

Comments of AEPO-ARTIS on the staff working document “Study on a community initiative on the cross-border collective management of copyright”

AEPO-ARTIS represents 27 collective management organisations in charge of the administration of rights of 300 000 to 400 000 performers in 21 European Countries.

AEPO-ARTIS received the staff working paper from the Commission during the month of July, in a single language, and has informed its members and collected their comments before communicating any opinion to the Commission. The very short period of time given informally to the professionals to answer to these proposals is hardly understandable when, at the same moment, some substantial questions, like the content of the protection of performers in the *acquis communautaire*, are still neglected.

The staff working document communicated during July 2005 does not take into consideration the insufficient level of the *acquis communautaire* with regard to the protection of performers, and the only recent creation and development of performers' rights and their collective administration.

Some alleged discriminations are based on inaccurate or wrong information.

The option 3, favoured by the staff working document, would not bring an answer to massive uses of music on line like peer to peer.

This option would be unable to bring a proper solution to the need of cross-border collective management, generating a deterioration of the situation of most of the performers, and would globally weaken the proper management of their rights.

AEPO-ARTIS, on the basis of the improvement of the operations of bilateral agreements, is ready to contribute to the establishment of contractual relationship with the users that will answer to their need to obtain cross border licenses.

1. The Staff Working Paper neglects the lack of satisfactory *acquis communautaire* for the protection of performers :

One year ago, the Commission has communicated a «*staff working paper on the review of the EC legal framework in the field of copyright and related rights*».

After a review of a content of the *acquis communautaire*, the Commission concluded 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...*”.

AEPO-ARTIS has communicated its remarks to the Commission, notably on the lack of protection in the audiovisual field, the unsatisfactory level of guarantee for broadcasting and communication to the public of commercial phonograms, and the insufficient duration of protection.

The Staff Working Paper is based on the example of music services, but for instance, for any use of audiovisual production, no protection is granted to performers (except for on demand services on the ground of directive 2001/29).

In a number of the 25 EU countries, cross border licensing, which is the major subject of the last staff working paper of the Commission, is just out of the reach of performers, by lack of protection.

It must be kept in mind that granting authorization, notably through collective management of rights via licenses, implies :

- existing rights,
- the non transfer of these rights by performers except to their collective management organisations.

The Commission, in order to fully evaluate the situation of collective management of performers’ rights in Europe, should scrutinize the level of performers’ protection and the possibilities for performers and their collective management organisations, in practice, to administer their rights.

This could be made by a revision or an updating of the existing directive, and a study on the practical impact of the implementation of these directives.

2. The Staff Working Paper does not take into consideration the fact that the existing rights are in most of EU countries new rights, administered by new organisations

In a number of EU countries, it is only after the directive 92/100 that a basic protection has been granted.

In practice, it means that it is only in the mid 90s that a number of countries have adopted legislation granting rights to performers.

On the basis of these rights, and with sometimes the utmost difficulties in the relation with users (among which a number of important economic actors like broadcasters or representatives of the industry), national organisations were created by performers to administer their rights, with sometimes the support of EU funds in the framework of cooperation programmes like the PHARE and TACIS programmes.

It means that the practice among the countries members of the EU of administration of performers' rights, licensing and development of bilateral agreements has been able to be developed mainly during the last 10 years. This is a very short period for the implementation of new rights, and to evaluate the effect of the single market in this field.

This must also be taken into consideration when analysing the level of cooperation of collective management organisations, and the development of their contractual relationship.

3. The affirmation of existing discrimination is based on inaccurate or wrong considerations

3.1.

The document refers specifically in page 12 to the SCAPR model agreements of type B.

But this type of agreement, in the field of performers' rights that are just being developed in a number of EU countries, is a necessity, in parallel to existing agreement based on cross border payment of royalties.

For an exchange of remuneration it is necessary for each of the partners organisations:

- to collect remuneration
- to identify precisely recordings for which the remuneration has been collected
- to identify the performers who have contributed to these recordings.

In a number of countries, the users, when they pay, do not communicate their play lists (and are not legally obliged to do so) making the identification of recordings that are used impossible and the task of distribution extremely difficult.

The obligation for the users to report precisely should be incorporated in all EU legislations.

Moreover, when reports are communicated, they include only the name of the work and the name of the main performer, not the name of the other performers (musicians, chorists...). The same work may have been recorded different times with different performers.

