation (NBI) handles such cases forwarded by all Local Police Departments, except Helsinki.¹⁴⁶ As previously stated, this seems to be foremost a question of resources.

▪ SEIZURE

Seizure (*takavarikko*) of a document, data or item is possible under Chapter 4, Section 1 of the Coercive Measures Act. The conditions for the use of seizure are that the object or data in question either A) is suspected to be used as evidence in a criminal case or B) has been taken from someone with an act that constitutes a criminal offence or C) may be confiscated by a court. It should be especially noted that seizure is also applicable to data, which is located on a server because the conditions do not require that someone in particular (e.g., the owner or holder of a certain item which contains copyrighted material) is being suspected of a crime, which makes it applicable in many Internet related crimes. When such data is stored on a computer (i.e. on a hard drive disk) in forms of different files, they are regarded as electronic documents among evidence.¹⁴⁷ It should be also noticed that according to Chapter 4, Sections 2 and 3 of the Coercive Measures Act, the seizure of (physical or electronic) documents may be limited by, e.g., the protection of a confidential message.¹⁴⁸

A policeman is the main official responsible for seizing the items or documents that are subjected to the seizure, whereas the official authorized to make an arrest¹⁴⁹ is the one responsible for the *decision* on the use of seizure.¹⁵⁰ However, according to Chapter 4, Section 6(1) of the Act, a policeman may carry out the measure even before such decision is made, e.g., during a home search or in cases where quick action is necessary. In these cases the competent authority must be informed without delay in order for that authority to make a decision on the use of measures afterwards. In addition, a court is competent to make a decision on the use of coercive measures when it handles the charges connected to them.¹⁵¹

In order to increase legal security, the person subjected to seizure must be notified without delay, unless that person is present when the seizure is being carried out. In addition, a report concerning the use of a coercive measure must be made, containing details on the purpose of the seizure, the course of action and the objects subjected to seizure. A certificate regarding the seizure must be handed over to the person in whose possession the items in question have been. For the same reasons relating to legal

¹⁴⁵ Supra note 149. This argument is also partially based on e contrario reasoning: according to a couple of business-to-business (B2B) oriented attorney interviewees, it seems clear that at least among the bigger law firms handling copyright cases, criminal procedure is very rarely used as a means of enforcement in B2B type of situations. The reasons behind this were, e.g., bad publicity and difficulties in showing the defendants' willfulness. Because we managed to get only one police expert opinion on the use of coercive measures, more interviews on this subject would be potentially useful to form a clear picture of the practical scope of application of coercive measures in copyright context.

¹⁴⁶ Interviews, February and April 2013.

¹⁴⁷ Sorvari 2007, p. 405–406.

¹⁴⁸ Also, see Sorvari 2007, p. 406.

¹⁴⁹ As defined in Chapter 1, Section 6 of the Coercive Measures Act, these include a police commissioner or inspector, an official prosecutor, the chief of the Customs' crime prevention unit, the chief of the Finnish Border Guard, and many others.

¹⁵⁰ See Chapter 4, Sections 5 and 6.

¹⁵¹ Chapter 4, Section 5 of the Coercive Measures Act. See also Chapter 4, Section 13: the court also has competence to examine a party's claim regarding the validity of the seizure.

security, seizure must be annulled as soon as it becomes unnecessary or if 4 months have passed and the prosecutor has not yet pressed charges in the related case.¹⁵²

▪ HOME SEARCH

Home search (*kotietsintä*) is carried out under Chapter 5, Section 1 of the Coercive Measures Act. The general conditions for the use of home search are that 1) there is a suspicion of a crime, which 2) has a penal scale of 6 months of prison in minimum and 3) the searched item(s) may be subjected to seizure or otherwise be significant in solving such crime. Thus, it should be noticed that in the context of copyright related crimes this means that almost all of the criminalizations under the Copyright Act (Sections 56 a – 56 f) are excluded from the scope of home search as their maximum penalty is a fine. The only exception is Section 56 b of the Copyright Act, which has a complicated penal scale; its violation may be penalized under Chapter 38, Sections 1–2 or under Chapter 40, Section 5 of the Criminal Code. Some of the penal scales under those sanction provisions are thus at least theoretically applicable.¹⁵³ Instead, all the copyright related criminalizations under Chapter 49, Section 1 (copyright offence, maximum of 2 years in prison) and Sections 3–5 (maximum of 1 year in prison for each) of the Criminal Code have a compatible penal scale for the requirements of home search.¹⁵⁴

