NOTE ON THE POSSIBLE COLLECTION OF EQUITABLE REMUNERATION FOR NON-INTERACTIVE STREAMING OF PHONOGRAMS (INCL. QUESTIONNAIRE)

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For several years AEPO-ARTIS has been examining the possibility for members to collect – **under existing law** – equitable remuneration for non-interactive use of *phonograms* on subscription based audio streaming platforms. Unfortunately, under the current acquis communautaire (such as article 8(2) of Directive 2006/115/EC), the right to equitable remuneration applies only to phonograms.

Since the CDSM Directive did not grant a right to equitable remuneration for making available, this could provide an additional source of revenue, that would (at least in some countries) **not** require a change in the law.

We wish to examine this further with a view to ascertaining whether such collection for phonograms is a possibility in specific countries of AEPO-ARTIS members. As such, this is a **preliminary questionnaire** that will allow us to subsequently conduct a **more targeted investigation** in individual countries.

1. INTERACTIVE VERSUS NON-INTERACTIVE STREAMING

Most music streaming platforms allow a user to select a specific song and listen to it at a time and place of their choosing. This is an act of ***making available on demand*** (as covered by article 3, Directive 2001/29/EC and article 10, WPPT, examined below) and is therefore categorised as an ***interactive*** stream.

However, these platforms also provide services such as curated playlists, auto-play functions, "radio" and options where one selects a specific song and the platform will use an algorithm to then play a list of similar or related songs.

Some of these services will offer the user no possibility to select a specific song and therefore would be categorised as a ***non-interactive*** stream that would fall under the ***category of "any" communication to the public*** (as set out in article 8(2) Directive 2006/115/EC and article 15 the WPPT).

Other services will fall into a grey zone where there can be a valid debate on whether they contain sufficient interactivity to be included in the making available category, or the category of "any" communication to the public.

One thing however is clear. Each of the most well-known music streaming platforms carry out at least *some* acts of non-interactive streaming. The only debate is which streams should be categorised as interactive, and which should be categorised as non-interactive.

As will be shown below, **under EU and international law**, platforms are obliged to pay performers (and producers) equitable remuneration in respect of the non-interactive streams.

2. <u>THE POSITION UNDER EU AND INTERNATIONAL LAW</u>

<u>EU law: non-interactive streaming</u>

Article 8(2) of Directive 2006/115/EC provides:

> **Broadcasting and communication to the public**
>
> 1. …
>
> 2. Member States shall provide a right in order to ensure that a single equitable remuneration is paid by the user, if a phonogram published for commercial purposes, or a reproduction of such phonogram, is used for broadcasting by wireless means or for ***any*** **communication to the public,** and to ensure that this remuneration is shared **between the relevant performers and phonogram producers**.

<u>EU law: interactive streaming</u>

Article 3(2) Directive 2001/29/EC provides:

> **Right of communication to the public of works and right of making available to the public other subject-matter**
>
> …
>
> 2. Member States shall provide for the 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:
> (a) for performers, of fixations of their performances;
>
> …

<u>WPPT: non-interactive streaming</u>

At the international level, the WPPT mirrors the (unclear) provisions of EU law.

Article 15(1) of the WPPT states:

> **Right to Remuneration for Broadcasting and Communication to the Public**
>
> (1) Performers and producers of phonograms shall enjoy the right to a single equitable remuneration for the direct or indirect use of phonograms published for commercial purposes for broadcasting *or for any* communication to the public.

Like EU law, the WPPT contains a separate article covering making available:

Article 10 of the WPPT states:

> **Right of Making Available of Fixed Performances**
>
> Performers shall enjoy the exclusive right of authorizing the making available to the public of their performances fixed in phonograms, 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.

The way EU and international law on this subject is worded is illogical and confusing. One can argue that making available should be included in the category "any communication to the public" and therefore equitable remuneration should be payable for making available. Nevertheless, it is the commonly held view that article 8(2) of Directive 2006/115/EC and article 15 of the WPPT cover all forms of communication to the public of phonograms, but **exclude acts of making available**. As can be seen, this is not stated specifically in EU or international law.

Some national legislation takes a different and clearer approach.

3. NATIONAL LEGISLATION

It is often made very clear in national legislation that the national provisions implementing article 8(2) exclude making available.

For example, UK law provides that ER for communication to the public of a sound recording is payable when:

> "…a commercially published sound recording is …(b)is communicated to the public **otherwise than by its being made available to the public**…"

The legislation in Sweden (and other countries) follows the same approach.

In other countries, the subject of communication to the public is not broken down into (i) making available; and (ii) *all other* forms of communication to the public, as is the case in EU and international law.

In these countries, specific provisions in the legislation deal with **individual** forms of communication to the public (such as traditional radio broadcasting, webcasting, simulcasting etc.), but are silent on the specific form of communication to the public that is "non-interactive streaming". In those countries, if there is no law that applies to non-interactive streaming, there is no basis upon which to claim equitable remuneration from a streaming platform.

In order to fully understand the nuances of each national situation we would appreciate you taking the time to answer the following questions.

4. Questionnaire

PART I – IDENTIFICATION

PART II - QUESTIONS ON NATIONAL LAW PROVISIONS RE COMMUNICATION TO THE PUBLIC AND MAKING AVAILABLE

5. Does your law have (multiple answers possible):

- A general right of communication to the public covering all acts of communication to the public of phonograms, explicitly including making available?

- A general right of communication to the public covering all acts of communication to the public of phonograms, explicitly excluding making available?

- A general right of communication to the public covering all acts of communication to the public of phonograms, without making any reference to making available?

- Specific provisions on different types of communication to the public of phonograms (e.g. broadcasting, public performance, webcasting, simulcasting, making available …)?

- A specific provision that applies only to non-interactive streaming of phonograms?

6. Does your legislation provide these rights to audiovisual works too?

- Yes

- No

- Other (please specify)

7. Do any of the following forms of exploitation fall within the scope of the equitable remuneration in your current legislation?

- Simulcasting (meaning the simultaneous linear online broadcast of a linear terrestrial broadcast).

- Podcasting (meaning a downloadable or streamable full programme containing music).

- Web-radio (meaning that this radio has no terrestrial broadcast, but only an online streamed signal).

8. **Do you consider that there is any *legal* reason why you would not be entitled to collect equitable remuneration for non-interactive streaming?**

- Yes
- No

If YES, please explain what this legal reason is.

9. Do you consider that there is any *practical* reason why you would not be entitled to collect equitable remuneration for non-interactive streaming?
("Practical" reasons might include such things as e.g. financial limitations, relations with other categories of rightholder, lack of resources etc..)

- Yes
- No

If YES, please explain what this legal reason is.

10. Have you approached any streaming platforms to discuss non-interactive streaming?

- Yes
- No

If YES, what was the outcome and what stage are you at? (For example have there been any discussions on tariffs)

11. Would you support an AEPO-ARTIS initiative demanding that streaming platforms pay (to performers' CMOs) equitable remuneration for non-interactive streaming?

- Yes
- No

If NO, please specify why.

12. Please provide us with the name and email address of the person to whom we should address further questions.