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Assessing Copyright and Related Rights Systems

# Availability of Alternative Dispute Resolution Mechanisms

## Report on Piloting in Finland

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**Assessing Copyright and Related Rights Systems: Availability of Alternative Dispute Resolution Mechanisms. Report on Piloting in Finland.**

This report is the result of the first pilot study implementing Description Sheet 10 – *Availability of Alternative Dispute Resolution Mechanisms*, 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 the core project team, Nathalie Lefever and Tiina Kautio, between June and November 2014 and its results were first published in December 2014 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 tenth description sheet presented in the methodology handbook, titled "Availability of Alternative Dispute Resolution Mechanisms". The goal was to describe the mechanisms available in Finland for dispute resolution in copyright matters.

Alternative dispute resolution mechanisms available in Finland and suitable for copyright disputes include:

1. Arbitration;
2. Mediation and conciliation, either through private mediation services, court mediation in civil matters or conciliation in criminal matters;
3. Opinions by the Copyright Council.

Arbitration is often preferred in cases of commercial disputes. The main centre for domestic and international arbitration is the Arbitration Institute of the Finnish Chambers of Commerce. The procedure for arbitration is defined in details in accordance with UNCITRAL rules and arbitrators are often highly specialized. Arbitral awards are final (non-appealable in general courts), binding and enforceable immediately, which allows for a faster resolution of disputes than the one offered by the court system. Finnish copyright law explicitly provides for arbitration in certain types of copyright disputes, but these disputes are not very common.

Mediation and conciliation are procedures whereby a mediator assists those involved in a dispute to reach an agreement which is later sanctioned by courts. It is available in Finland on a voluntary basis in civil and some criminal cases. Private mediation services are available, but courts also offer mediation services under certain circumstances. The course of the procedure is not regulated by legislation and can be arranged to fit the circumstances of each case. The mediation process can be informal but the mediation must proceed equitably and impartially. Successful mediation results in settlements that can be rendered enforceable by a court decision. The process is therefore likely to be less adversarial than regular court procedures.

Finally, the Finnish Copyright Council, appointed by the government and comprised of representatives of the most relevant right holders, offers opinions on copyright matters free of charge. Although these opinions are not binding and do not involve testimonies, they are very specialized and used as guidance by courts. The authoritative importance of decisions and the low costs involved make this procedure attractive to parties involved in copyright disputes with low monetary value.

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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 10 of the framework, titled "Availability of dispute resolution mechanisms". It is the result of the first pilot study applying this indicator in Finland.

This study was conducted by the core project team, Nathalie Lefever and Tiina Kautio, between June and November 2014.

## *B. PRESENTATION OF THE INDICATOR*

The indicator implemented here is part of the second pillar of the methodology, "Functioning and Performance of the Elements of the Copyright System", and its second area, "Enforcement". It is a description sheet which which presents the available dispute resolution mechanisms in order to support the analysis of the operation of the national copyright and related rights system.

As explained in the methodology handbook, some legal systems offer the possibility to settle copyright disputes privately. Therefore, the area "Enforcement" in the methodology framework includes the description and analysis of the use of dispute resolution mechanisms in cases of copyright infringement. This aspect is covered in Description Sheet 10 and Methodology Card 8.

Description sheet 10 suggests gathering data on the existence and use of alternative resolution mechanisms for solving copyright disputes.[1] The description includes information on the availability of assistance from third parties like organizations, bodies or lawyers with activities linked to dispute resolution on copyright issues. It also describes the types of assistance as well as the procedures connected to each available mechanism.

[1] Processes and techniques that act as a means for disagreeing parties to settle disputes without resorting to litigation in traditional courts. These mechanisms include negotiation, mediation, conciliation, collaborative law and arbitration, also called "*external dispute resolution*" in some countries.

Description sheet 10 includes the following topics:

- Types of the alternative dispute resolution mechanisms available as an alternative to litigation
- The availability of assistance from third parties: organizations, bodies or lawyers with activities linked to dispute resolution on copyright issues
- Additional information: Case study on the types of contractual clauses and alternative dispute settlement mechanisms most often used in copyright-related contracts
- Description of the procedures connected to each available dispute resolution mechanism

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

## *C. METHODS*

The information collected for this indicator can be found through available national information sources. The method chosen was therefore desktop studies.

Lists of national and international information sources used for this report can be found in the Appendices.

# Results

## INTRODUCTION: ADR MECHANISMS AVAILABLE IN FINLAND FOR SOLVING COPYRIGHT DISPUTES

Alternative dispute resolution (ADR) mechanisms offer alternatives to the litigation and judicial enforcement system. The ADR mechanisms relevant in cases of copyright disputes available in Finland include arbitration, mediation, conciliation and recommendation[2].

**Arbitration** (*välimiesmenettely*) is an ADR method where the disputing parties involved present their disagreement to one or a panel of private, independent and qualified third party arbitrators. The arbitrator(s) determine the outcome of the case through a decision called an "award". Generally, the procedural rules regarding arbitration are formal but not as strict as the ordinary procedural rules that govern litigation. An arbitration decision usually has the force of law, but is not binding to courts.

**Mediation** (*sovittelumenettely*) is an ADR method where a neutral and impartial third party, the mediator, facilitates dialogue in a structured process to help parties reach a conclusive and mutually satisfactory agreement. The mediator acts as a neutral third party and facilitates rather than directs the process by assisting the parties in identifying and articulating their own interests, priorities, needs and wishes to each other. Contrary to informal negotiation, mediation has a structure and timetable and the process is private and confidential. Participation is typically voluntary. A successful mediation process ends with a written agreement that binds the parties contractually. The agreement reached can, under some conditions, be sanctioned by a judge.

