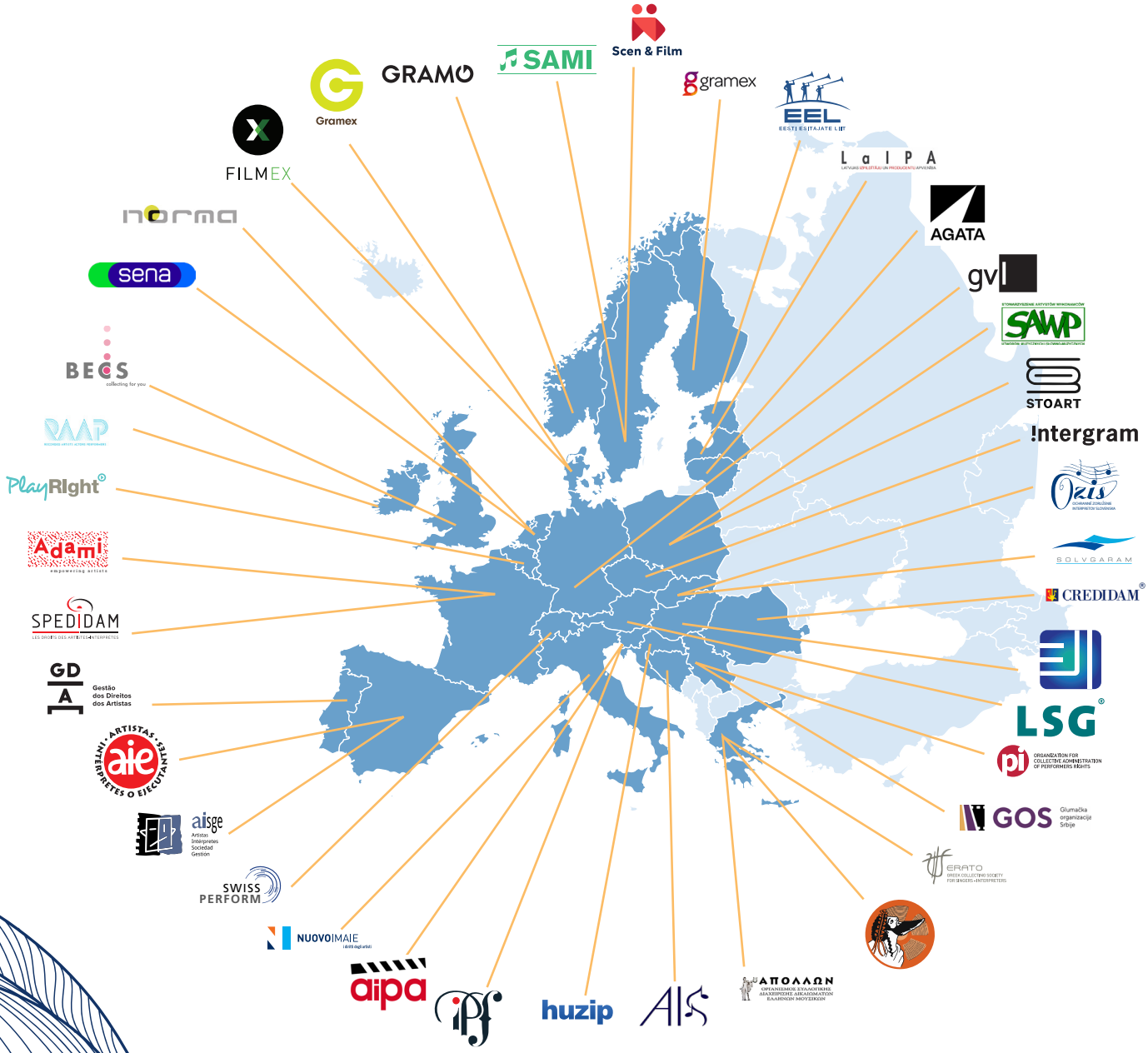
AEPO ARTIS

ASSOCIATION OF EUROPEAN
PERFORMERS ORGANISATIONS

2024-2029
POLITICAL GUIDELINES FOR A FAIR ENVIRONMENT FOR PERFORMERS IN EUROPE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30 YEARS OF DEFENDING PERFORMER RIGHTS

Founded in 1994, AEPO-ARTIS is a non-profit making organisation that represents 39 European performers' collective management organisations from 29 different European countries. The number of artists represented by our 39 member organisations can be estimated at more than 650.000 actors, musicians, dancers and other performers active in the audio and audiovisual sectors.

