

September 2006

Dear Madam,
Dear Sir,

After the Commission adopted a Recommendation on collective cross-border management of copyright and related rights for legitimate online music services in October 2005, the European Parliament is drafting opinions and reports on the same subject. In particular, a Report addressed to the European Commission is being written by EP Committee on Legal Affairs.

The first presentations of this report are a serious matter of concern for European organisations managing performers' rights: the views expressed so far ignore the specificities of performers¹' rights collective management, disregard good practices governing the collective management of rights and favours a system that would be unmanageable and detrimental to the cultural sector.

Therefore, AEPO-ARTIS representing most European collective rights management organisations for performers wishes to explain the risks of adopting mistaken provisions and calls for your attention to the ongoing debates.

Performers' rights for online music services : recent and weak rights that are hardly managed collectively

A directive adopted in 2001² introduced an exclusive right for rightholders to authorise or prohibit the making available to the public through on-demand services of their works and recordings. Such new right was lately introduced in national legislations and its practical implementation is at a starting point.

In addition, most performers are regrettably in a position which does not enable them to enjoy this right in practice: for lack of bargaining power, most of them have no choice but to transfer all their exclusive rights to producers when signing their recording or work contract.

As regards the audiovisual domain, in most European legislations and in accordance with dissatisfying provisions of a European Directive of 1992, performers are even presumed to have waived their exclusive rights to producers unless their contract stipulates otherwise. In counterpart for this transfer, most performers receive only a single fee.

On the other hand, as regards online communication to the public - broadcasting via the Internet, communication through cable or webcasting for instance - no European directive protects performers for such communication of their audiovisual fixations.

For these reasons, so far the huge majority of European performers' collecting societies are not yet in a position to administer the making available right corresponding to actual use by Internet users, through on-demand or on line services, of recordings of performances.

¹ unlike authors, performers are those artists who do not create work but perform in any cultural field, like musicians, actors, dancers etc.

² see Article 3 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society ('Directive on Information society')

In this regard, the 'acquis communautaire' does not give a satisfactory level of protection to performers for it fails to give them an opportunity to benefit from new uses of their performances; it definitely needs to be improved.

Most criticisms levelled at collective rights management practices in the draft report have no ground

In her provisional statements as well as in her declarations MEP Mrs Levai, as a Rapporteur of a report which should be finalized soon, works on assumptions that collecting societies would be badly governed. Such grievance is unjustified. It is prejudicial to collecting societies and to the rightholders they work for. It questions the earnestness of the forthcoming report.

It seems urgent to recall that current performers' collecting societies are already ruled by good governance practices:

- Performers' collecting societies are non for profit organisations. Like any other legal body, they are subject to general rules of company law and competition law. Since collecting societies' revenues consist of administration fees directly linked to the remuneration collected and distributed for rightholders, it is in their interest to support the value of copyrighted works and recordings that are exploited;
- European performers' collecting societies are directed by boards comprised of rightholders and therefore reflect the interests of performers;
- To date, performers have already the possibility to entrust any collective management organisation throughout the European Union. They can withdraw from an organisation or join another one at any time. They can entrust all their economic rights, or only some of them, to collecting societies;
- Distribution systems do not discriminate between national and non-national rightholders. When remuneration is managed through bilateral agreements between collecting societies, administrative costs are generally deducted only once;
- Obligations regarding the publication of the tariffs applied by collective management societies differ from one country to another. In many countries where there is no obligation of publication, performers' collecting societies have taken the initiative to make their tariffs publicly available on their websites.

On the other side, efficient collective management of rights rests on the communication of all relevant information by those bodies liable for payments, which is unfortunately often difficult to obtain. **In order for the collective rights management societies to be able to identify rightholders 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.**

Cross-border collective management of rights cannot work without reciprocal representation of collecting societies through bilateral agreements

Although the Commission Recommendation of 2005 does not choose between several proposed options, the European Parliament seems to focus on one proposal only³, which would consist of giving rightholders the choice to appoint any collecting society across the entire European Union (as it is already the case for national territory) for the EU-wide management of their rights, while prohibiting any recourse to bilateral agreements between collecting societies.