**Conciliation** (*sovittelumenettely*) is another ADR process that involves building a positive relationship between the parties of disputes. It is similary to mediation but used in a wider range of disputes, including disputes resulting from a criminal behavior. A (sometimes court-appointed) conciliator seeks to identify a right that has been violated and searches to find the optimal solution. Contrary to mediation, it is the conciliator, not the parties, who usually develops and proposes the terms of settlement. It is interesting to know that in Finland there are no separate procedures for mediation and conciliation; both are designated by the same word and ruled by the same law which allows the mediator/conciliator to adapt the procedure to the circumstances. As a result, mediation and conciliation are usually not distinguished.

Some disputes can also be solved based on **recommendation**, using a process where the parties bring their dispute in front of a (group of) specialized expert(s) that will provide them with an opinion on their case. Recommendations are not binding but may be very useful in offering authoritative answers concerning specific disputed questions.

In worldwide studies, the five most frequently reasons for using ADR methods over litigation in intellectual property disputes include cost and time efficiency; finality of arbitral awards and party autonomy to settle; confidentiality; specialized expert knowledge; preservation of the relationship

[2] According to Nari Lee and Marcus Norrgård ('Alternative to Litigation in IP Disputes in Asia and in Finland' (2012) 43 Cal. W. Int'l L.J. 109), depending on who coordinates the dispute resolution process, ADR mechanisms can be grouped as private ADR, judicial ADR (e.g., court mediated civil mediation), and administrative ADR. The private ADR method is facilitated and coordinated by private entities or the parties in the dispute themselves without any involvement or support from the public authorities. The judicial ADR method is a dispute settlement process mediated by the courts. In contrast, the administrative ADR method is coordinated and mediated by public administrative agencies based on special laws and statutes.

between the parties after disputes (non-adversarial nature); creativity in the solutions reached; possibilities to solve an international dispute through a single neutral procedure.[3]

This pilot study focuses on the alternative dispute resolution mechanisms available in Finland that can be used in copyright-related matters. Its purpose is to present the functioning of each one of these relevant mechanisms and facilitate the understanding of the report concerning *Methodology card 8. Use of dispute resolution mechanisms.*

## SECTION 1. ARBITRATION

Arbitration is a formal, private and binding process where the dispute is resolved by the decision of a nominated arbitrator. Finnish law explicitly provides for arbitration in certain types of copyright cases. According to section 54 of the Finnish Copyright Act, certain remunerations and licenses (especially extended collective licenses) are to be handled through arbitration in a case of dispute, namely[4]:

- remunerations for
    - copies made for visually impaired or disabled persons;
    - the use of literary or artistic works of compilation for the purposes of education;
    - lending of copies of a work to the public;
    - the use of an audio recording and a music recording containing images;
- the granting of an authorisation for an organization (Collective Management Organizations) to apply extended collective licenses and the terms of this authorisation concerning:
    - reproduction by photocopying and corresponding means, or by means other than transmitting on radio or television, if the matter relates to the making of copies for use in educational activities;
    - simultaneous and unaltered retransmission of a radio or television broadcast (and issues concerning cable retransmissions of programs originating from another country belonging to the European Economic Area, for which extended collective licenses are allowed in some cases);
- the settling of a matter between the author and the user in a case where technological measures prevent a lawful user to use the work and the author did not offer the user other means to enjoy it.

However, if a party concerned refuses the arbitration of a matter listed above, the matter may, upon application by a party concerned, be submitted to a court of justice for settling. Altogether, arbitration in these types of cases is not very common.[5]

[3] Sources: Mitchell Smith, 'Mediation as an Alternative to Litigation in Patent Infringement Disputes', ADR Bull., Nov. 2009, at 1, 3-4, available at http://epublications.bond.edu.au/adr/vol11/iss6/1 (visited on 2.8.2014); Nari Lee and Marcus Norrgård, 'Alternative to Litigation in IP Disputes in Asia and in Finland' (2012) 43 Cal. W. Int'l L.J. 109; 'IPR Helpdeks Fact Sheet: Efficient resolution of disputes in R&D collaborations, licensing and other technology transfer', WIPO ADR Arbitration and Mediation Centre, November 2012, available at http://www.iprhelpdesk.eu/sites/default/files/newsdocuments/Alternative_Dispute_Resolution_Mechanisms.pdf (Visited on 2.8.2014); The Role of Private International Law and Alternative Dispute Resolution, WIPO's IP Survey concerning e-commerce and copyright, available at http://www.wipo.int/copyright/en/ecommerce/ip_survey/chap4.html (visited on 2.8.2014).

[4] Tekijänoikeuslaki [Copyright Act], Act No. 404/1961, § 54 (Fin.), available at http://www.finlex.fi/fi/laki/kaannokset/1961/en19610404.pdf. Visited on 21.8.2014.

[5] Source: Nari Lee and Marcus Norrgård, 'Alternative to Litigation in IP Disputes in Asia and in Finland' (2012) 43 Cal. W. Int'l L.J. 109

### *A. FUNCTIONING AND APPLICABLE RULES*

Arbitration is regulated by the Arbitration Act of 1992. This act was inspired by the UNCITRAL[6] model law on arbitration of that time. Finland is also a party to the New York Arbitration Convention[7].

