

COUNCIL OF EUROPE
COMMITTEE OF MINISTERS

RECOMMENDATION No. R (89) 7

**OF THE COMMITTEE OF MINISTERS TO MEMBER STATES
CONCERNING PRINCIPLES ON THE DISTRIBUTION OF VIDEOGRAMS HAVING
A VIOLENT, BRUTAL OR PORNOGRAPHIC CONTENT**

*(Adopted by the Committee of Ministers on 27 April 1989
at the 425th 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 the achievement of greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage;

Bearing in mind the Convention for the Protection of Human Rights and Fundamental Freedoms, in particular Articles 8 and 10 thereof;

Recalling its commitment to freedom of expression and the free circulation of information and ideas, to which it gave expression, in particular, in its declaration of 29 April 1982;

Recalling Resolution No. 5 on the distribution of video-cassettes portraying violence and brutality adopted by the 4th Conference of European Ministers responsible for Cultural Affairs (Berlin, 23-25 May 1984);

Bearing in mind Recommendation 963 (1983) of the Parliamentary Assembly on cultural and educational means of reducing violence;

Recalling Recommendation 996 (1984) of the Parliamentary Assembly on Council of Europe work relating to the media, which stresses the need for action concerning in particular the quality of programme content and measures to regulate the distribution of video-cassettes portraying violence and brutality likely to have a pernicious influence on children and adolescents;

Having regard also to the final text of the 1st Conference of European Ministers responsible for Youth (Strasbourg, 17-19 December 1985), Recommendation 1067 (1987) of the Parliamentary Assembly on the cultural dimension of broadcasting in Europe and the conclusions and resolutions of the 16th Conference of European Ministers of Justice (Lisbon, 21-22 June 1988);

Being aware of the importance of strengthening action taken in respect of the distribution of videograms having a violent, brutal or pornographic content, as well as those which encourage drug abuse, in particular with a view to protecting minors,

1. Recommends that the governments of the member States:

- a. take concrete measures to implement the principles set out below;
 - b. ensure, by all appropriate means, that these principles are known by the persons and bodies concerned; and
 - c. proceed to a periodical evaluation of the effective application of these principles in their internal legal orders;
2. Instructs the Secretary General of the Council of Europe to transmit this recommendation to the governments of those states party to the European Cultural Convention which are not members of the Council of Europe.

PRINCIPLES

Scope

The following principles are designed to assist member States in strengthening their action against videograms having a violent, brutal or pornographic content, as well as those which encourage drug abuse, in particular for the purpose of protecting minors. They should be envisaged as a complement to other existing Council of Europe legal instruments. These principles concern in particular the distribution of videograms.

1. Systems for the distribution of videograms

The member States should:

- encourage the creation of systems of self-regulation, or
- create classification and control systems for videograms through the professional sectors concerned or the public authorities, or
- institute systems which combine self-regulatory with classification and control systems, or any other systems compatible with national legislation.

In all cases, member States remain free to make use of criminal law and dissuasive financial and fiscal measures.

2. Self-regulatory systems

The member States should encourage, by appropriate means, the distributors of videograms to draw up codes of professional conduct and voluntary systems of regulation, which could comprise notably classification and control systems inspired by principles 3 and 4 hereafter.

3. Classification and control systems

3.1. The member States should encourage the creation of systems of classification and control of videograms by the professional sectors concerned in the framework of self-regulatory systems, or through the public authorities. Such systems may be implemented either prior to, or following the distribution of videograms.

3.2. In order to promote the use of classification and control systems by public authorities, the introduction of a system of legal deposits should be considered by national legislators.

3.3. The classification and control systems shall involve either the issue of a free distribution certificate, a limited distribution permit specifying the videogram's distribution conditions, or possibly an outright prohibition.

3.4. Under the classification and control system, the age of the public to whom the videogram can be distributed shall be specified according to national criteria.

3.5. All classified videograms shall be registered and their material mediums (video-cassettes, videodiscs, etc) shall display in a clear and permanent fashion the classification of the videograms and the public for whom they are intended. In the case of material mediums, featuring several videograms, the member States shall take measures so that the most restrictive classification be applied.

