COUNCIL OF EUROPE
COMMITTEE OF MINISTERS

_____

RECOMMENDATION No. R (95) 1

**OF THE COMMITTEE OF MINISTERS TO MEMBER STATES
ON MEASURES AGAINST SOUND AND AUDIOVISUAL PIRACY**

*(Adopted by the Committee of Ministers on 11 January,
at the 525th meeting of the Minister's 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;

Concerned by the resurgence in sound and audiovisual piracy in Europe;

Considering that the resurgence of piracy is due, in particular, to:

a. the major political, economic and social changes which have occurred in central and eastern Europe as well as the difficult economic situation in many European countries;

b. technical developments, in particular digitalisation, which facilitate:

- the reproduction, often of excellent quality, of phonograms, audiovisual works, broadcasts and computer software associated with audiovisual productions (in particular, the so-called multimedia and video games);

- the manufacture of decoding equipment and other similar means used for protecting access to works and other protected contributions;

Noting that piracy prejudices the rights and interests of authors, producers of audiovisual works, performers, producers of phonograms and broadcasting organisations as well as the cultural professions and related industries in general and the public at large;

Noting the increasing international character of sound and audiovisual piracy;

Recognising that action at the level of legislation and awareness is necessary for combating effectively all forms of sound and audiovisual piracy;

Resolved to promote effective action in this area;

Convinced that any such action must be based on the adoption of appropriate measures at national level as well as on international co-operation;

Bearing in mind the work carried out or being carried out on the strengthening of the protection of rights within other fora, in particular within the framework of the European Union, Unesco, and the World Intellectual Property Organization;

Bearing in mind also the work carried out or being carried out within other fora with respect to enforcement of rights, in particular the Agreement on Trade-Related Aspects of

Intellectual Property Rights, including Trade in Counterfeit Goods (TRIPS Agreement) concluded within the framework of GATT and the European Union regulations outlining border measures on the importation of counterfeit products;

Noting in this respect the need for effective implementation of the existing recommendations which it has already adopted in this area:

- Recommendation No. R (88) 2 on measures to combat piracy in the field of copyright and neighbouring rights;

- Recommendation No. R (91) 14 on the legal protection of encrypted television services, and

- Recommendation No. R (94) 3 on the promotion of education and awareness in the area of copyright and neighbouring rights concerning creativity;

Bearing in mind the need to address continuously and in an appropriate manner the issue of sound and audiovisual piracy, in particular the forms of piracy, in a rapidly evolving technological context;

Noting therefore that, in addition to the implementation of the above-mentioned recommendations, a number of considerations should be borne in mind in pursuing effective action against piracy,

Recommends that the governments of member states:

- step up their action against sound and audiovisual piracy;

- to this end, ensure speedy and more effective action at national and international levels against the forms of sound and audiovisual piracy mentioned in the appendix to this recommendation;

- take account of the considerations in the appendix to this recommendation when developing their anti-piracy policies.

Appendix to Recommendation No. R (95) 1

1. There is a resurgence in Europe of various forms of sound and audiovisual piracy, such as:

a. the unauthorised fixation of live performances for commercial purposes and the unauthorised reproduction and distribution for commercial purposes of such fixations;

b. the reproduction, distribution and communication to the public of phonograms in violation of the relevant existing rights of right holders and for commercial purposes;

c. the reproduction, distribution and communication to the public of audiovisual works in violation of the exclusive rights of right holders and for commercial purposes;

d. the unlawful retransmission, cable distribution, fixation and reproduction of broadcasts for commercial purposes and the unauthorised distribution for commercial purposes of copies of broadcasts;

e. the unauthorised manufacture and distribution for commercial purposes of decoding equipment and other similar means enabling unlawful access to works and other protected contributions;

f. the unauthorised reproduction and distribution for commercial purposes of computer software associated with audiovisual productions, in particular the so-called multimedia and video games.

2. These new challenges may require a continuing examination of the scope of sound and audiovisual piracy offences.

3. A number of member states have successfully introduced in their fight against sound and audiovisual piracy:

- anti-piracy units, composed of officers specialised in the fight against sound and audiovisual piracy;

- special chambers within criminal courts and tribunals which are competent to deal with issues relating to sound and audiovisual piracy.

4. As a complement to the existing legal framework for dealing with sound and audiovisual piracy offences, the introduction of technical anti-piracy devices may increase the security and protection of works and other contributions against the threat of sound and audiovisual piracy.

5. An awareness campaign directed at judicial and administrative authorities on the need to act decisively against sound and audiovisual piracy may also be useful, as would the promotion of awareness among the public at large of the importance of the seriousness of sound and audiovisual piracy offences and of the need to respect the rights of holders of copyright and neighbouring rights in works and other protected contributions.

6. Co-ordination at international level is important so as to facilitate:

- legal proceedings involving sound and audiovisual piracy offences;

- exchanges of information between bodies in each member state responsible for combating sound and audiovisual piracy.

7. The exchange of information between professional bodies involved in the fight against piracy is also important for effectively combating piracy.

* * *

Explanatory memorandum

Introduction

1. The development of telecommunications and information technologies has greatly facilitated access by the public in Europe to literary and artistic works, and especially to phonograms and audiovisual works. For example:

- techniques enabling individual reception of broadcasts transmitted by satellite and/or distributed by cable, in particular in the context of pay-TV services and pay-per-view services, make it possible for increasingly large segments of the public to have access to a far greater number of broadcasts and audiovisual works, both domestic and foreign;

- the use of compact discs (in particular interactive discs) and various kinds of computer software makes it possible for individuals to have access to literary and artistic works, as well as phonograms and audiovisual works contained in electronic and multimedia environments.

2. In the same vein, it is becoming increasingly simple and affordable to make high quality reproductions of sound recordings, audiovisual works, broadcasts and computer software, as a result of the development of new technologies, especially digital technology.

3. However, technological development has also brought about a resurgence in Europe of unlawful commercial activities directed against works and other contributions protected by intellectual property law. In particular, the following categories of unauthorised activities carried out for commercial purposes may be noted:

- the fixation of live performances (commonly referred to as "bootlegging"), for example in concert halls, as well as the subsequent reproduction and distribution of such

fixations. Unlawful fixation is becoming more and more prevalent and is a matter of particular concern in the different European countries;

- the reproduction of sound recordings (in particular compact discs), audiovisual works, broadcasts and computer software associated with audiovisual productions (especially multimedia and video games): it is now relatively easy from the technical point of view to reproduce on a large scale without it being possible to distinguish easily the copies from the originals:

- the manufacture of decoding equipment enabling access to encrypted programme services.

4. The activities referred to above are linked to other unlawful activities including the distribution of counterfeit or illegal material (for example, the unlawful distribution of decoding equipment). These latter activities sometimes assume a pan-European dimension. As regards decoding equipment or other similar means for protecting access to works and other protected contributions, there are other unlawful activities which should not be overlooked such as the commercial promotion or advertising for the manufacture, importation or distribution of such equipment.

5. These classic piracy activities, which were essentially addressed by the Committee of Ministers in its Recommendation No. R (88) 2, are unfortunately still prevalent.

6. Moreover, in addition to those activities a range of other unlawful practices has appeared. In certain European countries, for example, there is an increase in communication to the public, in breach of relevant existing rights of right holders and for commercial purposes, of sound recordings (sound systems in discothèques, shops, hotels, etc.) and audiovisual works (projection rooms, public screenings in blocks of flats or housing estates, bars, local community groups, etc.; redistribution beyond the receiving household via private cable networks, etc.).

7. Note should also be taken of the increase in unlawful retransmission and cable distribution of broadcasts for commercial purposes: piracy does not only have consequences for audiovisual works such as films but also, and increasingly so, for broadcasters' signals. Small private transmitters are retransmitting without authorisation and for commercial purposes the programmes of other broadcasters; alternatively, they transmit their own programmes composed of works and other contributions without having obtained the necessary authorisation from right holders.

8. These various activities may today be considered as acts of piracy. This being said, the notion of piracy must not be overly stretched as this could weaken the fight against piracy. Piracy essentially consists of the breach, for commercial purposes, of the exclusive rights of authors and other right holders. It is obvious that a failure to pay fair remuneration for the use of their works and other contributions also constitutes a reprehensible act, even though, strictly speaking, it does not fall within a category of piracy. Member states should ensure, by all means judged appropriate, that fair remuneration is paid to right holders[1]. One such means could possibly be a refusal to renew the operating licence of a party which failed to fulfil its obligation to pay fair remuneration.