Section 2 of the Arbitration Act provides that "[a]ny dispute in a civil or commercial matter which can be settled by agreement between the parties . . . may be finally resolved through arbitration."[8] According to case law, a case is considered arbitrable if the dispute can be resolved without the intervention of public authorities.[9] Consequently, questions concerning infringement, scope of rights, and license-related matters in copyright issues are considered arbitrable.[10]

The main centre for domestic or international arbitration is the Arbitration Institute of the Finnish Chambers of Commerce[11]. The Institute administers arbitrations conducted under the auspices of its rules[12]. It also appoints arbitrators and conciliators to both domestic and international cases and under the UNCITRAL Rules.

### *B. PROCEDURE*

Arbitration must be agreed to in writing. Arbitration clauses are usually included in business agreements or in articles of association (*yhtiöjärjestys*). The Arbitration Institute proposes model arbitration clauses for parties who wish to submit to arbitration under the Arbitration Rules of the Finland Chamber of Commerce.

Three types of arbitration procedures are available:

1 (Regular) arbitration: the normal procedure for every case where the parties have agreed to submit their disputes to arbitration under the rules of the Arbitration Institute. The Rules stipulate a sole arbitrator unless the parties agree otherwise. If the board of the Institute considers it appropriate, the number of arbitrators may nevertheless be three.

2 Expedited arbitration: expedited arbitration is designed for a speedy resolution of minor disputes (less complex, with a smaller amount in dispute) by a sole arbitrator.

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[6] United Nations Commission on International Trade Law.

[7] Convention on the Recognition and Enforcement of Foreign Arbitral Awards by UNCITRAL. The New York Convention sets international obligations for the signatory states to recognize and enforce foreign arbitral awards, and is often considered the basic international instrument for commercial arbitration.

[8] Laki välimiesmenettelystä [Arbitration Act], Act No. 967/1992, § 2 (Fin.). Available at http://www.finlex.fi/fi/laki/ajantasa/1992/19920967. Visited on 21.8.2014.

[9] Korkein oikeus [Decision by the Supreme Court of Finland], No. 2003:45, May 14, 2003 (Fin.), available at http://www.finlex.fi/fi/oikeus/kko/kko/2003/20030045. Visited on 21.8.2014; see also Patrik Lindfors, Arbitration in Finland - Characteristic Features Currently Under Discussion, 1 Nordic J. Com. L., no. 1, 2003, at 4 (Fin.), available at http://www.njcl.utu.fi/1_2003/note3.pdf. Visited on 25.8.2014.

[10] Source: Nari Lee and Marcus Norrgård, 'Alternative to Litigation in IP Disputes in Asia and in Finland' (2012) 43 Cal. W. Int'l L.J. 109

[11] For more information see the website of the Finnish Arbitration Institute: http://arbitration.fi/

[12] The Arbitration Institute has two sets of rules, Arbitration Rules and Rules for Expedited Arbitration, which are available at http://arbitration.fi/en/rules/. Visited on 28.8.2014.

3 Ad-hoc arbitration: in cases where parties agree that the Arbitration Institute appoints the arbitral tribunal but the arbitration is not governed by the Arbitration Rules of the Finland Chamber of Commerce. In these cases, the arbitration proceedings are governed solely by the Finnish Arbitration Act (967/1992).

The Arbitration Rules of the Institute were recently updated to better conform to international best practices. The key objectives of the reform were to address issues such as expediency and cost efficiency, multi-party administration, arbitrator-ordered interim relief and increased confidentiality. The new arbitration rules include detailed provisions on the composition of an arbitral tribunal in multi-party cases, joinder of additional parties to pending arbitration proceedings, claims between multiple parties, claims under multiple contracts (including multiple arbitration agreements) and on the consolidation of two or more arbitrations into a single arbitration proceeding.[13]

### *C. ENFORCEABILITY*

Arbitration awards are final (non-appealable in general courts)[14], binding and enforceable immediately. Thanks to the New York Convention of 1958, arbitral awards can be enforced in most countries.

## SECTION 2. MEDIATION AND CONCILIATION

Mediation is an alternative for settling and resolving cases arising from offences and disputes, whereby a mediator assists those involved in a dispute to reach an agreement. In Finnish law, the term "mediation" (*sovittelu*) broadly refers to any instance in which a third party helps others reach an agreement, including in certain cases resulting from offences. Conciliation is a type of mediation involving parties seldom meeting face-to-face, more suitable for criminal cases[15].

There are several types of mediation methods available in Finland. The Finnish Bar Association provides private mediation services. Alternatively, if the parties wish, they may utilize publicly provided court mediation in some cases of civil disputes or criminal offences. Furthermore, a judge dealing with any civil and commercial matter has a duty to determine whether there are possibilities for settlement.[16]

[13] Source: ICLG – International Comparative Legal Guides, Finland Chapter - Litigation & Dispute Resolution 2014, Kristiina Liljedahl / Borenius Attorneys at law; Niki Welling / Borenius Attorneys at law, available at http://www.iclg.co.uk/practice-areas/litigation-and-dispute-resolution/litigation-and-dispute-resolution-2014/finland. Visited on 19.6.2014.

[14] However, if the arbitration award may be considered invalid pursuant to the Arbitration Act, e.g. due to an arbitrator exceeding his mandate, a party may challenge the award in general courts.