3.6. When the video classification procedure is separate from that of cinematographic films, the member States shall look for consistency between the two, in so far as possible, but taking account of the differences between the two media.

3.7. Allowance should be made, within the classification and control system, for simplified procedures or exemption of procedures for certain types of programmes, such as material whose purpose is educational, religious or informative. These exemptions should not apply to programmes having an unduly pornographic or violent content.

3.8. The control of the distribution of videograms shall apply to the distribution of both nationally produced videograms and imported ones.

3.9. The establishment of a system designating which officers of a company should be liable for offences under the videogram classification and control system could be considered by the member States.

4. Limitations on distribution

4.1. Permits for limited distribution referred to in paragraph 3.3. above may include in particular:

-a ban on commercial supplies or offers to supply to minors;

-a ban on commercial supplies or offers to supply except at sales or rental outlets set aside for adults only;

-a ban on advertising;

-a ban on mail order sales.

4.2. The classification of each videogram should be specified on the packaging of the material medium and in video catalogues, advertisements, etc.

5. Measures against offences to the classification and control systems

5.1. The member States which have classification and control systems shall take appropriate measures to punish any infringement of these systems by dissuasive sanctions, for instance heavy fines, imprisonment, confiscation of the videograms and of the receipts gained from the unlawful distribution.

5.2. In member States where licensing exists, the authorities could envisage the suspension or withdrawal of the licence.

6. Application of criminal law

In conjunction with, parallel to, or independently from the application of classification and control systems, or as an alternative to such systems, the member States should consider if the application of their criminal law concerning videograms is effective in dealing with the problem of videograms having a violent, brutal or pornographic content, as well as those which encourage drug abuse.

7. Dissuasive financial and fiscal measures

The member States should consider the possibility of taking measures of a financial and fiscal nature which discourage the production and distribution of videograms with a violent, brutal or pornographic content, as well as those which encourage drug abuse.

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EXPLANATORY MEMORANDUM

I. PREAMBLE AND REASONS FOR ELABORATING THE RECOMMENDATION

1. For the purposes of this Recommendation, the term *videogram* denotes all audio-visual works on videocassette or videodisc. It refers to the content (images) and not the medium (material medium). Although most videograms are currently in videocassette form, this Recommendation uses the term *videogram* and not videocassette so as to allow it to apply in the context of possible technological developments in the material medium within the video industry.

2. There is a substantial growth in the production and wide-scale distribution of videograms having a violent, brutal or pornographic content, or which encourage drug abuse. Particularly with a view to the protection of minors, certain member States of the Council of Europe have recently adopted legislative provisions in order to limit the distribution of such videograms and, as a result, their production. Other States envisage so doing. In addition, there exist gaps in the laws and regulations of certain States which make it easier to circumvent the specific legislative provisions adopted by other States.

3. This situation calls for measures to reduce the circulation of such videograms in Europe. With this in mind, the Recommendation offers member States a series of rules which might be taken at national level. The aim of the Recommendation is essentially based on the concern to contribute to the protection of children and adolescents against the harmful effects of these videograms, without overlooking their impact on other sections of society.

4. The problems raised by such videograms were examined on the occasion of the 4th Conference of European Ministers responsible for Cultural Affairs (Berlin, May 1984). In their Resolution No. 5, the Ministers recommended that the Committee of Ministers of the Council of Europe invite the Council for Cultural Co-operation (CDCC) and the Steering Committee on the Mass Media (CDMM):

- "to conduct a comparative survey of European national legislation on the distribution of videocassettes;

- on the basis of this survey, to consider the preparation of a recommendation for the governments of member States, proposing suitable measures to regulate the distribution of videocassettes portraying violence and brutality likely to have a pernicious influence on children and adolescents”.

5. Following the opinions given by the CDMM and by the CDCC on this Resolution, the Committee of Ministers, at the 389th meeting of the Ministers’ Deputies (17-25 October 1985), agreed to leave the initiative in this field to the CDMM, whilst noting that the latter wished to address problems concerning pornography and drug abuse.

