

COUNCIL OF EUROPE
COMMITTEE OF MINISTERS

RECOMMENDATION No. R (90) 11

**OF THE COMMITTEE OF MINISTERS TO THE MEMBER STATES
ON PRINCIPLES RELATING TO COPYRIGHT LAW QUESTIONS IN THE FIELD OF
REPROGRAPHY**

*(Adopted by the Committee of Ministers on 25 April 1990
at the 438th 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;

Having regard to the need to safeguard properly the interests of copyright owners faced with rapid technological developments, in particular the widespread use of photocopying and analogous reproduction procedures (reprography);

Bearing in mind at the same time the need not to restrict unduly the public's use of these new copying techniques;

Taking note of the fact that copyright obligations between the Council of Europe member states are governed by the Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention), Article 9 of which grants authors the exclusive right of authorising the reproduction of their works to which exceptions are allowed only in certain special cases;

Recalling its Recommendation No. R (86) 9 on copyright and cultural policy of 22 May 1986, in particular point V thereof,

Recommends that governments of member States examine questions concerning copyright which arise in relation to reprography and, in so doing, be guided by the following principles.

PRINCIPLES

1. States should, in their legislation on copyright, limit exceptions to the exclusive rights of copyright owners, according to the letter and spirit of the relevant provisions of the Berne Convention. This should especially be the case where exceptions are made to the exclusive rights of authors but are not accompanied by remuneration.
2. States should, having regard to Article 9 of the Berne Convention, carefully examine whether reprography in their respective countries is carried out in a way and to an extent that conflicts with the normal exploitation of works or otherwise unreasonably prejudices the legitimate interests of right owners. In case of such conflict or prejudice, States should seek to take appropriate measures.

3. In cases where authors have the exclusive right to authorise the reproduction of their works, States should consider:

- if and how they can assist right holders to enforce their rights;
- if and how they can assist users to obtain permission to copy.

In so doing, they should consider:

- facilitating voluntary licensing schemes. The effects of such schemes could be reinforced, if necessary, by appropriate statutory provisions;
- provision of machinery for voluntary settlement of disputes.

4. (a) When considering matters referred to in Principles 2 and 3, States should give particular attention to areas where solutions are especially called for, *inter alia*:

- educational copying;
- copying in libraries;
- copying in commercial enterprises, state administration or other public institutions.

4. (b) When solutions of a non-voluntary nature are adopted for institutional copying, States should consider the need to remunerate right holders.

5. Where States legislate with regard to distribution of remuneration, they should, in principle and where practicable, aim to secure distribution on an individual basis.

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EXPLANATORY MEMORANDUM

I. INTRODUCTION

1. Although the effects of photocopying (“reprographic reproduction”) on copyright protected material is often difficult to quantify and identify with any certainty, it has been recognised that, over the last thirty years, technological progress has undoubtedly enabled the secondary use of printed works on a massive scale.

2. This situation has given rise to concern, not only on the part of right owners, but also of governments and intergovernmental organisations responsible for the protection of intellectual property, such as the World Intellectual Property Organization (WIPO) and the United Nations Educational, Scientific and Cultural Organisation (Unesco).

3. In 1975, the sub-Committees of the Executive Committee of the Berne Union and the Intergovernmental Committee of the Universal Copyright Convention studied the question. To solve the problem, they encouraged the establishment of collective systems to administer the right to remuneration, emphasising that it “rests with each State to resolve this problem by adopting any appropriate measures respecting the provisions of the Conventions”. Subsequently, in 1984, the Group of experts on the private copying of protected works emphasised that, according to both the Berne Convention for the protection of literary and artistic works and the Universal Copyright Convention, authors possessed an exclusive right to authorise the reproduction of their works and that the right of reproduction was not limited to public or profit-making use of works, but that it also covered protection as regards various forms of reproduction for private purposes. It was in the light of these findings, and in particular the rapidly expanding and widespread exploitation of protected works and the prejudice caused by it to authors and publishers, that WIPO decided to propose that this subject be analysed in depth.

4. In pursuance of a decision taken in September 1987 by the governing bodies of WIPO and the Unions administered by WIPO, a Committee of Experts on Model Provisions for Legislation in the Field of Copyright met in March 1989. The model provisions which were examined include sections on reprographic reproduction, a subject which was analysed prior to this meeting in a UNESCO/WIPO Secretariat memorandum entitled “Questions concerning the protection of copyright in respect of the printed word - Part I” (document UNESCO/WIPO/CGE/PW/3-I of 14 September 1987).

5. The Committee of Ministers of the Council of Europe first addressed this problem in its Recommendation No. R (86) 9 on copyright and cultural policy of 22 May 1986. The present Recommendation reinforces and expands this earlier instrument. It has been prepared on the basis of an assessment of the present situation in which the free reproduction of protected works by means of photocopying is now occurring on such a large scale that it often conflicts with the normal exploitation of copyright protected material and unreasonably prejudices the legitimate interests of authors. Furthermore, right holders often have difficulties in enforcing their exclusive right to authorise copying over and above the limits of free copying. Thus, the intention is to lay the basis for appropriate steps to be taken to ensure that the right of reproduction is guaranteed without undue restriction of the public’s use of new copying techniques.

