



## Committee on Legal Affairs

# Working Group on Intellectual Property Rights and Copyright Reform

Meeting of 13 September 2016, from 15:00 to 17:00

Strasbourg, meeting room: Louise Weiss S4.4

Draft minutes

*Mr Cavada, coordinator of the Working Group, chaired the meeting.*

### 1. Adoption of agenda.

The agenda was adopted.

### 2. Approval of minutes of meeting of 13 July 2016.

The minutes were approved.

### 3. Discussion on the relationship between Creative Commons licences and rightholders' compensation schemes including social and cultural rights and remuneration of creators

The following spoke: Jean-Marie Cavada, Paul Keller (Vice-chair of Kennisland and public project lead for Creative Commons Netherlands), Xavier Blanc (Director of Legal and International Affairs of SPEDIDAM and General Secretary of AEPO-ARTIS), Julia Reda, Helga Trüpel.

Mr Cavada introduced the topic and welcomed the guests.

Mr Keller introduced Creative Commons ('CC') and explained the rationale behind it. CC licenses allow creators to communicate which economic rights they reserve, and which rights they waive for the benefit of recipients or other creators. Mr Keller explained that CC licenses do not replace copyright, but are based upon it. He detailed the three different layers of CC licenses and the six different types of CC licenses and informed that he would focus in his presentation on licenses that are granted only for non-commercial purposes. He mentioned that Wikipedia and Google use those licenses. Regarding the topic of the co-existence between CC licenses and the system of collective rights management, Paul Keller reminded that at the start of CC, artists chose to work either with CC if the aim was to make content freely available or with collective rights management, when the artist wanted to get revenues. Then, artists wanted to combine both systems, part of the work under CC for promotion or community spirit, and part of it for reward. In 2007, Creative Commons Netherlands negotiated a pilot project with a collecting society allowing its members to use non-commercial licenses, the collecting society collecting for the commercial uses of the work. This solution was expanded to other collecting societies in another country (France). Now the two systems coexist. However, problems remain between the CC licenses and mandatory compensation schemes. For example the compulsory

(non-waivable) nature of licensing mechanisms in some of the Member States (e.g. news publishers' neighbouring rights in Spain) undermines the general principles of Creative Commons licenses and makes the validity of CC uncertain (it becomes impossible to licence under CC).

Mr Blanc stated that he would represent artists and performers in this debate (AEPO ARTIS represents 500.000 artists and performers). He first explained the remuneration system for artist and performers: in most of the cases, exclusive rights of artists and performers are transferred by contract to producers in exchange for a fixed remuneration. Only 5% of the artists (mostly well-known artists are able to negotiate royalties) might benefit from their exclusive rights by getting a profit from the percentage of the sales. The rest (95%) of the artists and performers does not benefit from the uses of the works on internet. Mr Blanc considers that there is a need to ensure that artists are paid for downloads and streaming online. He commented the leaked version of the proposal for a directive on copyright saying that the question is not to improve the relationship between artists and producers but to protect copyright, where artists could exercise their intellectual property rights and be paid by platforms for the streaming and downloading. Replying to Mrs Reda who asked whether he was describing the situation when artists are forced to a contract on unfair terms with producers, he said that the vast majority of the production is done through this kind of contracts.

Mrs Reda asked both speakers whether they considered that the prospective Commission proposal was compatible with CC and whether both kind of issues could be resolved without any negative impact on the other party.

Mr Blanc raised the issue of the possibility to establish a compensation system for the work of the creators on the online streaming and downloading and suggested that from his point of view, this compensation system should be mandatory. Replying to a comment by Mrs Reda that there are creators who do not want to exploit commercially their works and want to give their music away for free on the internet, Mr Blanc said that almost all artists work for money, and this is what differentiates professional and amateurs. Those who hand out music for free are only a marginal part of the artists and it is up to the artist to give up his/her rights. Regarding the leaked proposal, Mr Blanc explained that the transparency obligations proposed would concern only 5 % of the artists and performers and would not protect the majority of the artists as there is no system of compensation. In addition, the request for additional remuneration would be too burdensome for the artists.

Mrs Trüpel mentioned that when the reform of the collective management system was discussed, the task was to find a solution whereby artists willing to work with Creative Commons would be free to do so for certain works, but would also be able to use a traditional copyright system approach for other works, if they so wished. The issue in this particular issue is more about individual freedom: whether artists themselves want to be remunerated or not. From this angle of the problem, the solution found was satisfactory. However, there is also the problem that many artists are not remunerated adequately, especially those who work with streaming and online services and this issue requires an adequate solution. The issue relates

also to the question of how to regulate internet platforms. Mrs Trüpel asked whether the leaked proposal for a directive would be a solution to satisfy both parties.

Mr Cavada asked how remuneration of artists and performers could be ensured and at the same time allow for easy access to and distribution of works. He also mentioned the taxation applied to platforms.

