

COMMISSION OF THE EUROPEAN COMMUNITIES

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PROPOSAL FOR A COUNCIL RECOMMENDATION ON ACTION AGAINST AUDIO-VISUAL PIRACY

(presented by the Commission to the Council)

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COUNCIL RECOMMENDATION

on action against audio-visual piracy

EXPLANATORY MEMORANDUM

1. Audio-visual piracy is the unauthorized copying for commercial purposes of recordings of all kinds—sound records, videotapes, films for cinema showing, radio and TV broadcasts, and some software.

Broadly, it covers the making, importation, distribution and sale or rental of illicit recordings.

2. In the early 1980s receipts from sound-record pirating were calculated at 1500 million dollars, 15% of the legitimate trade's world turnover.¹

Estimates vary of the video and cinema industries' losses from piracy. In Britain, the Community country with the most tape recorders, the market share of illicit tapes was put by the British Government in early 1984 at two-thirds of the legitimate market. Legislation having been passed, the Government reckons that pirate tapes now account for less than 35% of the market and that this share will diminish further.

Generally speaking, piracy is liable to increase with the expansion of the audio-visual media, which will afford it more and more raw material, and with technical progress, which will make it easier and easier.

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¹See R. Abrahams, PIRACY—THE PERFORMING RIGHTS YEARBOOK, 1981, pp. 53-54.

3. Piracy is harmful economically, harmful socially and harmful to the arts.

Far from operating separately, its undesirable effects are closely interconnected.

First, as it is confined to recordings already popular, it sidesteps the risk involved in launching any new recording. Secondly, it pays nothing in respect of copyright, of performing rights, of artistic and technical processing, or of taxation. Consequently, it offers stiff competition to the production, distribution and showing of cinema films, to the radio and TV networks and to the record and videotape industry. So it has had much to do with the latter's declining sales since 1979 both on the internal Community market (where wholesale sales fell from 2201 million dollars in 1979 to 1784 million in 1981) and for export to third countries: British exports of discs, for instance, stood in 1981 at £13.5 mn compared with £19.3 mn in 1979.*

As well as depriving the authors and performers of part of their earnings for work they have already done, piracy poses a threat to their future employment and what they could earn from it, since the extent of that employment and earnings depends on how much the lawful producers can themselves earn: if they earn less, they have to cut back on their operations, and on the capital spending needed to produce really good recordings.

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*Striking though it is, the drop in sales should not be allowed to obscure the size and importance, economically and socially, of the Community record and videotape industry: it is the second largest in the world and exports more than the American industry, and currently employs on production, processing, distribution and sales a total of something like 120,000, compared with over 130,000 in 1978-79. In addition it employs several thousand full-time or part-time writers, composers and performers (conductors, instrumentalists, singers, actors, &c.).

For the arts to thrive, authors, performers and technicians must not find themselves obliged to depart in droves from occupations which do not afford them reasonable living and working conditions. The arts sector needs them---plenty of them, and good ones: in point of fact it is the arts themselves that are protected by the protection which copyright and performing rights give to those working in them. Piracy is a deliberate infringement of those rights.

What is more, most of the pirate recordings on offer are greatly inferior to the real thing: the pirates do not have the technical experience and equipment needed to provide a product of the high quality which is attained by the legitimate producers' methods nowadays. The result is not only that the public is cheated but that damage is done to the authors', performers' and producers' professional reputations.

In the case of video-cassettes (which are often sold packaged in precisely the same way as the original, producer's logo and all), the wretched quality, as well as disappointing the consumer, makes the new device itself mistrusted.

4. It is true that the Community Member States have taken steps at national level, sometimes with success, to deter and penalize piracy.

In Britain, for instance, the courts have provided victims of piracy with means for helping to detect pirates operating behind "front men," and enabled them to recover damages by distraint on the defendants' property (the Anton Piller Order). An amendment of the Copyright Act imposing stiffer penalties for piracy has had notable success. The going rate for illicit videotapes is already well below what it was before these measures took effect.

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However, action against what is by now a cross-frontier offence can only have any real prospect of working if it is likewise conducted on a cross-frontier basis.