It should be also pointed out that, despite its name, the use of home search is not strictly limited to ‘homes’ in a common sense;¹⁵⁵ the searched place may be a building, a room, a closed place or even a closed vehicle if such place is under the possession (e.g., rented) of the potential suspect.¹⁵⁶ In addition, if the search place is defined as none of the mentioned places, the requirements for a search are clearly broader; most notably, there is no requirement for a minimum penal scale for the suspected crime and the legal security related rules regarding home search under Sections 3–7 of the Coercive Measures Act do not apply.¹⁵⁷

The authority deciding on the use of home search is the same as the one deciding on seizure, but a policeman has a broader consideration competence to decide on the use of home search without such decision.¹⁵⁸

SECTION 4. CUSTOMS

A. OVERVIEW

The Customs play an important role in enforcing intellectual property rights, including copyright. In addition to protecting the interests of the rights-holders, the work of the Customs in the field of intellectual property also benefits the society at large. According to the homepage of the European

¹⁵² See closer: Chapter 4, Sections 7, 9 and 11.

¹⁵³ Further explanation: see Haarmann 2005, p. 355. Note also, that in practice it is difficult to say how much is this used in copyright related sanctions, for the statistical data regarding the sanctions for violating Section 56b is not separated from the other violations applicable to that same sanction provision (see also the pilot report on Methodology Card 7, Section 2).

¹⁵⁴ More about copyright related criminal sanctions: see the pilot report on Methodology Card 7, Section 2.

¹⁵⁵ For the other places that may be applicable as an environment for home search, see Chapter 5, Section 1 of the Coercive Measures Act.

¹⁵⁶ Chapter 5, Section 1(1) of the Coercive Measures Act. For certain exceptions to this rule, see Subsections 2 and 3 of the previously mentioned provision.

¹⁵⁷ See more closely: Chapter 5, Section 8 of the Coercive Measures Act.

¹⁵⁸ See more closely: Chapter 5, Section 3 of the Coercive Measures Act.

Commission, "... by preventing IPR infringing goods from entering the EU market, customs contribute to economic growth, the fight against organised crime and the protection of the health and safety of millions of consumers".¹⁵⁹

Finnish Customs is part of the European Union customs system. The border between Finland and Russia doubles as an external border of the European Union and thus, the territory of Finland is used to transit illegal goods both to European and Russian markets.¹⁶⁰ Finnish Customs has received international acclaim for effective work against counterfeiting. In 2002 they were awarded the Global Anti-Counterfeiting Award for outstanding achievement by a public organisation.¹⁶¹

B. TASKS AND ORGANIZATION

The tasks of Finnish Customs include:

- collecting the duties, taxes and charges on foreign trade and on the production of goods
- carrying out customs controls on imports, exports and foreign traffic and
- preventing and revealing customs crimes.¹⁶²

The Finnish Customs is supervised by the Ministry of Justice. It has approximately 2370 employees.¹⁶³ The organization of the Customs has been reformed recently. At the end of 2012 the National Board of Customs and five customs districts ceased to exist and were replaced by a single customs authority. The main reason for the new organization is the increasing shift towards electronic custom transactions. Further, the modification enables a flexible arrangement of tasks within national units throughout the entire country.¹⁶⁴

C. MEASURES UNDER THE NATIONAL LAW

The competence of Finnish Customs in undertaking a customs measure (*tullitoimenpide*) is regulated under Section 14 of the Customs Act.¹⁶⁵ The Customs have the right to, *inter alia*,

- stop and inspect a means of transport,
- stop a person and undertake a search of a person arriving in or departing from the customs territory, visiting a means of transport or another place where goods are unloaded, loaded or stored and, for special reasons, elsewhere within the customs territory and
- stop and, where required, confiscate goods, which have not been appropriately cleared through customs.

¹⁵⁹ The homepage of the European Commission, available at http://ec.europa.eu/taxation_customs/customs/customs_controls/counterfeit_piracy/role_customs/index_en.htm. Last visited on 19 August 2013.