6. This Recommendation also takes into account the concerns expressed by the Parliamentary Assembly of the Council of Europe in its Recommendations 963 (1983) on cultural and educational means of reducing violence and 996 (1984) on Council of Europe work relating to the media.

7. The Assembly was “concerned at the increasing tendency towards emphasis on violence in the media, and in particular on its portrayal in the visual media (... video ...)” (cf. Rec. 963 (1983) paragraph 15). Furthermore, the Assembly insisted that action was necessary, as regards in particular “the quality of programme content and measures to regulate the distribution of videocassettes portraying violence and brutality likely to have a pernicious influence on children and adolescents” (Recommendation 996 (1984) paragraph 9.c).

8. Subsequently, in its Recommendation 1067 (1987) on the cultural dimension of radio broadcasting in Europe, the Parliamentary Assembly invited the Committee of Ministers to “accelerate and intensify its work on guidelines for reducing violence, brutality and pornography ... not only on videograms, but also with reference to broadcasting in general”.

9. In a broader context, the 1st Conference of European Ministers responsible for Youth (Strasbourg, 17-19 December 1985) recommended that the Committee of Ministers of the Council of Europe “consider the feasibility of drawing up a European Convention on the protection of young people vis-à-vis the media; speed up and strengthen the ongoing work of the Council of Europe on audio-visual programmes with a pornographic, brutal, or violent content, especially where such programmes are likely to affect young people” (cf. paragraph 34 of the final text of the Conference).

10. Furthermore, the 16th Conference of European Ministers of Justice (Lisbon, 21-22 June 1988) expressed concern about the problem of pornography using children and young adults (Resolution No. 3).

11. Finally, it should be noted that the present Recommendation is situated in the more general framework of the Council of Europe’s work on violence and the media which includes additional matters such as the use of new communications technology for pornographic and criminal purposes.

II. SCOPE OF THE PRINCIPLES

12. The Recommendation does not define what is meant by videograms having a violent, brutal or pornographic content or which encourage the abuse of drugs; it will therefore be for each member State to decide whether or not this notion should be defined in its domestic law. An all-embracing and uniform European definition of violence, brutality, pornography or drug abuse

does not appear to be possible, just as tracing a clear borderline between, for example, acceptable and unacceptable levels of violence is also impossible.

13. In this context, it may be recalled that the European Court of Human Rights in the Handyside case (7 December 1976), took the view that “it is not possible to find in the domestic law of the various Contracting States a uniform European conception of *morals*. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in times characterised by a rapid evolution of opinions on this subject”¹.

14. Moreover, a detailed definition might have the disadvantage of not embracing all forms of violence, or even of causing evidential problems for national courts on account of the principle *nulla poena sine lege stricta*. However, it may be noted that:

- the term *violence* should not only apply to videograms which actually depict scenes of unjustified physical or mental violence, but also those which encourage acts of violence;
- the term *brutality* refers particularly to behaviour which gives a degrading image of the human person, reduced to the state of an irrational animal;
- the term *pornography* concerns certain videograms which degrade women or men to the point of making them mere objects of sexual gratification and, in particular, those involving children or adolescents.

15. Furthermore, it is to be noted that this Recommendation also covers videograms with or without a violent, brutal or pornographic content, which encourage drug abuse².

16. The scope of the Recommendation thus covers videograms having a violent, brutal or pornographic content as well as those which encourage drug abuse³, without losing sight of the concept of freedom, which is the very foundation of all democratic societies and of the principle aim of the proposed Recommendation, namely to protect minors against the pernicious influence of such videograms.

17. The Recommendation also takes into consideration the possible effects of such videograms on other sections of society, although they do not aim to prohibit videograms having a violent, brutal or pornographic content which are of particular interest from an historical, documentary, scientific or artistic point of view⁴.

18. The principles in this text are without prejudice to the provisions of the European Convention on Human Rights, in particular Articles 8 and 10 thereof, which concern, respectively, the right to respect for private life and the freedom of expression and information⁵.

¹ Handyside v. United Kingdom, Series A, N° 24, paragraph 48.