9. Consideration could also be given to the possibility of including, within the notion of piracy *stricto sensu*, attempts and acts which are preparatory to piracy offences as well as acts which are accessory to piracy.

10. Finally, piracy must 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 quite distinct. The Committee of Ministers of the Council of Europe has already adopted a legal instrument on this subject (see Recommendation No. R (88) 1 on sound and audiovisual private copying).

11. The major political, economic and social changes which have occurred in central and eastern Europe, as well as the difficult economic situation in many European countries, are related to the increase in the various forms of piracy. Members of the public in these countries want to have access to all types of sound and audiovisual recordings (both recent works as well as re-releases, especially works in back catalogues) and to an increasingly large range of foreign and domestic broadcasts (especially encrypted ones). Their wish is often thwarted owing to lack of financial means. All this seems to encourage piracy which offers the possibility of gaining access to the product sought at a lower price or free of charge.

12. Sound and audiovisual piracy causes, either directly or indirectly, serious harm to quite different interest groups: authors, composers, producers of audiovisual works[2], performers, phonogram producers, broadcasters, producers of software associated with audiovisual productions (multimedia and video games), distributors and retailers, cinema owners, etc.

13. Given the very nature of piracy, it is impossible to calculate its precise extent in these different sectors. However, the estimates available suggest that the economic loss

resulting from sound and audiovisual piracy in Europe amounts to billions of US dollars.

14. Pirated products are very often a direct substitute for the purchase or rental of legitimately produced products. As a result, piracy gives rise to a considerable loss of income for authors, performers and producers, as well as for 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, can only work against the interests of consumers in the long run. Furthermore, states suffer loss of revenue as a result of piracy given that customs duties and VAT, as with the various taxes on income and social contributions owed by companies involved in piracy, are rarely paid in respect of pirated products.

15. It is certainly true that a large number of member states have already taken steps to ensure that their legislation contains remedies of a civil and criminal law nature making it possible to act speedily and effectively against persons engaged in piracy, including those involved in the importation and distribution of pirated products[3].

16. These remedies, which are subordinated to the principles on the free movement of goods which underpin the trade relations between certain member states, have resulted in the effective suppression of certain forms of piracy, especially by a significant increase in criminal sanctions (imprisonment and fines). In some member states, the courts and tribunals have special chambers which allow for a degree of harmonisation in the case law concerning sound and audiovisual piracy offences. This system has shown itself to be particularly effective. Finally, the strengthening of the domestic legal framework has also provided additional support to the anti-piracy measures taken by interested professional bodies. In certain member states, for example, anti-piracy cells operate. These cells are composed of teams made up of duly sworn officers (for example, former police officers, customs officials and police officers who check up on the sales outlets). When spotted, suspect products undergo technical and legal control. Evidence of piracy offences results in complaints being made before the relevant prosecutor's office.

17. However, in other member states, there are important gaps in legislation as well as inadequate application of provisions in force. It should be noted that certain businesses specialise in exploiting these gaps to produce illegally copies of sound recordings (referred to as loophole piracy). Even though progress has been made, the existing legal provisions sometimes come up against indifference, even hostility, on the part of those who are supposed to apply them. There is often a fairly widespread attitude in society as a whole or in certain important sectors of society to the effect that piracy is not always perceived to be a harmful activity which requires to be sanctioned.

18. Even though it is highly desirable to avoid restricting the opportunities available to the public to benefit from technological developments so as to allow access to creative works - in particular, audiovisual works - it should also be stressed that the rights and legitimate interests of both national and foreign right holders must also be protected. An improvement of the legal framework and the introduction of technical anti-piracy methods must go hand in hand with awareness creation, targeted in particular at judicial (criminal and civil) and administrative (police and customs) authorities. Furthermore, major efforts at information and awareness creation must also be targeted at the users of sound and audiovisual works. In other words, the public in general must be made aware of the seriousness of piracy.

19. The transfrontier aspects of piracy (the illegal importation of compact discs, video cassettes and decoding equipment, etc.; the unlawful retransmission of foreign broadcasts, etc.) are assuming increasing importance, even though the methods for combating piracy are still national in nature.

20. The Council of Europe is particularly attentive to the need for international co-operation at the legal and political levels. The lack of effectiveness of measures taken within a particular country for combating piracy has negative repercussions on the situation in neighbouring countries. Furthermore, the lack of co-ordination at the international level between right holders makes the fight against piracy ineffective (the need to mount simultaneous actions before several national courts, the need to submit proof of piracy to each of the courts, etc. entails considerable costs). Member states could envisage bilateral agreements which incorporate, where possible, guarantees for copyright and neighbouring rights and also the obligation for national bodies responsible for combating piracy, including ministries of the interior and customs services, to exchange information on an ongoing basis on action to combat piracy of audiovisual and printed works. In addition to inter-state co-operation, member states could also encourage the transfrontier exchange of information between professional bodies involved in the fight against piracy.

21. Much has been done at the international level so as to strengthen the protection of rights and their implementation:

- Recommendations No. R (88) 2, No. R (91) 14 and No. R (94) 3 of the Committee of Ministers of the Council of Europe;

- the work being carried out within the European Union (in particular Directives 92/100 and 93/83 and the proposal for a Council Regulation laying down measures to prohibit the release for free circulation, export or transit of counterfeit and pirated goods);

- the work being carried out within the World Intellectual Property Organization and Unesco;

- the Agreement on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods (TRIPS Agreement) concluded within GATT.

22. Nevertheless, it must be said in conclusion that there exist substantial gaps in the legal protection against piracy in several European countries, as well as at the pan-European level, both in the legal protection against piracy and in the application in practice of existing provisions. The economic and cultural costs of piracy remain high (cf the findings of the aforementioned questionnaire). Failing the adoption of appropriate measures, the problem will get worse.

23. The aim of this instrument is to recommend to the governments of the member states that they ensure speedy and more effective action at the national and international levels against the aforementioned forms of piracy, having regard in particular to the provisions on sound and audiovisual piracy contained in Recommendations No. R (88) 2, No. R (91) 14 and No. R (94) 3.

24. The fact that this recommendation is focused on sound and audiovisual piracy does not mean that other acts of piracy and other unlawful activities are to be treated lightly. The spirit of the present recommendation would be seriously undermined if such other activities were to be seen as being less serious than acts of sound and audiovisual piracy.

25. The following three chapters reproduce, respectively, the texts of the three aforementioned recommendations, as well as their explanatory memoranda. It should be noted that the explanatory memorandum to Recommendation No. R (88) 2 has been adapted to take account of developments in this field since its publication.

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

Preamble and principles of Recommendation No. R (88) 2, adopted by the Committee of Ministers of the Council of Europe on 18 January 1988, together with the pertinent parts of the explanatory memorandum thereto

Preamble

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 unfixed 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.

26. 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.

27. The work carried out within the Council of Europe aimed at improving the legal protection of neighbouring rights holders, in particular the rights of performers, should be highlighted. This work has been reflected in a *discussion document on the protection of neighbouring rights*. In September 1993, the Committee of Ministers authorised the publication of this document and its wide distribution to all interested parties.

28. 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 Recommendation No. R (88) 2 that authors of computer software should benefit from copyright protection; this might be achieved by means of specific legislation on the subject or through interpretation of existing copyright provisions.

29. As regards recognition of rights, member states should also consider the issue of the rights which should be accorded to foreign right holders, especially to performers and phonogram producers whose performances and fixations are reproduced in countries where the legal systems do not grant them 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.

30. 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. Recommendation No. R (88) 2 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 criminal and civil law, though, of course, the accent placed on one or other type of procedure might well vary from country to country.

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.

31. In the context of the criminal law, Recommendation No. R (88) 2 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.

32. 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).

33. Recommendation No. R (88) 2 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.

34. 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. Recent experience in several member states shows that a substantial increase in the level of sanctions and an effective application of sanctioning policy by courts has had a real dissuasive effect on the commission of acts of piracy. These methods of dissuasion are even more essential whenever piracy assumes a transfrontier dimension. This implies bilateral and multilateral co-operation between the states concerned.

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.

35. As regards civil law, Recommendation No. R (88) 2 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 Recommendation No. R (88) 2 in this respect might be achieved through appropriate links between the criminal

and civil procedures.

36. 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.

37. 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.

38. As for the fate of infringing copies and means of production seized in the course of civil proceedings, Recommendation No. R (88) 2 indicates that they should either be destroyed or delivered to the plaintiff.

