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Remarks concerning the communication from the Commission of 16 April 2004 on the management of copyright and related rights in the internal market (COM2004 261 final).

AEPO and ARTIS, which represent the almost totality of performers' collecting societies in Europe, welcome the implication of the Commission on the aspects that concern the individual and collective management of rights.

Indeed, the recognition of statutory rights in the *acquis communautaire* has only a partial impact if the difficulties met by right-holders in the exercise of their rights are not completely identified and, if possible, resolved.

The cited Communication (hereinafter referred to as "the *Communication 261*") simply provides, in our opinion, a partial presentation of the situation of the exercise of performers' rights, and it does not give the desired responses in view of the met difficulties.

Before presenting some brief and specific observations on a number of points dealt by the *Communication 261*, ARTIS and AEPO would like to introduce two general observations:

1. The recognition of performers' rights is quite recent. The effective level of protection of these rights is obviously insufficient at EU level.

The European Parliament adopted in 1999 a Resolution on the situation and role of artists in the European Union, pointing out to what extent performers were predominately in a situation of serious precariousness in Europe. Far from this, the situation has not improved.

The Directives adopted since 1992 introduced some intellectual property rights to performers, but their impact as regards an effective remuneration remains extremely insufficient.

As an example we can refer to the lack of a right of communication to the public of audiovisual fixations in the *acquis communautaire* (except for the right of making available right on-demand recognised by article 3 of Directive 2001-29), or to the numerous difficulties met by the implementation of Directive 92-100 to the prejudice of performers.

A priority should then be to reinforce the statutory rights of performers, not only on the *acquis communautaire* level, but also in the frame of Member States' national legislations.

2. Performers usually work under a subordinate relationship

The content of individual contracts (which is usually imposed to performers) has frequently the effect of annihilating the intellectual property rights granted to performers by the law.

As concerns this issue, points 2.2.2 and 2.2.3 of the *Communication 261* represent an optimistic vision of the guarantees that can be awarded to performers in their contractual relations with producers. National legislations protect performers in a very limited way.

Our specific observations are as follows:

On international licensing

Considering the fragility of performers' exclusive rights, and the difficulties that are met when applying private international law *rules*, we strongly favour the solution adopted by CISAC 's member societies (Santiago agreement) as concerns the rights of on-line communication to the public, which properly guarantees an effective exercise and an effective control of rights.

Any other solution, as the one resulting from the IFPI/simulcasting agreement, would be unfeasible for performers rights' collecting societies.

On compulsory collective management or extended collective management

For the stake of performers, and considering the weak situation of certain performers' collecting societies in the field of contractual negotiations, we are favourable to the systems of compulsory collective management or of extended collective management.

This point is partially dealt with by the *Communication 261* and would deserve a deep analysis at community level, particularly as regards performers' rights.

On DRM systems

We approve the conclusion of the Commission, according to which a necessary prerequisite to the development of DRMs' systems would be that such systems are fully inter-operable, as well as the consideration expressed in point 1.2.5 of the *Communication 261*, according to which "*in their present status of implementation, DRMs do not present a policy solution for ensuring the appropriate balance between the interests involved*".

AEPO and ARTIS consider that technical protection measures, in the sense of article 6-3 of Directive 2001-29, should only be considered "efficient", and therefore subject to protection, if their use is effectively authorised by right-holders, specially authors and performers.

On the difficulties met by collecting societies to collect remunerations, either deriving from the number of users, or from the multiplication of vertical concentrations of the medias

In point 15 of the Resolution adopted on the 15/1/2004, the European Parliament calls the Commission to take the necessary measures to protect the collective management of rights when confronted to the increasing vertical concentration of the media.

The situation is identical when collecting societies face mass uses such as the ones deriving from sound systems fitted in places open to the public.

It is our desire that the Commission opens a reflection on this point.

On the application of competition law to collecting societies

In the point 17 of the Resolution adopted on the 15/1/2004, the European Parliament calls for the restriction of competition law to the eventual cases of abuse by collecting societies.

The *Communication 261* does not evidently take into account this call and it even contradicts it when maintaining the arguments that motivated its, in our opinion, questionable decision of 8 October 2002 in the field of simulcasting.

We call the Commission to take into consideration point 17 of the Resolution of the Parliament and, in consequence, to formulate proposals in this sense.

On the essential role of collecting societies in the cultural field (stimulation of creation and cultural diversity)

With respect to this issue, the *Communication 261* from the Commission also seems to set aside the Resolution adopted by the Parliament, especially as concerns points 22 to 27, when this matter should be taken into account in the context of an eventual EU legislative intervention.

On the questions that require, according to *Communication 261*, a legislative approach

ARTIS and AEPO fully agree with the utility of rules that can lead to the establishment at national level of a “specific status” of collecting societies, notably to guarantee their transparency.

From this point of view, such specificity is justified by the existence of missions of general interest.

However, we do not understand the necessity to harmonise these rules at community level, considering the principle of subsidiarity.

As regards the existence of type-B Agreements, it is important to recall that if performers’ societies are open to the development of a network of A-type agreements, the B-type agreements can be necessary in a transitory way (specially when initiating a collecting society activity, or for certain categories of right-holders or uses which suffer specific identification problems).

The perfect exchange of remunerations between collecting societies requires indeed the identification of the uses for which these remunerations are collected and the identification of the right-holders linked to the fixations object of these uses.

In this respect, it seems essential that information obligations are imposed to users when it comes to the identification of the works and protected fixations, as well as to introduce in the *acquis communautaire* the principle adopted by the Parliament in point 58 of its Resolution, which should impose to users and producers the obligation to communicate all the information related to the exploitation of rights.

The undertaken consultations have shown the resistance of users' representatives to accept a collective management of rights which allows a better protection of the rights as well as the will of certain manufacturers to hamper this collective management in order to easily obtain a transfer of rights for their benefit.

The main voices that call for a European legislative intervention in the field of collective management are those who consider intellectual property as an obstacle for their commercial activity. Their objective is not to favour the establishment of an internal market, which is not in our opinion endangered by the disparity of collecting societies status.

Finally, as regards the question of the control of collecting societies, we find it quite difficult to imagine what community rules could harmonise the diverging control mechanisms, often very strict, already put in place in the Member States.

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