

COMMENTS ON SECTIONS III.1 AND IV.A) OF THE REPORT ON OPPORTUNITIES
AND BARRIERS TO ONLINE DISTRIBUTION OF MUSIC
PREPARED BY THE STAKEHOLDERS OF THE ONLINE COMMERCE ROUNDTABLE
FOR THE EUROPEAN COMMISSION.

AEPO-ARTIS SUBMISSION

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Preliminary remarks

General comments

AEPO-ARTIS represents 29 European performers' collective management societies from 22 countries in Europe. With different sizes and ages, they totalize some 350.000 performers as members, in all cultural fields: musicians, singers, dancers, actors...

In a significant number of countries some 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 AEPO-ARTIS member organisations are administering the rights of can be estimated between 400.000 and 500.000.

AEPO-ARTIS welcomes the opportunity to comment in the framework of the European Commission's work and reflections on issues related to online commerce and in particular online distribution of music.

AEPO-ARTIS was not part in the Online Commerce Roundtable and related meetings about business opportunities created by the Internet and existing barriers to increased online retailing in Europe.

AEPO-ARTIS notes that according to the report, on the part of rights-holders only producers and authors were represented, whilst no representative of performers could report on their situation and voice their views. The absence of representation of this category of right-holders is regrettable.

Any decision in the field of online commerce of creative content would impact on performers and on those organisations that manage their rights. Therefore, their views should be duly taken into account in any such process.

Remark of a technical nature

For the avoidance of any confusion, may we stress that references in the report to "performing rights" or "public performance rights" should not be mixed up with performers' rights.

Whilst the former refer to the act of communication to the public of protected works and generally relate to paragraphs of the report dealing with authors' rights to a musical work used for the sound recording and further exploitation, the latter concerns the rights of the performers (singers, musicians...) which constitute a specific category of right-holders.

Those aspects pertaining to performers' rights do not seem to have been addressed in the framework of the roundtable discussions.

I. Mapping out the online market

Opportunities as well as barriers concern not only content providers and other commercial users, investors and consumers but also creative people holding rights on their music or film.

The music online retailing market offers opportunities for a wide marketplace (potentially worldwide), with a wide range of services: simulcasting, webcasting, streaming, downloading... that are also new ways of broadcasting and communicating content to the public, renting it, reproducing it, distributing it, making it available from a place and at a time individually chosen by the consumer, depending on the situations.

The marketing options available to access these services also vary from free services, generally ad-based, to subscription-based services or pay-per-track services.

With regard to the distribution of the revenues from these services, the sharing of said revenues may vary as well depending on the types of actors involved (web services and ISPs, banks, right-holders...).

⇒ *It would be useful if the European Commission would map out the main aspects of this varied online music and film business models, study the rights involved in the various online services, analyse their practical implementation including not only the possible legal or technical barriers but also importantly the sharing of the revenues and make proposals for improving the situation of performers where needed.*

This should cover all aspects of online use (legal and illegal, commercial and non commercial...) and cover all cultural fields, thus extending also to the audiovisual sector.

II. Barriers and opportunities in terms of online music licensing: the specificities of performers' rights and related licensing schemes

Performers' rights present a number of specificities, which need to be taken into account when envisaging their licensing systems. Rights management practices therefore have to be adapted to the various types of rights-holders concerned.

The practices applied to publishers' rights, for instance, are totally different from those concerning the collective management of performers' rights. For the former category, a limited number of strong international economic operators have an individual negotiation power and even the possibility of exercising an important part of their rights individually, whereas the latter category concerns hundreds of thousands of individuals with no real negotiating power, who principally rely on collective management to obtain remuneration for the use made of their protected contributions.

In contrast with authors' rights as well, the number of performers involved in the use of one and the same performance is generally higher, often by far, to that of authors in respect to the use of their work.

These differences make it hardly possible for a single and same set of principles to apply in an undifferentiated manner to the collective management of the various types of rights.

- **Performers' rights specificities**

A first specificity consists in the important number of performers concerned by the use of one and the same performance fixation.

The number of performers concerned by the licensing of one single performance (online or offline) can be very high. A typical example of this situation is the use of a fixation of a concert performed by a symphony orchestra. This is not to mention the fact that the identity of performers vary for each movement played.