The incorporation in the recordings of data including the identification of performers, controllable and accessible by performers' organisation, should also be compulsory.

Some organisations in the 25 EU countries are collecting only a small amount of remuneration, limiting their ability to make research on these elements, indispensable for the conclusion of type A agreements with full exchange of remuneration (the document should have included, with the « top ten » societies in page 21, a list of the « bottom ten » societies, to fully reflect the reality of collective management).

For these different reasons, type B agreements are necessary during transitional or starting periods.

This has been reminded already in the submission of AEPO following the communication of the Commission dated of 16 of April 2004.

This is clearly indicated in the introduction of the SCAPR model contracts to which the document is referring :

‘The second option – annex B – covers the situation where the contracting parties have to develop the necessary management to introduce individual distribution, both on national and international level, within a maximum of 5 years.

During this period the agreement shall be developed from non exchange into exchange of remuneration across the borders. However, due consideration shall be taken to certain performers' rights, groups of performers or specific uses where the necessary information to allow individual distribution is not available or is only available at excessive costs.

The aim of option B is to increase the available information of both Performers Rights Collective Management Organisations and to establish a proper basis for individual distribution based on information from users regarding the actual use of the performers or recordings. The cooperation between those Performers Rights Collective Management Organisations primarily concerns exchange of data, but can also comprise an approximation of internal rules on distribution within the contracting parties to allow an adequate exchange of remuneration.”

In the model contract itself, the reference to these specific situation is extremely explicit, option B is described with the following whereas:

“whereas the cooperation between the Contracting Parties has to be developed over some years due to the fact that performers' rights were only introduced in country (A and/or B) as from ...

(and/or)

whereas (Party A and/or Party B)... have/has to establish a management of performers' rights, I.E. register the right owners, provide information on their protected recordings and establish a basis for individual distribution to the performers, and enabling the Contracting Parties to exchange the necessary information for the exchange of remuneration between the two Performers Rights Collective Management Organisations,

(and/or)

whereas the Contracting Parties take into consideration that the necessary information from the users on certain performers' rights, groups of performers or specific uses is not always available to allow a proper exchange of remuneration,

whereas the Contracting Parties declare their intention to develop management systems enabling partial or full exchange of remuneration within a reasonable number of years (maximum 5 years) as specified in the annex(es) in respect of rights, right owners or uses where the necessary information to allow individual distribution is available”.

Consequently, the document cannot find a demonstration of existing restrictions on cross border distribution of royalties (1.1.4.2.) only on this existing specific situation.

These agreements only reflect the situation of the management of performers' rights in some countries, not yet fully implemented, the lack of a satisfactory level of obligations for the users of recordings with regard to the identification of these recordings, and the absence of a standard format of identification of performers incorporated in recorded medias.

3.2.

The document quotes on page 13 the SCAPR « policy and guidelines », and the SCAPR « code of conduct » with regard to the membership of performers to collecting societies, in its will to demonstrate « restrictions » concerning « provision of cross border collective management services ».

But these guidelines fully respect the principle of freedom of performers, referring to the fact that « *a rightholder should PREFERABLY* » be member of the society where he has his permanent place of residence.

This makes the conclusion of bilateral agreements possible, making the work of identification of performers (rightholders who have participated to a recording for instance in Germany will probably be member of the German collecting society, that is supposed to have the information about their identity and their participation to recordings) but it does not prevent performers to join the society of his or her choice.

Rightholders are free to join any collective management organisations within the EU.

3.3.

All the document is based on allegations of non respect of EU principles by collecting societies :

« *The Study has found that the core service elements « cross border grant of licences to commercial users » and « cross border distribution of royalties » do not function in an optimal manner and hamper the development of an innovative market for the provision of online music services » (page 9).*

But this document does not bring examples of failure, from an user, to obtain a community wide licensing after negotiation with collecting societies.

In practice, with regard to performers' rights, the users consider that the producer is their only interlocutor with regard to neighbouring right holders, and simply do not ask for the authorization of performers' or their collective management organisations.

Right holders organisation can bring multiple examples of users who have infringed their rights, including through commercial downloading services, without even trying to obtain any license.

There is no evidence of discrimination or inefficiency in the cross border payment that can justify any EU initiative.

4. The proposed model in option 3 does not fit with the new uses of music

The user and possible contractor of rightholders is not anymore a single interlocutor.

Most of the uses of music are generated by internet users themselves, who download, who make available musical files through the internet.

