

Assessing Copyright and Related Rights Systems

Sanctions and Remedies for Copyright Infringement

Report on Piloting in Finland





cupore

Assessing Copyright and Related Rights Systems: Sanctions and Remedies for Copyright Infringement. Report on Piloting in Finland.

This report is the result of the first pilot study implementing Description Sheet 9 – *Sanctions and Remedies for Copyright Infringement*, 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 ninth description sheet presented in the methodology handbook, titled “Sanctions and Remedies for Copyright Infringement”, whose purpose is to map the available civil and criminal sanctions and remedies for copyright infringement.

Liability and compensation for damage caused by copyright infringement is regulated under Section 57 of the Copyright Act. Section 57(1) of the Act concerns a reasonable compensation (*hyvitys*) for unauthorized use and Section 57(2) concerns damages (*korvaus*) for any other loss, including mental suffering and other detriment. In addition, Section 57(3) includes a provision on damages caused by a punishable act. The provisions leave a lot of room for interpretation and the practice varies a lot.

In civil cases concerning copyright the court has the power to *confiscate* material which may have significance as evidence in the trial. The court may also declare illegal copies of a work and devices used in committing an unlawful act to be *forfeited* under Section 58 of the Copyright Act. The purpose of forfeiture (*hävittämisseuraamus*) is to prevent future infringements by the same person.

Temporal legal protection in civil cases concerning copyright and related rights may be obtained through the application of Chapter 7, Section 3 of the Code of Judicial Procedure. The provision is often referred to as a ‘general precautionary measure’ (*yleinen turvaamistoimi*). The court may issue a precautionary measure before the final decision, or even before the parties have taken any other legal action. Additionally, the court has the power to e.g., confiscate material, which may have some significance as evidence in the trial; the requirements are defined under the Protection of Evidence in Industrial Property and Copyright Related Civil Cases Act.

Sections 60 a–d of the Copyright Act include provisions on *prevention of access to copyright infringing material*. Under Section 60 a of the Act, the court may order an Internet service provider to *disclose the contact information* of a subscriber whose connection is used for the purpose of making copyrighted material available to the public without the consent of the author. Under Section 60 c of the Act, the court may *order an intermediary to discontinue the making of allegedly copyright-infringing material available to the public*. Sections 20–25 of the Act on Provision of Information Society Services lay down a procedure in which an Internet service provider may be demanded to block access to copyright infringing material. Such a procedure is globally referred to as the ‘notice and take-down’ procedure. The remedy is available for the authors and related rights owners as well as their representatives.

Copyright-related crimes in Finland consist of the crimes under Chapter 49, Section 1 and 3–5 of the Criminal Code, and the crimes under Sections 56 a – 56 f of the Copyright Act. The penalties available for these crimes according to the sanction provisions are imprisonment (only applicable to crimes under the Criminal Code) and fine. The maximum penalty for a copyright offense is 2 years in prison, whereas the maximum penalty for the other copyright-related crimes under the Criminal Code is one year in prison. The maximum penalty for all the other crimes constitutes 1–120 day-fines. Other available penalties include e.g. community service, which may be imposed as a substitute for an imprisonment penalty under certain conditions. Other criminal sanctions (*rikosoikeudellinen seuraamus*) consist of e.g. forfeiture (*menettämisseuraamus*) under Chapter 10 of the Criminal Code.

Customs have the competence to retain goods under the national law, based on Section 14(3) of the Customs Act, often referred to as ‘administrative retention’ (*hallinnollinen haltuunotto*). In certain situations, the measures under European Council Regulation (EC) No 1383/2003 may also be used.

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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 9 of the methodology framework, titled "Sanctions and remedies for copyright infringement". 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 description sheet implemented here is intended to shed light on the enforcement of copyright laws and policies by private and public parties by presenting a detailed description on the available sanction and remedy options in cases of copyright infringement. 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 an indicator which aims to list the sanctions and remedies available to the national court system, in order to support the analysis of the operation of the national copyright and related rights system.

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 enforcement. With growing possibilities for easy exchange of copyrighted works through digitalized forms, copyright infringement has increased in the past decennia, enforcement has become costly and the cases are increasingly difficult to prove.² In this context, evaluating the operation of official copyright enforcement procedures is a crucial step.

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

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

The act of enforcement covers three steps that follow a lack of compliance to regulations: first, the search for infractions and for 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 incurred by 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.

The maximum penalty mentioned in the law for copyright infringement is likely to provide indication concerning the deterrent effect of copyright law against piracy, and as such enlighten the overall functioning of enforcement. However, when the maximum penalty is never used in practice, this parameter might only describe the criminal policy of the country. The severity of penalties for copyright infringement can be analysed by comparing it to other crimes with the same level of penalties.

In this study the term 'copyright infringement' means both A) *unauthorizedly using* copyright-protected works (i.e. illegal copying or making such works available for the public), and B) *otherwise violating* rules on copyright protection, as laid down in the Copyright Act and the Criminal Code, such as circumventing a technical protection measure. This term may be systematized and defined otherwise as well, and its scope has room for interpretation, as no legal definition exists for copyright infringement.³

In the course of research for this indicator, it was discovered that, in order to complement the description of sanctions and remedies available in cases of copyright infringement, some extra information would be useful. This is why the description sheet now recommends to provide, if possible, a description of the evolution in time of penalties and remedies available, in order to understand legislative trends concerning copyright enforcement. Another important aspect of copyright enforcement is the choice of procedure by the copyright holders; when both civil and penal procedures are available, it is useful to understand the preferences of stakeholders and their reasons in order to assess the efficiency of both solutions. These two issues are not covered in this report.

Description sheet 9 should be understood both as a complement of Description sheet 8 in its description of enforcement procedures and actors, and as a basis for interpreting the results of Methodology card 7 which provides information on the actual use of sanctions and remedies in cases of copyright infringement.

A description sheet presenting the indicator can be found in Appendix 1 of this report.

C. METHODS

This report was drafted together with the report on the implementation of Methodology card 7 – *Application of sanctions and remedies for copyright infringement*. These two reports cover the same topics from different perspectives: the description sheet implemented here provides a description of sanctions and remedies available in cases of copyright infringement, and Methodology card 7 offers a statistical overview of their use. As a result, they cannot be considered separately; the same documentary sources were used and the same persons were interviewed.

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.

³ See Sorvari 2007, p.1 and 27-29.

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

SECTION 1. CIVIL SANCTIONS AND REMEDIES

A. LIABILITY AND COMPENSATION FOR DAMAGE

▪ OVERVIEW

Liability and compensation for damage caused by copyright infringement is regulated under Section 57 of the Copyright Act. The terminology here is twofold; Section 57(1) of the Act concerns a reasonable compensation (*hyvitys*) for unauthorised use and Section 57(2) concerns damages (*korvaus*) for any other loss, including mental suffering and other detriment. In addition, Section 57(3) includes a provision on damages caused by a punishable act. The provisions leave a lot of room for interpretation and the practice varies quite a lot.

▪ REASONABLE COMPENSATION

Section 57(1) of the Finnish Copyright Act states as follows:

Anyone who in violation of this Act or a direction given under Section 41(2) (testamentary provision) uses a work or imports a copy of work into the country or brings a copy of work onto the territory of Finland for transportation to a third country shall be obliged to pay a reasonable compensation to the author. (...)

Thus, by the main rule, the obligation to pay compensation does not relate to the liability to penalty nor does it require that the violation has been committed intentionally or negligently. The infringer cannot defend himself or herself by claiming that he or she did not know the law; it makes no difference whether the person knew or should have known about the unlawfulness of his or her act. A literal interpretation of the rule requiring no negligence is reflected in the Finnish caselaw and legal literature.⁴

Reasonable compensation is normally decided on the basis of general tariffs or licence fees. It does not include any damages since the plaintiff has the possibility to claim damages separately (under Section 57(2) of the Copyright Act). The above principle was set out in the Supreme Court decision 1989:87 (*Valintatalo*). However, compensation does not necessarily always equal to general tariffs or licence fees. For example, in decision 1989:151 (*Video copies*), the Supreme Court took into account that the infringement did not relate to “so-called copyright piracy involving commercial distribution to the public” and thus, determined the reasonable compensation lower than the general tariffs would have indicated.⁵

In a situation where there is no general tariff or licence fee, compensation is normally based on the costs of using the work in other similar situations and standard business practice. In case of computer software, compensation is often based on retail sale prices.⁶ As for authors, reasonable compensation

⁴ Sorvari 2007, p. 243–245. See, e.g., Supreme Court decision 1977 II 78 (*Pettäjän tie / Kohtalon kukka*). In the case, X had reproduced copies of a work and distributed them to the public based on a contract with Teosto, a collective rights management organisation. However, the contract was found invalid, because B, who had, as an author, made a customer contract with Teosto, did not, in fact, have the right to control the work. Despite that X had not knowledge of this, and thus, acted non-negligently, it was ordered to pay a reasonable compensation to A, to whom the rights of the work belonged to.

⁵ Moreover, in Supreme Court case 1999:115 (*Electronic mailbox*), the Supreme Court stated that the normal license fee was not reasonable as the use deviated from the normal use of computer programs. Thus, the plaintiff was ordered to pay half of the normal licence fee as compensation.

⁶ Sorvari 2007, p. 289.

for the sale of unauthorised copies of a composition has equalled to a recording licence fee. For producers, the reasonable compensation in a similar situation has corresponded to a wholesale price (excluding VAT), reduced by a recording licence fee.⁷

There has been some confusion concerning what the expression 'using a work' (in violation of the Act) refers to. According to Section 2(1) of the Copyright Act, copyright provides an exclusive right to control a work by reproducing it and by making it available to the public. In case law, a violation of these economic rights has been confirmed as a condition to establish the required 'using a work' (in violation of the Act).⁸

However, what has proved more challenging is the question of whether 'using a work' (in violation of the Act) also covers the violation of moral rights (as regulated under Section 3 of the Copyright Act). In Finnish legal literature, the general opinion seems to be that Section 57(1) of the Act does not apply in cases which concern the violation of moral rights. This is because the violation of moral rights does not establish the required condition of 'using a work' (in violation of the Act).⁹

As opposed to the main rule, illegal reproduction of a work for private use is subject to compensation only in cases where the maker of the copy has known or should have known that the copied material has been made available to the public in violation of the Copyright Act.¹⁰ The provision was added in parliamentary proceedings in 2005 on the basis that it might be difficult for the end-user to distinguish between a legal and illegal source. Thus, the obligation to pay compensation in situations of non-intention or non-negligence was considered inappropriate.¹¹

▪ DAMAGES

Section 57(2) of the Finnish Copyright Act states as follows:

If the work is used willfully or out of negligence, the infringer shall, in addition to compensation, pay damages for any other loss, including mental suffering and other detriment.

In contrast to compensation under Section 57(1) of the Act, Section 57(2) requires intention or negligence. Economical damages may include lost profit and revenue as well as surveillance and investigation costs. Mental suffering refers to that of the creator; in a situation where all the rights have been transferred to a company, the latter cannot receive damages for such cause.¹²

The burden of proof regarding damages is on the the plaintiff.¹³ It is very hard, sometimes even impossible, to prove a loss such as mental suffering or lost profit or revenue.¹⁴ If no evidence is available, or it can only be presented with difficulty, the court may assess the quantum of damages 'within reason'.¹⁵ However, it is required, as a minimum, that the plaintiff specifies the damage and gives some

⁷ Supreme Court Decision 2001:42 (Flea market).

⁸ Harenko, Niiranen & Tarkela 2006, p. 506.