Several international organizations have alerted their members to the importance of the issue and the need to tackle it.¹ So far, however, such moves have not brought practical international steps to deal with illicit practices in general: at present it does not appear that any measure calculated to make a real impact in the near future has been introduced at international level.

The time has come, therefore, for the Member States to make it clear that they are resolved to act together against piracy, and to equip themselves to do so, by harmonizing their efforts and stepping up their cooperation.

In the Community context the basic principles of the EEC Treaty offer scope for moves in this connection, more particularly to ensure that there is nowhere pirates can take shelter within the Community. Piracy can produce distortion of trade, not only directly but indirectly, unless there is coordinated legislative or other reaction by the Member States. Moreover, Community action would serve to ensure undistorted competition in the economic sectors concerned and to protect the legitimate interests of creative artists and other cultural workers.

5. The Commission attacked piracy in its communication of October 1982 to Parliament and the Council on stronger Community action in the cultural sector.²

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¹ E.g., in addition to the Rome (1961), Geneva (1971) and Brussels (1974) Conventions (see 8 below), the WIPO World Forums in Geneva in 1981 on the pirating of sound and visual recordings and in 1983 on the pirating of broadcasts and printer matter.

² Bulletin of the European Communities, Supplement 6/82.

Parliament in its resolution of 18 November 1983* endorsed this communication, including the passage on piracy.

Basing themselves on the communication and resolution, and on the views conveyed to them by the International Federation of Record and Videotape Producers, by the Societies of Authors and by the radio and TV performers and workers' unions, the Member States' Ministers for Culture meeting in Athens on 28 November 1983 also considered the subject of piracy.

6. It should also be borne in mind that action against piracy can now be based on certain provisions in the Solemn Declaration on European Union adopted at Stuttgart on 19 June 1983.

Section 3.3, on cultural cooperation, makes reference to "protecting, enhancing and safeguarding the cultural heritage." Obviously, doing this involves acting on behalf of those professionally engaged in disseminating and performing the literary and musical works in that heritage, and those writers, composers and others whose works go into it. Neither must be left defenceless against what piracy is doing to their livelihood and their artistic interests.

Section 3.4, on approximation of laws, says that special attention should be paid to fuller approximation in respect of commercial and industrial ownership, consumer protection, &c. Copyright and the corresponding rights of performers, film producers, record and videotape makers and radio and TV agencies, it may be recalled, have been ruled by the Court to fall under the heading of commercial and industrial property, and likewise action against piracy is a form of consumer protection.

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*OJ C 342, 19.12.83.

7. More vigorous action against piracy would be one specific contribution the Community could make to European Music Year, 1985. And not a mere passing contribution for this particular occasion, but one which would do lasting good to musicians' living and working conditions.
8. The rationale of the various sections of the proposal for a recommendation is as follows.

Sections 1-6

The relevant international conventions (in particular, the Rome Convention of 26 October 1961, the Geneva Convention of 29 October 1971 and the Brussels Convention of 21 May 1974) contain provision for greater rights for record producers and performers, entitling them to object to any reproduction not authorized by them. These conventions must accordingly be ratified by those Member States which are not yet party to them—the Rome Convention by Belgium, France, the Netherlands and Greece, the Geneva Convention by Ireland, the Netherlands and Greece, and the Brussels Convention by eight Community countries, only Italy and Germany having ratified to date.

By the terms of the conventions, a body of wide experience may consider the arrangements in force in all the acceding States in order to assess their effectiveness against illicit activities, and where appropriate propose amendments called for at national and international level. When transposed into domestic law they enable measures to be taken to allow the public authorities to give victims of piracy any necessary assistance in seeking, identifying and prosecuting the perpetrators.

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Effective action against piracy entails close cooperation among the national authorities concerned, and between them and the industrial and professional bodies. It is desirable that these forms of cooperation should be stepped up to the fullest possible extent.

