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CONSULTATION ON THE REFLECTION DOCUMENT
OF DG INFSO AND DG MARKT OF 22 OCTOBER 2009
"CREATIVE CONTENT IN A EUROPEAN DIGITAL SINGLE MARKET:
CHALLENGES FOR THE FUTURE"

SUBMISSION BY AEPO-ARTIS

Brussels, January 2010

AEPO-ARTIS represents 29 European performers' collective rights management societies from 22 countries. Together, they total some 350.000 performing artists (such as musicians, singers, dancers, actors) as members and manage the rights of some 400.000 performers in Europe.

AEPO-ARTIS welcomes the opportunity to comment in the framework of the European Commission's work and reflections on issues related a European digital single market for creative content.
The comments below refer to those points in the Reflection document with most relevance for performers' intellectual property rights and the collective management thereof.

The document reference pages are indicated into brackets.

Access to content for consumers and dealing with orphan works (page 14)

As it looks for ways to create easier access to creative content for consumers in respect of certain forms of digitization and online usage, the Reflection Document addresses extended collective licensing as one of the possible options to tackle in particular the issues of orphan works and possibly also out-of print works.

Creating easier access to creative content online means applying efficient ways of licensing the rights incurred for the use of a given work of performance. Performers and performers' collecting societies will cooperate enthusiastically in ensuring the availability of creative content, provided prior authorisation is requested and adequate remuneration is generated.

As regards orphan works in particular, significant work has been done in the framework of the sectoral working groups set up by the European Commission that resulted in having representatives of both users and rightholders drafting and signing on a voluntary basis a Memorandum of Understanding. This Memorandum of Understanding on Diligent Search Guidelines for Orphan Works adopted in

May 2008 provides for some practical mechanisms to reach the rightholders concerned and turn to the relevant licensor, and to reduce the number of orphan works in the future.
In addition, contractual agreements between commercial users and rightholders' organisations are already in existence in a number of countries, enabling the licensing and use of orphan works and performances as well as of other works and performances subject to IPR protection.

Collective management is key in this licensing process; since they represent rightholders collectively, collecting societies limit the number of individuals commercial users have to deal with to obtain the necessary license, while ensuring that rightholders' rights are not disregarded.

AEPO-ARTIS considers that extended collective licensing as well as compulsory collective management (as put in place for cable retransmission across borders by the Satellite and Cable Directive 93/83/EEC) can be envisaged as efficient practical tools to ease the licensing of orphan works as well as for certain types of mass use online.

Limitations and Exceptions (page 15)

It is difficult to provide a detailed response since the reflection document does not contain specific information as to what these limitations and exceptions might be.

A wide range of limitations and exceptions already exist within the *acquis.* In particular these exist in Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001on the harmonization of certain aspects of copyright and related rights in the information society on rental right and lending right and on certain rights related to copyright in the field of intellectual property at Article 5. These include allowing specific acts of reproduction by publicly accessible libraries, or making exceptions in the case of reproductions of broadcasts made by social institutions pursuing non-commercial purposes. Additional exceptions exist to benefit teaching, private study, scientific research, as well as people with a disability.
These provisions provide member states ample opportunity to shape their national laws and determine their own exceptions and limitations in a manner which they deem appropriate.
These provisions must be implemented in accordance with the international standard established by the three-step test and included in Article 5, par.5 of Directive 2001/29/EC.

We would suggest however, that there is no sign so far of a need to broaden the existing list of exceptions or limitations in EU law.

On one specific matter, the private copying exception and accompanying remuneration scheme for rightholders has been a highly effective, and indeed an essential means for them to receive fair remuneration. In addition, it benefits consumers by allowing them to copy creative content for their own use. This is a flexible system, which works well and should not be jeopardised or reduced in scope.

Commercial users' access – aggregating "digital copyrights" (pages 15-16)

The Reflection document contemplates the idea of **"**aggregating the two indispensable "digital copyrights" involved in the interactive online dissemination (e.g. interactive "making available"), the digital right of reproduction and the digital performance right".