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

39. With regard to paragraph 5 of Recommendation No. R (88) 2, 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.

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.

40. 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 Recommendation No. R (88) 2 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

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.

41. Paragraph 7 of Recommendation No. R (88) 2 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.

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

43. Recommendation No. R (88) 2 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 fora of new instruments addressing specifically the problem of piracy.

44. 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 Recommendation No. R (88) 2 is to be understood as implying that this position should be altered.

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.

45. 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.

46. Whenever piracy assumes a transfrontier dimension, states should promote bilateral and multilateral co-operation so as to facilitate the collection and tendering of proof before competent courts and tribunals.

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.

47. Recommendation No. R (88) 2 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.

48. 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 Organization.

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.

49. 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 and 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. Member states could also consider the appropriateness of acceding to the Treaty on the International Registration of Audiovisual Works (Geneva, 1989).

50. 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 ensure that right holders have appropriate rights at the national level so as to allow them to defend their economic interests *vis-à-vis* the various forms of piracy which technological developments make possible.

51. As already mentioned in the introduction, right holders should have legal protection against new techniques for mass reproduction of sound recordings, broadcasts, audiovisual works and computer software associated with audiovisual productions. Digitalisation has in particular made it possible to mass reproduce in simple, affordable conditions. The quality of the end result is excellent.

52. Technological evolution has also made it possible to develop effective techniques for the protection of works and other contributions. For example, identification codes, such as the SID [4] code of the International Federation of the Phonographic Industry (IFPI), have been developed to strengthen the security surrounding the manufacture of compact discs at both mastering and reproduction stages.

53. Member states should take the measures necessary to combat effectively the problem of unauthorised retransmission of broadcasts for commercial purposes. The problem has developed appreciably over the course of the last few years. By virtue of technological developments, opportunities for individual reception of broadcasts have considerably increased (reception of broadcasts transmitted by satellite and/or distributed by cable, especially in the context of pay-TV and pay-per-view). The demand for programmes has thus increased. To meet demand, certain broadcasters have retransmitted unlawfully other broadcasters' programmes. Small private transmitters and cable networks are retransmitting without authorisation and for commercial purposes the programmes of broadcasters. This is notably a concern in central and eastern Europe. States should consider the appropriateness of introducing administrative measures which could have an impact on the fight against this form of piracy. In particular, the grant or renewal of broadcasting or cable retransmission licences could be made subject to ensuring that the applicant for a licence has not been involved in pirated retransmissions.

54. Finally, as mentioned above, the unlawful communication to the public of sound recordings (sound systems in discothèques, shops, hotels, etc.) and audiovisual works (unlawful screenings in cinemas; public screenings and distribution beyond the individual receiving household, especially via private cable networks, in blocks of flats or housing estates; public screening in bars, local community groups, etc.) is another form of piracy which has also been facilitated by technological developments rendering the activity more affordable and producing quality results. Member states should take the appropriate measures to combat this form of piracy.

Chapter II — Legal protection of encrypted television services

Preamble and principles of Recommendation No. R (91) 14, adopted by the Committee of Ministers of the Council of Europe on 27 September 1991, together with the pertinent parts of the explanatory memorandum thereto

Preamble

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;

Noting the increasing development in Europe of television services, notably pay-TV services, the access to which is protected by means of encryption techniques;

Taking into account that these services contribute to the diversity of television programmes offered to the public and, at the same time, increase the possibilities of exploitation of audiovisual works produced in Europe;

Considering that the development of pay-TV is likely to increase the sources of financing of television services and, as a result, the capacities of audiovisual production in

Europe;

Concerned by the increasing degree of illicit access to encrypted television services, namely, access by persons outside the audience for which the services are reserved by the organisation responsible for their transmission;

Noting that this phenomenon is such as to threaten the economic viability of organisations providing television services and, hence, the diversity of programmes offered to the public;

Taking into account the fact that illicit access to encrypted television services also threatens legal certainty in the relations between, on the one hand, the organisations providing encrypted television services and, on the other hand, holders of rights in works and other contributions transmitted in the framework of such services;

Being aware that illicit access to encrypted television services indirectly prejudices the rights and interests of authors, performers and producers of audiovisual works, as well as of the cultural professions and related industries as a whole;

Noting that the organisations providing encrypted television services have the responsibility to use the best available encryption techniques;

Recognising nevertheless that legislative action is needed to supplement such techniques;

Determined that effective action should be taken against illicit access to encrypted television services;

Believing that this can most effectively be achieved by concentrating on commercial activities enabling such access;

Recognising that the protection of encrypted television services in domestic legislation should not be subject to the requirement of reciprocity,

Recommends the governments of the member states to take all necessary steps with a view to implementing the following measures to combat illicit access to encrypted television services.

55. Broadcasters have traditionally sought to reach the widest possible audience for their programmes. However, following economic and technical developments in recent years in the broadcasting sector, especially the advent of pay-TV services, this is no longer invariably the case, and certain broadcasters now wish to ensure that their audience is restricted. This may be for various reasons. As regards pay-TV services, the broadcaster seeks to restrict the access to its programmes solely to persons paying the required subscription, and the fees paid are used to finance the broadcaster's activities. A broadcaster may also wish to restrict the audience of its programmes for other reasons. For example, it may wish to limit the access to its broadcasts for reasons of copyright and neighbouring rights. Furthermore, particularly in the case of services with a professional vocation, the broadcaster may wish to restrict the access to its programmes to a closed user group particularly interested in the broadcasts (for example, a broadcaster transmitting medical programmes will reserve their access to medical personnel).

56. In order to control the access to its broadcasts, the broadcaster can modify or alter their characteristics by encrypting them and provide decoding equipment to the specific audience it seeks to address. Although the modified transmission may be widely receivable, only those who have decoding equipment can transform the transmission so that the programme can be seen and heard on the television set. This technical method of controlling the access to television services is highly effective, provided that only those members of the public whom the broadcaster seeks to reach are capable of decoding the signal.

57. Experience has shown, however, that the ability to decode the encrypted broadcast is not confined to the intended audience because decoding equipment capable of decoding the broadcast is made available to those outside the intended audience. This may be pirate decoding equipment, made with the intention of supplying it to persons outside the intended audience, or legitimate decoding equipment which finds its way into the hands of persons who are not entitled to have it.

58. Illicit access to an encrypted television service by persons outside the intended audience clearly has adverse effects on the broadcaster concerned and, indirectly, on the owners of rights in works and other contributions which are transmitted in the framework of that service. The most obvious example is the fact that illicit reception enables avoidance of the payment to pay-TV channels of the subscription which they impose for access to their programmes. Moreover, illicit access to an encrypted television service may prejudice the interests of broadcasters other than the broadcaster directly concerned. Illicit access to the programmes of a broadcaster intended for a determined audience

may cause the audience of another broadcaster to turn to the programmes of the first broadcaster, in particular if both broadcasters transmit similar programmes.

59. By depriving broadcasters (and thus, indirectly, right holders) of the payments which they are entitled to receive, illicit access to encrypted television services may threaten the economic viability of the broadcasting organisations concerned and, hence, the diversity of programme services offered to the public. This is particularly the case in those countries, such as in central and eastern Europe, where broadcasting organisations are financially weaker.

60. Furthermore, even in cases where a programme service is not encrypted for financial reasons but with a view to restricting its reception area to a given territory or audience, illicit access to that service entails legal uncertainty for the broadcaster concerned, even though such access may not cause it a direct financial prejudice. The broadcaster whose programmes are received illicitly may expose itself to legal action from holders of rights in the works and other contributions incorporated in these programmes, on the grounds that the actual transmission area exceeds that foreseen in the contracts negotiated with the right holders.

61. It is thus necessary to consider the action which should be taken in order to dissuade or prevent illicit access to encrypted television services.

62. At first sight, the notion of illicit access, finding expression in the illicit reception of an encrypted television service, is not one that sits comfortably with the principle of freedom of expression and of free access to information enshrined in many national laws and international conventions. For example, Article 4 of the European Convention on Transfrontier Television indicates that the Parties to the Convention "shall guarantee freedom of reception" of transfrontier television programme services. However, further reflection reveals that the freedom to receive broadcasts cannot be construed as an entitlement for the public to override the legitimate interests of those with an economic interest in the provision of television services. Opinions received by the Council of Europe from broadcasters, right owners and manufacturers of decoding equipment have confirmed unanimously the importance of the prejudice which they suffer due to illicit reception. As indicated previously, the practice will, if allowed to continue unchecked, have an adverse effect on investments in broadcasting which will be against the public interest, reducing consumer choice and access to a wider range of television services. Seen from this perspective, illicit reception prejudices the very freedom of reception that Article 4 of the European Convention on Transfrontier Television seeks to ensure.