Section 7

The illicit activity to be combated being an international one, action against it has a specifically Community aspect. The Community system, making for freer intra-Community movement of goods, carries the obligation to ensure that the easing of customs procedures is not turned to fraudulent use and that the lawfulness of goods imported into the Community from third countries is guaranteed by coherent and effective measures. In considering developments with regard to copyright, both at national and at Community level, in the debate on the Green Paper the Commission plans to bring out by the end of 1984, it will be essential to give thought to what can be done to increase the effectiveness of the procedures and penalties applying in respect of pirates and peddlers of pirated products.

9. The accompanying proposal for a recommendation represents the first stage in a progressive drive to combat piracy both within and outside the Community. It is limited purely to copying for commercial purposes (without prejudice to the problems posed by other unauthorized copies, for purposes other than personal use).

The next stage will begin with the issue of a Green Paper on various points relating to copyright.

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THE COUNCIL OF THE EUROPEAN COMMUNITIES,

having regard to the Treaty establishing the European Economic Community,

having regard to the proposal from the Commission,

having regard to the increasing scale of audio-visual piracy and of trafficking in illicitly reproduced works;

having regard to the harm thus done to authors and other creative artists, to performers, to producers of sound and audio-visual works, in particular cinematic ones, and to radio and television agencies, and more broadly to all those in show business, as well as to the public purse;

whereas part of this harm is that the deflection of earnings from those who have invested in the production of sound or audio-visual works endangers the production of more quality works, especially such as cost a great deal to make and therefore need a very wide audience;

whereas furthermore audio-visual piracy means that the consumer is very liable indeed to be offered substandard products;

whereas the ill-effects of audio-visual piracy extend beyond national frontiers, and the issue has therefore both a Community and an international dimension;

whereas the need to devise appropriate measures has been repeatedly recognized internationally, in particular in the Berne Convention and World Convention International Committees on Copyright and at the colloquia of 25-27 March 1981 and 16-18 March 1983; whereas the adoption of the Rome Convention of 26 October 1961 on the related rights of performers, broadcasting organizations and record producers, of the Geneva Convention of 29 October 1971 on the protection of record producers against unauthorized reproduction of their records and of the Brussels Convention of 21 May 1974 on the distribution of record-carrying signals relayed by satellite bespeaks the same concern;

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whereas the scale of piracy has nevertheless steadily increased, and such increase is attributable in part to the absence of effective procedures and penalties applicable to pirates and peddlers of pirated products,

whereas the free movement of goods, the institution of undistorted competition, and the protection of intellectual property and of workers, including cultural workers, are among the foundations of the Treaty and hence justify action to approximate on a Community basis measures adopted and to be adopted at a national level ;

HAS ADOPTED THIS RECOMMENDATION :

Member States

- (1) will, if they have not already done so, ratify international conventions calculated, by the provision they make for reciprocity, to facilitate the taking of proceedings against acts of audio-visual piracy, in particular the Rome Convention of 26 October 1961, the Geneva Convention of 29 October 1971 and the Brussels Convention of 21 May 1974;
- (2) will, pursuant to international conventions subscribed to or to be subscribed to by them, so strengthen their domestic and in particular their criminal law as to afford the competent authorities all necessary facilities for tracing and establishing acts of piracy, and the courts the necessary legal armoury for dealing with these in a manner calculated effectively to deter;
- (3) will issue to the government departments concerned and the fraud investigation authorities all appropriate instructions with a view to promoting close cooperation between them in combating audio-visual piracy;
- (4) will institute a systematic policy of cooperation between the authorities and the persons in the occupations concerned for the purpose of keeping abreast of developments in connection with piracy and regularly adjusting fraud prevention, detection and retribution methods accordingly;

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- (5) will make it their policy, in consultation with the international intellectual property organizations, to pass to States and holders of rights all particulars of statute and case law relating to audio-visual piracy;
- (6) will consider in the context of the current national and Community discussions on copyright any proposal for a convention, enactment or other instrument that could help to deal properly with the problems, and in particular any way to make the procedures and penalties in respect of pirates and peddlers of pirated products more effective.

DECLARATION BY THE COMMISSION

The Commission declares that

it will consider what steps can be taken at Community level to make for more effective action against piracy, and will submit appropriate proposals to the Council, possibly in the form of binding legal instruments.