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

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Preliminary remarks

AEPO-ARTIS appreciates the opportunity to comment on the Communication from the European Commission on Creative Content Online in the Single Market. It welcomes all initiatives promoting dialogue, exchange of views and of expertise and is willing to take an active part in them.

AEPO-ARTIS represents 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" and invite the Commission to take into consideration the proposals of legal and technical nature presented in it.
This study is available on its website: http://www.aepo-artis.org/pages/149_1.html.

Specific information about performers' rights, their collective management and licensing practices can also be found in previous position papers and answers to EC consultations.

As a general, preliminary remark, AEPO-ARTIS would like to stress the fundamental role of creativity in the flourishing of cultural industry and creative content online in particular: music, cinema, audiovisual works and performances stem from the work and talent of a European creative community that is at the heart of the creative content economy. Questions about access to knowledge and culture, licensing of rights, interoperability and transparency of DRMs and piracy would simply be of no relevance if disconnected from European culture and the creative people at its origin. They are an indispensable driving force for European creative wealth and cultural economy in need for greater recognition and adequate support in European policy.

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?

1/ One should differentiate between TPM (technical protection measures aimed at preventing or limiting the reproduction and use of creative content) and DRM (digital rights management systems at large).

1.1/ So far, performers are never asked, nor even informed, when TPM are put on their recordings. It is therefore urgently needed that all categories of right-holders be ensured the possibility to decide whether or not their content should be technically protected.

Beyond consumer information about the use of DRM or TPM systems on film or music recordings, which is legitimate and commendable, the information about the holders of rights in these films and music should be guaranteed, which is not the case today.

The use of TPM potentially raises concerns in terms of transparence and access to creative content. It is to fear that misuse of TPM, while being prejudicial to privacy and individual freedom of the citizens, may lead to rampant legal actions against individuals and hamper the access to and circulation of cultural content.
In addition, whilst TPM technologies have been developed at high costs before being finally abandoned by a number of record companies, notably for lack of acceptance of such systems by the consumers, it remains not transparent why is the music track's price for download proposed by some online services higher for TPM-free content – without any costs linked to the implementation of TPM –than for TPM-encrypted content.

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 in accordance with contractual deals),
-and providing no certainty that they are workable and will resist any attempt of circumvention,
are of no interest for performers.

1.2/ As regards DRM, 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. 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. In so far as they meet the conditions for artistic and creative content to circulate, to be spread out of national borders and in fine to flourish at international level while enhancing the full implementation and facilitating the management of IP rights, performers would favour these systems.

2/ Beyond technical questions relating to interoperability and standards, the following conditions of use would need to be put in place in order for DRM to have any positive impact on the development of online creative content services in the Internal Market:

2.1/ A crucial point is the availability of proper, complete information about right-holders for collective rights management societies in charge of administering their rights. DRM encrypted information on right-holders and recordings should help to improve and facilitate this exchange of information, while at the same time saving time and costs (see also remarks below about good governance and management practices).

2.2/ It is difficult to deal with information enshrined in DRM without mentioning adequate legal protection of performers' rights in the online sector that would grant them proper remuneration for the online use made of their performances.

Today, the online market is characterized by 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 peer-to-peer networks that can hardly be eliminated, where content is massively and freely available. Neither of these situations is acceptable, since they result in legal uncertainty combined with a lack of appropriate legal rules consistent with actual consumers' practices and the protection of right-holders. Actually, none of these systems guaranty the proper remuneration of all categories of right holders of the creative content used.
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.
For these reasons, 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. Further details on commendable management solutions are given below.

2.3/ 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.

3) Do you agree that reducing the complexity and enhancing the legibility of end-user licence agreements (EULAs) would support the development of online creative content services in the Internal Market? Which recommendable practices do you identify as regards EULAs? Do you identify any particular issue related to EULAs that needs to be addressed?
No comment

4) Do you agree that alternative dispute resolution mechanisms in relation to the application and administration of DRM systems would enhance consumers' confidence in new products and services? Which commendable practices do you identify in that respect?

The number of disputes would certainly be reduced should such an observatory as described under question 2 be set up.

5) Do you agree that ensuring a non-discriminatory access (for instance for SMEs) to DRM solutions is needed to preserve and foster competition on the market for digital content distribution?
No comment

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?

In the field of collective management of performers' rights for online use, which has developed only recently in many European countries and is characterized by a fast evolving market, AEPO-ARTIS believes that adopting binding rules would be premature.
Moreover, rights management practices are different for each category of right-holder. 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.
AEPO-ARTIS fully supports the European Commission's moves to favour exchange of views, voluntary initiatives and the building up of expertise. This gives a crucial opportunity for all stakeholders to open discussions and test solutions in an area of rapid changes.