6. In order to ensure that different views on the subject of reprographic reproduction were explained and duly considered, the Council of Europe’s Committee of Legal Experts in the Media Field (MM-JU) invited interested non-governmental organisations to a hearing on 20 October 1987 and, in particular, a delegation representing the International Forum for Reproduction Rights Organisations, now re-named the International Federation for Reproduction Rights Organisations (IFRRO), and the International Confederation of Societies of Authors and Composers (CISAC). Written communications were also received from the International Publishers Association (IPA) and the International Federation of Library Associations and Institutions (IFLA). The views of these organisations were taken into account when the Recommendation was drafted.

7. The point of departure of this Recommendation is that new photocopying techniques form part of modern daily life and in principle are to be welcomed; the uses that can be made of them should not be limited unduly. However, States should ensure that such developments do not cause inordinate harm to the economic rights of copyright owners in their works. Safeguarding the legitimate interests of right owners is ultimately in the interests of society as a whole; if the economic basis for the creation, production and publication of literary and artistic works were ever to be undermined, this would clearly have a harmful effect on output, both qualitatively and quantitatively.

II. COMMENTARY ON THE PROVISIONS OF THE RECOMMENDATION

General remarks

8. Although the term “reprography” can be understood as covering any process whereby facsimile (ie. exact) copies of works are made, this Recommendation specifically addresses problems arising from reprography of printed works by means of photocopying and analogous mechanical reproduction procedures. The subject of electronic databases (especially digital storage and telephone transmission of works stored in databases) is not dealt with in the Recommendation, nor is the subject of reprography from the point of view of piracy. This latter issue has been covered by the Committee of Ministers’ Recommendation No. R (88) 2 on measures to combat piracy in the field of copyright and neighbouring rights, adopted on 18 January 1988.

Principle 1: The need to properly safeguard the interests of copyright owners

9. Copyright law, as incorporated in the international copyright conventions such as the Berne Convention and the Universal Copyright Convention, grants to the author of a literary, scientific or artistic work the economic fruits of his creation. Most Council of Europe member States are members of the Union established by the Berne Convention, and this Recommendation is based on the principles of the Berne Convention, which guarantees the highest level of protection.

Principle 2: Examination of whether reprography is carried out in a way which might conflict with or prejudice right owners' interests

10. Under the Berne Convention and the Universal Copyright Convention, the author's proprietary interests are preserved by reserving to him the exploitation of his works. The author's exploitation rights include the right to authorise the reproduction of his works, in whatever manner or form. This right, as in the case of all exploitation rights, is in principle an exclusive right, ie. the author alone may authorise or prohibit its exercise, the authorisation generally being made subject to remuneration.

11. However, the copyright owner's exclusive right as regards the photocopying of his works is subject to certain exceptions. According to Article 9, paragraph 2, of the Berne Convention, national legislation may, in certain special cases, place limitations upon the exclusive right to authorise reproduction, provided that reproduction does not conflict with normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

12. Most national laws take advantage of the possibility offered by the Convention to allow certain exceptions to the author's exclusive right of reproduction. On the assumption that such exceptions neither conflict with normal exploitation of the work nor unreasonably prejudice the legitimate interests of the author, provision is not made for remuneration. However, in recent years it has become obvious that, as a result of these exceptions, the free reproduction of protected works by means of photocopying is now occurring on such a large scale that, in many instances, it conflicts with the normal exploitation of works and unreasonably prejudices the legitimate interests of authors, thereby removing the situation from the scope of Article 9, paragraph 2. Thus, although in specific instances photocopying may in itself not be harmful to right owners' interests, the overall effect of such use may nevertheless conflict with the normal exploitation of works and unreasonably prejudice their legitimate interests.

13. At the hearing held on 20 October 1987, the representatives of IFRRO indicated that 265 thousand million - mostly illegal - photocopies are made each year of protected material. IFRRO representatives also pointed out that surveys in various member States of the Council of Europe showed that governmental administrations were major users of protected material through reprography. In certain instances, such use is in violation of a government's own laws, exceeds the limits of "private use" or "fair dealing" and contravenes Article 9, paragraph 2, of the Berne Convention.

14. Principles 1 and 2 recommend that States should, in their copyright legislation, limit exceptions to the exclusive rights of owners and carefully examine whether photocopying is not carried out in a way and to an extent that conflicts with their international obligations under the Berne Convention.