¹⁶⁰ Juthström – Lilja 2012, p. 471.

¹⁶¹ Global Anti-Counterfeiting Awards - Background Note and List of Previous winners, available at <http://www.gacg.org/Content/Upload/Documents/GACAwardsNotePreviouswinners.pdf>. Last visited on 19 August 2013.

¹⁶² Section 2 of the Customs Administration Act.

¹⁶³ Finnish Customs homepage, available at http://www.tulli.fi/en/finnish_customs/index.jsp. Last visited on 19 August 2013.

¹⁶⁴ Finnish Customs homepage, available at http://www.tulli.fi/en/finnish_customs/about_us/index.jsp. Last visited on 19 August 2013. See also Government Proposal 145/2012, p. 5–7.

¹⁶⁵ Under Section 3 of the Customs Act, customs measure is defined as 'any measure taken within the competence of Customs with the exception of the preliminary investigation of customs offences'.

A customs measure must be carried out without causing greater inconvenience or damage than may be deemed justified for its implementation. Further, it must be justifiable in proportion to the importance and urgency of the task and the factors affecting the overall assessment of the situation.¹⁶⁶

Further, 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'.¹⁶⁷ Thus, the provision does not apply to goods that are in transit. The authority deciding on granting a seizure must be notified of the retention without delay.¹⁶⁸

D. MEASURES UNDER EU LAW

Council Regulation (EC) No 1383/2003 concerning customs enforcement of intellectual property rights is applied in all EU member states, including Finland.¹⁶⁹ The Regulation lays down the conditions for customs action and other measures in cases where a suspicion exists that an intellectual property right is infringed. The purpose of the Regulation is to enable customs authorities, in cooperation with right-holders, to improve controls at external border. It simplified the procedure for lodging an application for action with the customs authorities and for the destruction of fraudulent goods.¹⁷⁰

According to Article 2(1) of the Regulation, 'goods infringing an intellectual property right' include 'counterfeit goods', 'pirated goods' and goods which infringe a patent, a supplementary protection certificate, a national plant variety right, designations of origin or geographical indications or geographical designations. The term 'pirated goods' is defined as goods that are or contain copies made without the consent of the holder of a copyright or related right or design right.

A right holder may apply for action by the customs authorities in cases where goods suspected of infringing intellectual property are found.¹⁷¹ The application may be granted for a maximum period of one year at a time.¹⁷² 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.¹⁷³ 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.¹⁷⁴ In Finland, the requirement of 'sufficient grounds' has

¹⁶⁶ Section 13 of the Customs Act.

¹⁶⁷ Section 14(3) of the Customs Act. Retention (or a confiscation) under Section 14 of the Customs Act is often referred to as 'administrative retention' (*hallinnollinen haltuunotto*).

¹⁶⁸ The right for granting a seizure within the custom authorities is assigned to the Head of Customs Investigation Service and a customs officer who is appointed by the latter to be in charge of the investigation (Chapter 1, Section 6 and Chapter 4, Section 5 of the Coercive Measures Act). The requirements for granting a seizure are regulated under Chapter 4 of the Coercive Measures Act.

¹⁶⁹ New Regulation 5129/2013/EC concerning customs enforcement of intellectual property rights is scheduled to take effect from 1 January 2014. It widens the scope of the current Regulation by, *inter alia*, including devices to circumvent technological measures. (Press release of the European Parliament, 24 January 2013. The text of the Regulation is available at the official website of the European Union, <http://register.consilium.europa.eu/pdf/en/13/st05/st05129.en13.pdf>. Last visited on 19 August 2013.)

¹⁷⁰ The official website of the European Union, available at http://europa.eu/legislation_summaries/customs/111018c_en.htm#KEY. Last visited on 19 August 2013.

¹⁷¹ Article 5(1) of the Council Regulation No 1383/2003.

¹⁷² Article 8(1) of the Council Regulation No 1383/2003.

¹⁷³ Article 9(1) of the Council Regulation No 1383/2003.

