Political Guidelines for the implementation of Article 18 of the 2019 Copyright Directive

Article 18 of the 2019 Directive on Copyright in the Digital Single Market establishes that the remuneration of performers must be proportionate to the revenues generated by the exploitation of their work and that lump sum payments are to be the exception, rather than the rule (please refer to the joint FAIR INTERNET guidelines on Chapter III).

To this end, the Directive clearly says that Member States may rely on different existing or newly-introduced mechanisms. Performers' organisations are encouraged to urge their national decision-makers to achieve this aim by introducing into their national systems a right to remuneration for making available on demand for performers paid by online platforms and subject to mandatory collective management.

The following provides some political guidelines to performers' organisations as regards the implementation process of article 18 and the possible questions that may be raised vis-à-vis the remuneration right.

Q1. What mechanism is needed to achieve appropriate and proportionate remuneration for online mass uses of performances?

On the basis of Article 18, 2019 Directive on Copyright in the Digital Single Market, a new measure should be introduced into national law complementary to the relevant provisions regarding the on-demand use of performances in the online environment. This provision would guarantee that performers enjoy an unwaivable right to receive equitable remuneration, notwithstanding any possible transfer to the producer of their exclusive right for the making available on demand of their performances, independent of any terms agreed for such transfer and in addition to any possible contractual payments that are made by producers in this respect. This remuneration should be managed by performers' collecting societies and paid by the digital platforms.

Performers (e.g. musicians, actors, dancers, singers…) have been granted an exclusive right to authorise or prohibit the making available to the public on demand of their performances (EU Copyright Directive 2001/29/EC). This has accordingly been implemented in the different national laws of the Member States. In practice, however, this right has not been as effective as it should have, as most performers receive no remuneration from these forms of exploitation.

Specifically, Member States are encouraged to incorporate the following language in their national legislation in order to fulfill their obligation (under Article 18 of the 2019 Directive) of appropriate and proportionate remuneration as regards online exploitations:

"*Where a performer has transferred or assigned the exclusive right of making available on demand, and independent of any agreed terms for such transfer or assignment, the performer shall have the right to obtain an equitable remuneration to be paid by the user for the making available to the public of his fixed performance. The right of the performer to obtain an equitable remuneration for*

the making available to the public of his performance should be unwaivable and collected and administered by a performers' collective management organisation".

Q2. Why is the introduction of an unwaivable right to equitable remuneration necessary?

In the digital age, performances are made available on a massive scale on demand. Most performers receive no additional payment when their performances are used in the online environment. Indeed, more and more entities benefit from the use of these performances, without giving anything back to those who contributed to them. Performers are granted an "exclusive right" by EU Copyright Directive 2001/29/EC, which means that they must give their consent if they wish to allow their performances to be made available on demand online. However, the practical reality is that all too often performers are forced to transfer this right to producers (record companies, film studios etc.) for a one-off, symbolic fee, or even for no additional payment at all.

Legislation has therefore clearly failed to protect and adequately reward performers. The law must be changed so that protection granted to performers is made effective in practice.

Q3. Is an unwaivable right to equitable remuneration something new in law?

No. Such a right was already introduced in 1992 (Directive 1992/100/EEC, subsequently codified as Directive 2006/115/EC and subsequently implemented into national legislation) for when a performer transferred his/her rental right to a producer. Similarly, a remuneration right is granted to performers for the broadcasting and communication to the public of music (Directive 2006/115/EC and subsequently implemented into national legislation).

Some EU Member States, when implementing the 2001/29 Copyright Directive, have opted to provide broader protection to performers, for instance this is the case in Spain. The Spanish Supreme Court supported this extension of the Spanish law considering that an equitable remuneration for making available on demand is not in contradiction with the provisions of the 2001/29 Copyright Directive. Rather it is based on existing EU law, namely the principles contained in the 92/100 Directive on rental rights, which allowed a broader protection of neighbouring rights.

Q4. Under which circumstances will this remuneration be paid?

Where performers transfer or assign their exclusive making available right to the producer – whether by individual or collective negotiation – they should retain the right to receive equitable remuneration for as long as their performances are protected, as separate from any contractual arrangements agreed for such transfer or assignment.

Q5. Who should pay the remuneration?

The remuneration should be paid by the "user", that is the many companies and entities making audio and audiovisual content available on demand online. For example, it could be an online service platform which offers music or audiovisual works on demand, such as iTunes, Spotify, Netflix, Deezer or Amazon Prime. As users of protected content, these organisations would pay the remuneration to a performers' collective rights management organisation.

Q6. Will a new remuneration right add to the complexity of licensing, especially multi-territorial licensing?

No. A remuneration right would be a new element in the "chain" of commercial agreements between rightholders and users, insofar as it would introduce a new payment to performers that did not previously exist. It would be a simple and straightforward mechanism to implement whilst rewarding performers individually for the online and on demand use of their work.