AEPO-ARTIS aspires to ensure all performers benefit from the use of all their performances, in particular the digital exploitation of their work, and emphasises the important role that performers' neighbouring rights play in this. Our main aspiration is to ensure all performers are paid fairly for the valuable contribution they make to all of our lives.

During its 30-year existence, AEPO-ARTIS has played a crucial role in informing the EU institutions of the vital contribution that performers make to Europe's rich and diverse cultural sector and the specific attention their profession needs when shaping and reshaping legislation. We are a permanent and constructive partner to policy makers within all EU institutions.

Yet, although the EU, through its many directives on copyright and related rights, has provided a legal framework based on strong principles, the effective application remains a point of contention for the Member States. Moreover, the freedom that Member States have in transposing directives has led to divergent national legislation. This lack of harmonisation is detrimental to performers and hinders their legal representatives such as collective management organisations to support their members equally throughout the single market.

A FAIR ENVIRONMENT FOR PERFORMERS IN EUROPE

In 2022 the EU committed to the **Digital Decade Policy Programme 2030** (2022/2481) in which it pursues a **human-centric**, sustainable vision for a digital society that empowers citizens and businesses. This objective comes with a **Declaration on Digital Rights and Principles** for the Digital Decade (2023/C 23/01) in which it is written that the EU prides itself on a **fair digital environment for everyone.**

For performers, however, this is still a distant reality. And this is not the result of a lack of resources. The revenues reported by the music and audiovisual industry have been in an upward trend for a while.

After literally having hit rock bottom, the **music industry** has reported its ninth consecutive year of growth, resulting in an historic **€25,6 billion of revenues** in 2023, a growth of 10% as compared with 2022. Global streaming represented over €17 billion of these.

The **audiovisual sector** does even better with Netflix and Disney+ alone reporting a total revenue of **€37,9 billion** in 2023, a growth of 8%.

For both industries, these digital revenues also include those received from so-called User Generated Platforms like Instagram, YouTube and TikTok. As a result of the 2019 DSM directive, they are no longer able to use a safe-harbour clause to outrun their responsibility.

With a slight delay, the shift towards streaming has proven itself to be an opportunity for the industry. However, unlike large commercial entities such as film studios, record labels, streaming platforms, big tech companies, and recently AI-developers, performers are not benefitting from the digital transition in the same way. Study after study shows that in the shadow of the millions earned by certain industry executives and top rank musicians and actors, most professional performers are unable to earn a minimum wage.

The **fair and competitive digital single market,** which was one of the pillars of the EU's 2019 **Shaping Europe's Digital Future** programme, is certainly not fair to performers.

The **Copyright in the Digital Single Market directive** (2019/790) that requested Member States to adapt and supplement the existing copyright framework to guarantee its technological neutral application while upholding a high level of protection for all rightholders has only recently (July 2024) been implemented by all Member States. Despite some exceptional examples of effective improvement at national level, the promise that EU rules would be fit for purpose in the digital economy has not been fulfilled for what concerns the neighbouring rights of actors, musicians, dancers and other performers. They are receiving only a fraction of the value, if any at all, that is created with their work and increasingly face buyout contracts.

And the EU is aware of this. **During the past legislative term, the European Parliament has pointed out the lack of a decent protection of performers in the European Digital Single Market multiple times** but has been let down by inaction from the Commission and the Member States.

If the EU truly wants a fair digital environment for everyone to be a fait accompli by 2030, action is needed immediately. Performers cannot stand by and watch the European Commission and the Member States postpone the necessary changes any longer. This is even more the case with regard to artificial intelligence, where the commodification of our cultural heritage painfully demonstrates the EU's legal shortcomings.

A healthy human society needs professional performers who are given the necessary opportunities to practice their profession in a dignified manner. Performers do not need patronising, but tools that increase their chances to practice their activity professionally. Better protection of their rights is essential in this regard.