⁹ See, e.g., Haarmann, p. 360, Harenko, Niiranen & Tarkela 2006, p. 506–507 and Sorvari 2007, p. 257–258.

¹⁰ Section 57(1) of the Finnish Copyright Act.

¹¹ Statement of Constitutional Law Committee 7/2005, p. 4–5.

¹² Harenko, Niiranen & Tarkela 2006, p. 521–522.

¹³ According to Chapter 17, Section 2 of the Code of Judicial Procedure, the plaintiff must prove the facts that support the action (or claim).

¹⁴ Harenko, Niiranen & Tarkela 2006, p. 522–523.

¹⁵ Chapter 17, Section 6 of the Code of Judicial Procedure.

clarification about it.¹⁶ For example, in Supreme Court cases 1999:115 (*Electronic mailbox*) and 2005:43 (*Vocabulary of the study book*) a failure to do so resulted in that the court did not give an order to pay damages.

Section 57(3) of the Act includes a provision on damages caused by a punishable act. It states as follows:

Anyone who, otherwise than by using a work, is guilty of an act punishable under section 1 (copyright offence), 3 (circumvention of technical protection) or 5 (offence violating electronic docket information on rights) of Chapter 49 of the Penal Code, or section 56a (copyright violation), paragraph 1 of section 56e (violation of a technological measure) or section 56f (violation of electronic rights management information) of this Act, shall be obliged to pay the author damages for any loss, mental suffering or other detriment caused by the crime.

Thus, Section 57(3) of the Act only applies when something other than ‘using a work’ is at stake. In all other situations damages are decided on basis of Section 57(2) of the Act.¹⁷

B. PROTECTION OF EVIDENCE

In civil cases concerning copyright the court has the power to confiscate material, which may have some significance as evidence in the trial. The requirements for such an order are defined under the Protection of Evidence in Industrial Property and Copyright Related Civil Cases Act. The Act was enacted in the year 2000 to ensure the compliance of the Finnish legislation with Part III of the TRIPS Agreement concerning enforcement of intellectual property rights, especially its Article 50 on provisional measures.¹⁸

According to Section 3 of the Act, a confiscation may be ordered if the plaintiff proves the probability that he has a right, and that his right is being infringed or an infringement is about to happen immediately. Moreover, there must be a danger that the defendant, or someone who has the evidence in possession, hides or destroys the material. The confiscation must not cause unreasonable detriment to the defendant in view of the benefit that is being secured. Therefore the court must use balancing to weigh the interests of both parties.¹⁹

In addition to making a confiscation order, the court may decide on other measures, which are required to collect or preserve evidence. An example of such means is a precautionary measure under Chapter 7, Section 3 of the Finnish Code of Judicial Procedure.²⁰

To our knowledge, the provision is rather rarely applied by the court. However, there are at least a few software-related cases where it has been successfully put into practice by the applicant. For example, in case 11/7472, the District Court of Helsinki ordered copies to be made of certain software, files and other material owned, possessed and used by the defendant.

¹⁶ Harenko, Niiranen & Tarkela 2006, p. 522–523.

¹⁷ In a couple of cases, the Supreme Court has expressed explicitly what does not constitute the required ‘using a work’. In the Supreme Court decision 1996:43 (*Datamatti*), the Court considered handing over the source code of a computer software for the purpose of reproducing and making it available to the public not to establish ‘using a work’ (in violation of the Act). The same outcome reached in the Supreme Court decision 1999:8 (*Forwarding of video cassettes*) which involved an unauthorised sale of video cassettes and their rental rights. For discussion on the Supreme Court decision 1996:43 (*Datamatti*), see Oesch 1997.

¹⁸ Government Proposal 119/1999.

¹⁹ Jokela 2002, p. 125.

²⁰ Government Proposal 119/1999.

C. FORFEITURE

The court may declare illegal copies of a work and devices used in committing an unlawful act to be forfeited.²¹ The purpose of forfeiture (*hävittämisestä*) is to prevent future infringements by the same person.²² The rule is expressed in great detail under Section 58(1) of the Copyright Act. It states as follows:

If a copy of a work has been produced, imported into the country or brought onto the territory of Finland for further transportation to a third country, or made available to the public or altered contrary to this Act or to a direction given under section 41(2) (testamentary provision) or to the provision of section 51 (protection of names) or 52 (protection of signatures) or to a prohibition issued under section 53(1) (protection of classic works), or if a prohibition referred to in section 50a (circumventing a technological measure) or 50b (device for circumventing a technological measure) has been violated, the court may, upon the demand of the injured party or, in a case referred to in section 50b, of a public prosecutor, order, as it deems reasonable, that the copy and any composition, printing block, mould or other piece of equipment or illegal device for circumventing technological measures be destroyed, or that such property be altered in specified ways or be transferred to the injured party against a compensation corresponding to the cost of its manufacture, or be rendered unfit for unauthorised use. The provisions of this subsection shall apply to reproduction for private use only if the maker of the copy has known or should have known that the material reproduced has been made available to the public in violation of this Act.

Hence, forfeiture does not require that the unlawful act has been committed intentionally or negligently, except in cases of reproduction for private use.²³ Forfeiture may also be ordered in a penal order procedure.²⁴ The scope of forfeiture is restricted in that it may not be applied to a person who has acquired a property or some specific right in good faith, or to a work of architecture. A building may, however, be ordered to be modified as indicated by the specific features of the case and the circumstances.²⁵

The Supreme Court decision 1999:115 (*Electronic mailbox*) provides an example of the application of Section 58 of the Copyright Act. In the case unauthorised software on a hard drive of a computer and on a Digital Audio Tape was ordered to be destroyed (in addition to them being forfeited to the State as a means of commission of an offence under the Criminal Code). Earlier similar destruction orders have concerned video cassettes as well as rings, pendants, bracelets and their moulds.²⁶

Section 59 of the Copyright Act represents an exception to the principles presented above. The court may, if deemed reasonable in view of the artistic or economic value of the copies or other circumstances, permit the copy to be made available to the public or otherwise to be used for the intended purpose in consideration of a specific remuneration to the plaintiff. However, to our knowledge the section has never been applied by the court, at least not by the upper instances.²⁷

²¹ This remedy is not to be confused with forfeiture (*menettämisestä*) as under Chapter 10 of the Criminal Code: See Sorvari 2007, p. 348–350.

²² Harenko, Niiranen & Tarkela 2006, p. 531.

²³ Haarmann 2005, p. 368.

²⁴ (Subject to certain limitations.) Section 58(2) of the Copyright Act.

²⁵ Section 58(3) of the Copyright Act.

²⁶ Supreme Court decisions 1989:87 and 1980 II 3.

²⁷ Sorvari 2007, p. 331.

D. PROHIBITION TO INFRINGE

According to Section 56 g of the Copyright Act “[i]f a person infringes the copyright, the Court of Justice may prohibit him to proceed with or repeat the act”. The prohibition may also be given as a temporary precautionary measure in accordance with Chapter 7, Section 3 of the Code of Judicial Procedure.²⁸

The provision is not applicable against an intermediate, which has somewhat limited its practical significance. Thus, the Copyright Commission has proposed an addition of Subsection 2, which would allow courts to order an internet service provider to deny its clients access to a website whose purpose is to make available copyright protected content without the consent of the right holder.²⁹

Currently, the court may give a blocking order against an internet service provider in accordance with Section 60 c of the Copyright Act. However, the plaintiff is then required to raise a claim for injunction against the actual infringer under Section 60 b of the Act. This has proved challenging or even impossible, since the identity of the website administrators often remains unknown.³⁰

E. GENERAL PRECAUTIONARY MEASURE

▪ OVERVIEW

In general, the purpose of a precautionary measure is to ensure temporary legal protection via a court order in situations in which immediate legal protection is required. The court may issue a precautionary measure before the final decision, or even before parties have taken any other legal action. A precautionary measure prevents the adverse party from hindering or undermining the realisation of the right or decreasing its value or significance.³¹

As opposed to the Patent Act and the Trademark Act, the Copyright Act does not include special provisions on precautionary measures. It should not be forgotten that the remedies under Sections 60a–d of the Copyright Act (prevention of access to copyright infringing material) may be perceived as a type of precautionary measures. However, for these remedies to be applicable, the infringement must have already happened.

▪ REQUIREMENTS

The requirements for ordering a temporary precautionary measure are defined under Chapter 7 of the Finnish Code of Judicial Procedure. Section 1 concerns the right to claim and Section 2 concerns a specific property in possession of the adverse party when the applicant has a ‘better right’ to it. In contrast, Section 3 is general in its application and not confined to any specific subject matter. This provision, widely referred to as ‘a general precautionary measure’ (*yleinen turvaamistoimi*), is also applicable in copyright matters. The Section states as follows:

If the applicant can demonstrate that it is probable that he or she has a right ... that is enforceable against the opposing party ... and that there is a danger that the opposing party by deed, action or negligence or in some other manner hinders or undermines the realisation of the right of the applicant or decreases essentially its value or significance, the court may:

²⁸ Government Proposal 26/2006, p. 20.

²⁹ Report of the Copyright Commission 2/2012, p. 49, 56.

³⁰ Report of the Copyright Commission 2/2012, p. 51.

³¹ Havansi 2010, XI Erityiset prosessilajit ja vaihtoehtoinen riidanratkaisu > 1. Siviiliprosessin erityiset lajit ja vaihtoehtoinen riidanratkaisu > Summaariset prosessit siviiliasioissa > Turvaamistoimiprosessit.

- (1) prohibit the deed or action of the opposing party, under threat of a fine;
- (2) order the opposing party to do something, under threat of a fine;
- (3) empower the applicant to do something or to have something done;
- (4) order that property of the opposing party be placed under the administration and care of a trustee; or
- (5) order other measures necessary for securing the right of the applicant to be undertaken.”

Havansi concludes that there are two main requirements for a successful application: the claim requirement (*vaade-edellytys*) and the danger requirement (*vaaraedellytys*).³²

Norgård systematises the requirements in a somewhat different manner. He argues that there are, first, the infringement requirement (*intrångsrekvisitet*) and, second, the consequence requirement (*konsekvensrekvisitet*). The infringement requirement can be divided into two elements: retrospective and prospective. The retrospective element, in the context of intellectual property, requires that there is an infringement or a threat of infringement. The prospective element requires that there is a danger of infringement in the future. Obviously, these elements cannot be differentiated from each other if there is a mere threat of infringement. The consequence requirement involves balancing of the interests of the parties. The court must consider the consequences of granting and not granting the precautionary measure.³³ This requirement is reflected directly in Section 3, Subsection 2, which states that “... the court shall see to that the opposing party does not suffer undue inconvenience in comparison with the benefit to be secured”.

By the main rule, the opposing party must be given an opportunity to be heard. However, if the purpose of the precautionary measure would be otherwise compromised, the court may, on the request of the applicant, give the order without offering such an opportunity to the opposing party.³⁴

▪ EXECUTION OF A PRECAUTIONARY MEASURE

A precautionary measure as provided in Chapter 7 of Code of Judicial Procedure is executed in accordance with the Execution Code.³⁵ The applicant is required to lodge with the bailiff a security for the loss that the opposing party may incur as a result of the precautionary measure. The precautionary measure is unenforceable until the security has been lodged.³⁶ However, the court may, on application, release the applicant from providing the security if the applicant is found unable to do so and if his or her right is deemed manifestly well founded.³⁷ According to Havansi, this option is only available in exceptional situations, e.g. when the applicant is a bankrupt estate.