63. It is apparent from the evidence received by the Council of Europe that technology cannot provide a complete answer to the problems experienced by broadcasters in respect of illicit access to their encrypted television services. Although encryption techniques already provide important security and will continue to be improved, it will always be possible (at least for the foreseeable future) for a person determined to do so to produce illicit decoding equipment to enable access to an encrypted television service. Some audiovisual pirates are today equipped with personal and other computers allowing them to break proprietary scrambling algorithms and to engage in commercial, indeed mass production of pirate decoders and smart cards. This is increasingly the case in Central and Eastern Europe. Hence, this justifies the introduction of some legal provisions to reinforce the protection against illicit access to encrypted television services afforded by technology.

64. Therefore, Recommendation No. R (91) 14 invites member states to take certain measures in order to combat illicit access to encrypted television services. It is only concerned with the illicit access to encrypted television services by means of decoding equipment and not with other forms of access to television services which may be regarded as illicit, for example reception by members of the public who have not paid a television licence fee. Nor does Recommendation No. R (91) 14 deal in depth with the problem of the retransmission of a signal that has been received illicitly. Indeed, it is to be noted that such activity is already addressed by such international instruments as the Berne Convention for the Protection of Literary and Artistic Works and the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, the European Agreement on the Protection of Television Broadcasts and the Brussels Convention relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite.

65. Although the problem of illicit access is posed mainly from the point of view of broadcasting services, it may also concern, more generally, all kinds of distribution of television programmes. The principles set out in Recommendation No. R (91) 14 thus apply also to all kinds of distribution of encrypted television services, for example, by hertzian waves, cable or through multi-point microwave distribution systems.

66. It is clear that the organisation providing an encrypted television service should do all it can to deter illicit access to that service, and to this end should employ the best encryption techniques which are available to it. However, as noted above, this will not always be sufficient and, as has already been recognised in certain member states of the Council of Europe, some legal provisions are needed in order to supplement technical means of protection. In this perspective, Recommendation No. R (91) 14 envisages the enactment of legal provisions in five areas: the manufacture of decoding equipment, the importation of decoding equipment, the distribution of decoding equipment, commercial promotion and advertising of such activities and the possession of decoding equipment. The adoption of legal measures in respect of commercial activities is aimed at guaranteeing the effectiveness of the fight against illicit access to encrypted television services by stopping the circulation of decoding equipment at the source.

Definitions

For the purpose of the implementation of Principles I and II hereafter:

"encrypted service" means any television service transmitted or retransmitted by any technical means, the characteristics of which are modified or altered in order to restrict its access to a specific audience;

"decoding equipment" means any device, apparatus or mechanism designed or specifically adapted, totally or partially, to enable access "in clear" to an encrypted service, that is to say without the modification or alteration of its characteristics;

"encrypting organisation" means any organisation whose broadcasts, cable transmissions or rebroadcasts are encrypted, whether by that organisation or by any other person or body acting on its behalf;

"distribution" means the sale, rental or commercial installation of decoding equipment, as well as the possession of decoding equipment with a view to carrying out these activities.

67. For the purpose of the implementation of Recommendation No. R (91) 14, a number of definitions are set out which are aimed at clarifying several notions which might give rise to interpretation.

68. "Encrypted service" means any television service transmitted or retransmitted by any technical means, the characteristics of which are modified or altered in order to restrict its access to a specific audience. The definition also covers all kinds of technical means used for transmitting or retransmitting encrypted programmes, in particular by hertzian waves, including by satellite or multi-point microwave distribution systems, and by cable. On the other hand, it does not apply to the mere transport of signals not intended for direct reception by the general public. The unauthorised interception of such signals, whether encrypted or not, is prohibited under telecommunications law (ITU Radio Regulations). Moreover, the term "encrypted service" and, accordingly, Recommendation No. R (91) 14, do not apply to television services, the characteristics of which are modified involuntarily, for example due to interferences during their transmission.

69. "Decoding equipment" means any device, apparatus or mechanism designed or specifically adapted, totally or partially, to enable access in clear to an encrypted service, that is to say without the modification or alteration of its characteristics. Thus, this definition refers to all kinds of equipment enabling the viewer to receive in clear an encrypted service without the modification or alteration made to the signal by the organisation providing the service, although it is not necessary that the quality of the reception be identical to that of the original signal. It covers first the most frequent cases where a decoder in itself enables access to an encrypted service. It also applies to cases where access is only possible if the decoder is coupled with other pieces of equipment or devices. Such will be the case when a decoder can only be activated by means of a smart card which provides the key for access to an encrypted programme or transmission. In so far as possible, member states should ensure in this case that the provisions of their domestic legislation adopted under Recommendation No. R (91) 14 only apply to the part of the decoding equipment which in fact provides access to an encrypted service. Finally, the definition also covers cases where a single piece of equipment provides various functions, one of them being to provide access to an encrypted service.

70. "Encrypting organisation" refers to any organisation whose broadcasts, cable transmissions or rebroadcasts are encrypted, whether by that organisation or any other person or body acting on its behalf. Indeed, there might be cases where the technical activity of encryption or coding or scrambling is not directly carried out by the organisation providing the encrypted television service but by a third party with particular competence in this field. Accordingly, this definition covers cases where encryption is provided by a person or body acting on behalf of the organisation providing the encrypted television service.

71. It is to be noted that this definition and, accordingly, the protection provided by Recommendation No. R (91) 14 apply to all the organisations offering encrypted television services, both at local or regional level and at national and transfrontier level. Moreover, the protection applies regardless of the nationality of the organisations, and regardless of whether or not they come under the jurisdiction of the member states of the Council of Europe. Furthermore, the protection is not to be made subject to any requirement of reciprocity in the national legislations concerned.

72. Indeed, if member states were to grant protection only on a reciprocal basis, this could disadvantage right holders whose works or contributions are included in a non-protected broadcast. Furthermore, by excluding a foreign television organisation from such protection, a state might prejudice its own national television organisations: as mentioned previously, the illicit access of its public to the programmes of a foreign television organisation could result in the public neglecting the programmes of its own national television organisations. For these reasons, Recommendation No. R (91) 14 calls for protection of all organisations providing encrypted television services irrespective of their nationality.

73. "Distribution" covers all commercial activities relating to the supply of decoding equipment to the public, from wholesale to retail or rental. It also takes into account the

commercial installation of decoding equipment, such as the installation of decoding equipment in an individual's home.

Principle I — Unlawful activities

1. The following activities are considered as unlawful:

a. the manufacture of decoding equipment where manufacture is designed to enable access to an encrypted service by those outside the audience determined by the encrypting organisation.

74. If an organisation providing a television service wishes to limit its audience by the use of an encryption technique, it must not only encrypt the broadcast which it transmits but also ensure that decoding equipment is manufactured to supply the public it wishes to reach. Since such decoding equipment is frequently sold or leased to the public and provides the mechanism for payment for the service, unscrupulous manufacturers might be tempted to produce decoding equipment for sale at a price which need take no account of the payment for the television service and, hence, is much cheaper than the decoding equipment supplied lawfully. Although it is not covered by copyright law, this activity is not dissimilar in either its motivation or effect to copyright piracy, where protected works are reproduced for commercial purposes without the consent of the owner of the rights. The manufacture of such pirate decoding equipment is prejudicial to the interests of organisations providing encrypted television services and, indirectly, of the holders of rights in works and other contributions incorporated in encrypted services in much the same way as the production of infringing copies is prejudicial to copyright interests.

75. The analogy with copyright is not, however, a complete one. Quite apart from the protection to which an organisation providing encrypted television services may be entitled, its decoder may incorporate proprietary information which is otherwise subject to copyright, patent and other intellectual property law. Nothing of course prevents manufacturers from developing their own encryption services to be offered to broadcasters in competition with existing encryption services.

76. The manufacturer who merits censure is the one who makes decoding equipment for supply to an audience outside the one to which the encrypting organisation intends to reserve its encrypted television service. Recommendation No. R (91) 14 therefore considers as unlawful the manufacture of decoding equipment where manufacture is designed to enable illicit access to an encrypted service.

b. The importation of decoding equipment where importation is designed to enable access to an encrypted service by those outside the audience determined by the encrypting organisation, subject to the legal obligations of member states regarding the free circulation of goods.

