

COUNCIL OF EUROPE
COMMITTEE OF MINISTERS

Recommendation Rec(2002)7
of the Committee of Ministers to member states on measures to enhance the
protection of the neighbouring rights of broadcasting organisations

*(Adopted by the Committee of Ministers on 11 September 2002
at the 807th meeting of the Ministers' Deputies)*

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

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

Reaffirming the significance of the protection of copyright and neighbouring rights as an incentive for literary and artistic creation and production;

Concerned about the increasing exposure of European broadcasting organisations to piracy of their programmes due to technological developments over the last decades;

Recognising that the valuable contribution of European broadcasting organisations to creative and cultural activity requires major investment and effort in order to ensure quality and diversity of programmes and that this contribution is in imminent danger if protection against piracy is insufficient;

Recognising the need to balance broadcasting organisations' rights with the general public interest, in particular as regards education, research and access to information, and the further need for broadcasting organisations to recognise the rights of holders of copyright and neighbouring rights over the works and other protected items contained in their broadcasts;

Recognising the importance of the work undertaken within the framework of WIPO on the protection of broadcasting organisations, as well as the need to take account of any new developments in the international legal framework;

Recommends that governments of member states take account of the provisions in the appendix to this Recommendation in protecting the neighbouring rights of broadcasting organisations and adapting these rights to the digital environment.

Appendix to Recommendation Rec(2002)7

Rights to be granted

In order to increase the level of protection of the neighbouring rights of broadcasting organisations, member states should grant them the following rights if they have not already done so, bearing in mind that limitations and exceptions to these rights may be provided to the extent permitted by international treaties:

- a) the exclusive right to authorise or prohibit the retransmission of their broadcasts by wire or wireless means, whether simultaneous or based on fixations;
- b) the exclusive right to authorise or prohibit the fixation of their broadcasts;
- c) the exclusive right to authorise or prohibit the direct or indirect reproduction of fixations of their broadcasts in any manner or form;
- d) the exclusive right to authorise or prohibit the making available to the public of fixations of their broadcasts, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them;
- e) the exclusive right to authorise or prohibit the making available to the public through sale or other transfer of ownership of fixations and copies of fixations of their broadcasts;
- f) the exclusive right to authorise or prohibit the communication to the public of their broadcasts if such communication is made in places accessible to the public against payment of an entrance fee.

Pre-broadcast programme carrying signals

Member states should consider taking measures to ensure that broadcasting organisations enjoy adequate protection against any of the acts referred to in a) to f) above in relation to their pre-broadcast programme carrying signals.

Technological measures

Member states should provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures which are used by broadcasting organisations in connection with the exercise of their neighbouring rights and which restrict acts in respect of their broadcasts which are not authorised by the broadcasting organisations concerned or permitted by law.

Rights management information

Member states should provide adequate and effective legal remedies against any person who knowingly removes or alters electronic rights management information without authority, knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered by this Recommendation. The same should apply if a person knowingly simultaneously retransmits a broadcast or transmits, distributes, imports for distribution, communicates or makes available to the public fixations or copies of broadcasts knowing that electronic rights management information has been removed or altered without authority.

Term of protection

Member states should consider granting to broadcasting organisations a term of protection which lasts, at least, until the end of a period of 50 years computed from the end of the year in which the broadcast took place.

COUNCIL OF EUROPE

COMMITTEE OF MINISTERS

EXPLANATORY MEMORANDUM

to Recommendation Rec(2002)7 of the Committee of Ministers to member states on measures to enhance the protection of the neighbouring rights of broadcasting organisations

Introduction:

1. For several reasons, the Council of Europe's Steering Committee on the Mass Media and its Group of Specialists on the Protection of Rights Holders in the Media Sector decided in the year 2000 to embark on a standard-setting activity aimed at improving the protection of the neighbouring rights of broadcasting organisations.
2. The most important international convention in this field, the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (the Rome Convention), has not been revised since its adoption in 1961. Another important instrument in this field, the European Agreement on the Protection of Television Broadcasts, has not been subject to substantial revision since it was drawn up by the Council of Europe in 1960. In many respects, the latter is more modern than the Rome Convention. However, for reasons of technical nature, it now has only a limited number of ratifications, some of which have been accompanied by important reservations, which related exactly to those provisions which went further than the Rome Convention.
3. Although the decision to prepare a new instrument was taken as recently as in year 2000, the Declaration on neighbouring rights adopted by the Committee of Ministers of the Council of Europe on 17 February 1994 should be recalled, as it recognised that there was need for a general improvement in the protection of neighbouring rights. It was considered, at that time, that priority should be given to the study of, *inter alia*, the rights of performers, producers of phonograms and broadcasting organisations with regard to cable retransmission.
4. The Council of Europe has always stressed the need to secure a balance between the different categories of rights holders. However, other categories of holders of neighbouring rights, i.e. producers of sound recordings and performers (other than audiovisual performers), benefited from the WIPO Performances and Phonograms Treaty (WPPT) adopted in 1996. The preparation of a specific treaty for broadcasters is on the WIPO agenda, but in all likelihood, it will take some years before it will enter into force. Therefore, an instrument focusing on the rights of broadcasting organisations seems justified.

5. Furthermore, the piracy problems which European broadcasting organisations are facing, are to a large extent of a regional dimension, due to cultural proximity and the limited geographical area of coverage of satellites. This fact makes a regional solution particularly appropriate.

6. One of the main difficulties in drafting the Recommendation was a disagreement on whether there was a need to include a definition of the term “broadcasting”. From a legal point of view, it may have been appropriate to include such a definition. Bearing in mind, however, that it would have led to unforeseeable complications and delays to seek a definition which took into account technological advances in broadcasting since the adoption of the Rome Convention, it was finally decided to refrain from including any definition of that term. This being said, it is clear that the aim of the Recommendation is first and foremost to respond to the urgent need of broadcasting organisations in the traditional sense to receive better protection against piracy.

Scope of the Recommendation:

7. The Recommendation is aimed at enhancing the protection of the neighbouring rights of broadcasting organisations. Member states should consider granting not only a protection to the broadcast itself, but also to the pre-broadcast programme carrying signals. It is of little use for the broadcasting organisation to claim rights to its broadcasts if pirates can circumvent that right by picking up the programme-carrying signal before it is actually broadcast (cf. paragraphs 25-26). Furthermore, the Recommendation seeks to protect the broadcast as such, and this protection is separate from any rights under copyright or neighbouring rights in the content of the broadcast, which are not affected or prejudiced by the protection given to the broadcast.

Commentary on the provisions of the Recommendation:

Rights to be granted

8. It is recommended that member states should consider granting broadcasting organisations a certain number of exclusive neighbouring rights. Those rights build on the Rome Convention, as well as the European Agreement on the Protection of Television Broadcasts. However, they go further, taking into account the level of protection reached under the 1996 WIPO treaties for other categories of rights holders. The level of protection reached or proposed within the European Union is also taken into account.

9. Therefore, some of the proposed rights and measures have already been granted/taken at the national level in many Council of Europe member states.

10. In most cases, it is recommended to grant the rights in the form of exclusive rights to authorise or prohibit a given use. However, it has to be stressed that those rights which should be granted are not absolute. They may be subject to exceptions and limitations. It was not deemed necessary to elaborate further on that issue in this Recommendation. International instruments in this field allow for limitations and

exceptions such as with regard to private use, for purposes of news reporting and for the purposes of teaching or scientific research. Any limitations or exceptions must be confined to certain specific cases which do not conflict with the normal exploitation and do not unreasonably prejudice the legitimate interests of the rights holders (the so-called three-step test).

a) retransmission right

11. The unauthorised retransmission of broadcasts constitutes the most serious form of piracy which European broadcasters are facing. Therefore, it is of paramount importance that broadcasters be protected against such transmissions. This is clearly the single most important issue to be dealt with by the member states as they seek to enhance the protection of broadcasting organisations.

12. The Rome Convention, in Article 13, only grants the right of rebroadcasting, which is defined as simultaneous wireless transmission, and therefore gives no protection against cable retransmission or deferred retransmission. The European Agreement in Article 1 went further, granting also a right to authorise or prohibit wire diffusion, whether simultaneous or based on fixations.

13. The Recommendation builds on the standard achieved under the European Agreement and, for sake of simplicity, refers to it as the “right to retransmission”, covering all forms of rediffusion by whatever means.

b) fixation right

14. It is important to grant broadcasters a right to authorise or prohibit fixations of their broadcasts since the fixation is the precursor of all later acts of exploitation.