¹⁷⁴ Article 4(1) of the Council Regulation No 1383/2003. The right-holder must submit an application for action within three working days from the moment of receiving a notification from the Customs or else the goods are released for free-circulation (subject to completion of customs formalities).

been interpreted broadly; in practice goods are detained whenever there is merely a slight doubt about their genuine character.¹⁷⁵

The right holder must initiate proceedings to determine whether an intellectual property right has been infringed normally within 10 working days. The period may be extended by a maximum of another 10 working days.¹⁷⁶ If the right holder fails to comply with the time limit, goods are released for free circulation after the completion of customs formalities. It is important to notice that the question of infringement is always decided under the national law.

The Regulation includes an exemption which notably limits its usability with regards to copyright infringements. 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”. Thus, the Regulation does not apply to private importation.

According to the interviews with customs officials, there have been very few applications for action by customs authorities which concern copyrighted works. Currently, there are approximately less than five of such applications in the course of validity. This is probably an indication that the national legislation provides currently more efficient tools for copyright enforcement than the EU law. Most notably, the Regulation does not apply to private importation, whereas in the national legislation there is no such restriction.

SECTION 5. PUBLIC SUPERVISORY OR ANTI-PIRACY BODIES

A. OVERVIEW

In Finland, there are no public supervisory bodies (in the field of copyright) or any public anti-piracy bodies whatsoever. Supervision of the rights of copyright holders is performed by private organisations, such as the Copyright Information and Anti-Piracy Centre (CIAPC) and naturally, by the right-holders themselves.

Below, the Copyright Council, even though not a public supervisory or anti-piracy body, is discussed shortly. This is because of the important role of the Council in copyright enforcement. At least to our knowledge, the mechanism provided is rather unique to Finland.

B. THE SPECIFIC ROLE OF THE COPYRIGHT COUNCIL IN ENFORCEMENT

The Copyright Council operates under the Ministry of Education and Culture. It is appointed by the Finnish Government for three years at a time.¹⁷⁷ The Council consists of representatives of major rights holders and users of protected works.¹⁷⁸ The chair, vice-chair and at least one member are impartial.¹⁷⁹ The Council was established in 1984 as an amendment to the Copyright Act.¹⁸⁰

¹⁷⁵ Juthström – Lilja 2012, p. 480.

¹⁷⁶ Article 13 of the Council Regulation No 1383/2003. The period may be extended by a maximum of 10 working days. According to Article 11 of the Regulation, the Member States may also provide, in accordance with their national legislation, for a simplified procedure, in which the goods are destroyed without determining whether they infringe an intellectual property right or not. The provision has not, however, been implemented in Finland.

¹⁷⁷ Section 18(1) of the Copyright Ordinance.

¹⁷⁸ Section 19(1) of the Copyright Ordinance.

The duty of the Council is to assist the Ministry in copyright matters and issue opinions on the application of the Copyright Act.¹⁸¹ Typical subjects include interpretation of the 'creative work threshold', i.e. the originality and independence of a creative work, and the question of whether a work enjoys copyright protection or some other protection stipulated in the Copyright Act, i.e. photography, databases or directories.¹⁸² The Council does not issue opinions on contractual disputes.¹⁸³

An opinion of the Council can be requested by anyone - private persons, business enterprises, organizations, the police, authorities and courts of law, whether or not they have personal interests at stake.¹⁸⁴ The opinion is free of any charge or administrative cost.¹⁸⁵ The matters are decided on basis of the information, which the parties provide. The Council does not normally gather evidence itself.¹⁸⁶ Moreover, it must be noted that the Council does not, in fact, evaluate evidence. Opinions of the Copyright Council are best perceived as a type of 'expert opinions'.¹⁸⁷

The opinions of the Council are not legally binding.¹⁸⁸ The procedure gives a possibility for 'pre-checking' the possible outcome of a large-scale dispute before going to court. Even though the opinions are non-binding, they have influence on interpretation of the Finnish copyright law. This can be noted from law drafting materials as well as legal literature.¹⁸⁹ The opinions are also very often referred to in court cases by the applicant party and by the courts.¹⁹⁰

The Council issues approximately between 15 to 20 opinions a year - most of them are available online.¹⁹¹ According to Section 12 of the Work Procedure of the Copyright Council, opinions that have general significance on application of the Copyright Act must be published by appropriate means whenever possible. In the history of the Council, only a few opinions have been kept secret. The main reason for concealment has likely been an on-going preliminary investigation or consideration of charges.¹⁹²

¹⁷⁹ Section 19(2) of the Copyright Ordinance.