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

Licensing practices across borders stem from the rights to be licensed. For that reason, before addressing the issue of multi-territory or EU-wide licensing of performers' rights, notably in the audiovisual field, for online use, the level of the current *acquis communautaire* as regards performers' rights needs to be evaluated: the collective management of rights depends primarily on these rights being adequately protected by law.

Some important elements about the situation of performers' rights in the online sector have been described and analysed in details in a study that AEPO-ARTIS released in June 2007 and submitted to the European Commission. The study covers 10 European countries[1]. It describes the functioning of collective rights management for performers, including for online use in both music and audiovisual fields. It provides data and figures, evaluates the impact of Community law on these aspects of performers' rights subject to collective management and proposes a number of suggestions for improvement. This study is available on AEPO-ARTIS website: http://www.aepo-artis.org/pages/149_1.html.

AEPO-ARTIS would recall below the main aspects pertaining to multi-territory licensing of online rights, in particular in the audiovisual sector.

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.
Whilst the *acquis communautaire* has had positive effects on the protection of performers' rights and their management in many Member States, the existing legal environment in the EU for creative content online remains inadequate to protect performers and give them proper remuneration for new types of use.

In application of the *acquis communautaire* performers enjoy in principle "exclusive rights", also called rights to authorize and to prohibit the exploitation made of performances : rights of fixation, reproduction, distribution, rental and the "new" right of making available on demand introduced by Directive 2001/29/EC which is central is in online environment.

The right for making on-demand services available to the public has so far proved ineffective for performers. One figure sums it up: out of the 10 countries surveyed, only one collective management society succeeded in collecting an overall amount of € 32 for all performers in 2005! At a time when more and more commercial services for downloading are being developed, this sum highlights the obvious gap between the protection that the *acquis* intended to give to performers and the impossibility of their actually enjoying it.

As regards revenues from the online sales of recordings, a 2006 study[2] has showed that on the French market, performers are far from being fairly remunerated: in average, of a € 0.99 music track to download, the main performer of the recording receives € 0.03 to 0.04 and session musicians or chorists receive no revenue at all. The main performer receives in average 4% of the retail price of the same track in case of use as a mobile ringtone and here again, accompanying artists are not paid at all.

By contrast, the figures from the Screendigest study quoted (p9) in the European Commission Staff Working Document accompanying the Communication subject to the present consultation indicate that digital distribution and exploitation in Europe of creative content has generated, for the same year of 2005:
-in the music field (online and mobile): € 196.3m. Revenues are expected to grow up to € 1.1bn and represent as much as 20.4% of total revenues in 2010, of which € 120m from *à la carte* sales and subscription 'all-you-can-eat' platforms.
- in the film sector (VoD): € 30m;
- in the TV Programs sector (VoD and digital adverstising): € 4.5m.

[1] Belgium, Czech Republic, Croatia, France, Germany, Lithuania, The Netherlands, Spain, Sweden and the United Kingdom
[2] « *Filière de la musique enregistrée : quels sont les véritables revenus des artistes interprètes ?* », ADAMI, April 2006

By 2010, the European online TV market (distribution of television programmes over the open Internet) is expected to generate €689m in revenues. Total pay-TV market is expected to generate €34bn a year by 2010, with some €680m revenues from online services and TV on-demand.
-in the radio field, including podcasting: € 15m.

The reason for such poor results in terms of revenues for performers lies in the fact that because of unbalanced contractual bargaining relationships, most performers have no choice but to transfer their exclusive making available right with all their exclusive rights when they sign their individual recording or employment contract.
Against this transfer of exclusive rights performers receive a payment, most of the time taking the form of single lump fee, for the recording and for all possible exploitations of the recording, for all the term of protection.
In particular, the performer will most likely not be entitled to receive any remuneration for the sales of his/her performance or other form of distribution through digital platforms onto computers or mobile phones.

Unlike the provisions adopted by European legislation for the broadcasting and communication to the public of phonograms, for instance, those provisions of *acquis* for the online making available of recorded performances via on-demand services have failed to take into account this common practice. As a result, in practice this making available right simply cannot be administered via cross-border collective management and means no benefit for most performers.

For this reason, AEPO-ARTIS urgently calls for the introduction of a system that would enable performers, even after the transfer of their exclusive right for making available on demand, to enjoy an unwaivable right to equitable remuneration 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 possible transfer of performers' rights. Performers do need safeguards in this respect.