15. This right is already contained in the Rome Convention, Article 13, and in the European Agreement, Article 1. The latter is more detailed since it refers to fixations of “still photographs thereof”.

c) reproduction right

16. This right is already contained in the Rome Convention, Article 13, and in the European Agreement, Article 1. Article 13 (c) of the Rome Convention provides for some limitations to this right. It was not considered necessary to keep these limitations.

17. It is recommended that a broad reproduction right be granted, which covers both direct and indirect reproduction of fixations in any manner or form. An indirect reproduction is when a copy is made of copies of fixations.

d) making available right

18. It was the great merit of the 1996 WIPO treaties to introduce the making available right for the categories of rights holders covered by those treaties. In that manner, it is made clear that rights holders are protected against their work and other protected matter being made available to the public, without their consent, in such a way that members of the public may access them from a place and at a time individually chosen by them.

19. Broadcasting organisations are also in need of such a right. This need is becoming ever more urgent as increased bandwidth makes it easier to send audiofiles and audiovisual material through cyberspace.

20. The Recommendation closely follows the wording of the WIPO treaties in this respect.

e) distribution right

21. A distribution right, which is protected neither by the Rome Convention nor the European Agreement, can be important for broadcasting organisations, especially when a programme is not subject to copyright. This is the case, for example, where public events are broadcast. Even in such a case, the broadcasting organisation has a legitimate interest in protecting its product from unauthorised sale, for example in the form of videocassettes.

22. A distribution right was granted to other categories of holders of neighbouring rights by the WIPO treaties in 1996.

23. When formulating this right in national law, the legislator will have to take into account the need to determine conditions, if any, under which the exhaustion of this right applies after the first sale or other transfer of ownership of the fixation or its copy.

f) right of communication to the public

24. This right is already contained in the Rome Convention and the European Agreement on the Protection of Television Broadcasts. The Rome Convention uses the formulation “in places accessible to the public against payment of an entrance fee” (cf. Article 13 (d) of the Rome Convention). The Recommendation follows the Rome Convention approach, but bearing in mind that it is for the member states to define the term “entrance fee” in national law and that they may consider covering also indirect entrance fees.

Pre-broadcast programme carrying signals

25. Member states should bear in mind that it is of little use to provide rights in the programme-carrying signals once broadcast if pirates by the simple expedient of gaining access to the signal before it is broadcast can circumvent the protection. This

issue was addressed by the 1974 Convention relating to the Distribution of Programme-Carrying Signals by Satellite, known as the Brussels Satellite Convention, and 12 member states of the Council of Europe have adhered to the Convention. Under the Convention, Contracting States must take adequate measures to prevent the unauthorised distribution of pre-broadcast programme-carrying signals.

26. Among the measures referred to in the Recommendation, member states may consider providing protection under national unfair competition law or civil law or granting broadcasting organisations an exclusive right in respect of such signals. These measures would be aimed at protecting broadcasting organisations against unauthorised acts referred to in indents a) to f) of the section on “Rights to be granted”, i.e. the retransmission, fixation, reproduction of fixations, making available to the public of fixations in such a way that members of the public may access them from a place and at a time individually chosen by them, making available to the public through sale or other transfer of ownership of fixations, and communication to the public against payment of an entrance fee, of their signals.

Technological measures and rights management information

27. Technological developments are not only a threat to the rights of broadcasting organisations. They may also provide a solution to their problems and help them avoid unauthorised acts of exploitation. The so-called rights management information is also an important tool for rights holders to protect their rights. Interested circles, including rights holders, are already engaged in efforts to introduce, and agree on, such technology.

28. It may, however, prove necessary to grant a special legal protection to those new methods of protecting rights. Provisions to this effect are already to be found in the 1996 WIPO treaties regarding other categories of rights holders. The Recommendation follows the wording of those treaties.

Term of protection

29. It is recommended that member states consider granting to broadcasting organisations a term of protection, which lasts, at least, until the end of a period of 50 years as from the end of the year in which the broadcast took place. Indeed, the majority of Council of Europe member states have already granted such a term.

30. This is the same term as granted to other holders of neighbouring rights under the WPPT and Article 14 (5) of the TRIPS Agreement, whereas the Rome Convention in Article 14 only foresees a term of 20 years.