¹⁸⁰ "The Purpose and Functions of The Copyright Council", a presentation by Mikko Huuskonen, 24 October 2010.

¹⁸¹ Section 55(1) of the Copyright Act.

¹⁸² "The Purpose and Functions of The Copyright Council", a presentation by Mikko Huuskonen, 24 October 2010.

¹⁸³ Ministry of Culture and Education homepage (in Finnish), available at <http://www.minedu.fi/OPM/Tekijaenoikeus/tekijaenoikeusneuvosto/?lang=fi>. Last visited on 19 August 2013.

¹⁸⁴ Ministry of Culture and Education homepage, available at <http://www.minedu.fi/OPM/Tekijaenoikeus/tekijaenoikeusneuvosto/?lang=en>. Last visited on 19 August 2013.

¹⁸⁵ "The Purpose and Functions of The Copyright Council", a presentation by Mikko Huuskonen, 24 October 2010.

¹⁸⁶ Ministry of Culture and Education homepage (in Finnish), available at <http://www.minedu.fi/OPM/Tekijaenoikeus/tekijaenoikeusneuvosto/?lang=fi>. Last visited on 19 August 2013. Also, it must be noted that the Council does not, in fact, evaluate evidence. Opinions of the Council Council is may be perceived as a type of 'expert opinions'. (Comments by Rainer Oesch, June 2013).

¹⁸⁷ Comments by Rainer Oesch, June 2013.

¹⁸⁸ Ministry of Culture and Education homepage (in Finnish), available at <http://www.minedu.fi/OPM/Tekijaenoikeus/tekijaenoikeusneuvosto/?lang=fi>. Last visited on 19 August 2013.

¹⁸⁹ Vähätalo 2011, p. 35.

¹⁹⁰ "The Purpose and Functions of The Copyright Council", a presentation by Mikko Huuskonen, 24 October 2010.

¹⁹¹ Bruun – Mansala 2011, p. 74. During the history of the Council, the party requesting an opinion has been an author in 48 % of the cases and a user in 26 % of the cases. Other requesting parties have been the prosecutor (9 %), other interest supervisor (5 %), the court (4 %), a copyright organisation (4 %), a ministry (2 %) or other (2 %).

¹⁹² Bruun – Mansala 2011, p. 79.

There has been some discussion on the judicial status of the Copyright Council. According to Norrgård, the Council may be perceived as a type of alternative dispute resolution, or ADR, mechanism.¹⁹³ Vähätalo considers the Council as a public authority, which means that it must comply with the requirement of good governance in all its activity.¹⁹⁴ In any case, they both agree that the Council cannot be considered as a court of justice; the Council does not have judicial independence and its opinions are non-binding and unenforceable.¹⁹⁵

¹⁹³ Norrgård 2011, p. 84.

¹⁹⁴ Vähätalo 2011, p. 37, 49.

¹⁹⁵ Vähätalo 2011, p. 44 and Norrgård 2011, p. 84. Even though the Copyright Council does not have judicial independence, in practice it functions independently from the Ministry of Culture and Education. See the above.

Conclusions

A. ANALYSIS AND SUMMARY OF THE RESULTS

Civil and criminal cases concerning copyright and related rights have been traditionally handled by the general courts of justice. These include the District Court as the court of first instance, the Court of Appeal as the appellate court and the Supreme Court as the highest appellate court. Appealing a decision to the Supreme Court requires a leave to appeal. The main forms of court proceedings which apply in cases concerning copyright are civil and criminal proceedings. In addition, there are certain summary proceedings available. The most important summary proceeding with regard to copyright is the penal order procedure (*rangaistusmääräysmenettely*). A penal order is given by the prosecutor instead of the court.

Since 1 September 2013, new civil cases relating to intellectual property matters, including copyright matters, have been handled in first instance by a special court, the Market Court. Criminal cases are not handled by the Market Court as they are still heard by the general courts of justice only. The objectives of the reform were to reduce the current dispersion of handling of intellectual property matters and to guarantee the expertise of the court in intellectual property matters. A decision of the Market Court in intellectual property disputes and non-contentious matters is appealed directly to the Supreme Court. A leave to appeal is still required. The exclusion of the Court of Appeal was justified by the purpose of shortening the total duration of the process and reducing party expenses.

