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Public Consultation on Content Online in the Single Market

AEPO-ARTIS represents 27 European performers' collective management societies from 21 countries, 16 of which are established in Member States of the European Union. The other countries represented are Croatia, Norway, Romania, Russia and Switzerland.

With different sizes and ages, they totalize some 350.000 performers as members.

In most countries performers' rights are collectively managed for both performers who are members and those who are not members of the collecting societies. Thus globally, the number of performers represented by the 27 member organisations of AEPO-ARTIS can be estimated between 400.000 and 500.000.

QUESTIONS

Consumption, creation and diversity of online content

3. Do you think the present environment (legal, technical, business, etc.) is conducive to developing trust in and take-up of new creative content services online? If not, what are your concerns: Insufficient reliability / security of the network? Insufficient speed of the networks? Fears for your privacy? Fears of a violation of protected content? Unreliable payment systems? Complicated price systems? Lack of interoperability between devices? Insufficient harmonisation in the Single Market? Etc.

Matters of concerns:

The existing legal environment in the EU is inadequate to protect performers and give them proper remuneration for new types of use on line.

In addition, some gaps still exist in this European legal framework, creating legal uncertainty or lack of protection for performers.

1/ Significantly, most of the '*acquis communautaire'* is based on the principle of "exclusive rights", also called rights to authorize and to prohibit the exploitation made of performances : rights of fixation, reproduction, distribution, rental and, in particular, the 'new right" of making available on demand which is central is in on line environment (introduced by Directive 2001/29/EC).

None of these basic exclusive rights do in practice benefit to most performers. Most of the time these rights are actually transferred under individual contracts: so far, the huge majority of performers are regrettably deprived of their exclusive rights from the early time when they sign their recording/work contracts: to have his/her music recorded, a performer in a weak bargaining position (which is the case for most of them except a few stars at national level) has generally no choice but to sign an unbalanced contract with the producer, under which he/she waives all exclusive rights (for all territories and for the whole duration of rights) he/she is theoretically granted under European and national legislations. As a result, he/she will receive a single lump fee for the recording and all the possible exploitation of the recording, for all the term of protection. No additional remuneration will be paid, except those collected by performers' collecting societies which are based on un-transferable remuneration rights.
In particular, he/she will most likely not be entitled to receive any remuneration for the sales or other form of distribution through digital platforms, of his/her performance.

2/ The situation is similar, or even worse, in the audiovisual sector. Directive 92/100/ECC encourages the presumption of transfer of exclusive rights between performers and producers in national legislation, and fails to counterbalance this situation with efficient guarantees of remuneration.
As a result, there is simply no *acquis*, as no protection is granted for the broadcasting and communication to the public of fixed audiovisual performances, except for on-demand services. The large variety of online uses that are not based on on-demand services is therefore not covered.

3/ There is no such principle for performers as the one that exists in some authors' rights national legislations, according to which remuneration of rightholders must be proportional to the use of their works/recordings.
Regrettably performers' collecting societies have not been able so far to avoid the full transfer of these exclusive rights and to properly manage them.

As a striking illustration of this situation, a study conducted by AEPO-ARTIS on the impact of the *acquis communautaire* on performers' rights in Europe found out that in 2005, collecting societies for performers in the 10 countries studied (Belgium, Czech Republic, Croatia, France, Germany, Lithuania, The Netherlands, Spain, Sweden and the United Kingdom), collected altogether a total amount of 32 euros for the performers' right of making available on demand!

4/ The general guarantee of a single equitable remuneration for performers, as provided under Directive 92/100/EEC for all types of communication to the public of commercial phonograms, is not yet implemented in all Member States.

5/ Rental right, while subject to a protection under Directive 92/100/EEC, and which is subject of new forms or commercial services, does not protect efficiently performers.

6/ Private copying remuneration, which is crucial in the digital environment and represents more than one third of the rights collected by performers' collecting societies in Europe, is under attack while it is an indispensable source of revenue for rightholders. In some European countries it is not collected on copies originating from the internet, although under several national legislations

such copies can be considered as a reproduction for private purposes that would justify the payment of compensation on the ground of Directive 2001/29/EC.

