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Measures
to combat piracy
in the field of copyright
and neighbouring rights

Recommendation No. R (88) 2
adopted by the Committee of Ministers
of the Council of Europe
on 18 January 1988
and explanatory memorandum



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RECOMMENDATION No. R (88) 2
OF THE COMMITTEE OF MINISTERS TO MEMBER STATES
ON MEASURES TO COMBAT PIRACY
IN THE FIELD OF COPYRIGHT AND NEIGHBOURING RIGHTS

*(Adopted by the Committee of Ministers on 18 January 1988
at the 414th meeting of the Ministers' Deputies)*

The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe,

Considering that the aim of the Council of Europe is to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress;

Aware that the phenomenon of piracy in the field of copyright and neighbouring rights, that is, the unauthorised duplication, distribution or communication to the public of protected works, contributions and performances for commercial purposes, has become widespread;

Noting that this phenomenon seriously affects many sectors, in particular those of the production and marketing of phonograms, films, videograms, broadcasts, printed matter and computer software;

Conscious of the considerable harm that piracy causes to the rights and interests of authors, performers, producers and broadcasters, as well as to the cultural professions and related industries as a whole;

Recognising that this phenomenon also has detrimental effects on consumer interests, in particular in that it discourages cultural creativity and thereby prejudices both the diversity and quality of products placed on the market;

Bearing in mind the losses to national budgets suffered as a result of piracy;

Taking into account the adverse effects of piracy on trade;

Noting the links between the trade in pirate material and organised crime;

Recalling its Recommendation No. R (86) 9 on copyright and cultural policy of 22 May 1986;

Taking note of the work in relation to the fight against piracy being undertaken within other organisations, in particular the World Intellectual Property Organisation, the European Communities and the Customs Co-operation Council;

Determined that effective action be taken against piracy through both appropriate measures at national level and co-operation at international level,

Recommends that the governments of the member states take all necessary steps with a view to implementing the following measures to combat piracy in the field of copyright and neighbouring rights :

Recognition of rights

1. States should ensure that authors, performers, producers and broadcasters possess adequate rights in respect of their works, contributions and performances to defend their economic interests against piracy. In particular:

— to the extent that such rights do not already exist, performers should be granted at least the right to authorise or prohibit the fixation of their unfixated performances as well as the reproduction of fixations of their performances, and producers of phonograms and videograms at least the right to authorise or prohibit the reproduction of their phonograms and videograms;

— authors of computer software should benefit from copyright protection.

Remedies and sanctions

2. States should ensure that their national legislation provides remedies which enable prompt and effective action to be taken against persons engaged in piracy in the field of copyright and neighbouring rights, including those implicated in the importation or distribution of pirate material.

3. Under criminal law, provision should be made for powers to search the premises of persons reasonably suspected of engaging in piracy activities and to seize all material found relevant to the investigation, including infringing copies and their means of production. Consideration should also be given to the possibility of introducing powers for the securing of financial gains made from such activities.

In the event of conviction, powers should exist for the destruction or forfeiture of infringing copies and means of production seized in the course of proceedings. The forfeiture of financial gains from the piracy activities should also be made possible. All or a part of forfeited financial gains should be able to be awarded to the injured party as compensation for the loss he has suffered.

Penalties provided for by legislation in respect of piracy offences should be set at an appropriately high level.

4. In the field of civil law, effective means should exist for obtaining evidence in cases concerning piracy.

The plaintiff should, as an alternative to an action for damages in respect of the loss he has suffered, have the right to claim the profits made from the piracy activities.

Provision should be made for the destruction or delivery to the plaintiff of infringing copies and means of production seized in the course of proceedings.

5. Consideration should be given to the need to introduce or reinforce presumptions as to subsistence and ownership of copyright and neighbouring rights.

6. States should give consideration to the possibility of closely involving their customs authorities in the fight against piracy and of empowering such authorities, *inter alia*, to treat as prohibited goods all forms of pirate material presented for import or in transit.

Co-operation between public authorities and between such authorities and right owners

7. States should encourage co-operation at national level between police and customs authorities in relation to the fight against piracy in the field of copyright and neighbouring rights as well as between these authorities and right owners.

8. States should also, in the appropriate forums, encourage co-operation in the fight against piracy between the police and customs authorities of different countries.

Co-operation between member states

9. States should keep each other fully informed of initiatives taken to combat piracy in the field of copyright and neighbouring rights in the world at large.

