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SUBMISSION TO THE CONSULTATION ON CREATIVE CONTENT ONLINE POLICY / REGULATORY ISSUES

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AEPO-ARTIS appreciates the opportunity to comment on the Communication from the European Commission on Creative Content Online in the Single Market.

AEPO-ARTIS represents 27 organisations managing the rights of some 400.000 performers in Europe and therefore considers it particularly important that it participates in the Creative Content Online platforms discussions or other fora of relevance with intellectual property rights in all cultural fields and their management in Europe.

AEPO-ARTIS would refer to its 2007 study "Performers' Rights in European Legislation: Situation and Elements for Improvement" available on its website: http://www.aepo-artis.org/pages/149_1.html.

1) Do you agree that fostering the adoption of interoperable DRM systems should support the development of online creative content services in the Internal Market? What are the main obstacles to fully interoperable DRM systems? Which commendable practices do you identify as regards DRM interoperability?
2) Do you agree that consumer information with regard to interoperability and personal data protection features of DRM systems should be improved? What could be, in your opinion, the most appropriate means and procedures to improve consumers' information in respect of DRM systems? Which commendable practices would you identify as regards labelling of digital products and services?

It is urgently needed that all categories of right-holders be ensured the possibility to decide whether or not their content should be technically protected.
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 and providing no certainty that they are workable and will resist any attempt of circumvention are of no interest for performers.

Well designed DRM that would provide detailed information on the recordings used and related right-holders, could become useful tools assisting collective rights management societies to efficiently administer certain categories of performers' rights.

Beyond technical questions relating to interoperability and standards, in order for DRM to have any positive impact on the development of online creative content services in the Internal Market, complete information about right-holders in charge of administering their rights should be made available to collective rights management societies. DRM encrypted information on right-holders and recordings could help in this, while at the same time saving time and costs.
A European observatory body could ensure that the use of DRM, including TPM if any, is transparent and respectful of IP rights as well as privacy rules at European level. This body could also monitor issues of

interoperability and information to right-holders and consumers. This could take the form of an independent legal body in which the industry, the right-holders and the consumers would be represented.

6) Do you agree that the issue of multi-territory rights licensing must be addressed by means of a Recommendation of the European Parliament and the Council?

AEPO-ARTIS believes that adopting binding rules would be premature in this fast evolving market, but fully supports the European Commission's moves to favour exchange of views and voluntary initiatives.
Moreover, rights management practices are different for each category of right-holder, which 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.

7) What is in your view the most efficient way of fostering multi-territory rights licensing in the area of audiovisual works? Do you agree that a model of online licences based on the distinction between a primary and a secondary multi-territory market can facilitate EU-wide or multi-territory licensing for the creative content you deal with?

1/ A pre-condition for multi-territory markets to develop is the improvement of the situation of performers' rights in the online sector

Please see our study of June 2007, of which most pertaining elements are recalled below:

1.1 / The right of making available introduced in European legislation to adapt for certain types of online use has so far remained pure fiction for most performers.
Also, as regards revenues from the online sales of recordings in general, the main performers are far from being fairly remunerated and the other performers (non featured artists, session musicians etc.) receive no revenue at all. The reason for such poor results lies in the fact that because of unbalanced contractual bargaining relationships, most performers have no choice but to transfer their exclusive making available right when they sign their individual recording or employment contract.

Therefore, AEPO-ARTIS urgently calls for the introduction of a system that would enable performers, even after the transfer of their exclusive making available on demand right, to enjoy an unwaivable right to equitable remuneration to be collected from the users and managed by performers' collecting societies.

1.2/ Remuneration for performers for rental and private copying practices in the online sector needs appropriate implementation
As regards the rental of performances via Internet and other new technologies, performers' collecting societies encounter huge difficulties in collecting remuneration for their right-holders.
Private copying remuneration represents 38% of total collection for 2005 in average in the 10 countries covered by AEPO-ARTIS study. It is not only a valuable incentive for performers' creativity but also an essential source of revenues which directly impacts on their standard of living and needs to be preserved.

1.3/ The situation of performers' rights in the audiovisual sector is particularly weak and worrying.
According to European law, the broadcasting and non interactive communication to the public of audiovisual fixations is simply not protected. Moreover, European law encourages the presumption of transfer of performers' exclusive rights to co-contractors in national legislations and does not either seek to counterbalance this situation with efficient guarantees of remuneration.

1.4/ The demand for multi-territorial licensing of performers' rights for online use remains rare.
Performers need adequate protection corresponding to all the above mentioned practices.
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, not even web radios.
In addition, certain repertoires remain local and therefore raise demands from local users only.

2/ Good governance principles should be applied in licensing and management practices in the field of online rights for creative content as in the offline sector.
In particular, in order for the collective rights management societies to be able to identify right-holders 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.

3/ Multi-territory licensing of online rights
Neither a system based exclusively on direct multi-territorial licensing nor a two-tier system distinguishing between a primary market for direct pan-European licensing and a secondary multi-territory market based on bilateral agreements between collective rights management societies would in any way improve the management and 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 to impoverish the cultural offer to the detriment of local and regional repertoires and ultimately hamper the development and growth of the cultural industries.