This manifesto lists **the seven most important objectives that the EU must pursue** over the next five years to create the fair digital environment needed to keep the European cultural sector viable for our performers.

1. **Understanding performers are a separate category of rightholders**
2. **Fix streaming by introducing unwaivable remuneration rights**
3. **Ratify the Beijing Treaty and fix discrimination**
4. **Secure the balance between artificial intelligence and performers' rights**
5. **Promoting collective management as a key part of the artistic ecosystem**
6. **Continue to strive towards an EU wide status of the artist**
7. **Support performers at international level and in trade negotiations**

DURING THE PAST LEGISLATIVE TERM, THE EUROPEAN PARLIAMENT HAS POINTED OUT THE LACK OF A DECENT PROTECTION OF PERFORMERS IN THE EUROPEAN DIGITAL SINGLE MARKET MULTIPLE TIMES.

- In **2021**, while the COVID lockdown measures resulted in record breaking numbers for all digital content suppliers, the European Parliament adopted a resolution (2020/2261(INI)) on the situation of artists and the cultural recovery in the EU in which it "calls on the Member States to transpose Directive (EU) 2019/790 on copyright in the digital single market, with a strong focus on the protection of cultural and creative works and those creating them, and, in particular, to guarantee fair, appropriate and proportionate remuneration for authors and performers" and "calls on the Commission to closely monitor the effective implementation of these key principles".

- In **2023**, the European Parliament adopted an additional resolution on the social and professional situation of artists (2023/2051(INL)) in which it considers fair and adequate remuneration of authors and composers an essential part of their working conditions and livelihood. It recalled "the importance of properly implementing copyright and related rights, ensuring that authors and performers, in their capacity as rightholders, are fairly remunerated for the exploitation of their work" and called for "the meaningful transposition and enforcement of the Copyright Directive, aligned with its objectives."

- In **2023**, the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs published a study on "buyout contracts" (PE 754.184) in which it concluded that "Legal solutions must be considered to improve the effectiveness of the protective principles of the DSM Directive." and pointed out that "Implementing an inalienable right to fair remuneration for authors and performers within the framework of compulsory collective management, as seen in some European countries, would allow artists to continually derive income from the exploitation of their works on various platforms."

- In **2024**, in its resolution on Cultural diversity in the European music streaming market (2023/2054(INI)) the European Parliament noted "with concern that the current imbalance in revenue allocation in the music streaming market disfavours both authors and performers and puts the sustainability of their professional careers in the digital market at risk" and "welcomes any efforts towards fairer remuneration for authors and performers, in recognition of the importance of their role in the European music sector."

UNDERSTANDING PERFORMERS ARE A SEPARATE CATEGORY OF RIGHTHOLDERS

For policymakers, the landscape of copyright and related rights can sometimes seem like a complicated tangle. However, it is crucial to **understand that performers represent a separate category of rightholders with a separate type of right.**

The word 'performers' refers to the singers, musicians, actors, dancers and other performing artists whose contribution is indispensable to the creation and enjoyment of music, films and other works around the world. They are literally the face of our culture.

When delivering their performance, performers are the most crucial factor to allow any work to be experienced by an audience. **Musicians** are not necessarily the author (i.e. lyricist or composer) of the music they perform. The role of a musician is to provide the personal contribution that determines the way we perceive the work. **Actors** are rarely the writer of the script they perform, nor will they often be the director of the movie they play in. However, their role is determinant in our choice to watch a movie or not. **Dancers** are also not the ones who create the choreography, but they are responsible for bringing every dance performance to life.

Authors are protected by **copyright**. For the role they play, **performers** receive the protection of **neighbouring rights** (or related rights). Neighbouring rights and copyright are broadly similar but contain some crucial practical differences.

Like authors' rights ("copyright"), performers' rights ("neighbouring rights") are primarily designed as economic rights to ensure that the use of a performance is always subject to the consent of the performer and that the performer will receive a share of the revenues for that use.

In practice, however, the artistic contribution by performers is not only **less valued** than that of other types of rightholders. It is also more **difficult for performers to benefit from their rights**. More often than any other category of rightholders, their weak negotiating position results in them being forced to sign contracts that do not offer them a fair compensation for the transfer of their rights. Legal protection with guaranteed remuneration rights exists only for limited situations.