Principle 3: Implementation of exclusive rights

15. States may find that photocopying is harmful to right owners' interests. This may be due to the fact that the volume of photocopies made without authorisation from the right holders exceeds the amount acceptable under Article 9, paragraph 2, of the Berne Convention. When seeking appropriate measures to combat this problem, States should contemplate whether exceptions should be further limited, taking into account the letter and spirit of the said Convention. The possibility of remunerating right holders for reproduction allowed under non-voluntary exceptions should also be considered. In this respect, reference could be made to the fact that, in one member State where the copying of printed works for private and other personal and educational uses without the authorisation of the right owner has been allowed by legislation, a levy system has been introduced in order to remunerate the author. This system comprises a levy on reprographic machinery as well as an additional operator's fee for those reprographic machines which are operated in areas where reprographic copying takes place on a large scale.

16. Solutions of the kind mentioned above may be considered individually or complementary to measures mentioned in Principle 3.

17. Principle 3 concerns the situation in which an author's exclusive right to authorise reproduction is retained. In such instances, the rights are usually managed on a collective basis, thereby ensuring effective exercise of reprographic rights. States should try to ensure assistance to right holders and/or collecting societies to enable them to enforce their rights, and at the same time to assist users to obtain permission to copy material. In taking steps to ensure this, States are encouraged to consider facilitating voluntary licensing schemes, and where possible, to reinforce such schemes by appropriate statutory provisions. In this regard, reference could be made to the Nordic system known as "extended collective agreements" whereby authors - through associations representing a large number of authors - permit reproduction of a given category of their work by means of a collective agreement. This permission is extended by legislation to authors not represented by an association or to foreign authors, unless they have vetoed the use of their work. The fees collected are distributed, on an equitable basis, to members as well as non-members of the association concerned (see also the commentary on Principle 4 below). In the case of reprography, the system has so far been limited to copying carried out in education institutions.

18. Encouragement could also be given to the creation of collecting societies specialising in the recovery of royalties in the field of reprography.

19. Reference could also be made to the possibility of including indemnity clauses in collective agreements or the provision of machinery for the settlement of any disputes that might occur.

20. As concerns the former, collective agreements might contain indemnity clauses covering infringement actions brought by authors who are not party to the agreement. The inclusion of such indemnity clauses might even be made obligatory by legislation.

Principle 4: Solutions in certain special cases

21. Certain categories of uses need special consideration, including:

- copying for educational purposes;
- copying in libraries;
- copying in commercial enterprises, State administrations or other public institutions.

22. The rights of authors in relation to their works have to be respected even in these special cases; photocopying without remuneration beyond reasonably permissible limits is not acceptable. It is, however, generally accepted that teaching establishments should be able to make copies of protected works to the extent strictly required by their activities.

23. Likewise, in many states, special exceptions exist in favour of photocopying by libraries. Certain of these exceptions (for example, in relation to photocopying of works for conservation purposes) give rise to no objection. This being said, a decision to specialise and/or limit purchases to certain printed works, coupled with a system of inter-library loan, may deprive copyright owners of substantial revenue. States should endeavour to strike a fair balance between the economic interests of right holders and their obligation to ensure appropriate storage and dissemination of information. In addition, other common exceptions (for example, photocopying a work for an individual who requires a copy for research or private study) are capable of being abused and in particular could be exploited so as to by-pass restrictions on educational copying. At the same time, it is not easy for libraries to exercise effective supervision in this area.

24. The general rule with respect to photocopying in commercial enterprises, State administrations, research institutions, or other public institutions is that the author's exclusive right to authorise reproduction applies, subject to the customary exceptions in favour of copying for private/personal use. In this connection, the setting-up of schemes for negotiating rights should be encouraged.

25. As regards copying by government departments and public institutions in general, it appears that a system of voluntary licences has in many instances already been created or is being negotiated in certain States. In other States there exists a system of legal licences without remuneration. In this connection, extensive copying made for press cutting services has been noted as a subject of concern.

26. As regards copying by commercial enterprises, experience in some States has shown that, whereas major enterprises are prepared to enter into negotiations with a view to a voluntary licensing agreement, smaller firms tend to argue that they do not make copies of protected works. States should therefore define, at least in broad terms, the amount of permissible copying, thereby facilitating voluntary solutions.

27. Principle 4.a recognises that, when considering solutions of the type proposed in Principle 3, member States should give particular attention to the areas described above since they require specific solutions. Principle 4.b emphasises the need to consider the remuneration of right holders when non-voluntary solutions are found in this area, for example, "institutional copying".

Principle 5: Distribution of income

28. This principle deals with the distribution of income received under licensing schemes.

29. When licensing arrangements are voluntary, they should as far as possible ensure that income is distributed to right owners on an individual basis. If, however, the licensing arrangements are compulsory, then States should ensure that the share-out is fair, with the possibility of recourse to a competent body to determine this, if the need arises.

30. When arrangements are made for the distribution of income collected, member States of the Council of Europe should safeguard the position of foreign authors according to the principle of national treatment as laid down in the Berne Convention.