77. Importation of decoding equipment may be at the source of its circulation within a given country. Manufactured or distributed, even legally, in one country, it may be imported into another country and subsequently distributed so as to enable access in that country to an encrypted service by those outside the audience determined by the encrypting organisation. Accordingly, and given the crucial role which the customs authorities may play in combating the illicit circulation of decoding equipment, Recommendation No. R (91) 14 considers as unlawful the importation of decoding equipment where it is designed to enable illicit access to an encrypted service. Some countries have already provided for prohibitions on the importation of decoding equipment where importation is designed to enable television viewers to have illicit access to encrypted television services. Principle I.1.b advocates a similar approach. However, as regards EU member states, the decision to regard importation as a prohibited activity is not to be seen as prejudicing the operation of the relevant provisions of the Rome Treaty on the free movement of goods, including the decisions of the Court of Justice of the European Communities in regard to the meaning of those provisions. Accordingly, Recommendation No. R (91) 14 provides that the decision to consider the importation of decoding equipment as an unlawful activity, as mentioned in Principle I.1.b, must be without prejudice to the legal obligations of member states regarding the free circulation of goods. It should also be borne in mind that Recommendation No. R (91) 14 is addressed not simply to the governments of the EU states which are member states of the Council of Europe but to all member states of the Council of Europe, many of which are not bound by the Rome Treaty's provisions on free movement of goods. Thus, it was felt appropriate to give such countries guidance on how to deal with the issue of importation of decoding equipment for the purposes described in Principle I.1.b.

c. The distribution of decoding equipment where distribution is designed to enable access to an encrypted service by those outside the audience determined by the encrypting organisation.

78. Although measures aimed at the manufacture of decoding equipment will go some way towards preventing the problems of illicit access to encrypted services, it is clear this will not be sufficient. In order to ensure that the fight against illicit access to encrypted television services is really effective, it is also necessary to sanction the whole range of activities relating to distribution, which are designed to enable unlawful access. As indicated in the definitions above, Recommendation No. R (91) 14 covers the whole chain of operations ranging from wholesale distribution to retail sale or rental, including the illicit sale or rental of decoding equipment and the commercial installation of decoding

equipment.

d. The commercial promotion and advertising of the manufacture, importation or distribution of decoding equipment referred to in the above paragraphs.

79. Since the manufacturers, importers and distributors of decoding equipment may decide to promote their activities, Recommendation No. R (91) 14 provides, in order to complete the range of means available against illicit access to encrypted television services, that it is also unlawful to commercially promote and advertise the manufacture, importation and distribution of decoding equipment considered unlawful in application of Principle I. Thus, Principle I.1.d not only applies to advertising in the classic sense of the term in favour of the aforementioned activities, but also to any practice related to advertising which is designed to promote the same activities (sponsorship, etc.). Recommendation No. R (91) 14 envisages only civil remedies, for example, in the form of injunctions, in order to stop activities in the area of commercial promotion and advertising which are prohibited. Moreover, it should be noted that sanctions likely to be taken should be aimed exclusively at manufacturers, importers and distributors of decoding equipment and not at organisations which create or carry material used for commercial promotion or advertising (advertising agencies, newspapers, magazines, etc.).

80. Recommendation No. R (91) 14 does not prohibit the publication of technical information enabling access to an encrypted television service, in so far as it does not constitute a form of advertising or commercial promotion of the prohibited activities. Such a ban might indeed run counter to the principle of freedom of information, as established under certain domestic legislation. However, those member states which consider it possible to ban such publication on the grounds that it commercially promotes or advertises a prohibited activity, and which judge such a ban useful, may adopt provisions to this effect. Moreover, there may be other grounds for limiting publication if the technical information is proprietary or assists in the manufacture of unlawful decoders.

e. he possession of decoding equipment where possession is designed, for commercial purposes, to enable access to an encrypted service by those outside the audience determined by the encrypting organisation.

2. However, as regards the possession of decoding equipment for private purposes, member states are free to determine that such possession is to be considered as an unlawful activity.

81. When a member of the public uses decoding equipment to receive an encrypted television service to which he is not entitled to have access, he will deprive the encrypting organisation concerned of the control which encryption was intended to provide. At the very least, he damages the organisation by putting it to useless expense, but more usually he will be defrauding it of the payment that is due to it and this will indirectly prejudice the interests of holders of rights in the works and other contributions included in the television service.

82. Recommendation No. R (91) 14 makes a distinction between possession for commercial purposes and possession for private purposes in order to take into account that the adoption of provisions which seek to regulate what is done in the privacy of the home for purely non-commercial purposes could raise difficulties in regard to the right to private life embodied in certain national legislation. On this account, certain member states might find it impossible to provide remedies, both penal and administrative as well as civil, against the possession of decoding equipment for private purposes. Moreover, such provisions may be difficult to enforce. On the one hand, detection is *a priori* virtually impossible and even when the activity is detected, there may be practical difficulties in enforcing the law. Indeed, enforcement can be seen by the general public as heavy-handed and can bring the law itself into disrepute. For this reason, Recommendation No. R (91) 14 does not deal with possession of decoding equipment for private purposes while providing that member states are free to determine that such possession is to be considered as an unlawful activity.

83. Sanctions against the illicit use of decoding equipment by an individual can nevertheless contribute towards dissuading such use, even though their application may prove difficult. Thus, member states which consider it desirable to introduce remedies against illicit access to encrypted television services by individuals may do so. Those states could usefully refer on the subject to the provisions already set out in certain national laws.

84. It should also be borne in mind that decoding equipment may be used to enable a sizeable audience, outside the one determined by the encrypting organisation, to have access to an encrypted service, for purposes other than commercial purposes. For example, it may be the case that an individual enables his co-residents of a block of flats sharing a collective antenna to have access to encrypted television services by using decoding equipment in his possession. The aim of the individual is not to gain a financial advantage, but to offer a friendly service out of a sense of shared community. However, given the substantial number of persons having illicit access to encrypted television services in this way, member states may feel that it is appropriate to prohibit possession of decoding equipment in such circumstances, even though the motive for use may not be commercially inspired.

85. On the other hand, the illicit use of decoding equipment for commercial purposes should be considered as an unlawful activity, due to the special prejudice this entails for the encrypting organisation which is a victim of such use. Such would be the case, for example, of an hotel proprietor or a cable operator using one or more decoders in order to

offer illicit access by his clients to an encrypted television service. In so doing, the hotel proprietor or cable operator does not limit himself to an act of illicit reception but acquires an undue advantage from this activity, by including this service in the bill presented to clients or subscribers.

86. As in the case of private use of decoding equipment, use for commercial purposes may be difficult to prove. Punishing the use of decoding equipment presupposes that the police can record such use. Unless the police catches the user in *flagrante delicto*, it will, in practice, be impossible to record such use. Therefore, Recommendation No. R (91) 14 sanctions the possession of decoding equipment, with the presumption that such equipment will be used. This presumption is similar to that foreseen in certain domestic legislation which sanctions possession rather than use (for example, as regards the regulation of firearms).

Principle II — Sanctions and remedies

87. Having considered the activities which should be considered as unlawful, the question arises as to what legal measures should be introduced to deal with these activities. As noted previously, there are a number of parallels between the manufacture and distribution of decoding equipment for enabling illicit access to encrypted television services and the making and distribution of infringing copies prohibited by copyright law. In drawing up the provisions of Recommendation No. R (91) 14 relating to sanctions and remedies, the Council of Europe's Recommendation No. R (88) 2 on measures to combat piracy in the field of copyright and neighbouring rights has proved a useful model. However, the fact that a copyright provision was, in this limited respect, taken as a model from which this principle was developed does not imply that this is a matter of copyright law. The measures set out in Recommendation No. R (91) 14 may be implemented in whichever branch of law is deemed to be most appropriate by member states. Among the possibilities are telecommunications law, broadcasting law, administrative law, criminal law and additional provisions in the field of copyright law; these could also be used in combinations or a *sui generis* provision may provide the best solution. There is therefore complete flexibility for member states in their methods of implementation of Recommendation No. R (91) 14.

88. Recommendation No. R (91) 14 contains both criminal or administrative provisions and civil remedies. Such provisions constitute a minimum framework of intervention. Member states which so wish may therefore adopt stricter regulations than the one envisaged in Recommendation No. R (91) 14, in particular as regards the determination of activities subject to penal or administrative sanctions.

