COUNCIL OF EUROPE
COMMITTEE OF MINISTERS

RECOMMENDATION No. R (91) 14

OF THE COMMITTEE OF MINISTERS TO MEMBER STATES

ON THE LEGAL PROTECTION OF ENCRYPTED TELEVISION SERVICES

(Adopted by the Committee of Ministers on 27 September 1991
at the 462nd meeting of the Ministers' Deputies)

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

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

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:

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.

States should include in their domestic legislation provisions based on the principles set out hereafter:

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;

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;

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;

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

e. 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. 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.

Principle II — Sanctions and remedies

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.

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.