

AEPO-ARTIS Seminar of 18 - 19 November 2010

“Performers’ rights in today’s European environment: How to adapt existing rights to new uses of performances?”

Panel discussion 2.2:

“European Commission’s Digital Agenda and Performers’ expectations”

In her recent speech in Avignon, Neelie Kroes European Commissioner for the Digital Agenda¹ opened the floor by saying: “My goal, in promoting cultural diversity and content adapted to the digital age, is for European creativity to be even stronger. Europe has boundless cultural wealth to offer its citizens, and indeed to the world. Europe is and must remain a global cultural force.”

She concluded with these words: “Artists cast light on our world; our job is to let the light shine in.”

As part of the creative community, performers and the societies managing performers’ rights felt naturally directly concerned by this declaration.

The Digital Agenda unveiled in May this year is certainly ambitious, timely and far-reaching.

However, the first set of proposals that followed the announcement of the Agenda primarily focused on expanding the broadband coverage in Europe, optimizing the technical possibilities offered by the digital dividend and making it soon possible for every citizen in Europe to use his computer, his mobile phone or other handset anytime, anywhere, and stay connected. In short, to have highly efficient infrastructures.

But having everyone equipped and connected is only half an achievement, unless the robustness of the creative sector producing the content that is being circulated is also guaranteed.

This can only be achieved with a consistent set of tools to be proposed by the relevant services in the European Commission, and the copyright unit of DG Markt certainly has a major role to play here.

So what does the digital sector look like for performers? It gives a contrasted picture of huge potentialities on the one side, and real risks on the other side to put most on them in a precarious situation, failing to remunerate them fairly for the use made of their music and audiovisual performances. This would in itself be problematic. But it would also endanger the sustainability of the creative economy in the long run.

- **Huge potentialities first, since a commercial digital market is fast developing, with a number of music- and audiovisual-based players already clearly profitable.**

¹ A digital world of opportunities Forum d'Avignon - Les rencontres internationales de la culture, de l'économie et des médias Avignon, 5th November 2010

In 2009 more than 700 on-demand audiovisual services making films, TV programmes and music videos available on demand, were up and running in Europe². As a matter of comparison, there were around 250 of those services in 24 European countries at the end of 2007 and 142 only at the end of 2006³.

A number of music on-demand services have been developing fast as well. In September this year, iTunes had 160 million registered accounts in 23 countries. A total of 11,7 billion tracks had been downloaded from the iTunes store since its launch⁴.

Other companies competing on the creative sector, like Sony, are launching their own music and movie digital stores (called Qriocity for Sony – soon to be available in France, Germany, Italy, Spain and the UK).

And Google already owning YouTube is reported to plan to launch a music service. In a distinct move, Google music search-and-access service indexes partners' music for the net surfers to find their favourite songs. In so doing it strengthens its business thanks to creative content.

Music and video services directly contribute to the development of social networks (like Ping in the case of Apple services) and to boosting the sales of handsets and electronic devices (like the iPod or the iPhone or the Android).

The development of music- and audiovisual- Internet based services should thus be good news for everybody.

- **Yet these promising developments are not reflected in the evolution of the economic situation concerning most performers.**

- The disastrous effects of Internet piracy over the creative content economy are often reported. And certainly adequate solutions must be found to reduce illegal uses, condemn the bodies engaging in illegal commercial activities and restore respect for IP rights and for the value of creative work. Solutions should be found as well to conciliate ease of use and the circulation of creative content with the respect for IP rights and adequate remuneration schemes for rightholders.

It is common knowledge and common understanding that performing artists, just like any other right-holders, are not remunerated or consulted when their music or films are used and exchanged without authorisation.

- Less well known is the fact that the commercial services also fail to remunerate most performers. Whatever kind of commercial business model is used, be it streaming, centralised downloading or file-sharing, currently most performers receive no remuneration at all.

The reason for such an unjust position lies mainly in the fact that 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 online on-demand use – once and for all.

2 European Audiovisual Observatory and French DDM (Direction du Développement des Médias) study, ‘*Video on Demand and Catch-Up Television in Europe*’, October 2009 p 115

3 Report edited by NPA Conseil for the European Audiovisual Observatory and the Direction du développement des médias (DDM - France), ‘*Video on Demand in Europe*’, April 2008

4 Music & copyright, September 08, 2010, issue 419

To take an example in today's European music sector, for each song sold through an on-demand commercial service at the price of € 0.99, the main performer only receives on average between €0.03 and €0.04. As for non-featured artists, they simply do not receive any specific remuneration for the commercial use of their musical or audiovisual performances on demand.