[15] In Finnish, the terms "mediation" and "conciliation" have only one common translation: "sovittelu". This results in both procedures being often treated as variations of the same alternative dispute resolution method. In English translations of legal documents, the terms "mediation" and "conciliations" are not always clearly distinguised. This is the reason why this report covers both procedures in the same section. For more information, see for instance Liisa Sippel, "Comparative Aspects Between the Nordic Countries and Austria: Court Mediation In or Out?" in "The Future of Civil Litigation: Access to Courts and Court-annexed Mediation in the Nordic Countries", Springer, 2014, page 207.

[16] Oikeudenkäymiskaari [Code of Judicial Procedure], Act No. 4/1734, ch. 5, § 19, amended by Act No. 1052/1991 (Fin.), available at http://www.finlex.fi/en/laki/kaannokset/1734/en17340004.pdf. Sections 19 and 22. Visited on 19.6.2014.

## *A. FUNCTIONING AND APPLICABLE RULES*

- **PRIVATE MEDIATION SERVICES**

The mediation service offered by the Finnish Bar Association is the standard type of private mediation. It is conducted by a member of the Finnish Bar, trained in the art of mediation and registered under the Mediation Board of the Finnish Bar Association. The goal is to help the parties resolve their dispute amicably. Private mediation follows the Finnish Bar Association mediation rules but the procedure is flexible to be best suited to the circumstances of each case. This service is available in all types of civil and commercial matters, including IP disputes.[17]

- **COURT MEDIATION**

In general courts a special mediation is used in all kinds of civil disputes, which is regulated in the Act on Conciliation in Civil Disputes in General Courts[18]. The preconditions for court-annexed mediation (Suomen asianajajaliitto) are:

- that the matter is amenable to mediation: civil cases, other than those involving claims for damages based on a crime, may be referred to mediation only if the dispute is of a minor nature, taking into account the subject and the claims put forward in the case.
- that the mediation is appropriate in view of the claims of the parties
- that the parties have personally and voluntarily expressed their agreement to conciliation, whether the matter is already pending before the court (but before the preparation of the case has been concluded) or not.

After receiving an initiative for mediation, the mediation offices evaluate the suitability of the case for mediation and find out the willingness of the parties to use mediation[19].

- **CRIMINAL CONCILIATION**

According to the Act on Conciliation in Criminal and Certain Civil Cases[20], conciliation is possible in cases of lesser crimes such as assault, theft and criminal damage. The victim and the offender are given the opportunity to meet confidentially through the facilitation of an impartial mediator to discuss the psychological and material harm inflicted on the victim by the offence and to help the parties find a mutual solution to redress the harm. If the parties reach an agreement, it may result in discontinuance of the criminal proceedings, non-prosecution, waiving of sentence or to a more lenient punishment.

## *B. PROCEDURE*

Private mediation starts whenever the parties agree to it. The parties can call off the mediation process at any stage. Mediators can decide to discontinue the process, where necessary.

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[17] Source: Nari Lee and Marcus Norrgård, 'Alternative to Litigation in IP Disputes in Asia and in Finland' (2012) 43 Cal. W. Int'l L.J. 109 and the Finnish Bar Association website (in Finnish): http://www.asianajajaliitto.fi/asianajopalvelut/tarvitsetko_asianajajan/riitojen_sovittelu Visited on 28.6.2014.

[18] Act on mediation in civil matters and confirmation of settlements in general courts, Act No. 394/2011. Translation in English available at http://www.finlex.fi/en/laki/kaannokset/2011/en20110394.pdf. Visited on 20.6.2014.

[19] This information was provided by Aune Flinck, Development Manager (Kehittämispäällikkö) at THL – Terveyden ja Hyvinvoinnin Laitos (National Institute for Health and Welfare), interviewed by email in September 2014.

[20] Laki rikosasioiden ja eräiden riita-asioiden sovittelusta (sometimes called "The Mediation act"), Act No. 1015/2005. Translation in English available at http://www.finlex.fi/en/laki/kaannokset/2005/en20051015.pdf. Visited on 19.6.2014.

In the case of court mediation, the court makes the decision whether to start the process. In civil cases where the dispute is not yet pending before the court, the application must be filed in writing, indicating the subject matter of the dispute and how the positions of the parties diverge. In addition, grounds must be supplied as to why the matter is suitable for mediation. When the matter is already pending before the court, the request may be made without formalities.

Criminal conciliation can be requested by the parties involved in the crime, a guardian or trustees, the legal representative of a child or a young person, the police, prosecuting authority or other authority. The court, however, makes the decision whether to start mediation.

Mediation offices (*Sovittelutoimistot*) receive court mediation and criminal conciliation requests and co-operate with various authorities throughout the mediation process. Each mediation case is assigned to a voluntary mediator chosen by professionals working at the mediation office.[21]

In all types of mediation, the course of the procedure is not regulated in detail by legislation but can be arranged to fit the circumstances of each case. The mediation process can be informal but the mediation must proceed equitably and impartially. In practice, the mediator usually meets the parties for a joint session, after which the parties are met independantly. The parties can be assisted by a legal representative. The procedure ends when either
(a) the parties reach a written settlement;
(b) the mediator declares that the settlement procedures in place are not appropriate for the case; or
(c) a party provides a written notification to the mediator that the they no longer wish to continue the mediation procedure.[22]

In a case where mediation fails and the case is to be resolved through standard court proceedings, the judge who has acted as mediator cannot sit as a judge in that case. [23]

### *C. ENFORCEABILITY*

Settlement agreements that have been reached in mediation outside of court can be confirmed by the Court under certain conditions. After confirmation, the settlement agreement is enforceable in the same manner as judgments or decisions made by the Court.[24] At the European level, Directive 2008/52/EC allows those involved in a dispute to request a written agreement arising from mediation to be made enforceable.