A second specificity relates to the exercise of performers' exclusive rights.

Most online music services involve the exercise of exclusive rights of reproduction, making available on demand, rental or communication to the public. These performers' exclusive rights are generally subject to full transfer by the performers to producers or commercial users and, in most cases, do not give rise to collective management.

Generally they do not give rise either to any additional remuneration for the performers for the online use of their performance (in certain countries some remuneration accrues to the concerned performers in application of collective agreements for specific and limited types of use).

Given the fact that most performers have no choice but to transfer their exclusive rights to their recordings' user or producer, most often performers can neither efficiently mandate a collecting society nor take charge personally of their exclusive rights.

This is the case in particular for the exclusive right of making content available on demand.

In this respect, performers' collecting societies are so far involved to a very limited extent in this process of cross-border management of online rights in the musical field.

For all the reasons described above, to date, the majority of collecting societies for performers in EU Member States have not received any demand for EU-wide licences from any user.

Nevertheless, in a number of European countries collecting societies administer performers' rights for certain specific types of use, none of which are on-demand, on the basis of some limited remuneration rights or on compulsory collective management. This concerns mainly online streaming and simulcasting.

The collective management across borders of remuneration for online use in application to performers' rights is made via bilateral agreements between the collective rights management organisations, as is the case in the offline environment.

- **Strong cooperation among collecting societies via extended networks of mutual representation agreements must be encouraged and developed.**

Given the above described aspects of performers' rights, the main pitfall to be avoided is direct competition between collecting societies in a context where their reciprocal agreements would no longer exist. The positive effects expected from this kind of system on management fees and tariffs risk in fact being rather negative for all parties involved.

A scheme of direct competition between rights management organisations with no more bilateral agreements would likely result in a dual system with, on the one hand, a concentration of the rights management of the most famous and most lucrative performers by a limited number of collective rights management organisations, in an oligopolistic situation, and on the other hand a bunch of smaller organisations managing the rights of less famous performers at local level.

- This would entail increased difficulties for collecting societies in the first category to collect remuneration given the wide size of the territory covered.

- A system of this type would hamper right-holders from being treated on an equal footing: some collecting societies would take charge of the rights management for the main performers, whose recordings are subject to widespread use, whose identity is well known and generally easily identified.

On the other hand, the main category of performers who are not the most famous ones would stay in the societies of their place of residence. Thus the rights of all less famous performers, including those participating in the same recordings as most famous performers, would be administered by smaller, weaker collecting societies. Less famous performers are at the same time the ones whose rights are the most difficult to administer, and those for whom the additional source of income coming from exercise of their rights subject to collective management matters the most.

Also, since the management of this latter category of right-holders' rights is more complicated hence costlier than for the former category, the small collecting societies would face serious difficulties.

- The difficulties would also extend to the users. Users like online service providers or broadcasters would be in an extremely unsatisfactory situation. Instead of negotiating with one society capable of representing the other societies, they would potentially have to negotiate with all of them: they would have to conclude licences with every society representing any of the performers having participated in a given repertoire, that means potentially hundreds of performers and a huge number of licences.

- This uneven playing field would also raise concerns as regards the quality of the services offered and would ultimately penalize the consumers. It risks hampering the preservation and development of diversity in the cultural offerings, which has always been the main advantage of the European cultural sector on the worldwide market.

This would be detrimental to the management of performers' rights in general. It would affect cultural diversity and the representation of local and national repertoires.

In order for cross-border licensing of online music rights to develop and expand in the mid-term, it is essential to avoid dismantling and disorganizing the functioning of collecting societies and licensing.

A system whereby one user signs a licence with one collecting society for the European territory via an effective network of reciprocal representation agreements with other societies would therefore remain the best system for multi-territorial use.

At the same time, guarantees for efficiency and transparency must be given to rightholders and to users.

Moreover, exercising rights means identifying recordings and performers. Access to this necessary information – identification of the users, of the tracks used, of the performers involved in each recording, their localisation and membership – is essential to the proper administration of rights and should be encouraged at European level.