Mr Keller mentioned that there is a need to ensure that creators are remunerated if they choose to be so and that this remuneration should be fair and transparent. However, he reminded that there are creators or performers who are not interested in the financial aspect and nevertheless copyright law treats all creators in the same way. According to Mr Keller, the leaked proposal could create damages as the proposed legislation assumes one dominant model (the one where the creator wants to be remunerated) and some platforms are made for creators who are not interested in remuneration.

Mr Blanc stated that in the audio and audiovisual sectors most of the performers want to ensure that they get paid. What is broadcasted and generates money is professional work and it concerns artists who have not renounced their rights. He recognised that there were certain exceptions, for example groups of music that became famous thanks to internet. But in the end, their rights will be transferred to producers. According to Mr Blanc, there is a need to extend the concept of “communication to the public” to platforms and to establish a right to remuneration for stream and download services. When their exclusive rights have been transferred, it should be guaranteed that a share of the subscription to the service will be paid by the intermediary to the artists.

Mrs Reda asked Mr Keller whether he thinks that it would be possible to design a system of remuneration that applies only to those creators who exercised their exclusive rights and transferred them to the producers. Mr Keller replied that it is not up to the Creative Commons to design such a system as Creative Commons is a non-commercial company dealing only with non-exclusive rights. The other rights might exist alongside. Mr Keller also mentioned that French law is incredibly dangerous as it tries to fix something for a minority by applying instruments that will have negative effects on the entire population. He gave the example of photography where non-professionals are the majority. Mrs Trüpel stated that she shares the interests of those who want to use Creative Commons and have a possibility to share information on the internet in a non-commercial way. Artists and performers are a minority but they should be protected as well.

Then, the discussion turned around the issue of co-existence of the two systems. To the question whether there is a possibility to create a distinction at technical level between those artists who want to be remunerated for their work and those who do it for free, Mr Blanc replied that this distinction should be based on transferring exclusive rights. AEPO-ARTIS’ proposal is based on the idea that the right of remuneration is based on the transfer of rights: once exclusive rights are transferred to the producer, the artist should have a right to be remunerated. According to him, the system is compatible with the one in which an artist does not transfer his rights to a producer but in this case, the right to remuneration will not be generated. He mentioned that the

right of remuneration after the exclusive rights are transferred, already exists in the framework of Directive 2006/115 (rental directive).

Paul Keller emphasised that CC is in favour of providing wider protection to professional artists, however, under the current legislative proposal there is a danger of putting an obligation over all artists and not just those who seek remuneration. Mr Keller was then asked to clarify his position, i.e. whether he thought that as a general rule all content should be free and remuneration should be rather the exception. Mr Keller suggested that granting of rights should be based on a result of affirmative act rather than something that happens automatically. Mr Blanc expressed his concern hearing this philosophical and ethical concept that rights are a burden and that authors should have no rights unless they expressly ask for them. Mr Keller specified that the system would be fairer if granting of exclusive rights would be based on a result of an action rather than by default. On the question whether a system where authors can be remunerated and publish freely their works can exist, Mr Keller stated that the question here is what should be a default level of protection for the performers, whether it should be minimum until certain actions are taken or whether it should be maximum. Mr Blanc objected to the system proposed by Mr Keller.

Mrs Reda asked whether it is possible to build a system where artists can be fairly remunerated for uploaded content or for streaming services and where people might upload content in the internet for a free use at the same time. Also, whether it is possible to make a proposal based not on copyright law but rather on copyright contract law. The issue here is that online platforms pay the performers but this payment is usually inadequate or unfair.

Mrs Trüpel added that, so far, there is no solution on how to create a system where professional artists get fair remuneration for their work and at the same time the system of CC is not entirely destroyed.

Mr Blanc proposed that there should be a system where the platforms pay directly the author, rather than the producers. At the same time, he did not want to change the relationship between the producer and the artist. He suggested that this Directive should establish the framework, which deals with artists' or performers', as well as other parties' fair remuneration. He suggested two options: either remuneration will not be given to the artists, or it will go into possession of artists' funds.

Mr Cavada proposed that if the share paid by the platform is eventually not attributed (e.g., the artists creates for free) then the amount would go to a legal fund (e.g. CNC in France). Mrs Reda rejected the idea of asking streaming service that only offer CC licensed music to pay a fund or other artists as it would not be compatible with the concept of Creative Commons. Mr Blanc replied that in one of the two options no right has been transferred to the producer and therefore no remuneration is to be paid (as the service would not generate any revenue). Mrs Reda replied that some websites generate value even if they are based on creative commons licences. Mr Keller added that there are commercial services that build up a collection of CC licence music with the intention of issuing commercial licenses.

Then Mr Keller and Mr Blanc discussed about the possible solutions that would take into account both the creators who want to be protected and to get paid and the others. Mr Keller said that the initial idea of CC was not to become an opt-out mechanism for platforms. Mr Blanc repeated that he did not know any streaming and downloading site operating on a commercial basis that is exclusively based on CC content, nor had he met any creator who refused to be protected and paid. He also clarified that the AEPO-ARTIS' proposal would apply to any entity making content available to the public on demand. This could include user generated content platforms, but then if no right has been transferred to the producer, there would be no right to remuneration.