Identification of 'road-blocks' and proposals for solutions develop trust in and take-up of new creative content services online

All in all at present, apart from a few persons, performers are excluded from all the schemes of remuneration above mentioned and, more and more, their work is used without remuneration.

Legal solution should be found, at European Level, to guarantee that performers are duly remunerated for the various types of use of their recordings online.
Such solution can only rely on collective management of performers' rights, by organising the compulsory collective management of their rights (for on demand services for instance) or, in case where exclusive rights are waived by performers, by the collective management of a right to remuneration that would not be transferable (ie that it would remain in the hands of the performer, whatever this performer agrees under contractual commitments), to be directly collected from the users.

As regards technological tools, technical protection measures (TPM) do not represent an alternative solution for performers. Locking CDs, DVDs or online-content is neither realistic, nor efficient or even necessary: the development of TPM, implemented on the initiative of the sole industry, has already proven prejudicial to privacy and individual freedom. Such strategy would only lead to rampant legal actions against individuals and hamper the circulation of cultural content.
As regards the cost for consumers, it remains not transparent which share of the retail price is would cover for costs linked to the implementation of TPM.

While the private copying remuneration system has not hampered the development of online music and video markets, its limitation will not necessarily increase sales of copyright protected contents.

Besides, the industry that markets copy-enabling technology of protected content through online services and makes high profits from these sales is the same one that is campaigning against remuneration systems for private copying that are the only way for performers to be compensated for these copies. For this reason, TPM-based systems prohibiting private copying practices and excluding the corresponding remuneration scheme would be highly detrimental to performers.

One should note that so far, performers are never asked, nor even informed, when TPM are put on their recordings' fixations. It is therefore urgently needed that all categories of rightholders be ensured the possibility to decide whether or not their content should be technically protected against copying.

TPM,
-put on devices without performers' prior authorization,
-failing to give the necessary information on all performers concerned,
-having no positive impact on performers' rights (for those exclusive rights that performers are generally bound to waive during contractual deals),

-and providing no certainty that they are workable and will resist any attempt of circumvention, are of no interest for performers.

This said, performers and their collecting societies are willing to adapt to any technological and economical evolutions likely to positively impact on the management of intellectual property rights. In particular, they believe that certain well designed DRM (digital rights management) systems could become useful tools assisting collective rights management societies in the collection and distribution of remunerations for performers. DRM systems are currently being developed, that may be able to provide detailed information on recordings used. There is no reason why the implementation of DRM systems should substitute collective management of rights. Given the complexity and variety of tasks performed by collective rights management societies, far from substituting these societies, DRM systems could at the best usefully serve them to efficiently administer certain categories of rights.

Moreover, in order for the collective rights management societies to be able to identify rightholders and administer their rights as efficiently as possible, European legislation should clearly set an obligation for commercial users and producers to display on a free access basis complete and accurate information concerning the use of performers' recordings and all elements related to their identification.

With regard to the trust in the system of authors' rights and neighbouring rights, the current debate opened by the Commission on collective management of rights has seriously damaged the balance between the users and the rightholders.

The actual promotion of a cross-borders management system in which a direct competition between collecting societies is organized, and that would even put an end to the development of bilateral agreements, can only lead to less protection for performers and more uncertainty for users:

- by making the enforcement by collecting societies of copyright and related rights more difficult, given the huge territory they would have to cover, it would increase legal uncertainty. This would lead to increased piracy;

- before the effects of direct competition between collecting societies actually concentrates the market in the hands of a small number of remaining collecting societies, a transitional period will be characterized by a high level of legal uncertainty, with users having to address a vast number of collecting societies to obtain a licence, each of these collecting societies representing parts of a rightholders' category but none of them representing them all (for the same recording, the most famous performer may be member of one society, musicians of another and singers from the choir in a third one…);

- this would also conflict with some national legislations according to which the management of online music services is subject to a 'legal licensing' system entrusting collecting societies to administer those rights at national scale only;

- competition between collecting societies leading to a concentration of the market, without appropriate safeguards, would unbalance the system: a small number of collecting societies would manage the rights of those most famous performers whose names are well known and for which all necessary information is generally available. On the other side, other collecting societies would have less means to administer the rights of less famous but more numerous performers (session musicians, members of bands and orchestras…), whose collection and distribution of rights is more complicated and costly for lack of relevant information.