III. Barriers and opportunities in terms of guaranteeing sustainable creative input and new musical content of quality: the need for a fair recognition and exercise of performers' rights online

Beyond barriers and opportunities that users, consumers and the various categories of right-holders may be facing as regards the technical aspects of online licensing, the main failing of the existing system consists in the lack of care for those who are at the very centre of all musical online exploited content, i.e. the performing artists. In the mid-term this shortcoming will result in drying-up creative content and endangering the development of a competitive European online music market on the worldwide scene.

Paradoxically, in the current disastrous situation, where little recognition and little care is paid to performers' rights in the online environment, the main barrier for performers and the collective management organisations representing them consists of not having the possibility to exercise their rights and derive revenues from the online use of their performances.

Today, most performers' rights for online use are contractually transferred or assigned from the first day against a single one-off payment. They do not give rise to any subsequent payment to the performers for the online commercial use of their performances.

As to the types of online use that entitle performers to additional remuneration, namely those that are subject to collective management – they are sometimes hampered by a lack of compliance.

In this second case, the societies are in a similar situation as that described by SACEM in (33) concerning authors' rights: some users do not declare their use of music and pay the amount due, either through a lack of knowledge about intellectual property rights or in an attempt to free-ride. Some users have been reluctant to agree on reasonable licensing conditions, or even to recognise the right for performers to be remunerated for certain uses made of the recordings in which they have participated.

In the online environment, the users can operate from a remote place, which makes enforcement particularly complicated.

Also, the specificities of on demand online use – with a decentralised, multiple-point system where a multiplicity of users operate at different times, from different places, during long or short periods of time, are real challenges for the traditional management of rights.

⇒ *Flexible business models need to be envisaged as a means to adapt to these types of use, to combat and dissuade against infringing acts, and finally to ensure remuneration to the performers whose music (and film) recordings are used.*

- **Regarding the legal business, most performers are not remunerated at all.**

- When it comes to on demand use, the making available exclusive right has so far proved completely ineffective for performers.

The right corresponding in European law to uses on demand is the performer's exclusive right of making available to the public. This right was introduced in European law by Directive 2001/29/EC with the aim of adapting the law to the online world.

Performers deserve to be remunerated for the online use of their music (or films) offered by Internet or mobile operators. To date, this is far from being the case.

The reason for that is that most performers transfer this exclusive making available right with all their exclusive rights when they sign their recording or employment contract. European legislation has failed to take into account this common practice: unlike the provisions adopted for the broadcasting and communication to the public of phonograms, for instance, those provisions of the *acquis* for the online making available of recorded performances via on-demand services do not give performers any right to remuneration. As a result, in practice this making available right simply cannot be administered via cross-border collective management and results in no benefit for most performers.

This anachronistic and unfair situation urgently needs to be resolved at European level.

⇒ *A commendable solution would consist of introducing in European law an unwaivable right to remuneration for performers, even after the transfer of their exclusive right of making available on demand, to be collected from the users and managed by performers' collecting societies.*

At the same time, European legislation should encourage – as has been done already in some directives dealing with performers' rights – more balanced contractual relationships between performers and other contracting parties concerning the use of performances and the possible transfer of performers' rights. Performers do need safeguards in this respect.

- Performers should also be guaranteed remuneration for the streaming and simulcasting of their musical performance fixations.

⇒ *As is done with the equitable remuneration for broadcasting and communication to the public in the offline world, this remuneration should be subject to collective management so as to ensure its effectiveness and cost-efficiency.*

- **With regard to illegal use, which constitutes an significant part of online music distribution, performers obviously suffer from the disrespect for their rights both in terms of the infringement of these rights and in terms of a lack of remuneration.**

Large scale commercial piracy needs to be addressed and effective measures to get away from this should be proposed.

Respect for law and bringing an end to other types of illegal use should also be ensured by adequate regulatory measures.

This said, a number of enforcement measures have proved to be ineffective in stopping infringing use of protected works and other subject matters. This is notably the case for some practices developed by individuals for non-commercial use.

⇒ *For such uses, alternative solutions generating remuneration or compensation to all categories of right-holders should be envisaged.*

For a European digital agenda to be effective and forward-looking, proposals should both address market management practices and nourish this market by putting performers, those very people who give life to creative content and ensure its continuing renewal, at the centre of their policy.

This would finally ensure European performers receive well-deserved recognition, it would offer consumers a rich, lively and constantly renewed music repertoire and would contribute to the growth of the market.