Principle II.1 — Penal and administrative law

1. States should include in their domestic legislation provisions indicating that the following activities are the subject of penal or administrative sanctions:

a. the manufacture of decoding equipment as prohibited by Principle I.1.*a*;

b. the importation of decoding equipment as prohibited by Principle I.1.*b*;

c. the distribution of decoding equipment as prohibited by Principle I.1.*c*;

d. the possession of decoding equipment where possession is designed, for commercial purposes, to enable access to an encrypted service by those outside the audience determined by the encrypting organisation.

2. Sanctions provided for by legislation should be set at an appropriate level. States should provide for enforcement of these sanctions and, in so far as domestic legislation permits:

a. provision should be made for powers to search the premises of persons engaged in the acts mentioned in paragraph 1 above and to seize all material of relevance to the investigation, including the decoding equipment, as well as the means used for its manufacture;

b. Provisions should exist for the destruction or forfeiture of the decoding equipment and of the means used for its manufacture seized in the course of a procedure;

c. The forfeiture of financial gains resulting from the manufacture, importation and distribution activities considered as unlawful in accordance with Principle I should also be possible. In accordance with domestic law, courts should be able to award all or part of any financial gains so forfeited to injured persons by way of compensation for the loss

which they have suffered.

89. Recommendation No. R (91) 14 provides that the manufacture, importation and distribution of decoding equipment in a way which is designed to enable illicit access to encrypted television services, as well as the possession of decoding equipment for commercial purposes as defined in Principle II.1, are subject to either penal or administrative sanctions. As indicated in paragraph 82, the fact that the possession of decoding equipment for private purposes, as well as advertising and commercial promotion activities, are not considered among the activities subject to penal or administrative sanctions is designed to take account of the fact that certain member states might consider that the provision of such sanctions, and in particular penalties which result in a deprivation of liberty, would be disproportionate or impossible in the context of their national legal system.

90. Penalties should be set at an appropriate level; those provided in national legislation against copyright piracy can constitute a useful reference as to the appropriate level.

91. In so far as the legislation of member states permits, powers of search and seizure should be foreseen in order to obtain the necessary evidence, and the law should provide for the forfeiture of prohibited decoding equipment, as well as for the destruction of pirate decoding equipment and the means used for their manufacture. There should also be the possibility of forfeiting the profits from these illegal activities. If the national law permits, such forfeited profits may be awarded to the persons injured by illicit access to an encrypted television service, namely the encrypting organisation providing the service as well as holders of rights in works and other contributions transmitted in the framework of the service and received illicitly.

Principle II.2 — Civil law

1. States should include in their domestic law provisions which provide that the injured encrypting organisation may, apart from the proceedings foreseen under Principle II.1, institute civil proceedings against those engaged in activities considered as unlawful in accordance with Principle I, notably in order to obtain injunctions and damages.

2. In so far as domestic law permits, the injured encrypting organisation should, as an alternative to an action for damages in respect of the loss which it has suffered, have the right to claim the profits made from the prohibited activities.

3. In so far as domestic law permits, provision should be made for the seizure, destruction or delivery to the injured encrypting organisation of decoding equipment and the means used for its manufacture.

4. Effective means should exist for obtaining evidence in cases involving the prohibited activities.

92. Recommendation No. R (91) 14 also envisages that civil proceedings can be brought against those who engage in any of the prohibited activities. The usual remedies - injunctions, damages - should be available, and, where domestic law so permits, the injured encrypting organisation should also be able to claim, as an alternative to damages, forfeiture of profits made from activities prohibited by virtue of Recommendation No. R (91) 14. Moreover, in so far as national legislation permits, the injured encrypting organisation should have the possibility to obtain the seizure, destruction or delivery of decoding equipment and the means used for its manufacture. In so far as member states do not yet have such machinery, there should be proper machinery in place so that the necessary evidence can be obtained.

93. Although it is not stated expressly, courts should refuse to give effect to contracts or clauses in contracts concerning the manufacture, importation, distribution or any other prohibited activity referred to in Recommendation No. R (91) 14.

94. Only the organisation which has encrypted a television service has a right of action under Recommendation No. R (91) 14. Although holders of copyright and neighbouring rights may suffer if illicit access to such broadcast occurs, this damage is indirect. Moreover, if all the right owners were given a right of action it would create the potential for a multiplicity of legal actions. Since it is the encrypting organisation which suffers the direct damage, the legal process will be greatly simplified if that organisation alone has recourse to the courts. The right holders can ensure that their interests are safeguarded by contractually requiring the encrypting organisation to act against illicit access to its encrypted television services. In most cases, the principal concern is to ensure that the activity is stopped and injunctions and seizure may be all that is sought. But if any damages/forfeited profits are awarded to the injured encrypting organisation, the right holders should expect a share which is proportional to the harm they have suffered. This being said, member states are of course at liberty to give specific rights and remedies to aggrieved right holders, for example the right to take legal proceedings against manufacturers, importers or distributors of illicit decoding equipment.

95. Member states should include in their domestic legislation provisions indicating that the possession of decoding equipment where possession is designed, for private

purposes, to enable access to an encrypted service by those outside the audience determined by the encrypting organisation, should be considered as illicit and be the subject of penal or administrative sanctions.

Chapter III - Promotion of education and awareness in the area of copyright and neighbouring rights concerning creativity

Preamble and principles of Recommendation No. R (94) 3, adopted by the Committee of Ministers of the Council of Europe on 5 April 1994, together with the pertinent parts of the explanatory memorandum thereto

Preamble

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 of the inextricable links which exist between human rights, on the one hand, and cultural policy on the other, in particular the freedom which must be guaranteed to authors and other contributors to creation and the dissemination of culture to express themselves freely in different forms and contexts, and to communicate to the public the fruits of their creative endeavours;

Highlighting in this regard the relevance of Articles 9 and 10 of the European Convention on Human Rights which guarantee freedom of thought and expression respectively, as well as Article 27 of the Universal Declaration of Human Rights which specifically addresses the fundamental rights of authors and other contributors to creation and the dissemination of culture;

Reaffirming also the major contribution which authors and other contributors to creation and the dissemination of culture make to the development of the cultural life of a democracy and the economic development of a nation, and the fact that the works which they produce form a valuable cultural and economic asset such that the encouragement and rewarding of their activities is a matter of public interest;

Aware of the need not to restrict access by the public to works and other protected contributions;

Conscious, however, of the need to create greater awareness among the public in general and lawyers in particular (judges, prosecutors, legal practitioners, law professors, law students, etc.) of the fact that access to and use of works and other protected contributions can only be granted on the basis of respect for the rights of the right holders concerned, and that failure to observe this obligation constitutes an illicit act which prejudices the lawful rights and interests of authors and other contributors to creation and the dissemination of culture and, in the long term, literary and artistic creation and the development of society as a whole;

Convinced that one major means for achieving this is through the deployment of efforts at educating and creating awareness among the public at large of the need for the latter to recognise that authors and other contributors to creation and the dissemination of culture have legitimate rights and interests in respect of their works and other protected contributions,

Recommends the governments of member states:

a. to promote, having due regard to the principles set out hereafter, education and awareness among the public in general and lawyers in particular (judges, prosecutors, legal practitioners, law professors, law students, etc.) of the need to respect copyright and neighbouring rights granted to authors and other contributors in respect of works and other protected contributions (in particular literary and artistic works, musical works, phonograms, audiovisual works, broadcasts and computer software);

b. to encourage the representative bodies of the various categories of right holders as well as collecting societies to participate, wherever feasible, in co-operation with public authorities, in this initiative, in particular through the preparation and dissemination of relevant literature, audiovisual material, etc., designed to increase awareness of the importance of respecting copyright and neighbouring rights concerning creativity and of the economic and cultural consequences stemming from a failure to do so.

96. Authors and other contributors to creation and the dissemination of culture make a major contribution to the cultural life of a democratic society, as well as to the economic development of a nation. Their works and other contributions are so important at the cultural and economic level that encouraging and rewarding creation is in fact a matter of public interest. It is thus felt important to develop a greater awareness among users of such works and contributions of the fact that the latter constitute the patrimony of right holders and, as such, access to works and other contributions must only take place on the basis of respect for the rights and legitimate interests of those concerned. Failure to respect this obligation gives rise to an unlawful activity which prejudices the rights of authors and other contributors to creation and the dissemination of culture and, in the long term, literary and artistic creation.