The applicant who has unnecessarily resorted to precautionary measures is liable to compensate the opposing party for the damage caused by the precautionary measures and their enforcement and to cover the expenses incurred.³⁸ The applicant is under strict liability, or non-negligent liability, i.e. there is no need to prove negligence on the part of the opposing party.³⁹

³² Havansi 2010, XI Erityiset prosessilajit ja vaihtoehtoinen riidanratkaisu > 1. Siviiliprosessin erityiset lajit ja vaihtoehtoinen riidanratkaisu > Summaariset prosessit siviiliasioissa > Turvaamistoimiprosessit.

³³ Norrgård 2002, p. 63–64.

³⁴ Chapter 7, Section 5, Subsection 3 of the Code of Judicial Procedure.

³⁵ Chapter 7, Section 1 of the Execution Code.

³⁶ Chapter 7, Section 16 of the Execution Code.

³⁷ Chapter 7, Section 7 of the Code of Judicial Procedure.

³⁸ Chapter 7, Section 11 of the Code of Judicial Procedure.

³⁹ Linna 2008, p. 234.

In the interviews it became evident that the right-holders consider securities regarding to Chapter 7, Section 3 of Code of Judicial Procedure (as well as Section 60 c of the Copyright Act) to be very high. Difficulties in providing securities could hamper their ability to take full advantage of the remedies. On the other hand, it must be remembered that the applicant is under strict liability and the security must cover all losses that may incur as a result of the precautionary measure.⁴⁰

▪ APPLICATION IN COPYRIGHT MATTERS

Judging from what we gathered from the interviews, Chapter 7, Section 3 of the Code of Judicial Procedure is rarely applied in copyright matters. As far as we know, none of the cases have reached the upper courts. As the provision is general in its application, it is very hard to infer any typical uses for it. However, below are two examples of the use of general precautionary measure in copyright matters.

In case 08/5859, the District Court of Helsinki prohibited the defendants, under a threat of a fine of 100 000 €, to publish, produce or make available to the public certain design and buying guides, and to use, repeat or continue certain procedures, which cause a misleading picture to the customers.

In case 03/5226, the District Court of Espoo prohibited the defendant, under a threat of a fine of 10 000 €, to perform music that was represented by a copyright organisation in a certain restaurant.

F. PREVENTION OF ACCESS TO COPYRIGHT INFRINGING MATERIAL

▪ OVERVIEW

Article 8, Section 3 of Directive 2001/29/EC (generally referred to as the Information Society Directive) requires member states to “... ensure that right-holders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right”. A similar provision is included in Article 11 of Directive 2004/48/EY (generally referred to as the Enforcement Directive).

In Finland, the requirement of the Information Society Directive was implemented by enacting Sections 60 a–d of the Copyright Act in 2005. Section 60 c was modified already in the following year to meet the requirements of the Enforcement Directive.⁴¹

▪ DISCLOSURE OF CONTACT INFORMATION

The court may order an Internet service provider to disclose contact information of a subscriber whose connection is used for making copyrighted material available to the public without the consent of the author.⁴² Section 60 a (1) of the Copyright Act states as follows:

In individual cases, notwithstanding confidentiality provisions, an author or his representative shall be entitled, by the order of the court of justice, to obtain contact information from the maintainer of a transmitter, server or a similar device, or other service provider acting as an intermediary, about a subscriber who, unauthorized by the author, makes material protected by

⁴⁰ For more information on the topic, see the part concerning Copyright Act 60 c (order to block access) in this report.

⁴¹ Sorvari 2007, p. 401–402.

⁴² In *Promusicae v. Telefónica* (C-275/06), the European Court of Justice has stated that the TRIPS agreement does not contain provisions, which require the Electronic Commerce Directive, the Information Society Directive or the Enforcement Directive to be interpreted as compelling the Member States to lay down an obligation to communicate personal data in the context of civil proceedings (see paragraphs 60 and 70). Thus, it has been argued that, in Finland, copyright protection has been taken further than is required at the European Union level (Päivärinte 2012, p. 204).

copyright available to the public to a significant extent in terms of the protection of the author's rights. The information shall be supplied without undue delay. (...)

The plaintiff who has obtained such information must follow the rules of the Act on the Protection of Privacy in Electronic Communications pertaining to confidentiality of communications, the protection of privacy, the handling of messages and identification data as well as data protection. (...)

The provision enables right holders to enforce rights against unknown infringers. Without the possibility to obtain contact information in civil proceedings, they would be forced to request a police investigation instead.⁴³ Finnish law does not allow for an Internet service provider to independently investigate the identification data of a subscriber who is suspected of making available infringing material; a court order is always required.⁴⁴

One of the requirements of disclosure of contact information, as seen from the provision, is that the subscriber makes material available 'to a significant extent' in terms of the protection of the author's rights. What exactly counts as 'to a significant extent' is not described in the provision nor the legislative history, but is left to the evaluation of the court. According to Harenko, Niiranen & Tarkela, the decision must be based on an overall consideration, where harm caused to the intermediate, the subscriber and the possible third parties and, on the other hand, economical rights of the authors and their possible other interests to cease the making available to the public are balanced together.⁴⁵

▪ **INJUNCTION**

The author or his representative may take legal action against a person who makes copyright-infringing material available to the public by virtue of Section 60 b of the Copyright Act. In allowing the action, the court must at the same time order the activity to cease. The court may impose a conditional fine to reinforce its order.

The injunction can be obtained against the actual infringer only. It is not possible to grant an injunction against a third person, e.g. an intermediate. An injunction is a permanent order, not a precautionary measure.⁴⁶

▪ **ORDER TO BLOCK ACCESS**

○ **Requirements**

The court may order an Internet service provider to block access to a site that makes copyright infringing material available to the public. According to Section 60 c (1) of the Copyright Act,

... the court of justice may, upon the request of the author or his representative, order the maintainer of the transmitter, server or other device or any other service provider acting as an intermediary to discontinue, on pain of fine, the making of the allegedly copyright-infringing material available to the public (injunction to discontinue), unless this can be regarded as

⁴³ Comments by Kristiina Harenko, May 2013. According to Section 36(2) of the Police Act, the police have the right to obtain from a telecommunications operator and a corporate or association subscriber, or by using a technical device, the contact information about a subscription that is not listed in a public directory or the data specifying a telecommunications subscriber connection, an e-mail address or other telecommunications address, or telecommunications terminal equipment if, in individual cases, the information is needed to carry out police duties.

⁴⁴ Sorvari 2007, p. 403.

⁴⁵ Harenko, Niiranen & Tarkela 2006, p. 542.

⁴⁶ Harenko, Niiranen & Tarkela 2006, p. 545–546.

unreasonable in view of the rights of the person making the material available to the public, the intermediary and the author.

Further, a blocking order must not prejudice the right of a third person to send and receive messages.⁴⁷

A prerequisite for a blocking order is a claim for injunction against the actual infringer under Section 60 b of the Act.⁴⁸ However, if it is apparent that the author's rights would otherwise be seriously prejudiced, the court may give a blocking order also before such claim is made.⁴⁹

○ **Balancing the interests**

Blocking orders have a strong connection to human rights – these orders inevitably affect the free movement of information.⁵⁰ The freedom of expression and the right of access to information are secured under Section 12 of the Constitution of Finland. On the other hand, the right to property (Section 15) and the freedom of occupation (Section 18) also enjoy constitutional protection. In deciding the cases, the courts face a difficult task, where the rights and interests of various stakeholders – namely the public at large, the authors and the internet service providers – must be balanced in a reasonable manner.⁵¹

In Finland, there is no mention of copyright at the constitutional level – copyright is only regulated in ordinary law.⁵² However, copyright is commonly thought to enjoy constitutional protection through the right to property.⁵³ According to Aarnio, the main objectives of the right to property relate “... both to ensuring the economical freedom of action of an individual as well as protecting his or her security in a way that he or she may live as self-sufficiently, independently and safely as possible in the society”. Therefore the right to property links copyright strongly to the freedom of occupation, i.e. the right to earn his or her livelihood by the employment, occupation or commercial activity of his or her choice, and further to personal freedom, as secured under Section 7(1) of the Constitution, especially self-determination.⁵⁴

○ **Case law**

In Finland, there have been recently a few high-profile cases concerning the application of Section 60 c of the Copyright Act. On 11 June 2012, the Court of Appeal of Helsinki upheld the order for the telecommunications and ICT service provider Elisa to block access by its customers to the peer-to-peer file sharing website The Pirate Bay.⁵⁵ Elisa requested a leave of appeal from the Supreme Court, but was

⁴⁷ Section 60 c (4) of the Copyright Act.

⁴⁸ Section 60 c (1) of the Copyright Act.

⁴⁹ Section 60 c (2) of the Copyright Act.

⁵⁰ See Pihlajarinne, p. 136.

⁵¹ For consideration of the European Court of Justice on balancing fundamental rights (including copyright), see, e.g., *Promiscae v. Telefónica* (C-275/06), paragraphs 62–68.

⁵² At the European Union level, intellectual property is protected under Article 17(2) of Charter of Fundamental Rights of the European Union. At the international level, Article 27(2) of the Universal Declaration of Human Rights states that “[e]veryone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author”.

⁵³ Government Proposal 309/1994, p. 62 and Statement of Constitutional Law Committee 7/2005, p. 2. Also see Lämsineva 2011, III YKSITTÄISET PERUSOIKEUDET > 11. Omaisuudensuoja (PL 15 §).

309/1994, p. 62 & Statement of Constitutional Law Committee 7/2005, p. 2. Also, see Lämsineva 2011, III YKSITTÄISET PERUSOIKEUDET > 11. Omaisuudensuoja (PL 15 §).

⁵⁴ Aarnio 2006, p. 18.

⁵⁵ The Court of Appeal of Helsinki, S 11/3097 *Musiikkituottajat - IFPI Finland v. ElisaOyj*.

not granted one.⁵⁶ A similar blocking order has been given against two other internet service providers, TeliaSonera and DNA.⁵⁷

In the Elisa case, the Court of Appeal first compared the matter to the cases *Scarlet Extended v. SABAM* (C-70/10) and *SABAM v. Netlog NV* (C-360/10) of the European Court of Justice.⁵⁸ The first concerned a matter in which a Belgian collective management organization SABAM asked the national court to require an internet service provider, Scarlet Extended, to monitor the use of internet of its customers and so to prevent the spread of copyright infringing material. The latter concerned a similar matter, with a difference that the party in question, Netlog NV, was a social media service provider. In both cases, the European Court of Justice ruled that the introduction of the filtering and blocking system in question would have been against Article 15 of the Directive on electronic commerce, which prohibits a general obligation on providers to monitor the information that they transmit or store and a general obligation to actively seek facts or circumstances indicating illegal activity.⁵⁹

The Court of Appeal argued that the mechanism for preventing copyright infringement in question did not relate to those in the cases of *Scarlet Extended v. SABAM* (C-70/10) and *SABAM v. Netlog NV* (C-360/10). Elisa was not required to introduce a filtering and monitoring system, which concerned all the electronic communications passing via its services, or all the information stored on its servers by its customers, or which was applied universally to all its customers, or which was applied in advance. The obligations of Elisa were limited to the domain names and IP addresses listed in the execution request of IFPI Finland.⁶⁰

The blocking order was not held unreasonable in view of the rights of the person making the material available to the public, Elisa and the authors. The Court of Appeal took into account a witness' statement, according to which a combination of IP and DNS restrictions was an efficient means to restrain access to a certain site. However, this is hardly self-evident; it has been argued that these types of restrictions are, in fact, very easy to circumvent.⁶¹ Besides, the same material is usually available from multiple sources.⁶² On the other hand, it has been noted that a total restriction of access is never a realistic objective; blocking orders should be considered more as a means to reduce visits to a certain website.⁶³

The Court of Appeal also compared the amount of illegal material to the amount of legal material available on the The Pirate Bay website. According to the witness, there was a considerable amount of fully legal material related to the Linux operating system. However, as the Court noted, the same material was available from other sources as well. Third parties could not be mistaken on the illegal nature of the service because of the name of the service and the information that had been available in the media. Therefore, the Court concluded that the blocking order did not endanger the right of the third parties to send and receive information.⁶⁴

⁵⁶ Saunalahti Press release, 29 October 2012, available at <http://saunalahti.fi/tiedote/tiedote.php?index=4565>. Last visited on 19 August 2013.