AEPO-ARTIS would not support the idea of merging the "reproduction" right and the separate "making available" right for the purposes of online distribution as opposed to keeping each source of remuneration distinct. With regard to commercial users, they can already deal with these distinct rights in an efficient and straightforward manner, by addressing both of them in their contractual arrangements with rightholders in one single contract. This method currently works and we foresee no reason why it would not continue to do so.

As a general principle, the distinction should be maintained. The rights may have separate and different values. For example, for consumers the reproduction right is very important to them since it allows them to make, own and retain a copy of work, whereas the making available /communication to the public right is more transient in nature.

"One Stop Shop" (pages 15-16)

The Reflection document envisages all rightholders being brought within the fold of one "one stop shop".

AEPO-ARTIS believes that such a system would be extremely complex. In particular, this does not take into the account the fact that different categories of rights have their own requirements and practices. Some rights are subject to collective management, whereas some are not. The phonographic and audiovisual industries are often reluctant in the online market to renounce to the individual exercise of their rights.

It also risks weakening the representation of each category of rightholder, since instead of having one collecting society representing their interests, there would be one combined collecting society, which by necessity would have to compromise the interests of each category of rightholder in order to reach agreements. It may also unfairly reduce the overall tariff paid to rightholders.

Multi-territorial licences aggregating the music repertoire of several collecting societies (page 18)

The reflection document raises the issue of multi-territorial or pan-European licences states in particular: "One possible outcome of the CISAC decision (which is limited to music) might be that several collecting societies could be delivering multi-territorial licences aggregating the music repertoire of several collecting societies."

Pan-European licenses are one possible way to license the rights of a given repertoire for a given category of rightholders. To our knowledge however, there are so far not many requests from users in the online sector for a pan-European licensing of performers' rights in a given repertoire. It should also be noted that pan-European licensing may not be relevant in many cases, where the public targeted by a given commercial user is in fact located in a more limited territory (2 or 3 countries for instance, depending on national or regional cultural specificities). With this in mind, making pan-European licensing the compulsory or the default type of agreement would make little sense.

Also, AEPO-ARTIS believes that in order for cross-border licensing of online rights to develop, it is essential to avoid dismantling and disorganising the functioning of collecting societies. A system based on multi-territorial licensing with no more bilateral agreements between collective rights management societies would not improve the management or the licensing of performers' rights for online use. Beyond the practical obstacles and inefficiencies that they would entail, such systems would raise concerns as regards EU cultural diversity, risk impoverishing the cultural offer to the detriment of local and regional repertoires and ultimately hamper the development and growth of the cultural industries.

In the majority of cases, as a result of their weak negotiating position, performers' rights (such as their exclusive right to make their performances available) are transferred to the producers by way of contract. Consequently, collecting societies are often not able to manage a broad range of rights for online use.

Protection of rightholders – collective management of the making available right and additional unwaivable right to equitable remuneration (pages 19-20)

The document mentions the possibility of introducing an extended or mandatory collective management system for the administration of the "making available" rights of authors and performers and the provision of an additional unwaivable right to equitable remuneration.

This proposal is a matter of the utmost importance, particularly with regard to the development of a European Digital Single Market.
AEPO-ARTIS strongly supports such a measure and believes it would provide performers with more effective protection of their rights as well as strengthening their currently very weak negotiating position with regard to contractual arrangements with producers.
In making their performances available, both consumers and commercial users derive large benefits and it is therefore only fair that performers are rewarded accordingly. For this purpose, a system whereby collective rights management organisations would be able to collect remuneration from those commercial bodies making the creative content available for use and further distribute it to the concerned performers is needed.

Collective rights management - an extension of the scope of the Satellite and Cable Directive of 1993 to include online delivery of audiovisual content (page 17)

The reflection document is considering the “extension of the scope of the Satellite and Cable Directive of 1993 to online delivery of audiovisual content”.
It reads: “transposing the rationale of the directive to the Internet could imply that once an online service is licensed in one EU territory, for example the territory with which the service provider is most closely linked, then this license would cover all Community territories.
The principal rationale for domiciling licensor and licensee in one territory is to identify the relevant territory in which the multi-territorial license can be obtained”.