1.2/ Remuneration for performers for rental and private copying practices in the online sector needs appropriate implementation

The making available right for on-demand services does not cover all types of Internet use. For instance, some Internet or mobile services offering access and use of films or music for a limited period of time seem to imply rental rights that are subject to equitable remuneration in case of transfer of the rental exclusive right according to European law.
Performers' collecting societies encounter huge difficulties in collecting remuneration for their right-holders for the rental of their performances via Internet and other new technologies, with many of them collecting until now no remuneration at all.

Another broad type of online use is downloading and more generally private copying.
Private copying remuneration is crucial in the digital environment. In Europe it represents more than one third of the rights collected by performers' collecting societies. In the 10 countries covered by AEPO-ARTIS study, it amounted to 38% of total collection for 2005 in average. It is an indispensable source of revenue for performers.
This essential remuneration has been under attack by its debtors – that is to say retailers and importers of recordable equipment and media – arguing first that TPM would put an end to any act of private copying, then addressing mainly the question of harmonization of tariffs applied in each Member State.
Private copying remuneration systems have been put in place, sometimes for decades, by 22 of the 27 European Member States (all but Cyprus, Ireland, Luxembourg, Malta and the UK). In the UK and Ireland, acts of reproduction for private, non commercial use (except for strictly time-shifting purposes in the UK) are forbidden, but UK and Irish citizens nevertheless commit such acts in their daily life, sometimes even ignoring tat they are bypassing the law.

In addition, in some European countries private copying remuneration is not collected on copies originating from the Internet, although under several national legislations such copies can be considered as a reproduction for private, non commercial purposes that would justify the payment of compensation on the ground of Directive 2001/29/EC.

The ICT industry – mainly non-European actors selling notably on the European market - has made large profits during the last years as it appears in their annual reports, which profits are from the selling of recordable devices hence on private copying.
Remuneration for private copying is not only a valuable incentive for performers' creativity but also an essential source of revenues which directly impacts on their standard of living. It should be clearly kept in mind that the creative community is at the basis of the whole cultural industry.
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 nor make retail prices cheaper for consumers.

More details on this issue can be found in AEPO-ARTIS previous papers and answers to EC consultations initiated by the European Commission.

1.3/ The situation of performers' rights in the audiovisual sector is particularly weak and worrying.
At international level, the protection offered by all texts in existence – Rome Convention, TRIPS and WPPT - concerns only the fixation of a performance on a *phonogram*, not a fixation incorporated in an audiovisual work. This means that they simply grant no protection to performers for the various uses, including online, of audiovisual performances.
European law has failed to give adequate protection for performers' rights in the audiovisual field as well: the broadcasting and non interactive communication to the public of audiovisual fixations is simply not protected. Moreover, article 2 (par. 4 to 7) of Directive 92/100/EEC encourages the presumption of transfer of performers' exclusive rights to film producers and co-contractors in national legislations and does not either seek to counterbalance this situation with efficient guarantees of remuneration.
AEPO-ARTIS invites the Commission to take into consideration the proposals made in its 2007 study to improve this situation.

1.4/ The demand for multi-territorial licensing of performers' rights for online use remains rare
For all the reasons above described, 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 that should not be underestimated remain local and therefore raise demands from local users only.

2/ Good governance principles applying in licensing and management practices

Apart from the above detailed legal obstacles encountered by performers' collecting societies, other obstacles linked to licensing practices and access to information, deserve attention.
Some users have been reluctant to agreeing on reasonable licensing conditions, or even to recognizing the right for performers to be remunerated for certain uses made of the recordings in which they have participated.

Copyright rules should be applied in the field of online rights for creative content as in the offline sector. This is an essential condition for this sector to continue developing in the mid-term. Lengthy and costly disputes procedures should be avoided as much as possible.

In particular, transparency should be a mutual obligation, also incumbent to users, notably with regard to information in their possession that is needed for the identification of recorded uses and right-holders.
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.

With regard to dispute resolution, when tariffs are subject to negotiation and give rise to conflicts between the parties involved, guarantees should be given to right-holders' representatives in order to prevent from a situation where the use subject to disputed tariffs continues to be made whilst failing proper payment – if not any payment at all – or failing a system in which the amounts corresponding to the pending payments are put aside until agreement is reached on the amount to be paid.
This guaranty is not yet in existence in a number of Member States.

3/ Multi-territory licensing of online rights

Specific information about the collective management and licensing practices of performers' rights at multi-territorial scale can be found in AEPO-ARTIS position papers of September 2005 and July 2007 in answer to EC consultation and call for comments.

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.

For the reasons below described, 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 – no matter whether it differentiates between online and offline use or not – 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.