⁵⁷ The Court of Appeal of Helsinki, S 12/1850; the Court of Appeal of Helsinki, S 12/2223.

⁵⁸ The Court of Appeal of Helsinki, 15.6.2012 and S 11/3097 *Musiikkituottajat - IFPI Finland v. ElisaOyj*, p. 18-19.

⁵⁹ *Scarlet Extended v. SABAM* (C-70/10), paragraph 40 and *SABAM v. Netlog NV* (C-360/10), paragraph 38.

⁶⁰ The Court of Appeal of Helsinki, S 11/3097 *Musiikkituottajat -IFPI Finland v. ElisaOyj*, p. 19.

⁶¹ See, e.g., Savola 2013, p. 99–104.

⁶² See, e.g., Report of the Copyright Commission 2/2012, dissenting opinion, p. 51.

⁶³ Pihlajarinne 2012, p. 135.

⁶⁴ The Court of Appeal of Helsinki, S 11/3097 *Musiikkituottajat - IFPI Finland v. ElisaOyj*, p. 17.

○ **Execution of the blocking order**

A blocking order enters into force when the applicant provides the security referred to in Chapter 7, Section 16 of the Execution Code to the execution officer.⁶⁵ As stated earlier, the applicant is required to lodge with the bailiff a security for the loss that the opposing party may incur as a result of the precautionary measure. In TeliaSonera and DNA cases, the security, as decided by the execution officer, was 250 000 €. ⁶⁶ Both decisions were appealed to the District Court, but the appeals were dismissed.⁶⁷ The appellants, i.e. the right holders, claimed that the amount of the security was unreasonably high and that it was in no relation to the loss that TeliaSonera or DNA may incur as a result of the blocking order.⁶⁸

Without taking any stand on the cases, it may be noted, however, that securities of very high amount might be problematic with regard to access to justice, as they might make it impossible for the right holders to utilise the remedy.⁶⁹ This is an issue that would benefit from further analysis.

○ **Shortcomings of the provision**

Perhaps the most serious shortcoming of the current Section 60 c of the Copyright Act has proved to be the fact that it is not independently applicable, but requires a claim for injunction against the actual infringer under Section 60 b of the Act. This has substantially reduced the usability of the provision, because right holders have had difficulties in identifying and reaching the website administrators for raising the main action. Many of the illegal services are located outside Finland and Europe.⁷⁰

According to Section 56 g of the Copyright Act, “[i]f a person infringes the copyright, the Court of Justice may prohibit him to proceed with or repeat the act”. The Copyright Commission has proposed, as a solution to the above-mentioned issue, an addition of Subsection 2 according to which, under certain circumstances, the court could order a similar injunction against an Internet service provider. According to the new Subsection 2, the court could order the maintainer of the transmitter, server or other device or any other service provider acting as an intermediary to discontinue, on threat of fine, the making of the allegedly copyright-infringing material available to the public, unless this can be regarded as unreasonable in view of the rights of the person making the material available to the public, the intermediary and the author.⁷¹ As may be noted, the provision is similar to Section 60 c of the Act. However, most importantly, it would not require a claim for injunction against the actual infringer under Section 60b of the Act. The order would also be permanent *per se*.⁷²

G. PUBLICATION OF JUDGEMENT

Article of 15 of the Directive 2004/48/EC on the enforcement of intellectual property rights requires member states to “... ensure that, in legal proceedings instituted for infringement of an intellectual

⁶⁵ Section 60 c (4) of the Copyright Act. Also, see part G. General precautionary measure, and Execution thereof. Generally, the same rules apply here as well.

⁶⁶ Execution office of Eastern and Central Uusimaa, decisions 7514/6840/12P and 5276/6070/12P. We have no knowledge about the amount of the security in the Elisa case.

⁶⁷ The District Court of Helsinki, 26.10.2012, U 12/39770 (TeliaSonera) and the District Court of Vantaa, 24.10.2012, U 12/13447 (DNA). At least in the latter, the appellant filed a declaration of intent to appeal (to the Court of Appeal).

⁶⁸ Further, the decisions were claimed to interfere with the TRIPS Agreement and Article 14 of the WIPO Copyright Treaty.

⁶⁹ The same applies to precautionary measures under Chapter 7 of the Code of Judicial Procedure and securities thereof.

⁷⁰ Report of the Copyright Commission 2/2012, p. 51.

⁷¹ Report of the Copyright Commission 2/2012, p. 51.

⁷² Pihlajarinne 2012, p. 130.

property right, the judicial authorities may order, at the request of the applicant and at the expense of the infringer, appropriate measures for the dissemination of the information concerning the decision, including displaying the decision and publishing it in full or in part". The Article has been implemented in Finland by adding a new Section 59 a to the Copyright Act. It states as follows:

A court of justice may, in a civil matter concerning copyright and upon the request of plaintiff, order a defendant to recompense costs incurred from the dissemination, by using appropriate measures, of an information about the non-appealable judgment in which the defendant has been found to infringe copyright. The order shall not be issued, if the dissemination of the information is limited elsewhere in the law. When considering the issuing of the order and the contents of it, a court of justice shall take into account the general relevance of the dissemination to the public, the quality and extent of the infringement, the costs, which are caused by the dissemination and other corresponding matters.

A court of justice shall order a maximum amount of the reasonable dissemination costs to be recompensed by the defendant. The plaintiff is not entitled to compensation, if the information about the judgment has not been disseminated within the time that a court of justice ordered to be run from a passed non-appealable judgment.

At least to our knowledge, the provision has never been applied by the court.

H. NOTICE AND TAKE DOWN

Sections 20–25 of the Act on Provision of Information Society Services lay down a procedure in which an Internet service provider may be demanded to block access to copyright infringing material. Such a procedure is globally referred to as the 'notice and take-down' procedure. The remedy is available for authors and related rights owners alike, as well as their representatives.⁷³

At the European Union level there is no regulation, which stipulates directly about the notice and take down procedure. However, the procedure is in close connection to Directive 2000/31/EC (generally referred to as the Electronic Commerce Directive), especially its Article 14, which lays down the conditions under which an internet service provider is exempt from liability for hosting of information. According to Article 14(3), "[t]his principle [of exemption from liability] ... shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement, nor does it affect the possibility for Member States of establishing procedures governing the removal or disabling of access to information."⁷⁴ The European Commission has noted that Article 14 "... provides a basis on which different interested parties may lay down procedures for notifying the service provider about information that is the subject of illegal activity and for obtaining the removal or disablement of such information (sometimes referred to as 'notice and take down procedures')".⁷⁵ This statement was repeated in the Finnish Government Proposal 194/2011 for enactment of the Act on Provision of Information Society Services.⁷⁶

⁷³ Section 20 of the Act on Provision of Information Society Services. The exemption from liability of intermediaries is regulated under Chapter 4 of the Act on Provision of Information Society Services (by which the Directive on electronic commerce 2000/31/EC was implemented).

⁷⁴ Article 14(3) of Directive 2000/31/EC.

⁷⁵ Commission of the European Communities: Proposal for a European Parliament and Council Directive, 18.11.1998, COM(1998) 586, p. 29.

⁷⁶ Government Proposal 194/2011, p. 9.

According to the procedure, a demand must be first addressed to the content provider. Only when the content provider does not remove the material or block access to it without delay, it is possible to address the demand to an internet service provider.⁷⁷ The notice must be in due form and include a description of the material which allegedly infringes copyright.⁷⁸ After receiving the notice, the Internet service provider must notify the content provider of blocking the material. If the content provider considers the blocking unfounded, it may restore public access to the material by providing a statement to the demander and a copy to the Internet service provider. The statement must be in due form and include facts and other reasons which support the opinion.⁷⁹ After receiving the statement, the Internet service provider must not prevent the material from being available to the public, unless there is a contract between the Internet service provider and the content provider, or an order by the court or another public authority, which stipulates otherwise.⁸⁰

At the time of this research, neither studies nor statistics could be found to assess how common the procedure is in practice. This could be another interesting topic for research in the future.

I. GRADUATED RESPONSE – DEVELOPMENTS IN FINLAND

Graduated response refers to a procedure where a right owner, after noticing that his rights have been infringed online, sends, in co-operation with an Internet service provider, a number of warning letters to the alleged infringer, in which the infringement is brought to the attention of the person and he or she is threatened with legal action if the infringing activity does not cease.⁸¹ Such a procedure, with its different variations, is incorporated into the legislation of several countries, including the United Kingdom, France, South Korea, Taiwan and New Zealand.⁸²

In Finland, a graduated response scheme was proposed by the government in 2010, but the proposal expired because of the parliamentary election in 2011.⁸³ The proposal raised some criticism. According to the critics, the scheme would have interfered with the secrecy of communications as protected under Section 10(2) of the Constitution. Because of this, it would have needed to fulfil the general requirements for restricting fundamental rights.⁸⁴

In the context of restricting fundamental rights, the requirements of proportionality and protection under the law raised the most concern. First, according to the requirement of proportionality, restrictions must be essential for reaching the target and of proper scope with respect to the object that is protected and to the importance of the public interest that is behind the restriction.⁸⁵ In the proposal, there were no minimum requirements regarding the infringement before the eligible parties would have

⁷⁷ Section 20 of the Act on Provision of Information Society Services.

⁷⁸ Section 22 of the Act on Provision of Information Society Services.

⁷⁹ Section 23 of the Act on Provision of Information Society Services.

⁸⁰ Section 24 of the Act on Provision of Information Society Services. There is no statistical data available, at least to our knowledge, on the use of the notice and take down procedure.

⁸¹ See Norrgård 2010, p. 638. The term ‘three-strike rule’ is also often used in the same meaning.

⁸² See, e.g., Bridy 2011, p. 560.

⁸³ Government Proposal 235/2010. See Ministry of Education and Culture homepage (in Finnish), available at http://www.minedu.fi/OPM/Tekijaenoikeus/tekijaenoikeuden_kehittaaminen/vireilla_tekijaenoikeus/luvaton_verkkojakelu/index.html?lang=fi. Last visited on 28th April 2013.

⁸⁴ Norrgård 2010, p. 644–645.

