



CONSULTATION
GREEN PAPER ON THE ONLINE DISTRIBUTION OF AUDIOVISUAL WORKS
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RESPONSE OF PEARLE*

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1. Introduction

The Commission launched this consultation in order to open a debate on opportunities and challenges of the online distribution of audiovisual works. In the context of a future digital single market and with the objective of contributing to its achievement, the Green Paper aims at identifying obstacles to the development of a European wide distribution of audiovisual works and enquiring on policy options in this field.

Pearle*, which is the European trade federation representing the interests of more than 4,500 performing arts organisations across Europe, welcomes the Commission's initiative to launch this debate. Audiovisual recordings of live performances today are made available on new platforms; the internet opens opportunities to ease the access to cultural events across borders. Still, there are barriers for the European audience to fully benefit from digital material, therefore the legal framework within the EU, especially with regard to copyright law needs to be revised.

However, Pearle* is concerned about the narrow scope of the above mentioned Green Paper. Whilst the introduction is referring to audiovisual works and the cultural industries in general, the text mainly focuses on the rights clearance for the online distribution of *audiovisual media services* and *cinematographic works*. It disregards the fact that other cultural sectors as well use the internet to disseminate audiovisual works. Live performance organisations offer a tremendous diversity of edited recordings online and therefore have to be taken into account in the policy debate. Once again – Pearle* already underlined this lack of recognition in its response to the 2009 Reflection document of DG Infso and DG Markt¹ – policy makers proof to be unaware of the role of the performing arts sector in the online

¹ Creative Content in a European Digital Single Market: Challenges for the future. A Reflection Document of DG INFISO and DG MARKT. Response of Pearle* to the consultation is available on the website: <http://www.pearle.ws/en/positionpapers/detail/43>

world. In order to include audiovisual material provided by orchestras, concert halls, theatres, opera houses, dance companies, festivals and other organisations, the Commission's approach must be broadened.

The contribution of Pearle* to the Green Paper first gives an overview of the online use of audiovisual works in the performing arts. It then replies to a number of selected questions asked by the Commission.

2. General remarks: Audiovisual works online in the live performance sector

Whilst 'traditional' live performances including the physical participation of a consumer at a particular place and time remain the core business of the performing arts, the use of digital devices is of vital importance for the sector. Edited recordings and live streaming of performances play an increasing role on the internet, which is also a tool to keep in contact with and attract the audience or to promote a new production with an audiovisual excerpt. At the same time, new forms of presenting performances are explored; models are for example live to big screens or live/"as live" to cinemas. Some live performing organisations today start digital experiments by creating contemporary theatre exclusively in the online world.

The use of recordings is also essential in the areas of arts education, e-learning via the internet and scientific purposes. In this context, digital libraries of live performance organisations have been set up in the last years in order to make creative content available online. In addition, recordings play an important role when it comes to internal uses, such as understudies, training for artists and documentary purposes.

Pearle* would like to emphasise the fact that most of the recordings in the performing arts do not face language barriers. Contrary to the conclusions drawn in part 3 of the Green Paper (page 13), audiovisual works in this sector are mostly not language-specific (recordings music, concerts, ballet and dance performances and to a certain extent operatic works and musical theatre) and do not focus primarily on a national audience as most audiovisual media services.

3. Response to selected questions raised in the Green Paper

Question 1:

What are the main legal and other obstacles – copyright or otherwise - that impede the development of the digital single market for the cross-border distribution of audiovisual works? Which framework conditions should be adapted or be put in place to stimulate a dynamic digital single market for audiovisual content and to facilitate multi-territorial licensing? What should be the key priorities?

From the perspective of live performance organisations, the digital market today is characterised by legal uncertainty. Before a production can be made available online, they are confronted with a large number of rights to be cleared and which are divided upon a multitude of right holders and collecting societies. They face complex, time-consuming rights clearance processes, especially with producers in several countries. As a consequence, live performance organisers are confronted with delivery problems, in particular when it comes to cross border online services such as streaming of a live event in third countries.