3.1/ 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.
-UMPG agreement with SACEM (FR) is for SACEM to administer UMPG's Anglo-American and French repertoire in the digital market;
-Warner Chappell PEDL agreement with MCPS-PRS Alliance also called "Music Alliance" (UK), STIM (SE) and GEMA (DE) is for Warner Chappell repertoire to be more spread on the European market;
-'Alliance digital' agreement between US independent Peermusic, MCPS-PRS again (UK) and SGAE (ES) is for Music Alliance to administer the Anglo-American repertoire and SGAE the Latin repertoire;
-The previous CELAS agreement between EMI on the one side and Music Alliance (UK) and GEMA (DE) on the other side is aimed at Music Alliance and GEMA administering EMI Publishing Anglo-American repertoire in European territories.
Finally, the last worldwide music major Sony/ATV is said to have similar projects.

To date, the only agreement that has been in place for some months – the CELAS agreement for EMI repertoire – seems to have failed to meet the satisfaction of users/service providers, hence led to no significant deal with users and no improvement of the situation.
Only now that all majors have clinched agreements for their Anglo-American repertoire is it possible that all this repertoire – encompassing split compositions with various right-holders having different publishing agreements – be covered and therefore dealt with users.

This has put light on the difficulties, if not the mere impracticability, of direct multi-territory licensing of music repertoire in case of a plurality of authors in a given composition. Taking from that, one can imagine the difficulties that would arise for the management of performers' rights, since there is almost always a plurality of performers, sometimes even in very large number (eg orchestras…).
In addition, these agreements (apart from some new initiatives that do not yet seem to be up-and-running) basically concern Anglo-American repertoire and seem to facilitate above all the predominance of this mainly non-European repertoire on the European market.

3.2/ 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 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;

- as recent examples of multi-territory licensing of authors' rights have illustrated (see above), before the effects of direct competition between collecting societies actually concentrate 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 right-holders' category but none of them representing them all. For one single film, the most famous performer may be member of one society, other actors of another and musicians of soundtracks of a third one…
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, cinema or music repertoire, that means potentially hundreds of performers and a huge number of licences.
In this respect, AEPO-ARTIS disagrees totally with the wording on p 24 of EC Staff Working Document according to which: "Transaction costs for online music offerings are considerably increased by the obligation to contract with several collecting societies in the Member States. The recommendation aims at encouraging actors to eliminate this bottleneck."
The positive effects expected from this kind of system on management fees and tariffs risk in fact being rather negative for all parties involved;

- this would also conflict with some national legislations according to which the management of online music or film 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 lead to unbalance the system: a small number of collecting societies would manage the rights of those most famous performers for which all necessary information is generally easily available. Indeed, these performers are represented by their agents who can "shop around", negotiate with collecting societies and choose between them.
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. Smaller collecting societies would have less means to administer the rights of these less famous but more numerous performers, whose rights management is precisely the most complicated and costly. Less famous performers are at the same time those for whom the additional source of income coming from the exercise of their rights subject to collective management matters the more.

As a result, right-holders would not be treated on an equal footing. 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.

In addition, this trend potentially raises concerns in terms of anti-competitive behaviour deriving from monopolistic or oligopolistic markets. Safeguards regarding tariffs, operating rules of all parties and licensing rules would need to be put in place and enforced.

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)?

AEPO-ARTIS is not convinced that the “long tail” theory applies to all creative content online.
Neither is it convinced about any direct relation between possible long tail market trends and designing specific licensing practices for back-catalogue works.
Both music and audiovisual 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. There are examples of music or audiovisual works that had stopped selling and surprisingly came back very successfully on the market after decades.
In addition, if the online market is to become as concentrated as is the offline one, the diversity and availability of artistic works offered – including back-catalogues – is likely to depend essentially on the commercial interests and marketing efforts of a very limited number of actors.

An appropriate measure would in our view 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. This would help to better recognize their creative talent, in line with Commissioner McCreevy’s position in favour of extending the term of copyright protection for European performers from 50 to 95 years (see public announcement and speech of 14.02.2008).

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

New types of use on the Internet, mobile phone or multifunctional equipment give new opportunities for creative works and recordings to be seen and enjoyed by a growing number of people, but the relating appropriate business models still have to be found.

In particular, while peer-to-peer exchanges are one of the main sources of circulation among European citizens of music and audiovisual recordings, existing rights models have shown unsuited to the public demand and to the rights of right-holders. The public is massively exchanging and downloading recordings on the Internet, without any authorisation from right-holders.
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.
This has resulted in an impressive number of legal proceedings carried out all over Europe, but lawsuits and their settlements have failed to put an end to these practices, failed to bring authors and performers the remuneration that should return to them for this use of their work, whilst at the same time deteriorating the care for creativeness and the rights of those very people that made the cultural content massively used. At present, peer-to-peer practices seem to go on developing or at least not to decrease.