Recent announcements of pan-EU digital licensing in the music field seem in fact rather consist of agreements enabling a few number of actors (mainly the major publishers) to license Anglo-American repertoire in Europe. So far, they do not seem to have had the expected beneficial effects on the online licensing market.

As regards performers in particular, a system of direct competition between collecting societies in a context where reciprocal agreements would no more exist or be relegated to a secondary level of networks is to avoid.
This would increase legal uncertainty. Instead of negotiating with one society capable of representing the other societies, users would potentially have to negotiate and contract licences with every society representing any of the performers having participated in a given audiovisual, film or music repertoire, that means potentially hundreds of performers and a huge number of licences.
The effects on management fees and tariffs risk being negative for all parties involved. Also, in the mid-term the smaller collecting societies would have to face serious financial difficulties.
This would impact negatively on both the quality of services rendered by collecting societies and the effective protection of right-holders, who would not be treated on an equal footing.

For all these reasons, any steps forward to obtain a fully implemented Internal Market should keep on relying on mutual agreements between collecting societies. Nevertheless, this can only be workable and efficient if and when appropriate protection and harmonisation of performers' rights is met at European scale, and minimum safeguards relating to applicable tariffs, distribution keys, clear rules as for laws and territories of reference, transparency, dispute settlement and enforcement procedures are implemented.

8) Do you agree that business models based on the idea of selling less of more, as illustrated by the so-called "Long tail" theory, benefit from multi-territory rights licences for back-catalogue works (for instance works more than two years old)?

Creative sectors are characterized by the fact that the works and recordings are prototypes hence the duration, regularity and extent of their online exploitation are very difficult, if not impossible to foresee.
An appropriate measure would consist of extending the duration of protection of performers' rights in order to make sure that performers are not deprived of the benefit of their work while they are still alive.

9) How can increased, effective stakeholder cooperation improve respect of copyright in the online environment?

1/ Respect of performers' rights in the online environment should start by improving the current situation that sees most performers excluded from the schemes of remuneration for online use
The public is massively exchanging and downloading recordings on the Internet via peer-to-peer exchanges or the like without any authorisation from right-holders. The resulting impressive number of legal proceedings carried out all over Europe has failed to put an end to these practices. On the other side

up until now, the right-holders cannot deliver in any way proper authorisations for these billions of uses, nor collect any remuneration.
Those marketing and distribution schemes that are emerging, whilst likely to generate significant profit, do not benefit to performers who, here again, are not remunerated or taken into account in any manner.

Legal solutions urgently need be found, at European Level, to guarantee that performers are duly remunerated for the various types of use of their recordings online. Such solutions can only rely on collective management of performers' rights, by guaranteeing that, in case where exclusive rights (making available, rental…) are waived by performers, they retain a right to remuneration that would not be transferable, to be directly collected from the users and managed by collective management organisations for performers.

Moreover, Internet service providers should be involved in remuneration systems for right-holders in the works and recordings used online. Given the fact that they gain profit from the content offered in services they license to consumers, they should be responsible for the payment of part of this remuneration.

2/ Respect of performers' rights in the context of digitization projects
One element to guarantee the success of the European Digital Libraries initiative is that intellectual property rights attached to the documents to be used are taken into account and subject to agreements with right-holders' representatives. Also, those production or recording organisations that have relevant information on the right-holders should systematically incorporate it on the sleeve or the credit of the recordings.

10) Do you consider the Memorandum of Understanding, recently adopted in France, as an example to follow?

The methodology used in France can hardly be considered as a model.
The preliminary study carried out in preparation of this memorandum (the "Olivennes Report") has not taken into account the proposals communicated by the two French performers' collecting societies on the question of rights granted to performers in the Internet environment and expressions of the need for further consideration in order to find new business models for non commercial exchanges on the Internet (including peer-to-peer practices). Then, contrary to other organisations, performers' collecting societies were not associated to the drafting of this memorandum, nor consulted.
As this memorandum only refers to two main strategies considered as inefficient by these organisations – preventing non commercial exchanges by Internet users treated as "piracy" and finding new methods to punish such exchanges, notably through cooperation with Internet service providers that will generate problems with regard to the respect for privacy -, the French performers' collecting societies did not sign it.

While the substance of this memorandum and the working method adopted is certainly not an example or a model to follow, AEPO-ARTIS encourages in general the search for solutions driven by fully democratic consultations, cooperation and dialogue between all categories of stakeholders.

11) Do you consider that applying filtering measures would be an effective way to prevent online copyright infringements?

AEPO-ARTIS would refer to the judgement of 29.01.2008 by the European Court of Justice[1] according to which EU law does not force the disclosure of Internet users' details in file-sharing cases but let it up to each country to decide how to balance intellectual property protection measures and the protection of Internet users's privacy.

In respect of privacy rules, AEPO-ARTIS favours well running legal systems offering varied, rich audiovisual and music repertoires accessible to as many European citizens as possible while at the same time securing appropriate remuneration for all categories of right-holders.

[1] Case C-275/06 Promusicae vs Telefonica de Espana published in OJ C 212 of 02.09.2006, p.19