Understanding performers are a separate category of rightholders that require tailormade solutions is a prior necessity for any cultural policy that strives for a healthy and liveable working environment for actors, musicians and dancers.

FIX STREAMING BY INTRODUCING UNWAIVABLE REMUNERATION RIGHTS

In 2019 the EU adopted **two directives that aimed at modernising the EU Copyright framework** to respond to the way rapid technological developments continue to transform the way works and other subject matter are created, produced, distributed and exploited. Both the Copyright in the Digital Single Market directive (2019/790) (the "DSM directive") and the Online Transmission Directive (2019/789) aim at adapting and supplementing the existing Union copyright framework, while keeping a **high level of protection of copyright and related rights.**

For performers, the most important element of these directives is without a doubt the principle of the benefit of an **appropriate and proportionate remuneration** when they transfer their exclusive rights, which can be found in Article 18 of the DSM Directive. While in the Online Transmission Directive a clear preference for collective management solutions is put forward, the DSM Directive leaves Member States free to **use different mechanisms** to pursue this objective of fair remuneration for performers and authors.

A few Member States have taken the opportunity to introduce **unwaivable and non-transferable remuneration rights,** often combined with **mandatory collective management.** Such mechanism guarantees that performers are effectively remunerated both when their work is streamed by platforms such as Netflix and Spotify, or when it is used by UGC-platforms (YouTube, TikTok, Instagram, etc.). The Commission has found this to be a correct application of EU law.

"The current imbalance in revenue allocation in the music streaming market disfavours both authors and performers and puts the sustainability of their professional careers in the digital market at risk"

EP report on the European Music Streaming Market (2023/2054(INI))

"The Commission considers that, in principle, Member States could transpose article 18 through an unwaivable remuneration right."

Commissioner Thierry Breton (E-001255/2022)

Most countries have regrettably limited the transposition of Article 18 to a literal copy-pasting of the principle, limiting their effort to a set of **mandatory clauses** designed to make contracts between performers and producers (i.e. record labels and film studios) fairer. However, a recent study by Daniel Johansson[1], conducted with the support of AEPO-ARTIS and IAO, has shown that producers do not comply with these articles and most clauses are hardly or not at all used.

The lack of effective implementation of these directives has led to an even more **disharmonised digital single market** where collective management organisations are limited in their capacity to collect and distribute remuneration for performers on a level playing field basis.

Under article 258 of the Treaty on the Functioning of the European Union, the Commission has a legal obligation to ensure that Member States have implemented directives effectively. It has been shown that the vast majority of Member States have failed to do this. It is vital that the Commission complies with their obligation and insists Member States act. Performers need legal certainty that they will receive fair remuneration when their work is being streamed or used by other digital players. If the Commission fails to ensure that this happens, the European Parliament will have a role to play in holding them to account.

1. See: https://www.aepo-artis.org/streams-and-dreams-2-shows-the-ineffectiveness-of-the-dsm-directive/

RATIFY THE BEIJING TREATY AND FIX DISCRIMINATION

In the long history of copyright, **performers' neighbouring rights are a recent phenomenon.** It was not until 1961 with the adoption of the Rome Convention, that performers were first granted a basic international level of protection.

For musicians this first treaty was updated in 1996 with the WIPO Performances and Phonograms Treaty (WPPT). **Actors had to wait until 2012 for WIPO to adopt the Beijing Treaty** on Audiovisual Performances (Beijing Treaty).

Despite 12 years having passed, **the Commission has not done anything to prepare the ratification** of the Beijing Treaty while prohibiting Member States to do this themselves. The lack of decisiveness means that actors cannot count on the rights and income that the treaty was designed to provide. This is not only the case for the use of their work outside the EU, but also within. The lack of equal treatment also means that CMOs cannot offer actors the same added value that they offer musicians.

The inequality in the treatment of performers in the audio and audiovisual sectors within the EU is unfortunately something that is not limited to the lack of ratification of the Beijing Treaty. The presumption of transfer of their exclusive rights faced by actors further weakens their negotiating position and the remuneration rights granted by the European directives to music recordings for broadcasting and communication to the public do not apply to audiovisual recordings.