10. States should offer each other mutual support in relation to such initiatives and envisage, when desirable and through appropriate channels, the taking of action in common.

Ratification of treaties

11. States should re-examine carefully the possibility of becoming parties, where they have not already done so, to:

— the Paris Act (1971) version of the Berne Convention for the Protection of Literary and Artistic Works;

— the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome, 1961);

— the Convention for the Protection of Producers of Phonograms Against Unauthorised Duplication of Their Phonograms (Geneva, 1971);

— the European Agreement on the Protection of Television Broadcasts (Strasbourg, 1960) and its protocols.

12. States should ensure that national measures adopted with a view to the ratification of the above-mentioned treaties fully take into account relevant new technological developments.

EXPLANATORY MEMORANDUM

I. Introduction

The unauthorised duplication, distribution or communication to the public for commercial purposes of works, contributions and performances protected by copyright and neighbouring rights, commonly referred to as "piracy", is an illegal activity. It has today reached significant proportions — partly as a result of the new techniques of recording and duplication — and is causing considerable damage to a wide range of interests. Sectors affected by the phenomenon of piracy include those of the production and marketing of books, sound recordings (records and tapes), films and broadcasts as well as, more recently, of videogames and computer software. Given the very nature of the activity, it is impossible to calculate the precise extent of piracy in these different sectors. However, from the estimates available, it would seem certain that the total worldwide economic loss resulting from piracy in the field of copyright and neighbouring rights is to be counted in billions of United States dollars, a significant part of this loss being felt in west European countries.

Pirate products are very often a direct substitute for the purchase or rental of legitimately produced goods. As a result, piracy *inter alia* results in a considerable loss of income for authors, performers and producers, as well as for the companies involved in the production and distribution of works. This in turn tends to discourage cultural creativity and future investment, which, by prejudicing the diversity and quality of products available, in the long run, can only work against the interests of consumers. Furthermore, states suffer loss of revenue as a result of piracy, given that, frequently, customs duties and VAT will not be paid in respect of pirate products.

Piracy has been the subject of discussion at intergovernmental level for many years, within the governing bodies set up under the international conventions on copyright and neighbouring rights. Moreover, the World Intellectual Property Organisation has organised two worldwide forums on the matter, held respectively from 25 to 27 March 1981 (piracy of sound and audiovisual recordings) and from 16 to

18 March 1983 (piracy of broadcasts and of the printed word). The European Communities have also been active in this field. In particular, on 24 June 1984 the Council of the European Communities adopted a Resolution on measures to combat audiovisual pirating, and more detailed provisions are now under consideration. Similarly, work on various aspects of the question of piracy is taking place within the Customs Cooperation Council and the United Nations Educational, Scientific and Cultural Organisation. As for the Council of Europe, the Committee of Ministers adopted, on 22 May 1986, Recommendation No. R (86) 9 on copyright and cultural policy, in which, *inter alia*, it recommended member states to "take without delay appropriate measures, including the provision of effective sanctions, to permit rapid and dissuasive deterrent action against all acts of piracy in the media field".

The present Recommendation is designed to build on previous statements at international level on the subject of piracy in the field of copyright and neighbouring rights (and in particular the above-mentioned Recommendation No. R (86) 9) by proposing certain specific measures of a practical nature capable of effectively combating the phenomenon. All forms of piracy are covered by the Recommendation, including, for example, "bootlegging", that is the unauthorised fixation and subsequent duplication for commercial purposes of a performer's live performance.

Piracy is to be carefully distinguished from the quite separate subject of copying by individuals of protected works, contributions and performances for their own private purposes, so called "private copying". The issues raised by piracy on the one hand and private copying on the other hand are very different. The Committee of Ministers of the Council of Europe has already made recommendations as regards sound and audiovisual private copying (see Recommendation No. R (88) 1) and other types of private copying are currently being examined.

Finally, it should be borne in mind that pirate products often consist of counterfeits, to which trade mark and trade description legislation will apply in addition to legislation applicable to piracy in general.

II. Commentary on the provisions of the Recommendation

Recognition of rights (paragraph 1)

The laws of all member states of the Council of Europe offer certain possibilities of action against piracy. However, in order to be able to fight

effectively against piracy, the parties concerned need to possess relevant specific rights. The situation of authors in this respect is on the whole satisfactory in all member states; however, the same cannot be said for that of other parties concerned, in particular performers and producers and especially in so far as sound recordings are concerned. Whereas in some member states performers and producers are accorded specific rights over their contributions, in others no such rights exist and performers and producers are obliged to have recourse to more general remedies such as those available under laws on unfair competition, to defend their interests. Unfortunately, the requirements for successfully invoking these remedies are often such that they are not an efficient means of combating piracy. It is consequently recommended that in all member states specific rights should be granted to performers as regards the fixation of their unfixed performances as well as the reproduction of fixations of their performances, and to producers of phonograms and videograms as regards the reproduction of their phonograms and videograms.