But assuming that an extension of the principle of this directive would have such an effect is disputable.
In its interpretation of this directive in the framework of the CISAC case, the Commission has considered that “Directive 93/83/EEC established the applicable law for the satellite exploitation of copyright works. The fact that the law of a specific Member State is applicable is not relevant to making a determination on which collecting society can grant the licence” (paragraph163).
In this decision, the Commission considers that any collecting society of a member state should be able to deliver a license.
Consequently the extension of Directive 93/83/EEC and of such principles would not lead to the effect of “domiciling licensor and licensee in one territory” and “the identity of the relevant territory in which the multi-territorial license can be obtained”, as the CISAC decision restricts the impact of the directive to the determination of applicable law without prejudice to the choice by the licensee of the collecting society that will grant the license or to the place where this society is located.

Commercial users’ access and freely accessible ownership and license information (page 17)

AEPO-ARTIS supports the principle of transparency highlighted in the Reflection Document.

AEPO-ARTIS would stress that information about ownership and license is essential for performers’ collective management societies to be able to properly administer the performers’ rights. Collecting this information and keeping it up-to-date is a complex task, all the more so as regards performers since a high number of performing artists may be involved in the recording of one single musical or audiovisual fixation.
On the point of having this information made freely accessible to commercial users or the public at large, AEPO-ARTIS would raise the fact that it may have the possible adverse effect of creating confusing situations where the absence of a rightholder’s name or of a title in a list of ownership

would be misinterpreted as meaning that the related fixation is in the public domain or otherwise made free of use.

Whatever the type of right to be exercised, performers' collective rights management societies often encounter difficulties in simply accessing the information needed to identify performances and those performers to whom remuneration is due. This problem is particularly acute for those performers who are not main performers or stars and whose name does not always appear in association with the use of their recordings. In this regard, improved exchange of information would be greatly enhanced by introducing an obligation for Member States to provide for free access, for the benefit of collecting societies, to the existing information needed in order to identify the use of the work or other subject matter and the corresponding right-holders.

Governance and transparency of collective rights management organisations (page 20)

AEPO-ARTIS supports the principle of transparency and good governance. This principle already exists, and is respected performers' by collecting societies.
Moreover, this issue has already been subject to provisions adopted in articles 3-9 of the Commission recommendation No 2005/737/EC of 18 May 2005 on collective cross-border management of copyright and related rights for legitimate online music services on "the relationship between right-holders, collective rights managers and commercial users".

Alternative forms of remuneration involving notably ISPs (page 19)

The Document refers to this idea "mainly for mass reproductions and dissemination of copyright protected works and sound recording in the internet or on digital fixed or mobile services".
In particular, it advances the option that ISPs could be requested to contribute financially to the remuneration of rightholders for the online use made of their works or performances.

ISPs are among the main beneficiaries of today's creative content digital market. They are even greater beneficiaries since broadband access has developed in the European Union, and recent European projects to have access to broadband made compulsory to encourage further development of this market is likely to confirm this situation.
Unauthorised exchanges of copyright protected content (music or films) account for a significant part of the traffic enabled by ISPs, and it appears that stopping or decreasing the number of these exchanges is difficult to achieve. This wide practice of unauthorised use deprives performers, with all other rightholders, from revenues that they deserve to receive.
In light of this, it seems fair and equitable that ISPs should financially contribute to the creative economy that constitutes an essential part of their business by compensating the rightholders for this unpaid use of music and films.

Harmonisation of copyright laws in the form of a "European Copyright Law" (page 18)

Having all existing pieces of European legislation on authors' rights and neighbouring rights compiled in one single law is not a pressing concern for performers. What is important is the result; i.e. achieving an improvement of performers' rights current situation as a matter of urgency.
Given member states' differing legal traditions, a harmonised European Copyright Law would take a considerable amount of time to conceive and implement. It would therefore not be of assistance in improving the position of performers in the short term.
European efforts should rather concentrate on the implementation in practice of already existing rules and on improving the situation where need be. In particular, the difficulties of performers having their rights properly exercised under fair conditions in the online sector need to be tackled as a priority matter.