Thus, the most famous performers would attract all attention whereas the huge mass of less famous performers would be neglected; this would have negative effects on both the quality of services rendered by collecting societies and the effective protection of rightholders;

-as a consequence of the effects above described, this system would in the mid-term negatively impact on EU cultural diversity, impoverish the cultural offer to the detriment of local and regional repertoires and hamper the development and growth of the cultural industries.

For these reasons, any steps forward to obtain a fully implemented Internal Market should keep on relying on mutual agreements between collecting societies. They should be accompanied by safeguards relating to applicable tariffs, distribution keys, clear rules as for laws and territories of reference, transparency, dispute settlement and enforcement procedures.

4. Do you think that adequate protection of public interests (privacy, access to information, etc) is ensured in the online environment? How are user rights taken into account in the country you live / operate in?

See previous comments: in order for the collective rights management societies to be able to identify rightholders and administer their rights as efficiently as possible, European legislation should clearly set an obligation for commercial users and producers to display on a free access basis complete and accurate information concerning the use of performers' recordings and all elements related to their identification.

Left to the sole control of the industry, as has been shown recently with the Sony case[1], digital exploitation of content can lead to systems intrusive for privacy. Instead of racing to provide legal protections for TPM, the real need is to protect against the misuse of this technology. The side-effects to be avoided are those of protecting spy ware, undermining consumer confidence, and ultimately reducing the sales and growth of content online.

Implementation of DRM systems could therefore be subject to the control or the prior consultation of an independent legal body in which the industry, the rightholders and the consumers would be represented, in order to regulate at the European level those questions related to security and privacy.

[1] Enquiries revealed in 2005 that Sony was using a copy-protection TPM on some of its CDs that installed a software program known as a "rootkit" on users' computers, without informing those users. Such system presented both a security and potential privacy risk
Class action lawsuits were launched in the US, in Italy and elsewhere, which resulted in the removal from stores of the CDs involved and the provision by Sony of information necessary to be able to uninstall the program.

5. How important for you is the possibility to access and use all online content on several, different devices? What are the advantages and / or risks of such interoperability between content and devices in the online environment? What is your opinion on the current legal framework in that respect?

Interoperability should be guaranteed to the consumer. It is a condition for online services to be consumer-friendly. At the same time, it sets the conditions for artistic and creative content to circulate, to be spread out of national borders and in fine to flourish at international level.
Any provisions regarding interoperability should be accompanied by the setting up of the measures above mentioned (see point 3) to ensure that performers' rights are respected and well implemented in the online environment.

6. How far is cultural diversity self-sustaining online? Or should cultural diversity specifically be further fostered online? How can more people be enabled to share and circulate their own creative works? Is enough done to respect and enhance linguistic diversity?

In terms of cultural diversity, so far the commercial on line market seems to essentially reproduce the monopolies and unbalanced commercial share of the off-line market.
Yet specific practices like non commercial peer-to-peer for instance are by nature not concentrated nor centralised.

Competitiveness of European online content industry

New business models and transition of traditional ones into the digital world

8. Where do you see opportunities for new online content creation and distribution in the area of your activity, within your country/ies (This could include streaming, PPV, subscription, VOD, P2P, special offers for groups or communities for instance schools, digital libraries, online communities) and the delivery platforms used. Do you intend to offer these new services only at national level, or in whole Europe or beyond? If not, which are the obstacles?

As regards new types of use on the internet, there are undoubtedly new opportunities, but the relating appropriate business models still have to be found.