In conclusion, civil and criminal proceedings concerning copyright are handled in first instance by a different court. The appellate procedure is also different. As the only appellate instance in civil cases, the Supreme Court might be under pressure to lower the threshold for granting a leave to appeal.

The prosecutor has many kinds of roles in different phases of the criminal procedure: in pre-trial investigation the prosecutor may in certain circumstances, e.g., stop the investigation or demand more investigations to be conducted. When pre-trial investigation has ended and the cleared case has been forwarded to the prosecutor, the prosecutor's role becomes central: the consideration of charges is in exclusive authority of a prosecutor. Imposing fines via penal order proceedings (which is a commonly used summary type of procedure in copyright-related crime) belongs to the responsibility of the prosecutor. Prosecuting in criminal case in public courts is one of the prosecutor's main duties.

The police have a central role in carrying out pre-trial investigations, which are presumably in most cases initiated by a request of a complainant. During pre-trial investigations the police also execute coercive measures. In criminal proceedings the most relevant coercive measures are seizure and home search, which are applicable under certain legal conditions. It seems that especially in cases relating to digital piracy criminal proceedings are a preferred form of enforcement because of the effectiveness of the coercive measures.

The Customs play an important role in enforcing intellectual property rights, including copyright. 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 in another process.

In certain situations, the measures under Council Regulation (EC) No 1383/2003 may also be used. A right-holder may apply for action by the customs authorities in cases where goods suspected of infringing intellectual property are found. However, according to the interviews with customs officials there have been very few applications concerning copyrighted works. Furthermore, the scope of the

Regulation is limited in that it does not apply to private importation. For these reasons, potential infringements of copyright that come to the knowledge of the Customs are usually handled solely in a procedure according to the national law.

In Finland, there are no public supervisory bodies (in the field of copyright) or any public anti-piracy bodies whatsoever. Supervision of the rights of copyright holders is performed by private organisations, such as the Copyright Information and Anti-Piracy Centre (CIAPC) and naturally, by the right-holders themselves.

The Copyright Council is not a public supervisory or anti-piracy body, but nevertheless, it has a great significance in copyright enforcement. The mechanism provided is rather unique to Finland. An opinion of the Council on the application of the Copyright Act can be requested by anyone - private persons, business enterprises, organizations, the police, authorities and courts of law, whether or not they have personal interests at stake. The opinions of the Council are not legally binding. The procedure gives a possibility for 'pre-checking' the possible outcome of a large-scale dispute before going to the court. Even though the opinions are non-binding and unenforceable, they have a notable influence on interpretation of the Finnish copyright law. This can be noted from law drafting materials as well as legal literature. The opinions are also very often referred to in court cases by the applicant party and by the courts.

B. METHODOLOGICAL FINDINGS

▪ LIMITATIONS

International cooperation in the work against piracy is not assessed in the report. This is mostly due to difficulties in gathering information about the topic. We were unable to reach for interview persons who might have known more about the cooperation. Furthermore, there seems to be no public written information about the topic from the Finnish perspective.

▪ GUIDELINES FOR FUTURE RESEARCH

Further interviews with police and prosecutor officials would be useful. We managed to interview only one police official (who had expertise in the area of computer & IT crimes). One topic of discussion could include the role of the National Bureau of Investigation in copyright enforcement. Furthermore, it would be useful to gather more information especially on the practical aspects of the work of the prosecutor.

The time necessary for this research will highly depend on the availability of the interviewees. Taking into account only the actual time needed for research, interviews and drafting of the report, the work would take approximately one month.

Appendices

A. DESCRIPTION SHEET

Description sheet as presented in the Methodology Handbook, version 20.12.2013.