⁸⁵ Statement of the Constitutional Law Committee 25/1994. The requirements for restricting fundamental rights are largely developed through interpretation by the Committee. The constitution itself does not mention them. See Viljanen 2011, II Yleinen osa > 3. Perusoikeuksien rajoittaminen > Perusoikeuksien yleiset rajoitusedellytykset.

been able to send a warning letter.⁸⁶ Second, according to the requirement of protection under the law, when restricting a fundamental right, sufficient legal remedies must be ensured.⁸⁷ It has been noted that the scheme would have created a kind of private notification procedure without any judicial review.⁸⁸

SECTION 2. CRIMINAL SANCTIONS AND REMEDIES

A. CRIMINAL LEGISLATION AND CRIMINAL LIABILITY FROM THE NATIONAL PERSPECTIVE

The main purpose of all criminal sanctions is to provide effective but legitimate deterrent effects and reparative measures, which are aimed to prevent exceptionally unwanted and harmful behavior in the society.⁸⁹ The criminal policy, in turn, is built on a presumption that a total elimination of crime, as well as preventing crime at all costs, is neither a realistic nor a proportionate goal.⁹⁰ Criminal sanctions and their use also require the consideration of important moral-normative aspects. Criminalizing certain acts or behaviour means serious limitation to the individual's freedom in the society. Therefore the use of criminalizations is bound, e.g., to the 'criminalization principles' of the Finnish legal system, which help to define the justification limits for criminal legislation.⁹¹ The criminalization principles consist of the principles of 1) legality, 2) ultima ratio, 3) protection of different public and private interests (*oikeushyvien suojelun periaate*), 4) inviolability of human dignity and 5) benefit-harm consideration.⁹² As the meaning of the first two principles is rather difficult to be understood merely judging by their names, and also due to their certain significance in terms of criminal copyright legislation, a short presentation is given in the following paragraphs.

The legality principle is stated under Section 8 of the Constitution of Finland:

No one shall be found guilty of a criminal offence or be sentenced to a punishment on the basis of a deed, which has not been determined punishable by an Act at the time of its commission. The penalty imposed for an offence shall not be more severe than that provided by an Act at the time of commission of the offence.

Jurisprudence has determined four central factors, or sub-principles, of the legality principle: all criminalizations must be clear, ascertainable and non-retrospective. These factors apply to the legislator. The fourth factor, *nulla poena sine lege*, means that no punishment can be ordered for an action, unless a criminal sanction provision criminalizing that action exists.⁹³

The *ultima ratio* principle dictates that criminal sanctions should only be used as the last means to control societally harmful behaviour. If another way to control an unwanted and harmful behaviour

⁸⁶ Norrgård 2010, p. 645–646.

⁸⁷ Statement of the Constitutional Law Committee 25/1994.

⁸⁸ Päivärinne 2011, p. 59–60.

⁸⁹ This is an argument presented among the paradigm 'punishment theories', influencing behind criminal policy and legislation. See closer: Lappi-Seppälä 2008 (in Lappi-Seppälä, et al.), Part I > Chapter 4 'Rangaistus kriminaalipolitiikan keinona'. Available at Sanomapro website: <http://onlinepalvelu.sanomapro.fi>.

⁹⁰ Anttila – Törnudd 1983, p. 22. Also, see Lappi-Seppälä 2008 (in Lappi-Seppälä et al.), Part I > Chapter 3 'Kriminaalipolitiikan perusteita' > 'Kriminaalipolitiikan tavoitteita ja keinoja'. Available at Sanomapro website: <http://onlinepalvelu.sanomapro.fi>.

⁹¹ Supra note 103.

⁹² Melander 2002, p. 938.

⁹³ Melander 2002, p. 940.

exists, it should be used instead. The desired effect for the behavior of an individual is either preventive (deterrence effect) or reparative (legitimate punishment of a blameworthy action).⁹⁴ Ultima ratio is closely linked to the principle of proportionality⁹⁵, which connects criminal policy to the demands of the Constitution of Finland, such as fundamental and human rights.⁹⁶ Other relevant principles limiting the exercise of power that are also mentioned in the Constitution of Finland include the equality principle (Section 6) and the reasonability principle (Section 7).⁹⁷ Regarding the balancing of interests of different stakeholders, it should be noted that none of the intellectual property rights are mentioned in the Constitution of Finland. However, they are widely considered to enjoy constitutional protection through the right to property (Section 15).

On the other hand, it is interesting to try to determine how the ultima ratio principle works in another direction; where is the line between reasonable and unreasonable avoidance of the criminal sanction legislation? For example, if an administrative or a civil type of enforcement alternative for a certain criminal sanction exists, but such measure is, e.g., very expensive and much less cost-effective to use, is it still a more legitimate and acceptable way to enforce copyrights than a criminal sanction? One answer is that the balance between crime-fighting and minimizing the unwanted effects caused by crime-fighting is ultimately a socio-political decision rather than being based strictly on the legitimacy values defined within the legal system.⁹⁸

In terms of the national context of copyright enforcement, the criminalization reforms of the Copyright Act and Criminal Code (legislations 821-822/2005), which sought to more efficiently control the growing amount of infringements occurring on the Internet, received some concerned reviews especially based on the clarity aspect of the legality principle: are the criminalizations clear enough to be obeyed?⁹⁹ It seems that no specific, empirical research has been done to assess the reality basis for such concerns, though.

B. SANCTIONS UNDER THE CRIMINAL CODE

▪ GENERAL OBSERVATIONS

The criminal sanctions for copyright infringement consist of 'penalties' (*rangaistus*) and 'other criminal sanctions' (*muut rikosoikeudelliset seuraamukset*). In this report the term 'criminal sanction' is used also as a general term for the sanction provisions themselves, which always contain at least the essential elements of a crime (*rikostunnusmerkistö*) and a penal scale (*rangaistusasteikko*).

Penalties are always based on a special provision of an act (i.e. an ordinance or other lower level regulation is insufficient to enact a penal sanction). The general rule is that, unless otherwise regulated, penalty provisions only apply when an act is committed willfully.¹⁰⁰ Thus criminal liability based on negligent acts requires a specific provision; however, a criminal liability based on an accident is not possible.¹⁰¹ In the field of copyright related sanctions, this division is pretty clear and consistent with the

⁹⁴ Melander 2002, p. 951–952.

⁹⁵ Statement of the Constitutional Law Committee 25/1994, p. 5; see also Melander 2002, p. 953–954.

⁹⁶ Melander 2002, p. 953–954.

⁹⁷ Lappi-Seppälä 2008 (in Lappi-Seppälä et al.), Part I > Chapter 4 'Rangaistus kriminaalipolitiikan keinona' > Rikosoikeuden oikeusvaltiolliset rajoitukset >

⁹⁸ See closer: Lappi-Seppälä 2008 (in Lappi-Seppälä et al.), Part I > Chapter 3 'Kriminaalipolitiikan perusteita' > 'Kriminaalipolitiikan tavoitteita ja keinoja' > 'Minimoimistavoite ja jakamistavoite'. Available at Sanomapro website: <http://onlinepalvelu.sanomapro.fi>

⁹⁹ See, e.g., Statement of the Constitutional Law Committee 7/2005, p. 2–3.

¹⁰⁰ Chapter 3, Section 5(2) of the Criminal Code.

¹⁰¹ Chapter 3, Section 7(3) of the Criminal Code.

penalty options for such violations; the Criminal Code includes mostly severe, willfully punishable criminal sanctions, imposing a threat of imprisonment (and/or a fine). Instead, the Copyright Act contains also negligence-based criminal sanctions, which, for the most part, impose a fine as the most severe available penalty.¹⁰² Moreover, this division has, in fact, been one of the main goals of the legislator during the overall reform of Criminal Code: all sanctions containing a threat for imprisonment should be included in the Criminal Code.¹⁰³

All criminal sanctions are meant to cause a negative, punitive experience to the person guilty of a crime.¹⁰⁴ Penalties consist of 1) fines¹⁰⁵, 2) imprisonment (also suspended imprisonment), and 3) community service¹⁰⁶. Other criminal sanctions consist of, e.g., forfeiture¹⁰⁷ and a ban of business operations.¹⁰⁸ In addition, there are certain measures, or ‘remedies’ (*suojakeino*), which are used to investigate crimes and to secure the course of the pre-trial investigation, consideration of charges and court proceedings.¹⁰⁹ These remedies consisting of e.g. coercive measures, are assessed in the next subchapters.¹¹⁰ In practice, the criminal sanctions ordered in copyright-related cases are almost exclusively limited to fines and suspended imprisonment.¹¹¹

▪ PENAL SCALES

Currently, the maximum length of imprisonment for a copyright offence is two years. In addition, the maximum duration of imprisonment for the modern sanctions described in Chapter 49, Sections 3–5 of the Criminal Code, is one year. The absolute maximum length of imprisonment for any single crime is 12 years or a lifetime.¹¹² In practice, a life imprisonment means unconditional imprisonment for approximately 12–13 years after which a pardon is normally allowed.¹¹³ The maximum fine for a single crime is 120 day-fines, whereas the absolute maximum for multiple crimes committed by the same person is 240 day-fines.¹¹⁴ If a person is convicted for more than one crime that may lead to a penalty,

¹⁰² Compare Chapter 49, Sections 1, 3, 4 and 5 of the Criminal Code with Sections 56 a and 56 c–56 f of the Copyright Act. Section 56 b, however, is a special type of sanction provision for its violations are punished under certain provisions of the Criminal Code.

¹⁰³ See Nuotio 2008 (in Lappi-Seppälä, et al.), Part I > Chapter 5 ‘Centralizing principle’ (*keskittämisperiaate*). Available at <http://onlinepalvelu.sanomapro.fi>. Last visited on 19 August 2013.

¹⁰⁴ See closer: Lappi-Seppälä 2008 (in Lappi-Seppälä, et al.), Part I > Chapter 6 > ‘Rangaistukset’. Available at <http://onlinepalvelu.sanomapro.fi>. Last visited on 19 August 2013.

¹⁰⁵ Note: the Finnish sanction system recognizes different types of fines and fine imposing procedures: for example, fines can be also imposed by a policeman (and furthermore, affirmed by a prosecutor) via penal order proceedings (*rangaistusmääräysmenettely*) or in a less severe form, summary penal fees (*riksesakko*), although the latter is not applicable in copyright related crimes. For more details on penal order proceedings, see the pilot report on Description Sheet 8, Section 2. Also a corporate fine (*yhteisösakko*) may be imposed upon a legal person under a special provision, such as under Chapter 4, Section 7 of the Criminal Code; however, apparently no corporate fines have ever been sentenced in copyright infringement cases (see tables in Section 2 E. of this report).

¹⁰⁶ Although not further assessed in this report, as a curiosity it is noted, that one community service penalty has been sentenced during the past five years; for a copyright offence in 2011.

¹⁰⁷ Note: this is based on Chapter 10 of the Criminal Code. It must be kept separate from the *civil* forfeiture under Section 58 of the Copyright Act.

¹⁰⁸ Section 3 of the Act on Ban of Business Operations.

¹⁰⁹ See, e.g., Chapter 4, Section 1(1) and Chapter 5, Section 1 of the Coercive Measures Act and Section 2 of the Pre-trial Investigation Act.

¹¹⁰ For a general description on criminal proceedings, coercive and summary measures, as well as the actions of different public authorities taking part in (criminal or civil) enforcement of copyrights, see the pilot report on Description Sheet 8.

¹¹¹ See the tables in Section 2 E in this report.

¹¹² See Chapter 2c, Section 2 of the Criminal Code.

¹¹³ Tapani – Tolvanen 2011, p. 324–325.