97. Within the Council of Europe, the protection of the respective interests of right holders and of the public has been guaranteed against the backdrop of certain provisions of the European Convention on Human Rights as well as of the Universal Declaration of Human Rights. Articles 9 and 10 of the Convention guarantee, respectively, the freedom of thought and the freedom of expression. Article 10 in particular enshrines the freedom to communicate (and receive) information and ideas. Article 27 of the Universal Declaration, for its part, enshrines the fundamental rights of authors and other contributors to creation and the dissemination of culture. The links between human rights and cultural policy, in particular the rights guaranteed to those who are at the origin of creative works and other protected contributions to express themselves freely in different forms and contexts, and to communicate to the public the fruits of their creative endeavours, has also been emphasised in this context.

98. More precisely, the Parliamentary Assembly and the Committee of Ministers of the Council of Europe have stressed in the framework of several legal instruments the importance of copyright and neighbouring rights from the perspective of human rights, culture and the economy, and have provided guidelines for the protection of such rights *vis-à-vis*, in particular, various types of uses which have been made possible through technological development.

99. As far as the work of the Assembly is concerned, reference should be made to the following Recommendations: 926 (1981) on questions raised by cable television and by direct satellite broadcasts (paragraphs 13.*ii*, 17 and 22.*iv*); 996 (1984) on Council of Europe work relating to the media (paragraph 9.*b*); 1067 (1987) on the cultural dimension of broadcasting in Europe (paragraphs 6.*d*, 20.*j*.ii); 1098 (1989) on East-West audiovisual co-operation (paragraph 16).

c. Furthermore, a number of recommendations adopted by the Committee of Ministers should also be mentioned: Recommendation No. R (86) 2 on principles relating to copyright law questions in the field of television by satellite and cable; No. R (88) 1 on sound and audiovisual private copying; No. R (88) 2 on measures to combat piracy in the field of copyright and neighbouring rights; No. R (90) 11 on principles relating to copyright law questions in the field of reprography; No. R (91) 14 on the legal protection of encrypted television services.

101. Finally, it should be recalled that the Committee of Ministers adopted on 16 February 1994 the European Convention relating to questions on copyright law and neighbouring rights in the framework of transfrontier broadcasting by satellite.

102. The specific issue of promoting education and heightening awareness in the area of copyright and neighbouring rights concerning creativity has been examined in detail within the framework of the Committee of Legal Experts in the Media Field (MM-JU).

103. In November 1992, the Committee of Legal Experts in the Media Field deemed it necessary, without however underestimating the importance of the work being conducted within other international bodies designed to stimulate and promote greater public awareness of these issues, to launch an initiative at the European level within the framework of the Council of Europe. The Committee of Legal Experts in the Media Field stressed that the European region is characterised by a highly significant volume of protected works and other contributions which can be used by means of various techniques. In addition, it was believed that the Council of Europe, by virtue of its competence in the area of, *inter alia*, human rights and culture, as well as its broad geographic scope reflected in its membership, was a body particularly well-suited to elaborate a legal instrument in this area.

104. Recommendation No. R (94) 3, addressed to the governments of the member states of the Council of Europe, is designed to:

a. highlight the importance of copyright and neighbouring rights from the perspective of human rights, culture and the economy;

b. promote education and awareness of the need to respect copyright and neighbouring rights granted to authors and other contributors in respect of works and other protected contributions;

c. in so doing, to encourage governments to take into consideration the principles set out in Recommendation No. R (94) 3, in particular:

- the introduction, at different levels of education (primary and secondary schooling, universities, professional training), of courses intended to provide instruction in the rationale for and basic principles governing protection of copyright and neighbouring rights and to create awareness of the need to ensure protection in this area. In particular, such courses should highlight concrete examples of unlawful activities (especially piracy) which cause serious prejudice to copyright and neighbouring rights holders. This action should be conducted particularly in the perspective of educating a new generation of jurists knowledgeable of the need to protect the rights of authors and all other contributors to creation and the dissemination of culture;

- the encouragement of representative bodies of the different categories of right holders to contribute to this initiative, in particular through the preparation and circulation of relevant literature, audiovisual material, etc., so as to increase awareness of the consequences stemming from the non-respect of copyright and neighbouring rights.

Principle 1

At the level of university education, particular consideration should be given to promoting the teaching of copyright and law on neighbouring rights.

For this purpose, the member states should encourage the development of regular specific courses within law faculties on the principles and practice of copyright and neighbouring rights, particularly in the perspective of educating a new generation of jurists knowledgeable of the need to protect the rights of authors and all other contributors to creation and the dissemination of culture. In addition, consideration should be given to the possibility of referring to the rights of creators and other contributors to creation and the dissemination of culture within the framework of other relevant private law courses as well as courses on constitutional law and civil liberties.

Outside the framework of legal education, encouragement should also be given to the development of education on copyright and neighbouring rights within other appropriate disciplines, in particular economics, computer science, arts and the humanities, and media studies.

105. It should be recalled that in November 1992, the Committee of Legal Experts in the Media Field stressed, *inter alia*, the need to promote training and education in the area of copyright and neighbouring rights at the national level. Several experts confirmed the importance attached to the development of education and training in this area, in particular for the benefit of members of the legal profession as well as the authorities responsible for implementing legislation on the protection of right holders.

106. Principle 1 stresses the desirability of promoting the teaching of intellectual property law at the university level, particularly in law faculties. As Principle 1 indicates, legal curricula are not the only vehicle for providing instruction in copyright and neighbouring rights. The basic principles governing the protection of right holders may also be communicated in the framework of other courses such as economics, computer science, arts and humanities as well as media studies.

107. While it is unlikely that the former disciplines can be used to impart detailed instruction on the law and practice of copyright and neighbouring rights, they can nevertheless be appropriate fora for emphasising other important aspects of copyright and neighbouring rights as well as of creativity. What is important is that students at the university level, depending on the nature of the courses which they follow, acquire a greater understanding of the role of copyright and neighbouring rights within society.

108. Principle 1 makes specific reference to the possibility of using courses of a public law nature for the purposes of increasing awareness of the rights of those who are at the origin of artistic and literary creativity. It is felt that such courses could usefully be adapted so as to emphasise the human rights aspects of the creation and the dissemination of culture, so as to confirm in the minds of students that copyright and neighbouring rights are also of relevance to the relations between the state and the citizen.

Principle 2

In addition to initiatives within the framework of educational curricula, member states should encourage greater awareness among the members of the legal profession, customs authorities, law enforcement authorities, etc., of the need to ensure respect for the lawful rights and interests of authors and other contributors to creation and the dissemination of culture.

For this purpose, use could be made of existing facilities such as the continuing training courses organised for the professional sectors referred to above so as to highlight the serious prejudice which is caused to creators and other contributors to creation and the dissemination of culture, as well as to society in general, by unlawful activities such as piracy (that is, mainly the unauthorised duplication, distribution or communication to the public for commercial purposes of works, contributions and performances protected by copyright and neighbouring rights), in particular sound and audiovisual piracy, computer software piracy as well as unauthorised reprography.

Where such training facilities do not exist, consideration could be given to their possible introduction.

109. The majority of member states of the Council of Europe have developed national rules and practices intended to protect copyright and neighbouring right holders, particularly from the perspective of the relevant international conventions. It should be noted that, as at 1 January 1995, all the member states of the Council of Europe were parties to the Berne Convention for the Protection of Literary and Artistic Works, and a number of such states had also adhered to the Paris Act (1971) version of this convention. In addition, several member states were also parties to the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome 1961), as well as to the European Agreement on the Protection of Television Broadcasts (Strasbourg 1960). The provisions of these international rules are reflected in national law and practice. However, they only become meaningful if the national implementing provisions are effectively enforced by the national authorities.

110. As noted above, under Principle 1, the Committee of Legal Experts in the Media Field has stressed the importance of continuing education and training programmes for the benefit of those who are responsible for implementing and enforcing legislation on copyright and neighbouring rights. For this reason, Principle 2 highlights the value of creating greater awareness among members of the legal profession, customs authorities and the police of the need to ensure respect for the lawful rights and interests of authors and other contributors to creation and the dissemination of culture. With this in mind, the principle recommends the provision of instruction on these matters to the professions in question, in particular via the continuing training courses which are run for the members of these professions in many member states. This principle recommends the introduction of such training facilities where they do not yet exist.

Principle 3

Member states should encourage the relevant professional bodies to develop literature, audiovisual material, etc., which could be used in educational curricula as well as in training courses to highlight the importance of ensuring respect for the rights of creators and other contributors to creation and the dissemination of culture. Material of this nature should also seek to emphasise the character of the harm which accompanies the commission of unlawful activities such as piracy and unauthorised reprography.