In particular, solutions still have to be found for non commercial use. This is particularly the case of peer to peer exchanges.
While these non commercial exchanges are one of the main sources of circulation among European citizens of music and audiovisual recordings, the existing rights models have shown unsuited to the public demand and the rights of rightholders. The public is massively exchanging and downloading recordings on the internet, without any authorisation from rightholders.
Up until now, the rightholders cannot deliver in any way proper authorisations for these billions of uses, nor collect any remuneration.

This has resulted in an impressive number of legal proceedings carried out all over Europe, attempting to prohibit mass uses through practices that are not considered by the general public as an act of piracy. Lawsuits and their settlements have failed to put an end to these practices, and

failed to bring authors and performers the remuneration that should return to them for this massive use of their work.

New marketing schemes are emerging - see Universal Music in the Northern Americain territory[2] - that combine free downloading with advertising. This initiative reflects creative content companies' willingness to capture some profit from the boom in digital distribution.
The development of these marketing and distribution schemes will only lead to a deterioration of the value of cultural goods:
-it is detrimental to the public, obliged to watch advertising when looking for cultural content;
-it will hamper the development of similar services that are not based on advertising;
-while it is likely to generate significant profit, it excludes performers from the system. It is detrimental to rightholders who, here again, are not remunerated or taken into account in any manner and will not help them to obtain the remuneration that they owe, as far as copyright protected content is concerned.

At the same time, the music and audiovisual industry sells I-pod and other MP3 devices that have the capacity of including 10.000 music recordings, supposedly paid 0.99 euros for each of them if downloaded from commercial music online stores. One can hardly imagine that the owner of an MP3 player is likely to invest 10.000 x 0.99 = € 9.900 in buying digital content.

9. Please supply medium term forecasts on the evolution of demand for online content in your field of activity, if available.

At the present, peer to peer practices seem to go on developing or at least not to decrease. Commercial services are in the process of emerging or developing.
Estimation by Merrill Lynch in August 2006 forcasted that the music sector would expand by 35 per cent this year in non-US markets to $11.6bn (€ 9.16). For the same period, US growth was expected to increase by nearly 30 per cent to $16bn (€ 12.63).
Estimation of gains for the huge majority of performers for the same online markets and the same period is nil.

10. Are there any technological barriers (e.g. download and upload capacity, availability of software and other technological conditions such as interoperability, equipment, skills, other) to a more efficient online content creation and distribution? If so, please identify them.

Possible barriers do not rely in the capacity. Lack of interoperability may be one of them.
But above all, the confrontation between a commercial market that tries to sell at a high price or against advertising a content that is not always freely usable, and the peer to peer networks that can hardly be eliminated, where content is massively and freely available, result in legal uncertainty and a lack of appropriate legal rules consistent with actual practices and the protection of rightholders. This problematic situation is most likely to hamper the fast and well-running development of content distribution and, in the mid-term, of content creation.

[2] Universal Music, the world's largest music company, announced in August this year its decision to back a start-up that will allow consumers to download songs for free. It will rely on advertising for its revenues. The service, SpiralFrog, represents a departure from Apple's 99 cents-a-song business model and other commercial download services which charge a subscription fee by being completely free. It is due to start up in December.

11. What kind of difficulties do you encounter in securing revenue streams? What should in your view be the role of the different players to secure a sustainable revenue chain for creation and distribution online?

As already indicated, the main difficulty met by performers' collective management organisations lies in the fact that most of the exploitation of creative content through the internet is based on the exclusive rights that performers have no choice but to transfer to the producers under contractual commitments. A remuneration system should be organised that would benefit performers for all the types of use of music and audiovisual recordings.
As far as internet services are concerned, internet service providers should be responsible for the payment of a part of the remuneration.

Moreover, as indicated under point 3, in order for the collective rights management societies to be able to identify rightholders and administer their rights as efficiently as possible, European legislation should clearly set an obligation for commercial users and producers to display on a free access principle complete and accurate information concerning the use of performers' recordings and all elements related to their identification.

Payment and price systems

12. What kinds of payment systems are used in your field of activity and in the country or countries you operate in? How could payment systems be improved?