¹¹⁴ The amount of a day-fine is connected to the convicted person’s daily income. More on day-fines, see e.g. <http://www.oikeus.fi/16071.htm>.

the cumulated maximum penalty is imprisonment for 15 years.¹¹⁵ The minimum length of any imprisonment penalty is 14 days and the minimum fine is one day-fine.¹¹⁶ The court may decide to order a penalty to be enforced either as a suspended sentence or as an unconditional imprisonment; however, it should be noted that at least during the past five years no unconditional imprisonment sanctions have been sentenced in Finland as a punishment for copyright related violations, although some unconditional sentences have been imposed in the earlier years.¹¹⁷

▪ COPYRIGHT OFFENCE

The copyright offence provision is located in Chapter 49 of the Criminal Code. Copyright offences were first criminalized in Finland in 1961. At that time the provision was part of the Copyright Act.¹¹⁸ In 1995, as part of the reform of the Criminal Code, the provision concerning possible sanctions (including imprisonment) was moved to the Criminal Code.¹¹⁹ The scope of copyright offence has also widened and changed over time, parallel to the evolution of the whole copyright system. Since the end of the 20th century, this widening has occurred especially in response to the new challenges that the emerging information society and globalization have brought. Therefore, since 2005, a special sub-provision has been in force, protecting copyright holders' rights as well as the society from the vastly growing amount of infringements occurring in cyber space.¹²⁰

Generally speaking, the copyright offence sanction is applicable to willful violations, and the provision protects both copyright and related rights. In addition, the provision protects both 'economic' and 'moral' rights included in a copyright.¹²¹ Moreover, a copyright offence may be imposed in three different situations. For the purpose of this report, these are called the basic, import, and digital forms.¹²² They each have a subsection of their own within the copyright offence provision.

First, subsection 1 (the *basic form* of a copyright offence) states that:

[a] person who for profit and in violation of the Copyright Act (404/1961) and in a manner conducive to causing considerable detriment or damage to the person holding a right, violates the right of another to

(1) a literary or artistic work, (2) the performance of a literary or artistic work or of national heritage, (3) a record or other device on which sound has been recorded, (4) a film or other device on which moving images have been recorded, (5) a television or radio broadcast, (6) a register, table, program or another similar work referred to in the Copyright Act and containing the compilation of a considerable amount of information, or a database the compilation, verification or presentation of which has required considerable effort, or (7) a photograph

shall be sentenced for a copyright offence to a fine or to imprisonment for at most two years.

¹¹⁵ For more specific information, see Chapter 7, Sections 1–2 of the Criminal Code.

¹¹⁶ See closer: Chapter 2a, Section 1(1) and Chapter 7, Section 3(2) of the Criminal Code.

¹¹⁷ See tables in Section 2 E of this report, Haarmann 2005, p. 347–348 and Sorvari 2007, p. 385. According to Haarmann and Sorvari, at least one unconditional imprisonment sentence was given in copyright offence cases in 1992 and 2002. In other words, such sentences have apparently always been rare.

¹¹⁸ The old provision: 404/1961, Section 56.

¹¹⁹ Nuotio 2008 (in Lappi-Seppälä, et al.), Part II > Chapter 37 > Yleistä > Rikoslain kokonaisuudistus, available at: <http://www.onlinepalvelu-sanomapro.fi>. Also, see Government Proposal 94/1993, p. 211–213.

¹²⁰ See e.g. Government Proposal 28/2004, p. 7 and 10.

¹²¹ See closer: Nuotio 2008 (in Lappi-Seppälä, et al.), Part > Chapter 37 > Tekijänoikeusrikos (RL 49:1). These rights are defined in Chapters 1 and 5 of the Copyright Act.

¹²² In this report the term 'digital copyright offence' thus implies to a copyright offence done by using a computer network or system.

In other words, the 'essential elements' of a copyright offence in its basic form are A) an act that violates the copyright of another in a way which is described in the Copyright Act (infringement); B) the act is committed by a natural or a legal person¹²³; C) the willfulness of the infringement; D) the infringement is done in a manner that is conducive to cause considerable detriment or damage to the complainant; and E) the infringer has a motive to profit from his illegal actions.¹²⁴ As seen from the provision, the infringement itself can be directed to seven different copyright protected item groups (see the list above). The list is exhaustive.¹²⁵

In some situations, even an exchange of copyright protected goods has been sufficient for liability if the amounts have been substantial: see, e.g., the Finnish Supreme Court decision KKO 1999:115.¹²⁶ Even more complex is the question of determining the profit motive in situations where an offence is being committed 'in the operations' of a legal entity, e.g., a corporation or a foundation. For instance, a single employee may profit indirectly in some circumstances, and thus be held responsible. Furthermore, Sorvari has also noted that within other criminal jurisprudential research, a separation has been sometimes made between profit purpose and willfulness.¹²⁷

In the next paragraphs, the elements of a copyright offence in its basic form are analyzed in more details:

(A) First of all, the scope of the subsection is very wide, and thus considered potentially problematic among some scholars, especially when weighed against the legality principle; according to the provision, any kind of act that violates the Copyright Act may be considered a criminal infringement. This, in turn, might raise a question, whether in some cases a person could infringe someone's copyright without realizing it. These kinds of scenarios may be problematic from the point of view of the predictability requirement (which, in turn, is a part of the legality principle).¹²⁸ In practice, an infringement (that violates the Copyright Act) in these types of copyright offences typically involves unauthorized copying or making the work available for the public without a permit.¹²⁹

(B) In short, it should be noted that according to Chapter 49, Section 7 of Criminal Code, a company, i.e. a legal person, may be held liable for a copyright offence as well. Corporate criminal liability is not possible in case of industrial rights or other copyright-related crimes than copyright offence. However, as previously stated, in practice, there are no judgments where such corporate liability has been applied.

(C) The willfulness of the infringement reaches out to a rather wide area; this wideness is required to enhance the legal protection of the defendant. According to a principle formulated by scholars, the willfulness of the defendant must reach upon all elements described in the sanction provision. This means that the prosecutor should adequately prove the existence of all those elements in a particular

¹²³ Although, as found out in Section 5 of this Chapter, no penalties have been imposed upon legal persons in courts so far. An attorney interviewee (interview, April 2013) explained this with the difficulty to allocate criminal liability within the operations of a legal person.

¹²⁴ See further explanations: e.g. Haarmann 2005, p. 344–346.

¹²⁵ See Appendix E for more details on the essential elements of copyright offence (in its basic form).

¹²⁶ See also Sorvari 2007, p. 225–226; compare this case to another presented in Sorvari's text, where the nature of such exchange was more obscure, and thus liability for an offence was not at hand.

¹²⁷ Sorvari 2007, p. 226.

¹²⁸ The Constitutional Law Committee has brought up this critique during the reform of Criminal Code and Copyright Act in 2004. See also e.g. Huttunen 2007, p. 42–43.

¹²⁹ Haarmann 2005, p. 345.

trial (*peittämisperiaate*). However, it has been asserted that in court cases the principle is not strictly followed; in the judgments, the willfulness is usually linked to the infringer's profit motive.¹³⁰

(D) The nature of the detriment or damage to the right holder can be either material or immaterial. The requirement of the infringer's actions, or conduciveness, means that the damage or detriment must not have actually occurred; an abstract risk is sufficient for criminal liability.¹³¹

(E) The profit element in the provision is a central division point between the copyright offence and the copyright violation provisions; acts done without this motive should be punished as violations. However, the amount or even the occurrence of actual profit is not relevant; instead, the intent to act in order to profit financially is the key factor when assessing the limit between an offence and a violation. According to the legislation proposals, a typical feature of profit motive involves a certain level of planning. The profit purpose may also be at hand indirectly, e.g., when a retailer hands over illegal video copies to costumers for free with the purchase of a video recorder.¹³²

Secondly, a copyright offence may come into question in *import situations* (subsection 2):

Also a person who for profit and in a manner conducive to causing considerable detriment or damage to the person holding a right, imports for the purpose of dissemination among the public or for transport through Finland to a third state a sample or a copy produced abroad of a work or photograph, a record, film or other device on which sound or moving pictures have been recorded or a register, table, program or another similar work containing the compilation of a considerable amount of information, or a database the compilation, verification or presentation of which has required considerable effort, as referred to in subsection 1, while knowing that it has been produced or copied in circumstances under which said production or copying would in Finland be punishable under subsection 1 or under section 56a of the Copyright Act, shall be sentenced for a copyright offence.

As shown above, the elements of the import-type offence are in many ways similar to the basic form of offence: willfulness and profit motive as well as the conduciveness of considerable detriment or damage are required. In addition, the importation must happen for the purpose of dissemination among the public. Since 2005, importing such products for transit purposes has been criminalized as well.¹³³ Finally, the importer must know that the sample or copy in question was criminally illegal (punishable) to manufacture or copy according to Chapter 49, Section 1(1) of the Criminal Code or Section 56 a of the Copyright Act.¹³⁴

Thirdly, the offence provision prohibits acts of infringement done via a computer network or system. This type of copyright offence was added in 2005 as a part of a legislative reform that aimed to adapt the Finnish national copyright system to the new challenges that the globally increased use of computer networks and technology had brought up.¹³⁵ More accurately, the certain anonymity and cross-border nature of the computer networks caused (and have continued to cause) immense jurisdictional problems relating to efforts to reach the vastly growing amount of online infringers, as well as technical

¹³⁰ Sorvari 2007, p. 222.

¹³¹ Haarmann 2005, p. 345; a situation like this was in question, e.g., in the Turku Court of Appeals case (THO 30.10.2001, R 00/1000, 2643).

¹³² Sorvari 2007, p. 224-225 ; Government Proposal 94/1993, p. 218.

¹³³ Haarmann 2005, p. 346.

¹³⁴ Haarmann 2005, p. 347.

¹³⁵ Government Proposal 28/2004, p. 1.

problems concerning the investigations of suspected infringements. In other words, the so-called digital piracy phenomenon had emerged.¹³⁶

The third subsection concerning copyright offence in its '*digital form*' is as follows:

Also a person who uses a computer network or computer system to violate the right of another to the objects of protection referred to in subsection 1 so that the act is conducive to causing considerable detriment or damage to the holder of the right that has been violated, shall be sentenced for a copyright offence.

In this situation, a copyright offence is at hand when an infringement is done by using a computer connected to an open network. This means the Internet, but other kinds of networks formed by one or more computers are also applicable in this context. A computer-based offence, in turn, means handling, storing or transferring copyright-related material in a technical manner, as further specified in Chapter 38, Section 8 of the Criminal Code.¹³⁷

As shown in the text of the provision, the most significant difference with the previous forms of copyright offence is that no profit motive is required for the infringement. The grounds for this were that infringers on the Internet are almost exclusively private persons with almost never any profit motive for their actions. On the other hand, e.g. the use of house search (requiring at least six months' penal scale for the crime in order to be used) would have been impossible, if the sanction for this type of crime was a copyright violation which is only punishable with a fine.¹³⁸ The penal scale is naturally the same as with the other subsections in the sanction provision (maximum of 2 years' imprisonment or a fine).

▪ CIRCUMVENTION OF TECHNICAL PROTECTION

The provision that criminalizes the circumvention of technical protection is located in Chapter 49, Section 3 of the Criminal Code,:

A person who in violation of the prohibition in section 50a of the Copyright Act and so that the act is conducive to causing considerable detriment or damage circumvents an effective technical measure protecting a work, shall be sentenced for circumvention of technical protection to a fine or to imprisonment for at most one year.

Circumvention of technical protection, along with the other modern sanction provisions (Chapter 49, Sections 4-5 of the Criminal Code), represent a layer of modern protection beyond the traditional range of protection of copyright. Some scholars call these modern extensions 'paracopyrights'.¹³⁹ This means that a violation of such sanction provision does not *per se* constitute an infringement of a copyright if the term 'copyright infringement' is understood as unauthorized use of copyrights in a manner which is regarded as being the exclusive right of an author or a right holder.¹⁴⁰ All of these criminal sanction provisions are based on the harmonization requirements enacted in the EU Directive on copyright in the information society (2001/29/EC).¹⁴¹ Another element in common with these modern digital environment oriented sanction provisions is that, like Chapter 49, Section 1(3) of the Criminal Code, no

¹³⁶ Ibid., p. 72–73.