An additional discrimination is found in the **2011 Term Extension directive** (2011/77/EU). This directive extended the term of protection for performers in music recordings from 50 to 70 years. The term of protection for audiovisual performances was kept at 50 years. For decades **actors must therefore undergo unfounded discrimination** compared to musicians, depriving them of 20 years of income from the exploitation of their work.

In 2021, the Commission concluded a study on the assessment of the directive, but although the findings are known, it refuses to publish them. The publication of this study is of an enormous importance for our performers in audiovisual recordings, since the directive explicitly imposes assessing the possibility for an extension of the term of protection for audiovisual performers too.

The EU must urgently put an end to this shameful situation. The inaction of the Commission must not be tolerated, and the ratification of the Beijing Treaty must be treated as an absolute priority. The EU must seize the opportunity to end any existing discrimination in the current legal framework.

SECURE THE BALANCE BETWEEN ARTIFICIAL INTELLIGENCE AND PERFORMERS' RIGHTS

In 2024 the EU was proud to announce it was the first region to regulate AI via the long debated **Artificial Intelligence Act** (Regulation (EU) 2024/1689).

While the Act is welcomed for obliging AI-developers to be **transparent** on the use of copyright protected works for the training of so-called generative models and put in place a **policy to comply with Union copyright law,** it offers those same developers a legal basis to invoke the highly contested text and data mining (TDM) exception (art 4. of the DSM Directive) in the unsolicited scraping of musical and audiovisual works.

This resulted in legal uncertainty for what concerns performers' rights to allow their work to be used for generative AI purposes and to be remunerated for such use.

In theory performers have the right to **opt-out** of the mining activities performed by AI developers. The practice has however proven that it is almost impossible to set this up for actors and musicians whose voice and likeness are the subject of unsolicited harvesting with a view to reducing them to a tradable commodity.

"Yes, performers should be remunerated for the use of their work by AI developers. Compensating performers aligns with principles of fairness, intellectual property rights, and ethical business practices, and it helps foster ongoing creativity and innovation."

Chat GPT in response to the question: "Do you think that performers need to be remunerated for the use of their work by AI developers?"

More than any other type of artist, **performers represent those who make culture a human thing**. If the EU's Digital Decade Programme truly pursues a human-centric, sustainable vision for a digital society that relies on technology that works for people, it needs to urgently clarify the application of the **principles of authorisation and remuneration** for the use of performers' works for AI purposes and force AI companies to seek licences.

The role CMOs can play in this has already been recognised. The EU must **ensure that performers' CMOs are provided with the necessary tools** to play their role in guaranteeing that performers share equally in the revenues made by licensing their works to AI-developers.

Additional measures are needed to secure the balance between providing AI development access to our cultural heritage and the protection of performers as the most important vehicle to provide such access. The EU should ensure that the development of AI applications that aim to compete with human creativity is discouraged and must commit to deploying more resources where necessary to keep human creativity at the centre of our culture.

5

PROMOTING COLLECTIVE MANAGEMENT AS A KEY PART OF THE ARTISTIC ECOSYSTEM

Collective management organisations (CMOs) play an **essential role in the professional life of every performer.** From their first steps in the life of acting, dancing or playing music until long after their retirement, CMOs stand with their performers to help them get remunerated for their work.

All 39 members of AEPO-ARTIS are not-for-profit organisations that have been founded and are supervised by the performers they represent. The total collection of remuneration for performers in 2023 represented **775 million euros,** the majority of which was collected for remuneration rights for broadcasting, public performance and private copying.

More than 80% of the amounts collected by CMOs are paid directly to rightholders. For performers, who are unable to negotiate directly with the users of their works, this is a percentage that no other partner can offer. A recent study by CMU[2], for example, showed that in the music industry, only an average of 8,4% of revenues made with streaming are paid to musicians.

In the EU the activity of CMOs is regulated by the **2014 Collective Rights Management (CRM) Directive** (2014/26/EU). This directive recognises that CMOs "enable rightholders to be remunerated for uses which they would not be in a position to control or enforce themselves, including in non-domestic markets" and that they "play, and should continue to play, an important role as promoters of the diversity of cultural expression, both by enabling the smallest and less popular repertoires to access the market and by providing social, cultural and educational services for the benefit of their rightholders and the public."