² Cf. the opinion of the Steering Committee on the Mass Media (CDMM) of the Council of Europe concerning Resolution No. 5 on the distribution of videocassettes portraying violence and brutality adopted at the 4th European Conference of Ministers responsible for cultural affairs (Berlin, 23-25 May 1984).

³ See, in this respect, the conclusions of the First Conference of European Ministers responsible for Youth (Strasbourg, 17-19 December 1985) in relation to the protection of young people vis-a-vis the audio-visual media.

⁴ See principle 3.3 below.

⁵ Article 8, paragraph 1, provides that: “Everyone has the right to respect for his private and family life, his home and his correspondence”. Paragraph 2 specifies that: “There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society ... for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

Article 10, paragraph 1, declares that: “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.” Paragraph 2 specifies that: “the exercise of these freedoms, since it carries with it

19. The principles should be read in the light of the case law of the organs of the Convention⁶.

20. In general, the principles in the Recommendation are aimed at the distribution of videograms, without however overlooking their production, reproduction and importation. The principles apply to all modes of distribution, irrespective of where they are produced⁷. Distribution includes, in particular, making videograms available to the public, whether by sale, rental, donation or exchange.

III.COMMENTS ON THE PRINCIPLES

1. Systems for the distribution of videograms

21. In order to achieve the aim of reinforcing action against videograms having a violent, brutal or pornographic content, or those which encourage drug abuse, member States should institute the system which best suits their own national situation from among the systems proposed in the Recommendation.

22. Member States are free to choose the system which they prefer, it being understood that they may also apply criminal law and dissuasive financial and fiscal measures.

23. They should choose from:

- encouraging self-regulatory systems elaborated by the video industry;
- the establishment by public authorities of classification and control systems;
- the introduction of mixed systems, which for example combine classification and control within a self-regulatory framework.

24. It should be stressed that Principles 3 and 4, which deal with classification and control systems established by public authorities, can equally serve as guidelines for a classification and control system within a professional self-regulatory framework.

25. It should also be pointed out that the application of criminal law is independent of the existence of a classification system. Criminal law provisions relate to the nature of the videogram, namely its violent, brutal or pornographic content or its encouragement of drug abuse (for further details, see Principle 6 below).

duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, ... for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others ...”.

⁶ See, in this respect, the judgments of the European Court of Human Rights in the Handyside Case, 7 December 1976, Series A, N° 24; the Sunday Times Case, 26 April 1977, Series A, N° 30; the Dudgeon Case, 22 October 1981, Series A, N° 45, and Müller and others Case, 24 May 1988, Series A, N° 133.

⁷ These principles also imply the possibility of restricting the import or export of videograms. For member States which are also members of the European Community, it may be recalled that Article 36 of the Treaty of Rome allows member States to impose “prohibitions or restrictions on imports ... justified on grounds of public morality ...” provided such prohibitions or restrictions do not “constitute a means of arbitrary discrimination or a disguised restriction on trade between member States”. According to a report of the European Parliament on the market for violent and horrific videocassettes, “it should however be noted by analogy with a consistent line of thought of the Court of the European Communities regarding derogations from the fundamental principle of free movement, the concepts which are relied upon to justify derogations must be strictly construed, that is, their scope cannot be unilaterally determined by each member State without being subject to control by the institutions of the Community.” (Report drawn upon on behalf of the Committee on Youth, Culture, Education, Information and Sport; Rapporteur, Mr. R. Simmonds; Doc. 1-230/84 pp. 27-28).

26. In addition, even where a control and classification system does not exist, dissuasive measures of a financial or fiscal nature could still be considered (see Principle 7 below).

2. Self-regulatory systems

27. Voluntary agreements on the classification of videograms have been drawn up in certain member States by the relevant sectors of the video industry (producers and distributors) in consultation with the competent government authorities. These voluntary professional codes of conduct enable the distributors themselves to classify videograms and to provide consumers with information (age group for which the videogram is intended; type of film, on the basis of a standard classification by genre; truthful information about the content of the videogram, reproduced on the packaging; the possibility of consulting a catalogue at all distribution outlets, in which the consumer may find more or less objective information). Although these codes may not always have a sufficiently dissuasive effect on all producers and distributors of videograms (in particular certain production and distribution firms might not abide by or apply these rules), it is obvious that voluntary systems should nevertheless be encouraged.