[21] Source: European E-Justice Portal, Mediation in EU members states – Finland; available at https://e-justice.europa.eu/content_mediation_in_member_states-64-FI-en.do?clang=en. Visited on 2.8.2014.

[22] Source: the Finnish Bar Association website (in Finnish): http://www.asianajajaliitto.fi/asianajopalvelut/tarvitsetko_asianajajan/riitojen_sovittelu Visited on 28.6.2014. See also Kaijus Ervasti, Tuomioistuinsovittelu Suomessa (Court Mediation in Finland), Oikeuspoliittisen tutkimuslaitoksen tutkimuksia, 256 (2011), available at http://www.optula.om.fi/material/attachments/optula/julkaisut/tutkimuksia-sarja/FdRuwETWJ/tuomioistuinsovittelu.pdf (English summary on p. 97). Visited on 2.7.2014.

[23] For more information on mediation processes, see the Finnish Institute for Health and Welfare's information package at http://www.thl.fi/en/web/thlfi-en/topics/information-packages/mediation-in-criminal-and-civil-cases. Visited on 20.6.2014.

[24] Source: Act on mediation in civil matters and confirmation of settlements in general courts (394/2011), translation in English available at http://www.finlex.fi/en/laki/kaannokset/2011/en20110394.pdf. Visited on 20.6.2014.

## SECTION 3. OPINIONS OF THE COPYRIGHT COUNCIL

The Copyright Council is a government-funded institution which assists the Ministry of Education and Culture by rendering non-binding opinions in matters relating to copyright and by issuing statements on the application of the Copyright Act. The Copyright Council is presented in details in Description Sheet 7 – *Public Administration of Copyright*. This section focuses on its role in dispute resolution.

A Copyright Council opinion can have an indirect role as an ADR mechanism: it helps resolving disputes cost-effectively and quickly by issuing opinions based on the law that parties will be likely to follow, therefore resulting in a settlement. The opinions are generally known to have an effect on subsequent court rulings but the opinions can also be deemed to affect dispute resolution in other ways. A Copyright Council opinion can discourage a party from seeking a court decision when it seems likely based on the opinion that the outcome of court proceedings will not be favorable for a party in the dispute. The Council opinions can also be requested with primary intent to find a solution to a dispute and thus avoiding going to court.

### *A. FUNCTIONING AND APPLICABLE RULES*

The Council plays a complementary role in the traditional dispute resolution system. In Finland, until 2013 when intellectual property disputes became the responsibility of the market court, copyright matters were not handled by specialist judges. Over the years it has been recognized as good practice to ask the Council for guidance before pursuing the more complex and possibly costly copyright cases. Judges were often inclined to follow Council advice on how to interpret copyright law, thereby emphasizing the role of the Council as a part of the dispute resolution system.

The Council is appointed by the Government upon proposal by the Ministry of Education, and is comprised of a chairman, a vice-chairman, a secretary and at most fifteen other members representing most relevant right holders[25]. The Council issues opinions regarding the application of the Copyright Act in individual matters[26], most often in cases of disputes that do not involve great sums of money but are, nevertheless, important to the concerned parties. It is also possible to turn to the Council for answers to questions concerning indisputed matters[27].

### *B. PROCEDURE*

Anyone can request an opinion from the Copyright Council − private persons, business enterprises, organisations, the police, authorities and courts of law, whether or not they have personal interests at stake.

The Council bases its proceedings on written or other relevant documents provided by the parties to the dispute; the proceedings and the resulting opinion is not based on hearing witness testimonies. Instead, the Council takes into account undisputed written evidence and physical objects (such as the objects in dispute, e.g., design objects, texts, websites, photographs, etc.). This means that the Council will not

[25] Copyright Decree (574/1995, amendments up to 1004/2008 included), sections 18 and following, available at http://www.finlex.fi/fi/laki/kaannokset/1995/en19950574.pdf.

[26] Copyright Act (Tekijänoikeuslaki), Act No. 404/1961, section 55.

[27] Source: Nari Lee and Marcus Norrgård, 'Alternative to Litigation in IP Disputes in Asia and in Finland' (2012) 43 Cal. W. Int'l L.J. 109

have all possible evidence at its disposal, but its goal is not to solve specific disputes, rather to offer legal interpretation[28].

### *C. ENFORCEABILITY*

According to the Government Bill creating the Council[29], the purpose of the Copyright Council is to provide a fast, simple, and cost-effective procedure in cases concerning the application of copyright law, not a procedure that would result in binding decisions. An authoritative non-binding opinion was considered sufficient; the idea put forth was that parties in small cases would accept the opinions of the Council and would not take the case to court. As a result, the Copyright Council's opinions are not directly enforceable.

There is no possibility to appeal the Council's decision, primarily because the decisions are non-binding. If a party is not happy with an opinion, the only recourse is to file a lawsuit.

[28] Source: Copyright Council's presentation on the Finnish Ministry of Education and Culture's website (in Finnish): http://www.minedu.fi/OPM/Tekijaenoikeus/tekijaenoikeusneuvosto/?lang=fi. Visited on 6.8.2014.

[29] Government Bill 32/1984, art 7 (in Finnish).