13. What kinds of pricing systems or strategies are used in your field of activity? How could these be improved?
Please see answers under point 3 (on DRM) and under point 11.

Licensing, rights clearance, right holders remuneration

14. Would creative businesses benefit from Europe-wide or multi-territory licensing and clearance? If so, what would be the appropriate way to deal with this? What economic and legal challenges do you identify in that respect?
Please see answer under point 3 on multi-territory licensing and the collective cross-border management of performers' rights.

15. Are there any problems concerning licensing and / or effective rights clearance in the sector and in the country or countries you operate in? How could these problems be solved?

Performers' collecting societies cannot licence rights that are transferred by performers to producers, and thus cannot be active so far on online markets.
In addition to measures improving the protection of performers' exclusive rights, where such exclusive rights could not be applied remuneration rights should be guaranteed to performers and hence subject to collective management.

16. How should the distribution of creative content online be taken into account in the remuneration of the right holders? What should be the consequences of convergence in terms of

right holders' remuneration (levy systems, new forms of compensation for authorised / unauthorised private copy, etc.)?

On this question, please see our answer to the consultation organised by DG for Internal Market and Services of the Commission on private copying that should be published, together with all stakeholders' contributions, on their website.

The current remuneration system for private copying has no negative impact on the development of digital sales in Europe. There is no reason why levies should hamper the development of the digital market. The ICT industry has made large profits during the last years as it appears in their annual reports. Over the past years, these markets have developed at high speed in both regions with and without remuneration schemes for private copying. Moreover, while the current private copying remuneration system has not hampered the development of online music and video markets, there is no evidence that its limitation would necessarily increase sales of copyright protected contents.

Remuneration for private copying is not only a valuable incentive for performers' creativity but also an essential source of revenues which directly impact on their standard of living. It should be clearly kept in mind that content creators are at the basis of the whole cultural industry.

Recital 35 of the Directive 2001/29/EC foresees a fair compensation system to compensate rightholders '*adequately for the use made of their protected works or other subject-matter*.' It leaves room for determining the '*form, detailed arrangements and possible level of such fair compensation'* to fit with each particular case.
National legislations either do not distinguish between analogue and digital copying or where they do so, they usually cover both analogue and digital domains and often use neutral terms that would fit with any new technology or convergence of technologies likely to appear on the market. They already take into account the degree of use for reproduction purposes, which remains relevant in a converging world.

Legal or regulatory barriers

17. Are there any legal or regulatory barriers which hamper the development of creative online content and services, for example fiscal measures, the intellectual property regime, or other controls?
Please see comments above.

Piracy and unauthorised uploading and downloading of copyright protected works

21. To what extent does your business model suffer from piracy (physical and/or online)?
What kinds of action to curb piracy are taken in your sector/field of activity and in the country or countries you operate in? Do you consider unauthorised uploading and downloading to be equally damaging? Should a distinction be made as regards the fight against pirates between "small" and "big" ones?

While not being at the initiative of these actions, performers' organisations observe that some producers and authors' rights organisations are developing a repressive policy with regards to unauthorized exchanges made on the internet, like peer to peer practices.
The possibilities of downloading are linked to uploading practices. It is certainly not possible to consider these activities made by individuals for their own benefit as commercial exploitation made without proper authorisation.

While a solution urgently has to be found, it seems that a right to prohibit exercises vis-à-vis millions of individual users, which relies on the necessity for them to obtain prior authorization from authors, performers and producers for any type of exchanges through online networks, is not realistic.

23. Could peer-to-peer technologies be used in such a way that the owners of copyrighted material are adequately protected in your field of activity and in the country or countries you operate in? Does peer-to-peer file sharing (also of un-copyrighted material) reveal new business models? If so, please describe them?
Please see comments above.

Rating or classification

24. Is rating or classification of content an issue for your business? Do the different national practices concerning classification cause any problem for the free movement of creative services? How is classification ensured in your business (self-regulation, co-regulation)?
See comments our comments on DRM under point 3 and below.