A problem of recognition of rights also exists in relation to computer software. The unauthorised reproduction of computer software for commercial purposes has become widespread in recent years, in particular with the growth in personal computer systems. At the same time, the extent to which the author of computer software is an "author" in the copyright sense has been the subject of considerable debate. It is stipulated in the Recommendation that authors of computer software should benefit from copyright protection; this might be achieved via express legislation on the subject or through interpretation of existing copyright provisions. Of course, to enjoy copyright protection, the computer software would have to constitute a personal intellectual creation.

Remedies and sanctions (paragraphs 2 to 6)

Success in the fight against piracy presupposes that the legal remedies available are up to the task. Such remedies should embrace procedures enabling rapid action with a view to obtaining the necessary evidence and lead to sanctions capable of dissuading future piracy activity. The Recommendation indicates that the remedies should cover all persons engaged in piracy activities, that is to say, the manufacturers of infringing copies, importers and persons involved in the distribution of such copies, down to and including the retail stage. Effective remedies against piracy should exist under both the criminal and civil law, though, of course, the accent placed on one or other type of procedure might well vary from country to country.

In the context of the criminal law, the Recommendation indicates that powers should exist for granting the police warrants to search the premises of persons reasonably suspected of engaging in piracy activities and to seize all material found which is relevant to the investigation, including infringing copies and their means of production. The introduction of powers for the securing of financial gains made from the piracy activities, assuming that such gains can be clearly identified, should also be considered.

Adequate powers of search and seizure are an essential weapon in the fight against piracy; without them, the obtaining of the evidence required for conviction would be extremely difficult if not impossible. Of course, these powers must be accompanied by appropriate safeguards, bearing in mind in particular the provisions of Article 8 of the European Convention on Human Rights; and the same holds good for any search/seizure procedures provided for under civil law (see below).

The Recommendation goes on to stipulate that provision should be made for the destruction or forfeiture of infringing copies and means of production seized, in the event of conviction. Similarly, financial gains derived from the piracy activities should be subject to forfeiture. It is also recommended that all or a part of forfeited financial gains should be able to be awarded to the injured party as compensation for the loss he has suffered. In this context, it should be recalled that in many countries the victim of a criminal offence may enter a claim for damages in the context of the criminal proceedings. Another approach would be to empower criminal courts to make a compensation order in favour of the injured party following a conviction.

With regard to the recommendation made concerning penalties, it should be recalled that piracy harms not only the interests of the right owners concerned but also those of the public at large and of the state. Stringent penalties will deter people from engaging in piracy activities and at the same time will encourage the relevant public authorities to devote sufficient resources to combating piracy.

As regards civil law, the Recommendation stipulates that effective means should exist for obtaining evidence in cases concerning piracy. The means in question will inevitably vary from country to country in the light of legal traditions and it was not considered appropriate to make specific recommendations on this question. Rather, each member state should examine whether the means presently available to plaintiffs are sufficient, bearing in mind the particular difficulties in the matter of securing evidence, which flow from the very nature of piracy activities.

The aim of the Recommendation in this respect might be achieved through appropriate links between the criminal and civil procedures.

It should be noted that in certain countries a plaintiff in civil proceedings is able to obtain *ex parte* a Court order requiring the defendant to allow the plaintiff to enter his premises and to search for and seize evidence of piracy activities. Needless to say, such orders are invariably accompanied by undertakings on the part of the plaintiff designed to protect the legitimate interests of the defendant. Procedures of this type have proved to be a very effective means of combating piracy.

The usual final remedy in the field of civil law will be an action for damages to compensate the loss suffered by the plaintiff. However, it is recommended that plaintiffs should also have the option to claim the profits made from the piracy activities when they can be identified. This possibility would be particularly useful in cases where the plaintiff has difficulty in demonstrating the precise extent of the loss he has suffered.

As for the fate of infringing copies and means of production seized in the course of civil proceedings, the Recommendation indicates that they should either be destroyed or delivered to the plaintiff.