New marketing schemes are emerging that combine free downloading with advertising. Others consist of subscription-based systems, which some analysts predict will become more widespread in the future.
Taking into account the trend of the online market to quickly concentrate, it is expectable that a number of free-of-use offers aimed at “capturing” consumers will after a limited period turn into subscription-based systems requiring these consumers to pay to continue benefiting from the same offer.

These new marketing and distribution schemes likely to generate significant profit:
-are detrimental to the public, obliged to watch advertising when looking for cultural content;
-will hamper the development of similar services that are not based on advertising;
-do not benefit to right-holders and in particular performers who, here again, are not remunerated or taken into account in any manner.

Interestingly, a recent poll[3] carried out in France for performer and consumer organisations among downloaders using both legal and illegal platforms indicates that a significant proportion of downloaders would be ready to buy more music online, should they have the guarantee that artists would receive a fairer share of it (64% of buying downloaders have declared to be interested by the proposal and 28% of them declared that they would certainly buy more; 56% of non-buyers would possibly decide to buy music and 19% would certainly do so).

Legal solutions 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 – presented in AEPO-ARTIS 2007 study – 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 (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 and managed by collective management organisations for performers.

Moreover, as far as Internet services are concerned, 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

AEPO-ARTIS welcomes the European Digital Libraries project to preserve and foster access for all to European cultural heritage. Beyond its participation in working groups hosted by the European Commission, AEPO-ARTIS is willing that this project be a full success. One element to guarantee such success is that intellectual property rights attached to the documents to be made available are taken into account and respected, independently from the number of documents to be digitized. It is essential that, for any service using archives or catalogues, proper agreements be concluded with performer collecting societies.
An element for this success to be durable is that all performers in a recording are easily identifiable. A number of published recordings are missing information to identify the performers, notably on CDs or DVDs' sleeves. 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. Failing to do so would contradict the moral rights of performers and hamper the efficient management of their rights. This applies to the audiovisual sector as well as to music or sound recordings.

3/ Interesting initiatives

AEPO-ARTIS welcomes a number of initiatives recently launched by the European Commission via which effective stakeholder cooperation would contribute to improve respect of intellectual property rights in the online environment.
There is certainly room for such projects in the framework of Open Methods of Coordination in cultural fields, fora and platforms.
Also, existing culture and innovation EC programmes and actions plans have a role to play for the recognition of Europe creativity and creative community. In particular, it would certainly be useful that intellectual property rights be understood by the public at large not as a repressive tool preventing them to access music or audiovisual cultural heritage, but as the frame and guarantee for creative people to make new films, music etc. and for their work to be adequately cared for.

Lastly, AEPO-ARTIS supports the strengthening of coordination between the European institutions and between their services in charge of culture, intellectual property rights and creative sectors.

[3] « *Rémunération des artistes"*, Strategir, 12.11.2007

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 so-called "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 and work 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.
In particular, it welcomes the statement in the declaration in EC Staff Working Document favouring co-operation procedures between access/service providers, right holders and consumers in order to ensure a wide online offer of attractive content, consumer-friendly online services, adequate protection of copyrighted works, raising awareness on the importance of copyright for the availability of content and legal certainty. But it does not seem that existing business models as they stand now and a repressive policy in the Internet environment will solve the problem of unauthorised new types of Internet exchanges, nor take into consideration the need to remunerate performers for the use of their work.

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[4] 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.
To this end, it believes that the *acquis communautaire* needs to be completed for performers, notably in order to compensate for existing lacks of appropriate protection and to ensure guarantees when exclusive rights are not applicable.

It invites the European Union to consider the issue of exploitations of content online as a whole, with the aim of striking a balance between right-holders and setting realistic basis for access to the content for Europeans. New models of rights and their management should be considered, that would adapt with today's and tomorrow's technologies.

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

AEPO-ARTIS represents 27 European performers' collective management societies from 21 countries, 17 of which are established in Member States of the European Union. The other countries represented are Croatia, Norway, 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 can be estimated between 400.000 and 500.000.

AEPO-ARTIS works, both directly or via its members, on items of national legislation as well as on the content of European directives and international instruments in the field of intellectual property rights.
As an NGO with observer status, it takes part in all important WIPO meetings with intellectual property rights relevance.
AEPO-ARTIS is a member of the Culture first! coalition promoting the interests of the creative community at European level.