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Remarks concerning the Commission Staff Working Paper on the Review of the EC Legal Framework in the Field of Copyright and Related Rights (SEC (2004) 995).

The AEPO, representing most of collective management organisations in charge of the administration of performers' rights in Europe, would like to express a limited number of comments with regard to the "*Commission staff working paper on the review of the EC legal framework in the field of copyright and related rights*".

The AEPO considers that some existing provisions of the already adopted directives could be improved in order to better protect performers.

Moreover the *acquis* does clearly not constitute a satisfactory level of protection for performers' rights, some basic uses of their recorded performances being not protected at all.

The AEPO can only express its concern with regard to the future of performers' rights.

More and more, the concentration in the phonographic and audiovisual industry generates pressures on the performers who are forced, most of the time without any counterpart, to transfer all their exclusive rights to the producers.

Protective devices limiting the possibilities of private copies may generate a serious decrease in the collection of private copying remuneration benefiting to performers. Such systems of blank tape levies have been in operation for years, to the satisfaction of all rightholders. The threat of such private copies on the market of pre-recorded CD or DVD has never been demonstrated.

The equitable remuneration granted in directive 92/100 is limited only to certain uses. And in most of the European countries, the phonographic industry tries to exclude from its field of application a number of uses of commercial phonograms, notably when they are broadcasted with an audiovisual fixation.

The rights granted in directive 2001/29 are not a realistic solution for the protection of performers, and the question of their management must be dealt with at European level.

If the acquis is not improved and the situation of performers' rights not taken into consideration, in the mid term, performers will less and less benefit from the exercise of these rights that will only benefit to the industry.

1. Equitable remuneration should be strengthened in the Directive 92/100

Article 8, par 2, of this directive gives a guarantee to performers of the benefit of an equitable remuneration when a commercial phonogram is broadcasted or communicated to the public.

But the directive does not organise the compulsory sharing of the remuneration collected in equal parts for performers and producers.

The equitable remuneration should be collected in common by performers and producers' organisations and shared 50/50.

This principle is applied in most of the Member States of the European Union.

When it is not stated in the legislation, this is to the detriment of performers' interest, like in the UK legislation where remuneration is collected by a producers' organisation, generating difficulties for performers in order to obtain their share.

On the other hand, the Commission should study the application of these provisions in the audiovisual field, where, in a number of countries, the equitable remuneration cannot be satisfactorily collected.

2. Most of the broadcasting and communication to the public of fixed performances are not protected

Only the broadcasting and the communication to the public of a phonogram published for commercial purposes is protected.

If a sound recording (a phonogram), that has not been published (master tape, or archive recording), is broadcasted or communicated to the public, no provision protects the performers who have participated to this recording.

Only the commercial phonograms are protected through the guarantee of an equitable remuneration in article 8 of Directive 92/100.

The situation is even worse for audiovisual recordings.

There is absolutely no protection for the broadcasting and communication to the public of audiovisual fixations.

It means that no rights are granted to the benefit of performers in the European directives when their performances are for instance fixed in a film or a show, broadcasted on television, by wire or wireless means, or communicated to the public in theatres.

The directive 2001/29 protects only fixations of any type for the acts of making available on demand.

A film or the archive of a concert is protected through the exclusive right of article 3 of directive 2001/29 when it is available on demand through the internet, but if the same film or archive of a concert is broadcasted on television or communicated to the public on line on the cable or internet, performers are not given any right for such uses !

This anachronistic situation is hardly acceptable.

At least an equitable remuneration should be guaranteed to performers covering all their fixed performances.

3. The duration of protection is insufficient

This question is raised under 2.2.3.1 of the working paper.

At present, the duration of 50 years from the communication to the public or the publication leaves without protection an increasing number of films and recordings.

Recordings published before 1954 are not anymore protected in 2004...

Sound recordings made using stereophonic equipment of excellent technical quality, feature films in colour of high quality, will not be anymore protected with regard to performers' rights. Consequently musicians, actors, singers, who may need to have an additional income for the exploitation of such recordings, will be deprived from any rights.

At the same time, the authors are protected during all their lives and their rights maintained for 70 years after their death.

The minimum should be to protect performers for a duration of 70 years from the communication to the public or publication of their recordings, that will still be far from the protection granted to authors.

4. The protection granted for on demand use in directive 2001/29 is not a satisfactory guarantee for performers

The directive 2001/29 grants performers (and authors and producers) an exclusive right to authorise or prohibit "*the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them*" with regard to the fixations of their performances.

This may appear, theoretically, as a satisfactory protection, for what is called more simply the acts of "making available on demand".

In practice, it leaves without any protection more than 99% of performers in Europe, who are under the pressure of their interlocutors, from the audiovisual or phonographic industry, to which they are forced to transfer their exclusive rights, without counterparts.

If the aim of the *acquis* is to protect performers, this provision should be improved and adapted to the realities...

The Commission should consider, for these acts of making available on demand, the possibility to organise, at Community level, the compulsory collective management of such right.

Performers are already used to comparable schemes that guarantee that they will really receive additional remuneration for a number of mass uses: article 8 par 2 of directive 92/100 is implemented in the Member States through the collective management of a remuneration right.

Moreover, such a system, concerning an exclusive right, already exists in the *acquis*: this is the principle included in chapter II of directive 93/83 regarding cable retransmission. This directive provides for a whole set of rules with regard to the exercise of the rights on such uses through a collecting society, including rules on mediators and measures concerning possible abuse of negotiation position.

This could be the basis for similar provisions in the field of on demand uses of recorded performances.

The chaotic situation prevailing at present in the field of internet distribution or making available on the internet is an additional reason for the Commission to consider such a possibility of compulsory management of rights.

At least for the above mentioned reasons, the AEPO does not share the view of the Commission in its conclusions considering that *“as far as the consistency of the existing *acquis* is concerned, only minor adjustments seem to be necessary”*, and that *“further legislative action at Community level is at present for the most part unnecessary...”*.

At the contrary, urgent action is needed to adapt and secure existing rights, and to grant a decent protection for performers.

AEPO will be pleased to provide any additional elements concerning the above mentioned points to the services of the Commission for further study or evaluation.

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