¹³⁷ See Haarmann 2005, p. 347.

¹³⁸ Haarmann 2005, p. 344. Also, see Government Proposal 28/2004, p. 72–73.

¹³⁹ E.g., DeBeer 2005, p. 89–90.

¹⁴⁰ See, e.g., Sorvari 2007, p. 32.

¹⁴¹ Government Proposal 28/2004, p. 1.

infringer's profit motive is required, and the penal scale for each of them is either a fine or imprisonment for maximum 1 year.

Generally speaking, the purpose of this sanction is to prohibit certain types of circumventing actions of (legal) copyright-protection technology. This notion is the most significant difference of the provision in comparison to Chapter 49, Section 4 of the Criminal Code (circumvention of technical protection offence), which in turn prohibits, e.g., manufacturing technical, illegal means meant to be used in circumventing technical protection set specifically to protect copyrighted content.

The requirements for criminal liability for circumvention of technical protection are at hand when A) a natural person B) circumvents a technical protection C) in violation of the prohibition set in Section 50 a of the Copyright Act D) by an act that is conducive to cause considerable damage or detriment. Distribution to the public or importation for that purpose also constitutes a violation of this provision.¹⁴² A 'technical protection' is further defined in Section 56 a (2) of the Copyright Act:

An effective technological measure means technology, a device or a component which, in the normal course of its operation, is designed to prevent or restrict acts in respect of the work without the author's or other rightholder's authorization and by means of which the protection objective is achieved.

▪ CIRCUMVENTION OF TECHNICAL PROTECTION OFFENCE

This sanction provision is located in Chapter 49, Section 4 of the Criminal Code:

A person who in violation of the prohibition in section 50b of the Copyright Act and so that the act is conducive to causing considerable detriment or damage, produces or imports for dissemination among the public, sells, rents, advertises for sale or rent or keeps in his or her possession for commercial use devices, products or parts that render it possible or make it easier to circumvent an effective technical measure protecting a work, or offers services making circumvention possible or easier, shall be sentenced for a circumvention of technical protection offence to a fine or to imprisonment for at most one year.

The first curious thing about this provision, when compared to other sanctions under Sections 1, 3 and 5 of Chapter 49 of the Criminal Code, is the prosecutor's right to press charges without the requirement of a report by the complainant (or the presence of a very important public interest).¹⁴³ This is because of the fact that the offence is not directly targeted at any rightholder.¹⁴⁴ The elements of an offence according to Section 4 are A) the violation of section 50 b of the Copyright Act, B) the act is conducive to cause considerable detriment or damage and C) a (natural) person – in ways described in the provision – offers certain types of circumvention products or services among the public. It is argued that if this type of circumvention product or service is uploaded into an open computer network, such act is always conducive to considerable detriment or damage, for it is then available to anyone.¹⁴⁵

▪ OFFENCE VIOLATING ELECTRONIC DOCKET INFORMATION ON RIGHTS

This sanction provision is located in Chapter 49, Section 5 of the Criminal Code:

¹⁴² Also, see Haarmann 2005, p. 348–349.

¹⁴³ Chapter 49, Section 6 of the Criminal Code.

¹⁴⁴ Haarmann 2005, p. 350.

¹⁴⁵ Haarmann 2005, p. 349.

A person who in violation of the prohibition in section 50 d of the Copyright Act and so that the act is conducive to causing considerable detriment or damage,
(1) deleted or alters electronic docket information on rights which identify a work, author or other holder of rights or which are consist of data on the terms of use of the work, or
(2) disseminates among the public or imports for dissemination among the public copies of a work or conveys to the public a work so that the data referred to in paragraph (1) have been deleted or altered without permission, and the perpetrator knows that his act causes, makes possible, conceals or facilitates the violation
shall be sentenced for an offence violating electronic docket information on rights to a fine or to imprisonment for at most one year.

As shown in the provision, the requirements, i.e. the essential elements for the use of this sanction, are in many respects similar to the previous two sanction provisions in Chapter 49 of the Criminal Code. The idea of this provision is to prohibit different types of violations, e.g., alterations and deleting of electronic docket information that is meant to help identify an author or a rightholder, a copyrighted work or certain information regarding the use of a copyrighted work.¹⁴⁶

C. SANCTIONS UNDER THE COPYRIGHT ACT

▪ OVERVIEW

The sanction provisions in the Copyright Act (404/1961) consist of six different criminalizations, each with their own penal scales and elements of violation. All of them, except the breach of confidentiality (Section 56 b), are only punishable by fine, not by imprisonment penalty.¹⁴⁷ The first of them, copyright violation (Section 56 a), is the oldest, the broadest in terms of scope of applicability, and by far the most often sentenced sanction among all copyright related crimes.¹⁴⁸ The other provisions were added in the Copyright Act in 2005, as a part of the implementation of the requirements of the so-called Copyright Directive (2001/29/EC). They represent the less severe sanction alternatives to the ones under Chapter 49, Sections 3–5 of the Criminal Code.¹⁴⁹

▪ COPYRIGHT VIOLATION

The provision for copyright violation is enacted in Section 56a of the Copyright Act:

(1) Anyone who

- 1. wilfully or out of gross negligence makes a copy of a work, or makes a work available to the public contrary to the provisions of this Act or infringes the provisions of section 3 concerning moral rights,*
- 2. otherwise violates a provision protecting copyright in the present Act or acts contrary to a direction issued under section 41(2), or to a provision of section 51 or section 52, or to a prohibition referred to in section 53(1) or section 54b(1), or*
- 3. imports into the country or brings onto the territory of Finland for transportation to a third country copies of a work which he knows or has well founded reason to suspect to have been produced outside the country under such circumstances that such production in Finland would have been punishable under this Act,*

¹⁴⁶ See closer: Haarmann 2005, p. 349.

¹⁴⁷ Section 56 b may be punished under, e.g., the provisions in Chapter 38, Sections 1–2 or Chapter 40, Section Section 5 of the Criminal Code; see further description in the subsection below.

¹⁴⁸ For more details, see the following paragraphs as well as Section 2 E of this report.

¹⁴⁹ Government Proposal 28/2004, p. 1 and Haarmann 2005, p. 350.

shall be sentenced to a fine for a copyright violation, unless the act is punishable as a copyright offence under section 1 of Chapter 49 of the Penal¹⁵⁰ Code.

(2) The making of single copies for private use of a computer-readable computer program or a database which has been published or copies of which have been sold or otherwise permanently transferred with the consent of the author, or the making of single copies for private use of a work contrary to section 11(5) shall not be considered to constitute a copyright violation.

As can be seen from the the provision, the violation can occur under two different scenarios similar to copyright offences: under a ‘normal’ scenario, and under an ‘import’ scenario. Within the first mentioned scenario, the essential elements of (objective) criminal liability are numerous. In a roughly summarized form they consist of the following elements: that A) the act is done willfully or out of gross negligence and B) by violating copyright protected economic or moral rights¹⁵¹, or C) ‘otherwise’ violating any copyright-protecting provisions of Copyright Act, or D) acting contrary to many other provisions.¹⁵² It should be also noted that if the grounds of liability for a copyright violation are based on the perpetrator’s actions contrary to a provision of Section 51 or 52, the crime in question is not a complainant offence, which means that the prosecutor may press charges against a suspect without the initiative of a complainant.¹⁵³

The second scenario concerns importation of copyright-infringing copies to Finland, or copies to be transported to a third country via the Finnish territory. In addition, the person must also have a ‘well founded reason to suspect’ the goods to have been produced outside of Finland in circumstances that would constitute a criminal liability under the Copyright Act. Thus, in each case an estimation must be made of the suspects’ reasoning. According to the Copyright Council, the place of purchase and the price of the product should be the primary measuring standards.¹⁵⁴

Since there is no requirement of making the infringing copies available to the public, importing for private use is punishable, even in situations where a person imports only one unauthorized copy of a copyrighted product to the country.¹⁵⁵ This part of the provision thus constitutes grounds for a policy called ‘zero tolerance’ among, e.g., the Finnish Customs officials.¹⁵⁶

Section 56a(2) of the Copyright Act, in turn, is a limitation provision in favor of private use of copyright-protected computer programs and databases.¹⁵⁷

All in all, most issues brought up during the previous description suggest that the scope of applicability of copyright violation is very wide, but also very obscure, which is at least theoretically problematic with regard to the clarity demands of the legality principle.¹⁵⁸ For observations on the application of copyright violations in courts, see Section 2 E in this report. Finally, it is noteworthy that no profit purpose nor an

¹⁵⁰ Note: terms ‘Penal Code’ and ‘Criminal Code’ are synonyms.

¹⁵¹ In addition, although not specifically mentioned in the sanction provision, liability for a copyright violation is also possible in situations, where copyright related rights (*tekijänoikeuden läbioikeudet*) under Chapter 5 of the Copyright Act have been infringed: see Section 60 of the Copyright Act.

¹⁵² Haarmann (2005, p. 351–352) recognizes that it is somewhat unclear what the term ‘otherwise’ may mean, and how reasonable it is.

¹⁵³ Haarmann 2005, p. 356.

¹⁵⁴ Haarmann 2005, p. 353.

¹⁵⁵ Nuotio 2008 (in Lappi-Seppälä, et al.) > Part I > Chapter 37 > ‘Tekijänoikeusrikos (RL 49:1)’ > ‘Maahantuonti’. Available at: <http://onlinepalvelu.sanomapro.fi>.

¹⁵⁶ Interview of a Customs official, April 2013.

¹⁵⁷ See closer: Haarmann 2005, p. 354–355.

¹⁵⁸ See closer: Haarmann 2005, p. 350–352; Sorvari 2007, p. 28–32.

act conducive to cause damage or detriment is required, which partly separates copyright violations from the more severe copyright offences (Chapter 49, Section 1 of the Criminal Code).¹⁵⁹

▪ **BREACH OF CONFIDENTIALITY**

The breach of confidentiality is criminalized under Section 56b of the Copyright Act:

A violation of confidentiality referred to in section 26d(3) or section 26l(4) shall be punishable under section 1 or 2 of Chapter 38 of the Penal Code, unless the act is punishable under section 5 of Chapter 40 of the Penal Code or unless a more severe punishment for the act has been laid down elsewhere in the law.

This provision imposes a penalty for a violator who either 1) willfully expresses confidential information concerning business activities of another entity, which the violator has received from a Customs official, a manufacturer, an importer or a retailer for compensation recovery purposes, or 2) who expresses a piece of information concerning business activities of another entity, which the violator has received during the inspection for resale compensation.¹⁶⁰

Perhaps the most noteworthy part of this provision, as mentioned previously, is its penal scale: the penal scale is scattered in the provisions of the Criminal Code and other laws,¹⁶¹ and thus – different to the other sanction provisions in Copyright Act – the breach of confidentiality may be also punishable by imprisonment penalty. However, its use in practice is difficult to assess; court judgments on breach of confidentiality are as scattered as the penal scale itself as they may be based on other crimes as well (e.g. on offence of secrecy under Chapter 38, Section 1 of the Criminal Code). Thus, the punishments are not separable in statistics: to find out how often this provision is applied in practice, examination should be made on a case-by-case level. That in turn would be a somewhat lengthy task to carry out, primarily because there is no national court case register, which could provide all available copyright-related criminal judgments from different courts across the country at once.