Moreover, tariffs have been constantly increasing in Member States for each exploitation of a work and it is often unclear to performance organizers how the calculation of tariffs for the online distribution of a work is determined. Live performance organisations are often confronted with ex post extra costs for which they had not budgeted in their productions.

As a user, Pearle* therefore urges the Commission to take the following key priorities into account to develop the digital single market:

- * A simplification of the rights clearance mechanisms across Europe
- * A service-oriented management of collective rights
- * Easing the administrative burdens to clear rights
- * Flexible one-stop-shops which allow for the right clearance in all EU Member States
- * Reduction of administrative fees and the possibility of regulating tariff criteria (not tariffs themselves)
- * More transparency as to the rights clearance process which would help live performance organisations understand what they are paying for

In addition to these priorities, it is highly desirable to revise the Information Society Directive (2001/29/EC) as suggested by the Commission. Attention should be paid to limitations and exceptions listed in the Directive. It is essential to widen the scope of cultural institutions to encompass performing arts organisations, in particular with regard to archiving and material for study purposes. National legislators should also be given the possibility to include other exceptions than those listed, such as, for example, the availability of a short trailer for advertising purposes online. An exception for advertising purposes used by live performance organisations already exists in some national legislation or regulation through collective agreement (in Germany and Finland for example).

Question 2:

What practical problems arise for audiovisual media services providers in the context of clearing rights in audiovisual works (a) in a single territory; and (b) across multiple territories? What rights are affected? For which uses?

When it comes to recording in the digital context, the status of live performance organisations is unclear. There is no live producers' neighbouring right in international law, so that there is no automatic right holder status for these organisations. Within the European Union, only performing arts organisations in Germany benefit from this special neighbouring right. It entitles them to record their production, to reproduce audio recordings and videos, to distribute them and to license their re-use or audiovisual dissemination. In other EU countries, different solutions were found to access the digital market and broaden the audience²:

- * Setting up an own record/audiovisual company
- * Signing a contract with a broadcaster organisation or a film company to record the event
- * Acquiring all rights through negotiations and contracts with right holders or applying creative commons licences

² A more detailed description of these solutions was provided in the response of Pearle* to the 2009 Reflection Document of DG Info and DG Markt: <http://www.pearle.ws/en/positionpapers/detail/43>

Another specificity of the performing arts sector already mentioned in the response to question 1 is the wide range of rights to be cleared, with a growing number of collecting societies. A live performance organisation has to deal with author's rights and related rights, concretely with the rights for texts, music, scores, use of sound recordings, video excerpts, photos, choreography, light plans, stage design, and etcetera. This situation can turn out to be an investment barrier in the digital world: The overall costs and administrative burdens, such as long negotiations with CMO's makes it impossible for small sized organisations, from an economic point of view, to set up a new digital service.

Question 3:

Can copyright clearance problems be solved by improving the licensing framework? Is a copyright system based on territoriality in the EU appropriate in the online environment?

Pearle* holds the opinion that copyright clearance problems can be solved by setting up better rules for governance and transparency requirements for collective rights management organisations and enforcing a better regulation. The aim is to achieve more efficiency and a simplification of the licensing process which would have cost-saving effects for right users. Pearle* believes that multi-territory licensing is adapted for the online distribution of audiovisual works. The principle of territoriality is seen as a major barrier to the creation of a digital single market.

Question 9:

How could technology facilitate the clearing of rights? Would the development of identification systems for audiovisual works and rights ownership databases facilitate the clearance of rights for online distribution of audiovisual works? What role, if any, is there for the European Union?

In the light of a multitude of right holders, rights ownership databases would facilitate the clearance of rights for online distribution of audiovisual works, provided that all information is available for right users. When setting up databases, it is of high importance to bring together all sectors involved in rights clearance: not only collecting societies, but also producers, editors, translators etc. as a collecting society only holds information on rightholders they represent.