I remember having given these terrible figures already in a speech last year, and maybe even the year before.

Since then, discussions have intensified at European level, notably at the European Parliament and the Council of Europe, about ways to guarantee fair remuneration for creators, including performers, in the digital sector.

=> 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.

The system should ensure that no discrimination occurs among performers and among users. The easiest way to implement it may be to use the existing network of bilateral agreements between collective rights management organisations throughout the European territory.

- Next to on-demand use, and sometimes proposed in combined commercial offers, are the linear online and mobile services similar to traditional broadcasting. Examples of this type of use are music or video simulcasting and webcasting.

The remuneration of performers for this type of use vary from one European country to another.

As regards music, a right to equitable remuneration for the broadcasting and the communication to the public of phonograms is established at European level. It currently accounts for more than 50% of the overall collection and distribution by performers' collecting societies in Europe, most of which still comes from the analog sector. In some countries (DE, NL) equitable remuneration is also applied for Internet-based broadcast-like uses. But in others (FR) it is not yet the case.

As regards audiovisual fixations, no similar equitable remuneration system to that for phonograms, even for offline use, exists under European law. However, some countries (ES, GR) have extended it to audiovisual fixations. Currently in practice little remuneration is collected for performers for this Internet use of audiovisual content at European level. In general it comes from collective agreements and individual contractual arrangements.

=> European statements would thus be welcome to ensure that performers are remunerated for the webcasting and the simulcasting over the Internet of their musical or audiovisual fixations.

- **Another important source of revenue for performers in the digital sector needs to be addressed as well: private copying.**

Private copying accounts for around 35% of the total collection of performers' rights collective management organisations.

Private copying remuneration is an application of an exception to the exclusive right of reproduction that Member States are allowed to implement in their national law. It exists in the huge majority of European countries.

In some of them, remuneration is only due for the manufacturing and distributing of recordable equipment and devices in the physical sector. That means that an importer of CD-Rs or DVD-Rs would be subject to payment, but not an importer of USB sticks or MP3 players.

In other countries all equipment and devices enabling the private copying of copyright-protected content are levied. Given the huge recording capacity offered by some of these devices, the tariffs payable in respect of these products have not increased in proportion to the increase in storage capacity which they provide.

In the digital age, the opportunity for individuals to make private copies of copyright protected content is greater than ever, and current schemes should be adapted where needed to take this evolution into account.

Private copying remuneration schemes in Europe have been fiercely contested by the ICT industry – which is liable for paying it – over the last years. In this context, it is important to underline that – as the European Court of Justice recalled in a recent ruling⁵ – **it is a legitimate source of revenue, and an essential one for performers; It allows performers to continue performing and contributing to the development of our society's cultural heritage. At the same time, the system ensures that individuals have the freedom to legally make copies of their favourite music and films so that they can enjoy them in a manner and at a time that is convenient to them.**

- **Finally, as regards technical aspects of the management of performers' rights for all types of online use, an essential tool is information enabling to identify the performers involved in a given performance.**

It may sound an obvious and simplistic remark, but this essential information is sometimes missing. The names of a dubbing actor in a film, of a session musician in a musical recording, are still frequently not reported. This has direct repercussions on the difficulties for the potential user to find the right holder and get the authorisation for use, and similar adverse effects on the smooth and rapid management of performers' rights.

Performers, like any rightholders participating in a creative work, should be credited clearly. In the digital sector, the task is facilitated in so much as information can now be encrypted in the digital format.

=> Member States and cultural institutions should be encouraged to organise the systematic and complete identification of all right-holders concerned. At European level, a legal obligation should be set up for commercial users and producers to make

⁵ Ruling from the European Court of Justice in the case of *Padawan SL v Sociedad General de Autores y Editores de España SGAE* (Case C-467/08, Reference for a preliminary ruling under Article 234 EC, ruling of 21 October).

accessible to collective management organisations, on a free access basis, such complete and accurate information as is necessary to enable collective management organisations to identify all performers having participated in a given performance.

To conclude, AEPO-ARTIS believes that these few points deserve attention and calls for action. European initiatives in this direction would not only contribute to answering performer's needs, but also to securing a sustainable, highly competitive European digital market.