The user would make a single payment to one collective management organisation.

It is important to bear in mind that the user will not be required to ask for an authorisation to carry out the acts of exploitation (as for the producers' exclusive right). Rather it is an obligation to pay an equitable remuneration to the performers' collective management organisation in similar procedural terms as the equitable remuneration for the right of communication to the public or for rental.

Performers' collective management organisations are already well equipped to deal with this situation and have agreements in place whereby equitable remuneration can be distributed to the relevant rightholders.

Producers, on the other hand, would be able to maintain their existing business models. They would still acquire the exclusive making available right of performers, through individual or collective negotiation, enabling them to further license the digital use of these performances.

Furthermore, the remuneration right granted to performers would similarly not affect authors who, like producers, hold an exclusive right.

Q7. Why can it not be left to contractual relationships between performers and producers?

Most individual performers do not have the power to negotiate fair contract terms. Performers are protected by a statutory "exclusive right", which means that they must give their consent if they wish their performances to be made available on demand online. However, the practical reality is that the large majority of performers are forced to transfer this right to producers (record companies, film studios etc.) in return for no or minimal additional payment.

Furthermore, it is not sustainable for producers to argue that upfront fees can include "equitable remuneration" for online uses which are becoming ever more diverse and difficult to assess in terms of economic value at the time when an audio or audiovisual work is produced.

Collective bargaining agreements, in the very limited number of countries where they may be considered a practical option, may be limited to performers in the audiovisual field or may not provide for remuneration for making available on demand. Additionally, it is important to note that these agreements only protect performers engaged for a production carried out under the terms of those agreements. This generally means that performers working in other Member States under different arrangements will not benefit from the terms of those agreements when their performances are made available on demand in these other countries. The inclusion of an equitable remuneration right in the acquis need not prejudice such collective bargaining agreements, where they exist. Such arrangements would rather be complementary to such a right, not a substitute for such a right.

Q8. Why are the contractual provisions in articles 19-20 of the Directive on Copyright in the DSM not sufficient to protect performers?

Granting performers to have more information on the contracts they sign and on the uses of their recordings by the producer does not improve the contract itself (article 19). A bad contract is a bad contract. Moreover, the provision contains a number of exceptions to the reporting obligation excluding it when the "administration burden" would be "disproportionate" and the performers' contribution not "significant". This could lead to the delivery of less comprehensive information at best or even preclude some performers from benefiting from this provision at all.

Article 20 grants performers the possibility to ask the producer for an additional remuneration if their recordings are successful. But only big stars are in a position to re-negotiate their contract. Smaller artists cannot afford to take the risk of getting into a dispute with the producer if they wish to continue their employment in the future.

It is not hard to anticipate that, in practice, any such claim is likely to lead to litigation. This provision is therefore likely to incur considerable uncertainty and expense which many performers may not be willing or able to take.

In addition, the risk of being "blacklisted" is not fiction. In Germany, dubbing actor Marcus Off, who was the German voice of Jack Sparrow in Pirates of the Carribean in the first three episodes, sued Walt Disney for additional remuneration when those movies became enormous hits. Whilst the German courts agreed with Marcus Off and awarded him an additional remuneration, he was later simply replaced by another dubbing actor in the fourth episode.

Q9. Under the AEPO-ARTIS proposal, would some performers be paid a second time for a right that has already been cleared?

No. The proposed equitable remuneration establishes a new mechanism, well fitted to the online world. It creates a new, fairer balance that does not overlap with the current framework. In the limited case where performers receive royalty payments (either through individual or collective negotiation) after the transfer of their exclusive right, the proposed mechanism would represent a

complementary channel of remuneration. Whereas a royalty payment would typically be made by the producer, the equitable remuneration would be paid by the user (see question 4 in this regard).

Q10. How would the tariffs be set?

Tariffs would depend on a number of factors such as the type of service, the type of use made of the performance, the revenue of the user, etc. Performers' collective management organisations have vast experience in reaching agreement on the level of tariffs to be set.

Q11. Will it make content more expensive and therefore encourage end-users to access illegal offerings?

There are two possible scenarios following the introduction of a guaranteed payment to performers for the making available on demand and online of their performances: either the stakeholders involved embrace a fairer sharing of the income made from the making available on demand online of these performances; or prices of content via on demand online services may increase - though to a very limited extent.

However, in the latter case, consumers may feel a degree of satisfaction that their money is not only going to what they may perceive to be "greedy corporate entities", but to the actual individual performer(s) involved.

Internet users are very sensitive to the "fairness" of the marketing models. Therefore, a guarantee that performers are remunerated on so called "legal uses" may actually help to dissuade people from using illegal sources.

For the same reasons, it can give added-value to a user and the service it provides.