# Conclusions

## *A. ANALYSIS AND SUMMARY OF THE RESULTS*

Alternative dispute resolution mechanisms available in Finland and suitable for copyright disputes include:

1. Arbitration;
2. Mediation and conciliation, either through private mediation services, court mediation in civil matters or conciliation in criminal matters;
3. Opinions by the Copyright Council.

Arbitration is often preferred in cases of commercial disputes. The main centre for domestic or international arbitration is the Arbitration Institute of the Finnish Chambers of Commerce. The procedure for arbitration is defined in details in accordance with UNCITRAL rules and arbitrators are often highly specialized. Arbitral awards are final (non-appealable in general courts)[30], binding and enforceable immediately, which allows for a faster resolution of disputes than the one offered by the court system. Finnish copyright law explicitly provides for arbitration in certain types of copyright disputes, but these disputes are not very common.

Mediation and conciliation are procedures whereby a mediator assists those involved in a dispute to reach an agreement which is later sanctioned by courts. It is available in Finland on a voluntary basis in civil and some criminal cases. Private mediation services are available, but courts also offer mediation services under certain circumstances. The course of the procedure is not regulated in detail by legislation but can be arranged to fit the circumstances of each case. The mediation process can be informal but the mediation must proceed equitably and impartially. Successful mediation results in settlements that can be rendered enforceable by a court decision. The process is therefore likely to be less adversarial than regular court procedures.

Finally, the Finnish Copyright Council, appointed by the Government and comprised of representatives of the most relevant right holders, offers opinions on copyright matters. Although these are not binding and do not involve testimonies, they are very specialized and used as guidance by courts. The authoritative importance of these opinions and the low costs involved make this procedure attractive to parties involved in copyright disputes with low monetary value.

The following table summarizes the results of the study, presenting the alternative dispute resolution mechanisms available in Finland for copyright disputes, rules applicable to them, main characteristics of the procedures and enforceability of the outcomes.

[30] However, if the arbitration award may be considered invalid pursuant to the Arbitration Act, e.g. due to an arbitrator exceeding his mandate, a party may challenge the award in general courts.

| Table 1. Characteristics of dispute resolution mechanisms available in Finland for copyright disputes | | | |
|---|---|---|---|
| **Mechanism** | **Applicable rules** | **Procedure** | **Enforceability** |
| **Arbitration** | - Finnish Arbitration Act (967/1992)<br>- Rules of the Arbitration Institute of the Finnish Chambers of Commerce<br>- UNCITRAL rules<br>- Finnish law explicitly provides for arbitration in certain types of copyright cases: section 54 of the Finnish Copyright Act (404/1961) | Arbitration must be agreed to in writing. A case is considered arbitrable if the dispute can be resolved without the intervention of public authorities. Three types of procedures are available:<br>- (Regular) arbitration: usually one, sometimes 3 arbitrators, under the rules of the Arbitration Institute;<br>- Expedited arbitration: for speedy resolution of minor disputes, one arbitrator;<br>- Ad-hoc arbitration: parties agree for the arbitration to be governed by the Arbitration Act. | Arbitration awards are final (non-appealable in general courts), binding and enforceable immediately in most countries. |
| **Mediation**, including | | | |
| - private mediation | Finnish Bar Association mediation rules | By demand from the parties, a mediator from the Finnish Bar Association helps the parties reach an agreement. The procedure is flexible to suit each case. | Settlement agreements that have been reached in mediation outside of court can be confirmed by the Court under certain conditions. After confirmation, the settlement agreement is enforceable in the same manner as judgments or decisions made by the Court. |
| - court mediation | Finnish Act on Conciliation in Civil Disputes in General Courts (1015/2005) | Courts refer civil cases to mediation (organized by public mediation offices) in cases where<br>- the dispute is not based on a crime<br>- the dispute is minor in nature and claim<br>- mediation is appropriate<br>- the parties agree.<br>A mediator helps the parties reach an agreement. The procedure is flexible to suit each case. | |
| - criminal conciliation | Finnish Act on Conciliation in Civil Disputes in General Courts (1015/2005) | Conciliation is possible in cases of lesser crimes such as assault, theft and criminal damage. It can be requested by the parties involved, their gardian, trustee or legal representative, or by prosecuting and other public authorities, and is decided upon by the judge and organized by public mediation offices. A mediator helps the parties reach an agreement. The procedure is flexible to suit each case. | |
| **Opinions of the Copyright Council** | - Finnish Copyright Act (404/1961), section 55<br>- Copyright Decree (574/1995), sections 18 and following | The Council issues opinions on demand regarding the application of the Copyright Act in individual matters. The Council bases its proceedings on written or other relevant documents provided by the parties as well as undisputed written evidence and physical objects. | The Copyright Council's opinions are not directly enforceable but are likely to influence subsequent court rulings and facilitate reaching settlements to disputes. |

## *B. METHODOLOGICAL FINDINGS*

- **LIMITATIONS**

The suitability of certain dispute resolution mechanisms for solving copyright disputes can be difficult to assess and as a result, the mechanisms described in this report might not be all be used in copyright disputes. This report should therefore be read together with information collected according to Methodology card 8 – *Use of resolution mechanisms for solving copyright disputes*.

- **GUIDELINES FOR FUTURE RESEARCH**

This pilot study was conducted together with the research concerning Methodology card 8 – *Use of resolution mechanisms for solving copyright disputes* as the information sources were complementary.

The time needed for a study based on Description sheet 10 will depend on the availability of information. In the case of Finland, the workload for collecting data and drafting this report could be evaluated at three weeks of full-time work.

