# PUBLIC HEARING ON AUDIOVISUAL PRODUCTIONS

*Brussels, December 13th, 2010*
*European Commission Charlemagne Building, 170 rue de la Loi*

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**AEPO-ARTIS**

AEPO-ARTIS wishes to express its gratitude to the Commission for the invitation to participate in this hearing.

AEPO-ARTIS represents 28 collective management organisations in charge of the administration of performers' rights in 21 European countries.

Combined, these societies have in excess of three hundred and fifty thousand performing artists (such as musicians, singers, actors, dancers) as members; and manage the rights of some four hundred thousand performers in Europe.

## 1. THE WEAKNESS OF THE ACQUIS

The situation regarding the protection of audiovisual performances in Europe still is characterized by the weakness of performers' rights in the audiovisual sector.

The Directive 2006/115 (codification of Directive 1992/100) does not protect performers with regard to the **broadcasting and communication to the public of audiovisual fixations**: Article 8 **only protects live performances** in its paragraph 1, while paragraph 2 only deals with the equitable remuneration right with regard to commercial phonograms (sound recordings).

Despite the fact that a number of Member States' national legislations nevertheless granted performers with rights for such use of audiovisual performances, we can only regret this difference of treatment as Directives are often seen, notably by non-EU members, as models, and not as what they are supposed to be: **a minimum level of protection**.

In practice, the disparity in the protection granted to audiovisual performances in different Member States leaves a number of performers unpaid when audiovisual fixations are commercially used.

This weakness of the acquis, which may be due to the strong influence of the audiovisual industry, has also been clearly apparent in the debate on the proposal for a Directive to extend performers' **term of protection**.

While no difference was made in the Directive 2006/116 (codification of Directive 1993/98) on the term of protection between the fixations (audiovisual or sound recordings) in which the performances were incorporated, the draft Directive proposed by the Commission in 2008, and its version adopted by the Parliament in April 2009, deals only with phonograms, and not with audiovisual fixations.

Performers are supportive of this draft, and still hope that, even if it is not a perfect text, the Council will finally adopt this useful proposal, hopefully in 2011. But here again, performers in the audiovisual sector will still be waiting for their situation to be improved and their work, their fixations, to be also subject to an extended duration of protection.

## 2. THE NEED FOR PROTECTION FOR ON DEMAND USES

Regarding the non-linear exploitation of contents, the on-demand uses, at present performers benefit in principle from a right granted by directive 2001/29, namely the exclusive **right for the making available on demand** of their fixed performances.

This Directive does not make any distinction between audio and audiovisual fixations, which, at the end of 2010, are subject to the same types of exploitations, being legal or illegal: on demand streaming, downloading, with direct payment or financed by advertisement, through computers, mobiles phones, tablets.... Increasing speed of connection, new types of services, the diversity of equipments suppress any possible distinction between the uses of sound recordings and audiovisual recordings.

The situation of performers, with regard to the implementation of the exclusive

rights granted by Directive 2001/29, is particularly demonstrative.

While the right for on demand use means real protection for other categories of right holders, notably the producers, it has proved ineffective for the majority of performers. For reasons of work conditions and contractual practices, the protection that European law intended to give to performers with the making available right for all uses on demand is contradicted by the impossibility of their enjoying it in practice.

At the time of signing their contract, most performers simply receive a single all-inclusive fee for giving away all their exclusive rights – including the so-called "making available right" corresponding to the on demand uses – once and for all. This buy-out contract applies for the recording and for all possible exploitations of the recording, including online or via mobile phone, throughout the duration of protection.

In the audiovisual sector, performers' rights are even weaker, since the transfer of the making available right to the producer is encouraged by a possible presumption of transfer in the event of concluding a film contract.

In addition, because of this systematic transfer of the making available exclusive right, this right cannot be exercised properly through collective management. In Europe, the vast majority of performers' rights collective management organisations have so far been unable to make any collection for performers for the on demand commercial use of their music or films.

AEPO-ARTIS believes that to ensure decent remuneration conditions for all performers, a specific measure urgently needs to be introduced for on demand services that would enable performers, even after the transfer of their exclusive right for the making available of performances on demand, **to enjoy an unwaivable right to equitable remuneration. This remuneration should be collected from the users and managed by performers' collecting societies**.

Similar systems already exist in European law for other types of rights (e.g. the rental right). In addition, a system such as we propose was introduced in Spain in 2006, where pacific negotiations with commercial users are currently taking place, and even some amounts have already been collected and distributed by our Spanish member society: AISGE.

Should the proposed solution be adopted, all performers involved in a song or film made available on demand ought to finally receive, through their collective management organization, a share of the selling or renting price for a film download onto personal computers or other multimedia device.

In the same way, performers in music or audiovisual recordings ought to receive a share of the subscription fee in the case of subscription-based services like those proposed by telecom operators or online services.

At a time when more and more commercial services for downloading are being developed, the obvious gap between the protection that *European law* intended to give to performers and the impossibility of their actually enjoying it urgently needs to be resolved.

We then respectfully ask the Commission to consider this reasonable and pragmatic claim performers have been expressing for the last 4 years. It needs to be addressed seriously in the discussions and then feature in concrete proposals to shape a sustainable creative sector for Europe.

## 3. THE QUESTION OF ILLEGAL USES

As to the question of illegal uses, AEPO-ARTIS is of course in favour of encouraging the use of legal services on the Internet. As already mentioned, performers will be all the more supportive if these "legal offers" start remunerating performers.

We also consider that setting up such a framework for fairer business models would be an important signal to send to the public (the performers' audience) that their payment for legal offers is also going to performers. A number of criticisms against the existing commercial offers that money would only go to the big industries are today partly true.

Repressive actions against illegal uses should target the commercial actors of these reprehensible uses, and not the general public.

AEPO-ARTIS encourages a common reflection, between all the stakeholders concerned, on a way to obtain some compensation from the existing massive

illegal uses on the Internet, benefiting mainly, if not to "professional pirates", to Internet services providers selling high-speed connection subscriptions.

The simplistic twofold strategy of encouragement of the development of legal offers and fight against piracy, which has been so far the priority in this sector, cannot solve all the challenges of these new practices on the Internet.

## 4. THE COLLECTIVE MANAGEMENT

In the area of collective management of rights, AEPO-ARTIS is confident that, once exercisable rights are given to performers for all types of online uses, performers' collective management societies will be able to offer users a simple and efficient service, in line with European principles.

At a time where the question of accountability and transparency of collective management is once again at the centre of the European debates, with a draft framework Directive expected soon, AEPO-ARTIS would like to remind that these principles should not only apply to right holders, but also to the different stakeholders.

Collective management will only be efficient if collective management organizations have an easy access to data, notably with regard to the **identification** of recordings and of performers.

AEPO-ARTIS therefore requests to set a legal obligation for commercial users and producers to make accessible to collective management organisations, free of charge, complete and accurate information as is necessary to enable the collective management organisations to identify all performers having participated in a given performance.

In sum, AEPO-ARTIS is strongly encouraging again the European Commission to grant performers a guarantee of remuneration for commercial on demand uses.

This permanent claim of our organisation is more and more justified and can no longer be postponed in a market which is now establishing its rules and its logic

with the support of the European and EU members' policies, but without consideration for the situation of performers.

The information society cannot be built without minimum of consideration for the very people who are contributing to creating European Culture and whose creative work is exploited.