The model of a contractor asking for a licence for all EU member countries is outdated or marginal.

The challenge is to avoid the prohibition of new uses by the internet users (such as peer to peer or downloading of files from web radios), while granting a guarantee of remuneration for the rightholders.

In that case, the users can clearly be located as internet subscribers, millions of users.

They are the one to be authorised, if necessary, for the downloading, for the copying. They are the one, by millions, who must have contractual relationship with rightholders. This is not a question of « cross border collective management of copyright » and the document fails to offer any solution to these new uses of music on line.

The document only refers to the « *legitimate digital music market* », legal music sites, that represents a minor part of the exchange of musical files through the internet and considers on this ground only that there are « *new business models* » (page 19 and 20).

5. Option 3 proposed would be inefficient

Option 3 that is recommended “*in the first instance*” “*for clearance for online music*”., would mean to encourage competition between collecting societies (“Option 3 would create the competitive discipline that forces CRMs to compete among themselves for right holders... “ page 41).

The concept is not only the already existing free choice of membership among the EU collecting societies, but also the exclusion of the use of bilateral agreements between collecting societies.

The collective management organisation would only be able to represent their direct members, and not the members of other collecting societies in Europe.

According to the staff working document, this solution would notably :

- be a source of legal certainty,
- bring guarantee of transparency,
- have positive impact on cultural aspect by the increase (at least for some societies) of the collection of royalties,
- be an encouragement to trade flow,
- generate employment
- increase the bargaining position of collective management organisations.

It would also make the large collecting societies being larger, and the smaller working as ... agents for the bigger one.

The Commission paper also states that this concentration would be in the interest of rightholders themselves.

These views are not in conformity with the reality.

5.1. The conclusion of bilateral agreements is the only valuable model

There is no legal way to prohibit free contractual relationship between private organisation like collecting societies, and notably the conclusion and operation of bilateral agreements.

These networks of agreement give the users the guarantee that their national interlocutors represent a large repertoire with regard to the category of right holders it represents.

The user know that there is no need to ask for a comprehensive list of members (which is unrealistic), to evaluate if the collecting society has a direct membership with rightholders.

There is no discrimination between right holders, being those directly members of a collecting society or those members of another organisation with which a bilateral agreement has been concluded.

This principle is included in the Code of Conduct of Performers' Societies adopted by SCAPR :

“Activities of societies should be based on the principle of equal treatment of all represented right owners, including national treatment of members of contracting parties without discrimination on grounds of nationality or domicile.”

Before representing a substantial part of rightholders, on the basis of only competition on tariffs and services, a collecting society will have to be active for years, and will have to adopt a commercial behaviour that does not exist for non profit making organisation like collective management organisations.

During years, the users will be in a situation of legal uncertainty, having in front of them different organisations claiming to represent partly a category of rightholders, but never in fact representing most of them.

How long would it take to have a concentration of performers whose rights are administered collectively in Europe, who should be around 300 000 or 400 000 ?

Instead of one interlocutor, having mandate of other collecting societies through bilateral agreements, the user will be confronted to several of them, and will hardly have the time and competence to check which part of the repertoire is represented.

This is clearly acknowledged by the document page 40, mentioning that *“Option 3 would not achieve the single access point for all European repertoire for all European territories because the European repertoire will be split among a small number of CRMs”*...

Moreover, the legal treatment of “on line” music, which is the basis for the model presented by the working document, is in a number of European Union member states subject to legal licensing system. Such legal licenses are based on national use only, making them incompatible with a “cross border” model.

5.2. Option 3 is not adapted to collective management of performers' rights

All types of performers are protected; famous actors and singers, but also session musicians, dancers, actors, singers, members of groups that are not famous.

When stars can negotiate without even the protection of intellectual property, performer's rights are the only guarantee for performers who are not famous to obtain additional remuneration for the use of their performances.

Collecting for them and distributing to them is more complex, more costly than for “stars” or well-known performers.

With option 3, a collecting society will try to attract famous performers, for whom it is easy to bargain with users, and to whom it is easy to distribute. Their name is always in the play lists, always in the credit, and they are easy to locate, being often represented by agents.

In the field of music, which according to the staff working document the first step of application of option 3, this situation is particularly demonstrative.

For one singer, or one conductor, the recording may include eight, ten, and up to more than one hundred other performers. And it makes a substantial difference with the practice of management of authors' rights or producers rights, when in most of the cases, only one right holder is concerned.