Description sheet 8. Enforcement by public and private actors

Description of the operation of the authorities in charge of copyright enforcement, as well as the (legal) provisions determining the enforcement by public authorities. Consider the following actors/institutions:

- Courts
 - Main principles of national court proceedings
 - Types of proceedings: Civil proceedings, criminal proceedings, special proceedings, out-of-court proceedings (briefly)¹⁹⁶
 - Composition of the court: Options available, qualification requirements for judges
 - Possible centralization of intellectual property matters in the specialized courts
 - Appealing a decision of the Court
- Prosecutors
 - Organization and general duties of the Prosecution Service
 - Prosecutor's jurisdiction
 - Prosecutor's role and duties during criminal proceedings: Prosecutor's role in the pre-trial investigation, penal order proceedings, consideration of charges and court proceedings, Prosecutor's right to bring charges
- Police
 - Pre-trial investigation and coercive measures (such as seizure and home search) available to the Police
- Customs
 - Tasks and organization
 - Measures under the national law
 - Measures under regional or international law
- Public supervisory or anti-piracy bodies
 - Tasks and organization
 - Coercive and searching methods available to these bodies

Information on the existence of non-governmental organizations working against copyright infringement (such as anti-piracy centers), including the following data:

- Name, description and activities of such organizations
- Possible role/mandate in national legislation for anti-piracy bodies (yes/no, description)
- Support from the government for rights owners' organizations in their work against piracy (amount and proportion in the organization's operational budget), as well as possible requirement for reporting from the subsidized organizations (yes/no)
- The amount of right holders represented by private anti-piracy bodies

Description of the international cooperation in the work against piracy (steps taken at an international level to lower the amount of unauthorized sharing and distribution of copyrighted works)¹⁹⁷:

- Amount of copyright enforcement cases making use of international cooperation between police or customs / year
- International cooperation of private copyright organizations and anti-piracy organizations in the enforcement of copyright (yes/no)
- Other cooperation with the authorities of other countries in the work against piracy (yes/no, between whom?)

¹⁹⁶ This last type of proceedings will be analyzed in details as part of *Description sheet 10. Availability of dispute resolution mechanisms.*

¹⁹⁷ This international work can take place on the basis of bilateral agreements or multilateral treaties, whether they are specifically designed for copyright enforcement or are part of general judiciary cooperation.

This is in some cases connected to the data of Description sheet 2 – *International and regional context.* Both sets of data will indicate a general tendency for, or lack of, international cooperation. The amount of copyright enforcement cases can be compared to the

<p>Description of the recent trends in enforcement, including:</p> <ul style="list-style-type: none"> - Level of use of anti-piracy devices (digital right management devices, holograms, etc.), including the list and description of anti-piracy devices used in each creative industry and statistics concerning the use of each types of anti-piracy devices - Information on how responsive and fast is the public enforcement action. 		
Definitions	<i>Civil case</i>	<i>A case handled in a civil procedure, normally concerning a dispute between two or more private parties. Civil procedures are always initiated by the plaintiff with no involvement of public prosecutors.</i>
	<i>Criminal case</i>	<i>A case in which the defendant is accused of a breach of law by a prosecutor. The case may also involve victims seeking compensation.</i>
	<i>Non-contentious civil case</i>	<i>Non-contentious civil cases are instigated with an application in which the court is requested to confirm an action or record a matter in a public register.¹⁹⁸</i>
	<i>Special proceedings</i>	<i>Proceedings such as certain summary proceedings (both civil and criminal) like the penal order procedure, and proceedings concerning the granting of precautionary measures.</i>
	<i>Public supervisory anti-piracy bodies</i>	<i>Publicly financed organizations specialized in copyright enforcement or the search for copyright infringement</i>
	<i>Piracy</i>	<i>Equivalent to “infringement of copyright”: unauthorized use of copyrighted works, both in their digital and physical form.</i>
	<i>Anti-piracy devices</i>	<i>Technical measures that effectively control the access and use of a copyrighted works, such as Digital Rights Management devices, anti-copying devices, etc.</i>
Guidelines for data collection	<p>The information for this indicator can be collected through expert interviews with the actors/institutions listed above, and found through available databases, online information sources, and literature.</p> <p>This study would require a minimum of one month of work, depending on the schedules of the interviewees and providing that the researcher has a good basic understanding regarding Finnish copyright / procedural regulation.</p>	
Limitations of the indicator	<ul style="list-style-type: none"> - Certain types of information can be collected through expert interviews only. - The level of use of anti-piracy devices might not be subject to statistics and therefore difficult to assess precisely. 	

number of requests for investigation and court cases required in the next indicator, in order to evaluate the importance of international cooperation at the scale of a country’s general copyright enforcement procedures.