Digital Rights Management systems (DRMs)

Digital Rights Management systems (DRMs) involve technologies that identify and describe digital content protected by intellectual property rights. While DRMs are essentially technologies which provide for the management of rights and payments, they also help to prevent unauthorised use.

25. Do you use Digital Rights Management systems (DRMs) or intend to do so? If you do not use any, why not? Do you consider DRMs an appropriate means to manage and secure the distribution of copyrighted material in the online environment?

Performers' organisations have no access to TPM that are linked to the media used and remain under the sole control of the phonographic and audiovisual industries. As already indicated, performers and their organisations are not even consulted or informed about their use on copyright protected content.
As regards DRM tools for the collective management of rights, please see answer under point 3.

26. Do you have access to robust DRM systems providing what you consider to be an appropriate level of protection? If not, what is the reason for that? What are the consequences for you of not having access to a robust DRM system?

As previously indicated (under points 3 and 11), apart from the question of performers' rights and practical means of managing them, performers' collective rights management organisations would like to have implemented, implemented on the different carriers, a system of identification of all the performers participating to the recordings.
Such system does not exist at present.

27. In the sector and in the country or countries you operate in, are DRMs widely used? Are these systems sufficiently transparent to creators and consumers? Are the systems used user-friendly?
Please see our comments under points 3 and following.

28. Do you use copy protection measures? To what extent is such copy protection accepted by others in the sector and in the country or countries you operate in?

Performers' organisations do no use TMP. They have no interest in such systems, as previously explained in more details. They do not consider that, for instance, anti-copy devices are a valuable and reliable way to manage intellectual property rights.

29. Are there any other issues concerning DRMs you would like to raise, such as governance, trust models and compliance, interoperability?

Please see answer to point 4: implementation of DRM or TPM systems could be subject to the control or the prior consultation of an independent legal body in which the industry, the rightholders and the consumers would be represented, in order to regulate at the European level those questions related to security and privacy.

Complementing commercial offers with non-commercial services

30. In which way can non-commercial services, such as opening archives online (public/private partnerships) complement commercial offers to consumers in the sector you operate in?

Archives can include highly valuable recordings and work.
With regard to performers, one must note however that, most of the time, archives are originating from broadcasting organisations that did not pay any remuneration to performers for the use of the recordings. In a number of cases, the recording itself has been made without the authorisation of performers. Consequently, it is essential that, for any service using archives, proper agreements be concluded with performers collecting societies.

Moreover, it is important to avoid unfair competition between the exploitation of archives and new productions. Distribution, making available, communication to the public, rental or reproduction of a theatre show or an opera commercialised from archives' fund without the necessity of paying rehearsal, recording studio or employment fee should not compete with similar use of a production that entail all these expenses, which will in the end generate employment.

What role for public authorities?

32. What could be the role of national governments / regional entities to foster new business models in the online environment (broadband deployment, inclusion, etc.)?

Government and national legislators have a responsibility to protect creators and their culture. The balance should also be a priority in an economic context of market concentration among rightholders as well as between rightholders and the music, audiovisual and ICT industries. Attention should be paid to the often particularly weak bargaining position of performers.

33. What actions (policy, support measures, research projects) could be taken at EU level to address the specific issues you raised? Do you have concrete proposals in this respect?

A revision of the *acquis communautaire* is necessary for performers, notably in order to compensate for existing lacks of appropriate protection and to ensure guarantees when exclusive rights are not applicable.

Information concerning the rights that are managed, notably to identify the performers participating to each recording and enable collecting societies to properly manage their rights, should also be freely accessible.

At present, the gap between the public (audience of performers) and intellectual property is getting deeper because of contrasting situations between practical access to content (sound and audiovisual recordings), and the complexity or impossibility to have a legal access for this use. The European Union should consider the issue of exploitations of content online as a whole, with the aim to strike a balance between rightholders and a set realistic basis for access to the content for Europeans. New models of rights and their management should be considered, that would adapt with today and tomorrow technologies.

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