# Appendices

## A. DESCRIPTION SHEET

Description sheet as presented in the Methodology Handbook, version 19.12.2014.

| **Description sheet 10. Availability of alternative dispute resolution mechanisms** | | |
|---|---|---|
| Description of the alternative dispute resolution mechanisms available in the country; Consider the following topics:<br>- Types of the alternative dispute resolution mechanisms available<br>- Rules and procedures connected to each available dispute resolution mechanism<br>- Availability of assistance from third parties: organizations, bodies or lawyers with activities linked to dispute resolution on copyright issues<br>- Enforceability of each available dispute resolution mechanism | | |
| Definitions | *Alternative dispute resolution mechanisms* (also known as *External dispute resolution* in some countries) | Processes and techniques that act as a means for disagreeing parties to settle disputes without resorting to litigation in traditional courts. These mechanisms include negotiation, mediation, conciliation, arbitration and recommendation. |
| | *Arbitration* | Alternative dispute resolution method where the disputing parties involved present their disagreement to one or a panel of private, independent and qualified third party arbitrators. The arbitrator(s) determine the outcome of the case through a decision called an "award. |
| | *Mediation* | Alternative dispute resolution method where a neutral and impartial third party, the mediator, facilitates dialogue in a structured process to help parties reach a conclusive and mutually satisfactory agreement. Contrary to informal negotiation, mediation has a structure and timetable and the process is private and confidential. A successful mediation process ends with a written agreement that binds the parties contractually. |
| | *Conciliation* | Alternative dispute resolution process similar to mediation where a (sometimes court-appointed) conciliator seeks to identify a right that has been violated and searches in collaboration with the parties to find the optimal solution. Contrary to mediation, it is the conciliator, not the parties, who often develops and proposes the terms of settlement. |
| | *Recommendation* | Alternative dispute resolution process where the parties bring their dispute in front of a (group of) specialized expert(s) that will provide them with an opinion on their case. Recommendations are not binding but may be very useful in offering authoritative answers concerning specific disputed questions. |
| | *Copyright disputes* | Disputes where the main issue or one of the basic issues is based on copyright legislation |
| Guidelines for data collection | The information can be collected as a desktop study through available national and international information sources. It can be complemented by expert interviews or by case studies. | |

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|---|---|
| Limitations of the indicator | The indicator does not take into account the cases where parties reached a settlement without the help of a third party (through negotiation), considering that those cases are not publicly documented. |

### *B. INFORMATION SOURCES*

**International:**

- 'IPR Helpdeks Fact Sheet: Efficient resolution of disputes in R&D collaborations, licensing and other technology transfer', WIPO ADR Arbitration and Mediation Centre, November 2012, available at http://www.iprhelpdesk.eu/sites/default/files/newsdocuments/Alternative_Dispute_Resolution_Mechanisms.pdf (Visited on 2.8.2014)
- 'The Role of Private International Law and Alternative Dispute Resolution', WIPO's IP Survey concerning e-commerce and copyright, available at http://www.wipo.int/copyright/en/ecommerce/ip_survey/chap4.html (visited on 2.8.2014)
- Mitchell Smith, 'Mediation as an Alternative to Litigation in Patent Infringement Disputes', ADR Bull., Nov. 2009, at 1, 3-4, available at http://epublications.bond.edu.au/adr/vol11/iss6/1 (visited on 2.8.2014)

▪ ***Dispute resolution centres***

- International Dispute Resolution Centre (UK): http://www.idrc.co.uk
- International Institute for Conflicts Prevention and Resolution: http://www.cpradr.org
- WIPO Arbitration and Mediation Center, http://www.wipo.int/amc/en/domains/decisionsx/index.html

**Finland:**

▪ ***Legislation and jurisprudence***

- Copyright Act (Tekijänoikeuslaki), Act No. 404/1961, § 54 (Fin.), available at http:// www.finlex.fi/en/laki/kaannokset/1961/en19610404.pdf
- Copyright Decree (574/1995, amendments up to 1004/2008 included), sections 18 and following, available at http://www.finlex.fi/fi/laki/kaannokset/1995/en19950574.pdf
- Arbitration Act (Laki välimiesmenettelystä)
- Act on mediation in civil matters and confirmation of settlements in general courts (394/2011), translation in English available at http://www.finlex.fi/en/laki/kaannokset/2011/en20110394.pdf
- Act 1015/2005, Laki rikosasioiden ja eräiden riita-asioiden sovittelusta (sometimes called "The Mediation act"), translation in English available at http://www.finlex.fi/en/laki/kaannokset/2005/en20051015.pdf
- Korkein oikeus [Decision by the Supreme Court of Finland], No. 2003:45, May 14, 2003 (Fin.), available at http:// www.finlex.fi/fi/oikeus/kko/kko/2003/20030045
- Oikeudenkäymiskaari [Code of Judicial Procedure], Act No. 4/1734, ch. 5, § 19, amended by Act No. 1052/1991 (Fin.), available at http://www.finlex.fi/en/laki/kaannokset/1734/en17340004.pdf. Sections 19 and 22

- Government Bill 32/1984, art 7 (in Finnish).