Such system is ill-fitted to the management of performers' rights. It would have a negative impact on collective management practices and *in fine* on performers:

³ commonly referred to as 'option 3'

- One single collecting society cannot efficiently monitor performers' rights across the entire EU territory without any reciprocal representation through bilateral agreements. The quality of the service rendered depends directly on the proximity between performers and the organisation that collects and distributes remuneration for them. On the other hand, the efficiency of such management of rights depends on the capacity for those organisations to ensure the enforcement of performers' rights. Such option would lead to difficulties of management, a soaring number of disputes and increased piracy;
- direct competition between collecting societies without any possibility of reciprocal representation would be characterized by a high level of legal uncertainty, with users having to address a vast number of societies to obtain a licence, each of these societies representing parts of a rightholder's category but none of them representing them all. Given the fact that one recording can frequently involve a hundred of rightholders, as it is the case for musical orchestras for instance, one can easily imagine the difficulties such system would undoubtedly raise;
- such system would conflict with some national legislations according to which the management of online music services is subject to a 'legal licensing' system entrusting a collecting society to administer those rights at national scale only;
- competition between collecting societies leading to a concentration of the market, without appropriate safeguards, would unbalance the system: a small number of collecting societies would manage the rights of those most famous performers whose names are well known and for which all necessary information is easily available. On the opposite, smaller societies would have less means to administer the rights of less famous but more numerous performers (session musicians, members of bands and orchestras...), whose collection and distribution of rights is more complicated and costly. The most famous performers would attract all attention whereas the huge mass of less famous performers would be neglected;
- as a consequence of the effects above described, such a system would in the mid-term impact negatively on European cultural diversity, impoverish the cultural offer to the detriment of local and regional repertoires and hamper the development and growth of the cultural industries.

Moreover, such option would not bring an answer to *massive* uses of music through online networks. Proposals should rather focus on the challenge to avoid the prohibition of new types of use by Internet users (such as peer to peer, downloading from websites or webradios...), while granting rightholders the remuneration they deserve.

For these reasons, any steps forward to obtain a fully implemented Internal Market should keep on relying on mutual agreements between collecting societies, which may be accompanied by appropriate safeguards relating to applicable tariffs, calculation of administrative fees, clear rules as for competent laws and territories in case of litigation, dispute settlement and enforcement procedures.

AEPO-ARTIS remains at your disposal for any further information on this issue.

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The Association of European Performers' Organisations, AEPO, was founded in Brussels on 20 May 1994. AEPO merged with ARTIS in November 2004. The new organisation is called the Association of European Performers' Organisations, AEPO-ARTIS.

AEPO-ARTIS represents 27 European performers' collective management societies from 21 countries, 16 of which are established in Member States of the European Union. The other countries represented are Croatia, Norway, Romania, 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 of AEPO-ARTIS can be estimated between 400.000 and 500.000.

The membership of the Association is made up of the following collecting societies:

Austria: LSG
Belgium: URADEX
Czech Republic: INTERGRAM
Croatia: HUZIP
Denmark: GRAMEX and FILMEX
Finland: GRAMEX
France: ADAMI and SPEDIDAM
Germany: GVL
Greece: APOLLON, DIONYSOS and ERATO
Hungary: EJI
Lithuania: AGATA
The Netherlands: NORMA
Norway: GRAMO
Poland: SAWP and STOART
Romania: CREDIDAM
Russia: ROUPI
Slovakia: OZIS and SLOVGRAM
Spain: AISGE
Sweden: SAMI
Switzerland: SWISSPERFORM
United Kingdom: BECS

The objectives of AEPO-ARTIS, which is a non-profit making organisation, are set out below:

- to develop and secure wider recognition of the collective administration of performers' rights;
- to further develop collaboration between performers' organisations at a European level in the field of performers' rights and in the collective administration of these rights;
- to contribute to highlighting the importance of the protection of performers and of the collective administration of their rights;
- to further develop cooperation on European and international agreements, with a special interest in clauses relating to collecting practices.

The Association of European Performers' Organisations has been involved in the PHARE and TACIS programmes of the European Commission, which promote cooperation and offer assistance on intellectual property issues in Central and Eastern European countries and in Russia.

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.

Since its foundation, the Association has closely followed discussions on new European directives issuing its own legal analyses both in the course of and after such debates.

The Association of European Performers' Organisations participated actively in the WIPO Diplomatic Conferences of December 1996 - where the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) were adopted - and December 2000, where no agreement was found on an instrument protecting performers in the audio-visual field. The Association also participates in the meetings of the WIPO Standing Committee on Copyright and Related Rights.

As an NGO with observer status, it takes part in all important WIPO meetings with intellectual property rights relevance.

AEPO-ARTIS has also been granted observer status at the Inter-governmental Committee of the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome Convention).

Any national organisation in Europe that participates in the collective administration of performers' rights may apply to be admitted as a member of AEPO-ARTIS.

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