28. In the elaboration of such voluntary systems, the professional sectors could draw on the principles *mutatis mutandis* contained in this Recommendation concerning the systems of classification and control set up by public authorities (see Principles 3 and 4 below). Both systems can co-exist or give rise to mixed systems, depending on the specific context of videogram distribution in each Member State.

3. Classification and control systems

29. Classification and control systems of videograms set up either by the professional sectors or by public authorities can contribute effectively to protecting young persons and providing information for the benefit of adults, whilst respecting the requirements of Articles 8 and 10 of the European Convention on Human Rights. Their aim is to provide the user with information on the content of the videogram.

30. In practice, few systems of this type exist in member States apart from certain voluntary professional codes which embody a voluntary system of classification.

Principle 3.1

31. The classification or control of videograms can be applied before or after their distribution.

32. A control system operating before distribution implies the grant of authorisation for distribution. A specialised commission classifies the videogram, by granting or refusing authorisation and by imposing, where appropriate, restrictions or limitations. Such commissions already exist for cinematographic films in certain member States.

33. A post-distribution classification and control system implies a system of legal deposit or declaration enabling a specialist commission to examine the videograms after their entry into circulation, with the possibility of then referring the videogram for examination by a commission or authority.

Principle 3.2

34. This principle underlines the usefulness of a system of legal deposits for effective classification and control systems operated by public authorities.

Principle 3.3

35. The purpose of classification and control is not to prohibit *automatically* all videograms with a violent, brutal or pornographic content. Some such videograms may be interesting from an historical, documentary, scientific or artistic point of view. In particular, it may be that the artistic integrity of the work, especially its dramatic value, requires the inclusion of certain scenes which on their own might be considered as violent, brutal or pornographic. These videograms, like all others, should be subject to classification and control. On this basis it will be decided if they can be distributed freely or be subject to restricted distribution or be prohibited outright. Reference to the particular value of a videogram should not allow it to be exempt at the outset from all classification and control.

36. The refusal to grant an authorisation to distribute a given videogram is compatible with the European Convention on Human Rights (Article 10 paragraph 2). The relevant case law confirms this. In this context, member States should be particularly attentive to the need to step up the detection and suppression of clandestine production and circulation.

Principle 3.4

37. The fact that a classification system specifies the age of the public to whom the videogram may be distributed may serve as a guide for adults, enabling the latter to know what is or is not suitable for young persons. This specification should be used in each member State so as to take account of national differences. Imported videograms should be subject to the national criteria of the importing State. International co-operation, notably between the national professional federations in the video sector, could be very useful for establishing common factors from among the different national criteria regulating age.

Principle 3.5

38. There should be a separate classification for the different versions of the same videogram designed for different audiences (for example, between complete and edited versions). It is especially important to indicate on the material medium (videocassette, videodisc), the classification rating attributed to each version, in order to avoid confusion or circumvention of the classification system.

39. It is important that the same classification as appears on the packaging also appears on the videocassette or videodisc.

40. Given the fact that a videocassette or videodisc may contain a number of videograms as well as advertisements (concerning, in particular, other videograms distributed by the same distributor), it is necessary to assign, depending on the content, a classification rating to each of these works, and to assign the most restrictive rating to the whole of the videocassette or videodisc.

Principle 3.6

41. Normally the classification given to videograms fixed on videocassettes and videodiscs should be similar to the one used for cinematographic films fixed on film tape, whilst bearing in mind the different uses of these two material supports. Thus, unlike cinematographic films on film tape which are usually exhibited publicly in cinemas, videograms fixed on videocassette or videodisc are, generally speaking, intended for private screening. Consequently, the individual viewer who watches videograms on a video recorder is able to re-play indefinitely the same sequence, or to watch the videogram or sequences thereof in slow-motion. In this sense, videograms could have an important impact on viewers and particularly on minors.