▪ ***Information sources***

- Copyright Council's presentation on the Finnish Ministry of Education and Culture's website (in Finnish): http://www.minedu.fi/OPM/Tekijaenoikeus/tekijaenoikeusneuvosto/?lang=fi
- European E-Justice Portal, Mediation in EU members states – Finland; available at https://e-justice.europa.eu/content_mediation_in_member_states-64-FI-en.do?clang=en
- Finnish Arbitration Institute: http://arbitration.fi/
- ICLG – International Comparative Legal Guides, Finland Chapter - Litigation & Dispute Resolution 2014, Kristiina Liljedahl / Borenius Attorneys at law; Niki Welling / Borenius Attorneys at law, available at http://www.iclg.co.uk/practice-areas/litigation-and-dispute-resolution/litigation-and-dispute-resolution-2014/finland
- Kaijus Ervasti, Tuomioistuinsovittelu Suomessa (Court Mediation in Finland), Oikeuspoliittisen tutkimuslaitoksen tutkimuksia, 256 (2011), available at http://www.optula.om.fi/material/attachments/optula/julkaisut/tutkimuksia-sarja/FdRuwETWJ/tuomioistuinsovittelu.pdf (English summary on p. 97).
- Nari Lee and Marcus Norrgård, 'Alternative to Litigation in IP Disputes in Asia and in Finland' (2012) 43 Cal. W. Int'l L.J. 109
- Patrik Lindfors, Arbitration in Finland - Characteristic Features Currently Under Discussion, 1 Nordic J. Com. L., no. 1, 2003, at 4 (Fin.), available at http://www.njcl.fi/1_ 2003/note3.pdf
- The Finnish Bar Association website (in Finnish): http://www.asianajajaliitto.fi/asianajopalvelut/tarvitsetko_asianajajan/riitojen_sovittelu
- The Finnish Institute for Health and Welfare's information package at http://www.thl.fi/en/web/thlfi-en/topics/information-packages/mediation-in-criminal-and-civil-cases
- Liisa Sippel, "Comparative Aspects Between the Nordic Countries and Austria: Court Mediation In or Out?" in "The Future of Civil Litigation: Access to Courts and Court-annexed Mediation in the Nordic Countries", Springer, 2014, page 207

## *C. CONSULTED PARTIES*

- Aune Flinck, Development Manager *(kehittämispäällikkö*) at THL – Terveyden ja Hyvinvoinnin Laitos (National Institute for Health and Welfare), interviewed by email in September 2014
- Marco Grönroos, Senior Legal Adviser (*hallitussihteeri*), Secretary of the Copyright Council, consulted on 11.9.2014.
- Viveca Still, Copyright Counsellor at the Ministry of Education and Culture, consulted on 3.9.2014.

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| Cupore webpublications 39:6 | Volume of Domestic Production of Copyrighted Products and Services. Report on Piloting in Finland. |
| Cupore webpublications 39:7 | Volume of Exported and Imported Copyrighted Products and Services. Report on Piloting in Finland. |
| Cupore webpublications 39:8 | Development of Digital Business Models and Income Based on Digital Distribution. Report on Piloting in Finland. |
| Cupore webpublications 39:9 | Copyright Law. Report on Piloting in Finland. |
| Cupore webpublications 39:10 | Copyright Policy. Report on Piloting in Finland. |
| Cupore webpublications 39:11 | Public Consultation on Law Proposals. Report on Piloting in Finland. |
| Cupore webpublications 39:12 | Use of Impact Assessment and Research in Policy Development. Report on Piloting in Finland. |
| Cupore webpublications 39:13 | Public Administration of Copyright. Report on Piloting in Finland. |
| Cupore webpublications 39:14 | Enforcement by Public and Private Actors – Focus: Public Authorities. Report on Piloting in Finland. |
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| Cupore webpublications 39:17 | Application of Sanctions and Remedies for Copyright Infringement. Report on Piloting in Finland. |
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| Cupore webpublications 39:19 | Use of Alternative Resolution Mechanisms for Solving Copyright Disputes. Report on Piloting in Finland. |
| Cupore webpublications 39:20 | Individual Exercise of Rights – Focus: Literature (Book Publishing Industry). Report on Piloting in Finland. |
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| Cupore webpublications 39:22 | Efficiency of Collective Management Organizations. Report on Piloting in Finland. |
| Cupore webpublications 39:23 | Copyright-related Information Activities. Report on Piloting in Finland. |
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| Cupore webpublications 39:25 | Public Awareness of the Rights. Report on Piloting in Finland. |
| Cupore webpublications 39:26 | Copyright-related Education as Part of the Education of Professionals for Creative Industries. Report on Piloting in Finland. |
| Cupore webpublications 39:27 | Research on Copyright-related Topics. Report on Piloting in Finland. |
| Cupore webpublications 39:28 | Copyright-related Research and Study Programs in Universities and Research Institutes. Report on Piloting in Finland. |
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| Cupore webpublications 39:31 | Access to Copyrighted Works for Follow-on Creation. |
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| Cupore webpublications 39:33 | Terms for Transfer and Licensing of Rights – Focus: Literature (Book Publishing Industry). Report on Piloting in Finland. |
| Cupore webpublications 39:34 | Unauthorized Use of Copyrighted Works in Physical Form. Report on Piloting in Finland. |
| Cupore webpublications 39:35 | Unauthorized Use of Copyrighted Works in Digital Form. Report on Piloting in Finland. |
| Cupore webpublications 39:36 | Analysis of Stakeholders' Opinions on the Copyright System – Focus: Literature (Book Publishing Industry). Report on Piloting in Finland. |
| Cupore webpublications 39:37 | Analysis of Stakeholders' Opinions on the Copyright System – Focus: End-users. Report on Piloting in Finland. |