



FAIR INTERNET FOR PERFORMERS

QUESTIONS & ANSWERS

AEPO-ARTIS | EuroFIA | FIM | IAO

Q1. What is the AEPO-ARTIS, EuroFIA, FIM and IAO proposal?

A new measure should be introduced in European law, complementary to the relevant provisions of Directive 2001/29 (the “Information Society Directive”) 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.

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). 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. For this reason, AEPO-ARTIS, EuroFIA, FIM and IAO call for a measure to be

introduced in European law, guaranteeing specific payments to performers, whenever their performances are made available on demand online to the public. This remuneration should be managed by performers’ collecting societies and paid by the users, i.e. those who make the services available to the public on demand.

Specifically, AEPO-ARTIS, EuroFIA, FIM and IAO propose the incorporation within legislation of the following wording:

“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.

The EU 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 EU law?

No. Such a right was already introduced in 1992 (Directive 1992/100/EEC, subsequently codified as Directive 2006/115/EC) for when a performer transferred his/her rental right to a producer. Such equitable remuneration right was effective in a number of EU member states, where payment was made directly by the users (i.e. rental

shops) and made subject to compulsory collective management. When this provision was introduced into the *acquis communautaire*, the rental right was significantly more valuable than it is today. Performances are now viewed or listened to on demand, online and are far less frequently rented from a physical outlet.

The *acquis* has established other guarantees to make sure performers are remunerated for the exploitation of their work. This is the case, for instance, for the broadcasting and communication to the public of music, where Directive 2006/115/EC grants them a remuneration right.

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 per-

formances 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 on-

line service platform which offers music or audiovisual works on demand to download, such as iTunes, or as a streaming service, such as YouTube, Deezer or LoveFilm Instant. 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 and would not add any additional licensing requirements, 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. 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 within the EU.

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.

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” (Directive 2001/29/EC), 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 as-

sess in terms of economic value at the time when an audio or audiovisual work is produced.

On the other hand, collective bargaining agreements do not provide for an EU wide solution. Only in a very limited number of countries (3 or maybe 4 countries among the EU Member States) collective bargaining agreements may be considered as a practical option. Even in these cases, some agreements 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, in the few countries where they exist. Such arrangements would rather be complementary to such a right, not a substitute for such a right.

Q8. Under the AEPO-ARTIS, EuroFIA, FIM and IAO 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).

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Q9. 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. Different

member states have different practices (e.g. negotiations, arbitration, intellectual property tribunals, etc.) for determining tariffs and the national

collective management organisations have vast experience in reaching agreement on the level of tariffs to be set.

Q10. 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 on-line 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 con-

tent 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 in-

dividual 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.



AEPO-ARTIS

Association of European Performers Organisations

Av. de Cortenbergh 116 | B-1000 Brussels

Tel. +32 2 280 19 34

aepo-artis@aepo-artis.org

www.aepo-artis.org

EuroFIA

European group of the International Federation of Actors

Rue Joseph II, 40 | B-1000 Brussels

Tel. +32 2 235 08 65

office@fia-actors.com

www.fia-actors.com

FIM

International Federation of Musicians

21 bis rue Victor Massé | F-75009 Paris

Tel. +33 1 45 263 123

office@fim-musicians.org

www.fim-musicians.org

IAO

International Artists Organisation

226 rue Saint-Denis | F-75002 Paris

Tel. +33 9 70 26 12 35

info@iaomusic.org

www.iaomusic.org