Principle 3.7

42. Videograms, as a means of expression, are playing an increasingly important role from the point of view of culture, education and information. It is therefore necessary to allow the producer of cultural, educational or informative videograms to request a simplified classification and control procedure. In certain cases, exemption from any one procedure might even be envisaged. However, any such exemption should not apply to videograms which claim to be cultural, educational or informative, but which in fact encourage violent or brutal behaviour or drug abuse.

43. Each member State may specify the conditions governing such simplified procedures or exemptions.

Principle 3.8

44. Distributors must be prevented from circumventing national rules on this subject by importing videograms. If member States use similar methods to classify and control videograms, the problems raised by their importation will diminish.

Principle 3.9

45. It is frequently difficult to know the identity of the person responsible for the distribution of a videogram which is violent, brutal or pornographic or which encourages drug abuse. In effect, it is not unusual for a third party ("straw-men") to be identified as the responsible party.

4. Limitations on distribution

Principle 4.1

46. Consistent with the general aim of the Recommendation, Principle 4.1 sets out a number of possible, non-exhaustive, limitations on the distribution of videograms having a violent, brutal or pornographic content, or which encourage drug abuse. The provisions of Principle 4.1 must be read together with those contained in Principle 3.3 which deal with the classification of videograms. In cases where the classification system gives rise to authorisation for a limited distribution, it becomes important to specify the conditions governing such distribution.

Principle 4.2

47. The specification of each videogram's classification on the packaging of the material medium (for example, on the cover of the videocassette, videodisc, etc.), in advertisements (for example, posters) and in video catalogues is the most effective way of avoiding misunderstandings or uncertainty as to the type of videogram in question.

5. Measures against offences to the classification and control systems

48. The logical consequence of any classification and control system instituted by public authorities is the possibility of sanctions of an administrative, civil or criminal nature for breach of the rules set out. It would be desirable for classification and control systems introduced by the professional sector within the framework of self-regulation to be accompanied by effective sanctions for cases of breach.

Principle 5.1

49. The public authorities should be able to apply effectively administrative, civil or criminal sanctions. Sanctions should not only concern non-respect of classification and control systems, but equally the dissemination of untruthful information about the classification of a videogram. The sanctions should be sufficiently punitive so as to have a dissuasive effect and to be effective. Thus, if domestic legislation does not provide for specific sanctions for the distribution of videograms of a violent, brutal or pornographic nature or which encourage drug abuse, then such sanctions might be envisaged, for example, in cases of recidivism or repeated offences. Supplementary penalties, such as the confiscation of the revenue gained from unlawful distribution, or confiscation of videograms unlawfully distributed, could also be envisaged. An enquiry conducted by the Customs Co-operation Council on the question of customs control of violent and brutal videograms illustrated the effectiveness of confiscation following seizure.

Principle 5.2

50. In the case of conviction, and subject to the provisions of Article 6 of the European Convention on Human Rights, and the corresponding case law, the closure of the distributor's establishment - either indefinitely or temporarily - could be envisaged. This sanction could be applied alone or in addition to the above-mentioned sanctions.

6. Application of criminal law

51. Furthermore, the application of criminal law may be envisaged as a means of combating the distribution of videograms having a violent, brutal or pornographic content, as well as those which encourage drug abuse.

52. Insofar as criminal law provisions refer to the precise character of the videogram, namely its violent, brutal or pornographic content or its encouragement of drug abuse, the application of criminal law is a matter independent of the existence of any classification system. In this sense, specific criminal law provisions might possibly be envisaged.

7. Dissuasive financial and fiscal measures

53. Classification is, by its very nature, the principal dissuasive measure. Whether established by public authorities or by the relevant professional bodies, classification can be reinforced and complemented by dissuasive financial and fiscal measures. The classification given to a particular videogram should form the basis of any dissuasive financial and fiscal measures applicable to its distribution.

54. The member States are free to examine, in the light of their national situations, the appropriateness of introducing dissuasive measures, for example the prohibition of public subsidies or financial aid or an increase in the taxes imposed on distributors.