▪ **ILLEGAL DISTRIBUTION OF A DEVICE FOR REMOVING A TECHNOLOGICAL MEASURE PROTECTING A COMPUTER PROGRAM**

This criminalization is located in Section 56c of the Copyright Act:

Anyone who distributes to the public for the purpose of gain or for such a purpose keeps in his possession any device whose sole purpose is unauthorised removal or circumvention of a technological device protecting a computer program shall be sentenced to a fine for unauthorised distribution of a device for removing a technological measure protecting a computer program.

It should be noticed, first of all, that this sanction protects specifically computer programs. Another thing worth mentioning is that the requirement of a profit purpose is two-fold: it is only required if the act is connected to the possession of a device mentioned in the provision.¹⁶²

¹⁵⁹ Also see further assessment by Haarmann: Haarmann 2005, p. 350–351.

¹⁶⁰ Haarmann 2005, p. 355.

¹⁶¹ Or ‘Penal Code’, as translated in the unofficial translation of the Copyright Act.

¹⁶² See also Haarmann 2005, p. 355–356.

▪ BREACH OF THE OBLIGATION TO PROVIDE INFORMATION

Anyone who wilfully or out of gross negligence violates the provision of Section 26d(2) or the obligation to provide information or to give account, laid down in Section 26k(2), shall be sentenced to a fine for a violation of the obligation to provide information as provided in the Copyright Act, unless a more severe punishment for the act has been laid down elsewhere in the law.

This sanction provision is located in Section 56d of the Copyright Act. The act may be committed either wilfully or out of gross negligence. The obligation to provide information is defined in Sections 26d(2) (obligation of a manufacturer, importer or seller of audiovisual recordings) and 26k(2) (obligation of a professional, publicly operating seller of works of fine art).¹⁶³

▪ VIOLATION OF A TECHNOLOGICAL MEASURE

Anyone who wilfully or out of gross negligence infringes
1. the prohibition to circumvent a technological measure, as provided in section 50a, or
2. the prohibition to produce or distribute devices for circumventing technological measures, as provided in section 50b, shall be sentenced, unless the act is punishable as a circumvention of a technological measure under section 3 of Chapter 49 of the Penal Code or as a offence of a device for circumventing a measure under section 4 of the Chapter, to a fine for a violation of a technological measure.

This provision (Section 56e of the Copyright Act) imposes a fine penalty for those who violate prohibitions under Sections 56a-56b, if the act is not punishable under Chapter 49, Sections 3-4 of the Criminal Code. A gross negligence is sufficient to constitute criminal liability. It should also be noticed that a violation of Section 56e(2) is not a complainant offence, unlike most copyright related crimes.¹⁶⁴

▪ VIOLATION OF ELECTRONIC RIGHTS MANAGEMENT INFORMATION

Anyone who wilfully or out of gross negligence infringes the prohibition to remove or alter electronic rights management information referred to in section 50d(1) or the prohibition referred to in subsection 2 of said section to distribute to the public or import a copy of a work for distribution to the public or communicate a work to the public in a form in which the electronic management information has been removed from the work or altered without authorisation, shall be sentenced unless the act is punishable as an offence of electronic rights management information under section 5 of Chapter 49 of the Penal Code, to a fine for a violation of electronic rights management information, if the perpetrator knows or has well-founded reason to suspect that his act causes, enables or conceals an infringement of the rights conferred by this Act or facilitates the infringement thereof.

Finally, the sanction for violation of electronic rights management information is regulated under Section 56f of the Copyright Act. It is a sanction for violating the prohibition set in Section 56d, unless the act is punishable under Chapter 49, Section 5 of the Criminal Code. Another condition for criminal liability is that the perpetrator knew or he or she should have known the illegal effect described in the provision.

¹⁶³ Haarmann 2005, p. 356.

¹⁶⁴ Ibid.

▪ FORFEITURE IN CRIMINAL PROCEEDINGS

Forfeiture (*menettämisseuraamus*) of either the proceeds of crime, an instrument of crime, or value gained by committing a crime are applicable in criminal proceedings. The provisions on this crime-related forfeiture are located under Chapter 10 of the Criminal Code, and it should be kept separate from forfeiture under Section 58 of the Copyright Act.¹⁶⁵ It appears that seizure under the Criminal Code is applicable to copyright-related crimes, but its relation to Section 58 is rather complex¹⁶⁶; apparently a prosecutor may demand seizure without the initiative of a complainant under Chapter 10, Section 5 of the Criminal Code, if the complainant has not demanded seizure under Section 58 of the Copyright Act.¹⁶⁷

SECTION 3. CUSTOMS MEASURES

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

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.¹⁶⁸ When the Customs come across goods that are suspected of infringing an intellectual property right covered by the application, it must suspend release of the goods or detain them.¹⁶⁹ 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.¹⁷⁰ In Finland, the requirement of ‘sufficient grounds’ has been interpreted broadly; in practice goods are detained whenever there is merely a slight doubt about their genuine character.¹⁷¹ Where goods are suspended from release or detained under the Regulation, a separate decision for seizure under the national law is not required.

However, the Regulation does not apply to private importation. This shows in Article 3(2) of the Regulation, which 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”.

¹⁶⁵ See Section 1 D of this report.

¹⁶⁶ See closer: Sorvari 2007, p. 340.

¹⁶⁷ Haarmann 2005, p. 369.

¹⁶⁸ Article 5(1) of the Council Regulation No 1383/2003.

¹⁶⁹ Article 9(1) of the Council Regulation No 1383/2003.

¹⁷⁰ Article 4(1) of the Council Regulation No 1383/2003.

¹⁷¹ Juthström & Lilja (2012), p. 480.

Conclusions

A. ANALYSIS AND SUMMARY OF THE RESULTS

▪ CIVIL ENFORCEMENT

Liability and compensation for damage caused by copyright infringement is regulated under Section 57 of the Copyright Act. Section 57(1) of the Act concerns a reasonable compensation (*hyvitys*) for unauthorised use and Section 57(2) concerns damages (*korvaus*) for any other loss, including mental suffering and other detriment. In addition, Section 57(3) includes a provision on damages caused by a punishable act. The provisions leave a lot of room for interpretation and the practice varies a lot.

In civil cases concerning copyright the court has the power to *confiscate* material which may have significance as evidence in the trial. The requirements for such an order are defined under the Protection of Evidence in Industrial Property and Copyright Related Civil Cases Act. To our knowledge, the provision is quite rarely applied by the court. However, there are at least a few software-related cases where it has been successfully put into practice by the applicant.

The court may also declare illegal copies of a work and devices used in committing an unlawful act to be *forfeited* under Section 58 of the Copyright Act. The purpose of forfeiture (*hävittämisestä*) is to prevent future infringements by the same person. In caselaw, forfeiture has concerned, *inter alia*, unauthorised software on a hard drive of a computer, video cassettes, rings, pendants as well as bracelets and their moulds.

Temporal legal protection in cases concerning copyright and related rights may be obtained through the application of Chapter 7, Section 3 of the Code of Judicial Procedure. The provision is often referred to as a 'general precautionary measure' (*yleinen turvaamistoimi*). The court may issue a precautionary measure before the final decision, or even before the parties have taken any other legal action. The provision is rarely applied in copyright matters but there have been at least a few of such cases.

Sections 60 a–d of the Copyright Act include provisions on *prevention of access to copyright infringing material*. Under Section 60 a of the Act, the court may order an Internet service provider to *disclose the contact information* of a subscriber whose connection is used for making copyrighted material available to the public without the consent of the author. This provision is applied increasingly often. Under Section 60 c of the Act, the court may *order an intermediary to discontinue the making of allegedly copyright-infringing material available to the public*. In a few recent high-profile cases, an ISP has been ordered to block access to the peer-to-peer file sharing website The Pirate Bay. None of the cases have ended up in the Supreme Court, which is rather unfortunate.

Sections 20–25 of the Act on Provision of Information Society Services lay down a procedure in which an Internet service provider may be demanded to block access to copyright infringing material. Such a procedure is globally referred to as the 'notice and take-down' procedure. The remedy is available for the authors and related rights owners as well as their representatives.

▪ CRIMINAL ENFORCEMENT

Copyright-related crimes in Finland consist of the crimes under Chapter 49, Section 1 and 3–5 of the Criminal Code, and the crimes under Sections 56 a – 56 f of the Copyright Act. The available penalties for these crimes according to the sanction provisions are imprisonment (only applicable to crimes under the Criminal Code) and fine.

The maximum penalty for a copyright offence is 2 years in prison, whereas the maximum penalty for the other copyright-related crimes under the Criminal Code is one year in prison. The maximum penalty for all the other crimes is 1–120 day-fines. Other available penalties include e.g. community service, which may be imposed as a substitute for an imprisonment penalty under certain conditions. Other criminal sanctions (*rikosoikeudellinen seuraamus*) consist of, e.g., forfeiture (*menettämisseuraamus*) under Chapter 10 of the Criminal Code.

▪ CUSTOMS MEASURES

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*). In certain situations, the measures under Council Regulation (EC) No 1383/2003 may also be used.

B. METHODOLOGICAL FINDINGS

▪ LIMITATIONS

The time period of the study did not allow for having interviews with prosecutors; also, only one police official was reached for an interview.

▪ GUIDELINES FOR FUTURE RESEARCH

In future studies, interviews of computer or network-oriented police experts especially at the Helsinki Police Department, the National Bureau of Investigation and probably also the National Police Board would provide great practical views concerning, e.g., criminal enforcement against digital piracy.

It is important to remember that this report was drafted together with the report on the implementation of Methodology card 7 – *Application of sanctions and remedies for copyright infringement*. It is therefore impossible to determine a separate timeframe for each of these two reports. The time necessary for the research for these two reports combined will highly depend on the availability of the interviewees. Taking into account only the actual time needed for research, interviews and drafting of the two reports, the work would take approximately two months.

Appendices

A. DESCRIPTION SHEET

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

Description sheet 9. Sanctions and remedies for copyright infringement		
<p>Description of the sanctions and remedies available by law in cases of copyright infringement. Consider the following categories:</p> <ul style="list-style-type: none">- Penalties for copyright infringement<ul style="list-style-type: none">- Types of penalties available (such as community service, fines or prison) for each type of copyright infringement and their conditions of application- Maximum penalties available (in each type of penalties)- Remedies and calculation of damages<ul style="list-style-type: none">- Types of remedies available to the victims of copyright infringement- Types of damages subject to compensation in cases of copyright infringement- Rules for calculating the amount of damages <p>Description of the recent trends in the award of sanctions and compensations in cases of copyright infringement:</p> <ul style="list-style-type: none">- Evolution of the penalties and remedies available over time- Preference of different actors concerning the procedure to be followed (do victims prefer to initiate civil or penal proceedings? For what reasons? Are these choices different when the victim is an organization or a private person?)		
Definitions	<i>Remedy</i>	<i>Remedies are the ways in which a right is enforced, satisfied or compensated for by a court after its breach inflicted some harm or injury to a victim. Remedies include damages, restitution, coercive remedies and declaratory remedies.</i>
Guidelines for data collection	The information for this indicator can be collected through expert interviews with the actors and institutions concerned, and found through available databases, online information sources and literature. The analysis should cover copyright infringement sanctions in a wide sense, taking into account provisions such as sanctions against circumvention of technical protections (if criminalized in the country in question).	
Limitations of the indicator	Certain types of information can only be collected through interviews with experts and stakeholders.	

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C. CONSULTED PARTIES

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