¹⁹⁸ Source: Official Statistics of Finland (OSF): Decisions by district courts in civil cases [e-publication]. Helsinki: Statistics Finland [referred: 6.9.2013]. http://www.stat.fi/til/koikrs/index_en.html.

B. RESULT TABLES

Table A1. Number of conclusions in civil cases concerning the application of the Copyright Act in the District Court by the stage of procedure. ¹⁹⁹					
	2008	2009	2010	2011	2012
Written preparation	29	54	71	101	94
Oral preparation	3	1	1	0	1
Main hearing	5	7	4	4	6
Total	37	62	76	105	101

Table A2. Number of main hearings in civil cases concerning the application of the Copyright Act in the District Court by the composition of the court ²⁰⁰					
	2008	2009	2010	2011	2012
One legally trained member	4	6	2	4	5
Three legally trained members	1	1	2	0	1
Total	5	7	4	4	6

C. INFORMATION SOURCES

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¹⁹⁹ Statistics Finland. Statistics Finland place all civil cases concerning the application of Copyright Act under the category 'copyright disputes', which is rather misleading.

²⁰⁰ Statistics Finland.

²⁰¹ The statement as a whole (in Finnish): "Immateriaaliasioiden keskittäminen Markkinaoikeuteen on hakemus- ja riita-asioiden kannalta erittäin hyvä asia, koska näin saadaan asiantuntemus keskitettyä sekä vaadittavaa tehokkuutta ja joituisuutta. Erittäin suuri epäkohta on se, että kaikki rikosasiat ovat jääneet tämän keskittämisen ulkopuolelle. Myös tekijänoikeusasioissa aineellisoikeudellinen osaaminen on merkittävässä asemassa, koska esim tekijänoikeusrikoksen tunnusmerkistö on ns blankko saaden sisältönsä tekijänoikeuslaista, minkä lisäksi rikkomustasojen tekojen esitutkinta- syyteharkinta ja oikeuskäsittely vaatii tekijänoikeuslain, ei aina niin yksiselitteisten säännösten osaamisen ja tulkinnan. Tekijänoikeusasioiden keskittämistä Markkinaoikeuteen perusteltiin niihin liittyvillä aineellisoikeudellisilla "haasteilla". Nämä samat ongelmat tai haasteet ovat olemassa myös silloin, kuin näitä asioita käsitellään rikosasioita, minkä lisäksi syyksilukeminen tuo niihin omat lisävaikutensa/haasteensa. Syyttäläitos ehdotti, että jos ja kun rikosasiat jäävät markkinaoikeuden ulkopuolelle, voitaisiin ammattitaitoa, keskittämistä ja joituisuutta pyrkiä parantamaan sillä, että myös tekijänoikeudellisiin rikosasioihin otettaisiin omat forumsäännöksensä, jolla niidenkin käsittely muiden ipr-asioiden tapaan keskitettäisiin Helsingin käräjäoikeuteen. Valitettavasti näin ei tapahtunut. Kun markkinaoikeudessa käsiteltävien IPR-asioiden valitustietään ei mene Helsingin hovioikeuteen, saattaa yhdenmukaisen oikeuskäytännön- ja varmuuden turvaaminen muodostua haasteelliseksi etenkin kun vaarana on, että asiansa osaavia tuomareita siirtyä merkittävässä määrin markkinaoikeuteen. . Tulevaisuus näyttää, mikä vaikutus ko uudistuksella tulee olemaan."

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- Government Proposal 82/1999
- Government Proposal 85/2008
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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 Counsel 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 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 39:33	<i>Terms for Transfer and Licensing of Rights – Focus: Literature (Book Publishing Industry). Report on Piloting in Finland.</i>
Cupore webpublications 39:34	<i>Unauthorized Use of Copyrighted Works in Physical Form. Report on Piloting in Finland.</i>
Cupore webpublications 39:35	<i>Unauthorized Use of Copyrighted Works in Digital Form. Report on Piloting in Finland.</i>
Cupore webpublications 39:36	<i>Analysis of Stakeholders' Opinions on the Copyright System – Focus: Literature (Book Publishing Industry). Report on Piloting in Finland.</i>
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