With regard to paragraph 5 of the Recommendation, it should be noted that facts as to subsistence and ownership of copyright or neighbouring rights are often very difficult and costly to establish. Consequently, legal proceedings against persons engaged in piracy activities can be seriously hindered by the calling into dispute of whether a plaintiff actually possesses copyright or a neighbouring right in the work concerned. To counter unreasonable challenges from defendants, it is recommended that consideration be given to the need to introduce or reinforce — as the case may be — presumptions in this area. By way of illustration, it might be provided that, in interlocutory proceedings, subsistence and ownership of copyright or of a neighbouring right shall be presumed unless an arguable case to the contrary is shown. Of course, as regards more specifically ownership of copyright, it is already the case that in most countries the person whose name appears on a work, purporting to be the author, will be presumed to be its author in the absence of proof to the contrary.

Customs authorities could also make a significant contribution to the fight against piracy. However, at the present time such authorities in many member states do not have the necessary powers in this respect. Paragraph 6 of the Recommendation calls upon states to give consideration to the possibility of closely involving such authorities in the fight

against piracy, and draws particular attention to the desirability of giving them powers to prevent the import or transit of pirate material in all its forms. In practice, action by customs authorities in this field might well be heavily dependent on the right owners being able to give advance notice of the arrival of pirate material. However, customs authorities could also receive — and should where possible act upon — information regarding shipments of pirate material from other sources, for example their counterparts in other countries.

Co-operation between public authorities and between such authorities and right owners (paragraphs 7 and 8)

Paragraph 7 of the Recommendation underlines the importance of co-operation at national level between, on the one hand, police and customs authorities and, on the other hand, between such authorities and right owners. The setting up of organisational structures for this purpose is not necessary, though clear and rapid lines of communication should exist; what is essential is to create a climate of collaboration between the different parties involved.

The crucial role to be played by right owners in support of action by the public authorities deserves to be underlined here. As already mentioned, for practical reasons customs authorities will often not be able to exploit powers to intervene against pirate material without the help of relevant information from the right owners. Similarly, the police will not be in a position to undertake investigations unless it is in possession of at least a minimum of evidence that piracy activities are taking place; it is up to the right owners to provide that evidence. Faced with this situation, right owners in several countries have set up their own investigating bodies. States in which such bodies do not already exist could usefully encourage right owners to follow this example.

The Recommendation also stipulates that co-operation at international level between police and customs authorities in relation to the fight against piracy should be encouraged. Organisations such as Interpol and the Customs Co-operation Council already provide the necessary framework for co-operation between these authorities, but as yet this framework does not appear to have been fully exploited in relation to piracy activities. If necessary, member states should promote the adoption within these forums of new instruments addressing specifically the problem of piracy.

In certain countries, action by public authorities against piracy is conditional on the lodging of a complaint by the right owner. Nothing in

paragraphs 7 and 8 or in any other provision of the Recommendation is to be understood as implying that this position should be altered.

Co-operation between member states (paragraphs 9 and 10)

Piracy in the field of copyright and neighbouring rights is a worldwide phenomenon and to a large extent is centred in countries outside Europe. Consequently, action at European level needs to be accompanied by appropriate measures *vis-à-vis* piracy in the world at large. This involves persuading and assisting the countries concerned to improve the level of legal protection against piracy and to take active steps against violators.

The Recommendation provides that states should keep each other fully informed of initiatives they take in this respect and offer each other mutual support. Diplomatic moves by a given state, for example, will clearly stand a greater chance of success if supplemented and backed up by others. Joint action by states, including within the framework of competent regional groupings, is also conceivable and the opportunities open in this connection should be fully explored.

Information on anti-piracy measures could also be transmitted to the Council of Europe and to other appropriate intergovernmental bodies, such as the World Intellectual Property Organisation.

Ratification of treaties (paragraphs 11 and 12)

States are recommended to become Parties to the latest version of the Berne Convention for the Protection of Literary and Artistic Works as well as to three other treaties which are relevant to the fight against piracy, namely the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome, 1961), the Convention for the Protection of Producers of Phonograms Against Unauthorised Duplication of Their Phonograms (Geneva, 1971) and the European Agreement on the Protection of Television Broadcasts (Strasbourg, 1960), together with its protocols. To date, these treaties have been ratified by approximately only half of the Council of Europe's member states.

States are also recommended to take into account new technological developments when adopting measures at national level with a view to the ratification of these treaties. To give one example, states should extend the protection the latter provide for producers of phonograms to videogram producers as well.

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