The work to collect the information on their participation to the recording, to identify them, to locate them and to distribute to them is far more complicate and costly than to distribute to a famous singer.

In term of "costs, efficiency, rationality, bargaining power " they are of no interest to a future collective management organisation having competitiveness as the main focus, and they will be neglected.

5.3. Option 3 will lead to a deteriorated management of rights of performers

Apart from famous performers, who may be attracted by a collective management organisation advertising on its supposed efficiency, other performers, as already indicated, need a lot of effort and work to have their rights properly managed.

They will be neglected by the future large organisations generated by competition, and will see their rights only managed by the future "agents", the smaller collecting societies, that will have less resources for this complex task.

The work to identify performers, the recording to which they have participated, to locate them, can hardly be done only by one or two collective management organisation at the European level.

One can also hardly imagine, that a musician living and working for instance in Greece, will have more transparency if his rights are managed in United Kingdom for than in his country.

In a number of performers collecting societies, there is a permanent flow of performers coming to bring information about their recording sessions, asking for some advices on contracts, submitting cultural projects...

This cannot be done online, and most of the performers do not have the financial capacity to travel over Europe in order to be in contact with all the services and support that their organisations are providing at present at national level.

5.4. Option 3 would threaten employment

The management of only "big names" among performers can be cost effective. There is no necessity to recruit for managing their rights, as already mentioned, they are easy to identify, and their recordings are well known.

But, if, as the working paper foresees it, the smaller collecting societies that will see their big names leaving for a more attractive organisation will become “agents” for the larger one, they will have to do it with a reduced budget, having less collection.

One will hardly see how this situation can generate employment.

5.5. Option 3 means less culture and less creativity

Collecting societies play an essential role in the field of culture.

They also create a balance in the relationship between different category of right holders.

By having such organisation in all members of the European Union, there is a guarantee that, in application of the national legislation or decision of the right holders, funds can be allocated to cultural activities.

Moreover, cultural funds are not only spent for nationals in each country but are also dedicated to exchanges within and outside the European Union.

This is also reflected in article 6 of the SCAPR model contract :

“On a practical and economic reciprocal basis – in cooperation with the performers’ professional organisation – the Contracting Parties express their mutual interest to initiate and carry through joint projects or otherwise to assist each other in order to promote the performing arts and the professional interests of the performers.”.

More financial power in the hands of a limited number of organisation would mean less diversity in the support to culture and creativity, the place for decision process and choice of cultural policy being concentrated in a few places, and being subject to the choice of only the most powerful right holders.

Local and regional repertoire, that are essential to culture in Europe, and that can only be identified and known by a day to day contact with performers, will be neglected to the benefit of more “commercial” activities, based on the notoriety and the impact in terms of public relation, the “big” collecting societies being in constant need to show their efficiency and their competitiveness.

It can hardly be in favour of more culture and creativity.

6. AEPO ARTIS is convinced that the present situation should be improved

The level of *acquis communautaire* should be revised in order to grant performers a satisfactory level of protection.

Without such protection, the debate on collective management, notably of on line content, will be largely theoretical.

The Commission should monitor the implementation of certain rights, in order to evaluate the practical impact of these rights on the right holders.

Due to the fact that performers' rights were only granted in a number of European Countries during the last ten years, performers are confronted, in some of the 25 members of the European Union to the utmost difficulties in order to exercise their rights, and collective management is not yet implemented at a satisfactory level.

Support must be provided at the European level in order to improve this situation.

Performers' collecting societies are ready to confirm their principles of operation and cooperation, with regard to freedom of membership, non-discrimination, transparency and accountability, the objectives described by the working document (page 31 et seq.).

This means the support of the Commission, notably to implement legal obligations to improve the cooperation with users of protected recordings concerning the information on their uses, and the incorporation of performers' identity code in medias.

Performers' organisations are ready to ensure the proper operation of bilateral agreements and membership agreements without any discrimination notably in order to contribute to the proper development of cross-border collective management.

AEPO-ARTIS is ready to consider the possibility, for the users, to contract with any performers' collective management organisation, representative on the basis of its membership and of its bilateral agreements.

AEPO-ARTIS, beyond the need for a better protection granted to performers at the European level, agrees with GESAC on the perspective of creating conditions and guarantees for the proper functioning of such a system, and notably with regard to applicable tariffs and operation fees. Such conditions and guarantees could be established in the framework of a dialogue with other rightholders organisations and with the services of the European Commission.

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