The assessment of the application of the directive, performed in 2021 and supported by two studies on collective licensing practices (SMART 2018/0069 and SMART 2019/0024), concluded that CMOs are abiding by the rules on governance and transparency and **have a positive effect on rightholders and the licensing market in general.** The 2019 DSM directive (2019/790) also recognises the added value of collective management, promotes its further development and even makes it mandatory for certain types of licensing.

CMOs are partners to the EU and its member states in striving towards a fair working environment for performers and promoting cultural diversity. This partnership should be further strengthened by empowering CMOs with a level playing field and better access to the use of the works of their members. The EU and its member states should support mechanisms that promote the involvement of CMOs in obtaining fair remuneration for performers for the exploitations of their work by digital platforms and AI developers.

2. See: https://unlimitedmedia.co.uk/performerpayments/

CONTINUE TO STRIVE TOWARDS AN EU WIDE STATUS OF THE ARTIST

During its previous mandate, in response to the impact of the COVID lockdown measures on the cultural and creative sectors, the European Parliament put the **precarious working conditions of artists** in Europe on the agenda.

Through two own-initiative reports issued in 2020 and 2021, as well as in the resolution adopted by the Parliament in November 2023, it called for the establishment of a European Framework for artists' working conditions. For the Parliament the "stopping of bogus self-employment and coercive buy-out contracts" was key to improving the situation of artists, as well as the need to properly implement copyright and related rights to ensure that performers and authors are fairly remunerated for the exploitation of their work, thereby recognising the important role collective management organisations play in this.

In April 2024, the European Commission responded to the Parliament's call with the confirmation that it also intends to maintain the issue of working conditions in the cultural and creative sectors as part of its agenda by **reinforcing the social conditionality in the next cycle of Union programmes and ensuring an effective transposition and application of the DSM Directive.**

The important work that has already been done needs to be followed up. The Parliament and the Commission have created a momentum for themselves that must not be allowed to fade away.

If there is one thing the COVID crisis has shown, it is that there is no turning back from the dominance of the digital market for experiencing culture. While the EU still needs to continue its search for the right legal basis to work towards harmonising the actual working conditions of our artists, it can and should already make the necessary progress in the area of performers' neighbouring rights, a matter for which there is no doubt that the EU has full competence.

7

SUPPORT PERFORMERS AT INTERNATIONAL LEVEL AND IN TRADE NEGOTIATIONS

Performers are very grateful for the treaties that the **World Intellectual Property Organisation** (WIPO) has given them: the Beijing Treaty and the WPPT. However, they do not make fair remuneration for performers in the digital environment a fait accompli. This applies to the EU, which has itself signed these treaties, and it also applies to its trading partners.

Aware of the need for improvement, the topic of fair remuneration in the music and audiovisual sector has been on the agenda of **WIPO's Standing Committee on Copyright and Related Rights** for years. In recent years, WIPO has commissioned various studies which provide additional proof that the current remuneration of performers is substandard and confirm that the reasons behind the DSM Directive apply to the international level too. However, the EU delegation is absent in these discussions and lacks outspoken support for its creators. As a result, little if any progress is being made at international level.

The European creative sectors need the EU to **speak out and make the fair remuneration of artists a common goal of the entire international community.** It is time that WIPO finally takes this to heart, especially now that their agenda has been expanded to include artificial intelligence.

And the same dedication should be visible in the free trade negotiations. **Free trade agreements** should be used to push the level of protection of performers worldwide to a higher level, not to give in to a race to the bottom.

This is even more true when it comes to the cultural value of the work our performers deliver. **The cultural nature of music and audiovisual works justifies an approach that is not solely based on economic principles.** Culture is more than a commodity and is entitled to exceptions that emphasize its exceptional character. The EU must fight to preserve the right of its Member States to take measures that deviate from the conventional principles that apply to free trade agreements, with a view to safeguarding the diversity and uniqueness of our European culture.

While the EU still has a lot of work ahead to secure the objective of a fair digital single market by 2030, it must support - not hinder - attempts to make progress at international level, primarily within WIPO. It must not refrain from promoting its internal objectives at international level and defend the interests of our cultural sectors in every free trade negotiation.

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www.aepo-artis.org

Rue Montoyer 1 (20)
1000 Brussels - Belgium