In Pearle*'s view, the European Union could take a coordinating role (with the development of a common webportal for instance) regarding the databases, so that all users in different Member States would have access to the same kind of information. This would particularly be of help for SMEs which only can benefit of the opportunities offered by the digital environment if administrative burdens are reduced.

Question 13:

What are your views on the possible advantages and disadvantages of harmonizing copyright in the EU via a comprehensive Copyright Code?

In general, a Copyright Code could lead to more efficiency and clarification in the rights clearance process. In this sense, Pearle* can see advantages in seeking for more harmonisation in copyright issues. However, as already stated in the response to the 2009 Reflection Document, Pearle* is convinced that at the same time there could be serious disadvantages of harmonizing copyright in the EU. A harmonisation by directive or unification by regulation could favour the highest standard of protection as a norm in a European single market, as IViR underlines in the report "The Recasting of Copyright &

Related Rights for the Knowledge Economy”³ published in 2006. This would jeopardise the diversity of performing arts organisations in Europe and further growth potential of the sector.

A simple codification of existing EU copyright directives, however would make the state of EU legislation clearer. A helpdesk with information on when and how a directive was transposed into national law in different European countries would be useful as well, as performing arts organisations have difficulties to get a good overview of 27 national copyright legislations. Also practical information about each country and its main characteristics of copyright law as well as a list of collective rights organisations and their competences could be published online.

Question 14:

What are your views on the introduction of an optional unitary EU Copyright Title? What should be the characteristics of a unitary Title, including in relation to national rights?

Pearle* would like to express its concerns regarding an optional unitary EU Copyright Title which doesn't show a way forward: A parallel system of titles – one at a national and another one at European level – would create confusion and make the rights clearance system even more complicated than it is today. The result would be a further fractioning of the value chain, resulting in more complexity, more administrative burdens and less transparency for live performance organisations.

There is a great danger that with the creation of a new layer of rights users will pay more. In the light of multiple rights to be cleared already, the performing arts sector would face a pressure on the programming, with less contemporary or still under copyright protected work (thus less revenue for the artists). This would lead in the end to less cultural diversity and a smaller offer of choice for the audience and the consumer.

Question 18:

Is an unwaivable right to remuneration required at European level for audiovisual performers to guarantee proportional remuneration for online uses of their performances after they transferred their making available right? If so, should such a remuneration right be compulsorily be administered by collecting societies?

Live performance organisations primarily act as users of copyright and related rights. However, they can also be right holders. In this sense, Pearle* is particularly attentive to a balanced reform and a fair remuneration for artists and creators.

Pearle* is not in favour of introducing an unwaivable right of remuneration administered by collecting societies. On the contrary, some Pearle* members followed a different path, for example in the UK, and explored new business models related to digital rights management. The performing arts organisations have come to agreements with performers and artists, represented by their trade-union bodies, to find contractual solutions regarding the performer's rights. Reducing the number of intermediary services, such as collecting societies, has been proofed to be beneficial for both sides, right users and right holders.

³ http://ec.europa.eu/internal_market/copyright/docs/studies/etd2005imd195recast_report_2006.pdf

4. Conclusions

The Green Paper is a welcome starting point for debate on the future of a digital single market. A European policy on the online distribution of audiovisual works helps to achieve this market and implement the Digital Agenda.

Pearle regrets the very limited scope of the paper focusing only on broadcasting and cinematographic works. It is of utmost importance to avoid a further fragmentation of the single market. It is therefore essential to broaden the scope of the debate by including other cultural sectors such as the performing arts sector into the policy strategy.

Missing licensing schemes at EU level and the large number of rights to be cleared are severe impediments to the creation of a digital single market.

Creating an optional European Copyright Title will increase the complexity of the rights clearance system and therefore seems counterproductive.

With the aim of including the live performance sector into the scope, the reconsideration of limitations and exceptions in the 2001 Information Society Directive is of key importance.

Simplification of copyright legislation, efficiency and transparency of the rights clearance process is essential to create the digital market for the distribution of audiovisual works. In this sense, Pearle calls upon the Commission to propose a new framework directive on the governance of collecting societies without delay.