111. The bodies representing the various categories of right holders have been instrumental in recommending public authorities to heighten awareness of the need to respect intellectual property rights. A similar plea has also been formulated at the level of various intergovernmental organisations, in particular Unesco and the World Intellectual Property Organization (WIPO).

112. Bodies representing right holders have a crucial role to play in encouraging the implementation of the principles laid down in Recommendation No. R (94) 3. Principle 3, building on the operational part of Recommendation No. R (94) 3, encourages such bodies to develop and circulate various types of teaching aids which could help further the educational process *vis-à-vis* the protection of copyright and neighbouring rights. Such teaching aids could be developed in a way which is adapted to the needs and interests of the specific groups targeted.

113. For example, as regards public awareness campaigns, the representative bodies should give consideration to the need to produce booklets or advertisements which emphasise the unlawful nature of various types of activities such as sound and audiovisual piracy and unauthorised reprography. The unlawful nature of such activities could also be highlighted by means of pamphlets, notices, etc., made available or displayed in libraries.

114. As regards the preparation of material for use in educational establishments, it might be appropriate for the representative bodies to make available teaching aids which are sufficiently attractive in their presentation to capture the imagination of the younger members of society.

Principle 4

Member states should endeavour to create greater awareness among the public of the importance of ensuring respect for the rights and interests of authors and other contributors to creation and the dissemination of culture. For this purpose, consideration should be given to the promotion of information and awareness campaigns highlighting:

- the importance of the rights attaching to creators and other contributors to creation and the dissemination of culture for the cultural and economic development of society, as well as the prejudice which infringement of these rights causes to right holders, to literary and artistic creation and, in the final analysis, to the public itself;

- the unlawful nature of activities which undermine those rights, in particular piracy and unauthorised reprography. Particular attention should be accorded not only to sound and audiovisual piracy but also to computer software piracy.

115. Principle 4 highlights the need to create increased awareness among the public of the important role which authors and other contributors to creation and the dissemination of culture play in regard to the cultural and economic development of society. Building on a number of the statements set out in the preamble to the text, this principle seeks to alert the public, *inter alia*, to the consequences resulting from non-respect of the legitimate rights and interests of authors and other contributors to creation and the dissemination of culture.

116. In particular, Principle 4 clearly indicates that violations of the rights and interests of these parties is a matter which concerns society as a whole. While authors and other contributors to creation and the dissemination of culture obviously suffer financial prejudice when their rights are not respected, it must not be overlooked that the infringement of these rights will dissuade the parties from contributing to the cultural development of society.

117. In brief, continuing and constant non-respect of rights will provide little incentive for the right holders to contribute to the creative process. This will result in fewer creative initiatives being undertaken and it is precisely this latter factor which could result in the cultural impoverishment of society; the public in general will no longer be able to enjoy the fruits of creative endeavours.

118. Among the public in general, as well as in certain social and professional circles, there is a marked ignorance of the serious prejudice which results from activities intended to take unlawful advantage of works and other contributions, that is to say activities which do not respect the rights of those who have contributed to bringing works into existence. Quite simply these activities constitute theft, but they are not perceived as such, or the gravity of the activities is minimised, by many individual users and even by certain professional sectors. The situation differs of course from one country to another. Nevertheless, the governments of the member states are invited to launch a concrete information and awareness campaign among the public on the need to respect the rights in question.

119. Principle 4 stresses the need to inform the public of the repercussions stemming from the non-respect of copyright and neighbouring rights. It encourages the member states to promote information in this regard, and to do so in a way which creates greater awareness among the public of these matters. The aim should be to identify clearly, in the minds of the public, authors and other contributors to creation and the dissemination of culture as parties having lawful rights and interests which deserve to be respected. In particular, information and awareness campaigns should seek to emphasise the sort of activities which cause particular prejudice to authors and other contributors to creation and the dissemination of culture, namely piracy (as defined in Principle 2), including piracy of computer software and unauthorised reprography.

Principle 5

Member states should endeavour to promote awareness at all relevant stages of the educational process of the importance of respecting the rights of those who are at the origin of creative works, including computer software and other protected contributions.

For this purpose, member states should endeavour to ensure that the learning process is accompanied by efforts at instilling an appreciation on the part of students of the special role performed by authors, composers, audiovisual producers, visual artists and photographers, performers, phonogram producers, broadcasting organisations, etc., in the cultural and economic development of society.

120. Whereas Principle 4 concerns a general strategy aimed at the public in general, Principle 5 takes a more targeted approach, emphasising the development of initiatives within the framework of educational and training establishments. Principle 5 addresses the educational process in general without making a distinction in regard to the level of education in question. In fact, there is no reason why attempts could not be made even at the level of primary school education to create awareness among pupils of the need to respect the rights of those who are responsible for providing them with literature, entertainment, etc.

121. What is important is that young members of society begin at an early age to acquire an appreciation of the special role played by authors and other contributors to creation and the dissemination of culture in the cultural and economic development of society.

Principle 6

Member states should give consideration to the possibility of introducing, in the framework of educational and professional training programmes, courses which are adapted to the age and interests of those targeted and which would be intended to promote awareness of:

a. the need to regard authors and other contributors to creation and the dissemination of culture as workers dependent on the revenue acquired through the use and public

exploitation of their works and other protected contributions;

b. the value of copyright industries within the framework of the domestic economy and the labour market;

c. the legitimacy of those economic and moral rights which are guaranteed to authors and other contributors to creation and the dissemination of culture, in particular against the background of the cultural and economic contribution which they make to society;

d. the illegality of certain types of activity which prejudice the rights and interests of creators and other contributors to creation and the dissemination of culture, in particular sound and audiovisual piracy as well as computer software piracy, and unauthorised reprography.

122. Principle 6 encourages the development and introduction of courses within educational and professional training curricula designed to foster an awareness of the issues listed in paragraphs *a*, *b*, *c* and *d* of this principle. It may not be necessary to introduce specific courses on the role and value of copyright and neighbouring rights in society. It might be possible to envisage the adaptation of existing courses so as to allow these various themes to be covered. For example, courses on literature and arts within the school curriculum could make reference to the different issues referred to in the principle. It is important that awareness is created throughout the period of schooling of the fact that activities which undermine the rights and interests of authors and other contributors to creation and the dissemination of culture are unlawful.

123. In addition to the measures advanced in Recommendations No. R (88) 2, No. R (91) 14, and No. R (94) 3, member states should ensure that the application of these provisions is based on information and awareness campaigns focused on the problems of piracy.

124. In this regard, member states should:

a. ensure a wide circulation, among the public in general and the different public and professional bodies concerned, of pedagogic material drawn up at national and international levels and intended to create awareness of the problems posed by piracy;

b. target awareness campaigns at the various sectors concerned: the public in general (consumers); distributors of sound and audiovisual works (commercial distribution: wholesalers, retailers; public libraries, the community, etc.); administrative authorities (police, customs authorities); judicial authorities, public prosecutors; right holders; collective administration societies, etc.;

c. encourage the creation of anti-piracy centres at the national level, based on those which already exist in certain member states.

125. In particular, member states should ensure that clear information is provided to persons concerned by piracy regarding the procedures which may be invoked:

- in the field of civil law (procedures making it possible for victims of acts of piracy to obtain interim measures rapidly to safeguard their rights (interim procedures and the like); ways in which the victims may prove the extent of the damage suffered; compensation methods via the grant of civil law damages);

- in the field of criminal law (measures which accompany criminal procedures (search and seizure and other measures designed to facilitate the collection of proof of piracy or counterfeit); the way in which victims may prove intention (the means required to qualify the activity as a criminal offence); ways in which the existence of gross negligence on the part of the offender may be proved, should such conduct constitute a criminal offence).

[1] As regards whether failure to pay fair remuneration is or is not an act of piracy, it should be noted that certain national laws regard the evasion of payment as a criminal offence whereas others treat payment as a civil debt under common law. At any rate, measures should be taken to ensure effective payment of remuneration.

[2] The expressions "films", "videograms" and "audiovisual productions" are not necessarily identical in the different national laws. Thus the terms used may differ from one law to another.

[3] Cf answers of the governments of the member states to the questionnaire drawn up in 1994 by the Council of Europe.

[4] The SID code (Source Identification Code) is a four figure code which is attributed, on request, to companies manufacturing CDs. The code makes it possible to determine where the CD is reproduced and where the original disc comes from. It is thus one of the primary control measures for the production of CDs.