Response to the consultation paper

1. Introduction

On 16 July 2008 the European Commission proposed an Intellectual Property package, including a green paper on ‘copyright in the knowledge economy’. The Commission invites stakeholders to participate in the debate on how knowledge for research, science and education can best be disseminated in the online environment. It therefore sets out a number of issues connected to the role of copyright in the knowledge economy, being intellectual resources such as know-how and expertise.

The consultation is seeking input in two parts: one on exceptions to exclusive rights as formulated in the Copyright Directive (2001/29/EC) and the other on the protection of databases (Directive 96/9/EC).

The scope of the green paper is based on the need for promoting free movement of knowledge and innovation as the "Fifth freedom" in the single market. This notion is applied to research, science and educational materials to the public. The public being scientists, researchers, students, disabled persons and the general public who want to advance their knowledge and educational levels by using the internet.

Pearle* notes that the Commission has chosen a limited scope in the debate on ‘copyright in the knowledge economy’. When the Commission highlighted in its Communication on the Single Market Review (Com (2007) 724 final) a need to promote free movement of knowledge and innovation in the single market, Pearle was looking forward to participate in such discussion. It is therefore regrettable that this paper is narrowing down on a limited number of issues, which do not allow to deliver a genuine debate on this so-called "Fifth freedom".

As explained below the subject of the consultation affects the sector of the performing arts only to a limited extent. This paper responds in a general way to the following topics: archiving, preservation, digitization and access to archives. The answers below intend to draw the attention of the Commission to issues which are not raised in the Green paper, but which may have an impact on the performing arts sector by future policy in this framework.

2. The interest of the performing arts sector in this consultation

As the European representative of the performing arts sector, we see great opportunities and challenges in developing an internal market where knowledge and innovation may flourish. Knowledge and innovation are essential conditions for cultural creativity. Making the results of this
creativity available and accessible to the public is the aim of the whole live performance sector. This is also an objective formulated in the Treaty, where Article 151, par 1 says: “the Community shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore.” Within the same article 151, par 2 underlines:

Action by the Community shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action in the following areas:

- improvement of the knowledge and dissemination of the culture and history of the European peoples,
- conservation and safeguarding of cultural heritage of European significance,
- non-commercial cultural exchanges,
- artistic and literary creation, including in the audiovisual sector.

It is necessary that a balance is found between the dissemination of knowledge on culture and the legal framework in which protected culture operates.

The Commission points out that knowledge and innovation are to be considered as a fifth freedom in the internal market, besides the free movement of capital, persons, services and goods. In the green paper the Commission only addresses the free movement of knowledge and innovation in an online environment. In Pearle*’s view the paper is lacking the scope of the free physical movement of persons and their movement knowledge and innovation. In particular in the performing arts sector this is what happens with touring companies who move within Europe with performances and who have to deal with rights clearance related to intellectual property in every member state.

The European Institutions have an important role to play in developing a policy that takes into consideration the promotion of culture, by which means it also supports cultural institutions to fulfil this role and the economic exploitation of copyright protected creations. Where intellectual property was set up to protect the creators at times when no social protection schemes existed, but which may promote innovation if used in a proper way, today it is more and more a burden for cultural institutions such as in the performing arts sector.

3. Enclosure of performing arts organizations in the scope?

The consultation addresses questions to publishers, libraries, educational establishments, museums, archives, researchers, people with a disability and the public at large. In this regard the Commission is seeking the viewpoint from different categories of stakeholders such as commercial enterprises (publishers), the non-profit or non-commercial sector and civil society. This approach is reflected in the exceptions which are formulated in articles 5, 2 c)\(^1\) and 5,3 a) and b)\(^2\) in Directive 2001/29/EC.

\(^1\) in respect of specific acts of reproduction made by libraries publicly accessible, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage

\(^2\) (a) use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved;

(b) uses, for the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature, to the extent required by the specific disability;
Directive 2001/29/EC limits the list of exceptions to ‘accessible, educational establishments or museums, or by archives’. Equally as museums, other cultural institutions such as opera houses, theatres or orchestras have an archive of recorded events and of compositions, libretti and plays. Indeed, just as museums, live performance institutions, which usually also receive public funding, and have a non-profit legal status, do also have a duty to make publicly available the archive material. In its further response below Pearle* assumes that a broad interpretation of archives within this context is accepted.

- **Archives in the sector**: preservation of compositions, libretti, plays, photographs, others and of recorded audio/video live events. Performing arts organizations are often faced with a difficulty of finding the rights holders for which they don’t have the manpower, neither the financial resources to undertake such search. In addition a great deal of the archive material concerns orphan works. Copyright clearance is therefore a real problem and does not take into account the complexity for institutions that are holding an archive. The administrative burdens related to archiving are not in relation to what the cultural institutions can put into it. In Pearle’s view this is a task that should be conducted by the collecting management societies, who are the owners of the databases of rights holders. A harmonized approach on orphan works, in particular when the aim is to put digitize works with a view to making those available in an online environment, needs therefore primarily attribute the role of collecting managements associations, who can rely on their databases.

- **Guidelines between right holders and users**: The Commission queries stakeholders whether it would be helpful to develop guidelines or model licences. Pearle* is only in favor of such instrument when this actually has an added value to the relationship between rights holders and users. Guidelines should help clarifying the position of each of the archive owners and particular attention should be given to non-commercial or non-profit cultural institutions. In the relationship between rights holders and users, Pearle* would see benefit in two other instruments which would advance the relationship between the two parties. One concerns arbitration mechanisms which allow to negotiate in disputes between right holders and users to come to a tailor-made outcome. The arbitration is to be guaranteed by governmental bodies, of which the people are fully independent and have no ties with neither right holders, collecting management societies, publishers and neither be connected to users. The other one involves the role of the public authorities, who develop a control body which monitors the content of contractual arrangements and that can interfere when a contractual proposal is not balanced. Both proposals come from difficulties that performing arts organizations have suffered in the past where it concerned disputes with right holders (collecting societies, publishers, ...), as cultural institutions have a weak negotiation position. This is too often neglected or put aside by policy makers, though in the context of this Green Paper, an important element to be studied, as the stakeholder group, except for the publishers (whose goal is to make profits), are institutions with a non-profit status having a public role.

- **Exceptions for libraries and archives**: The current copyright legislation, refers to publicly accessible libraries, educational establishments, archives and museums benefitting from the exception of reproduction right for non-commercial purposes and for communication to the public.

As mentioned above, Pearle believes that the scope should be interpreted broadly, to include cultural institutions from the performing arts sector as well. Indeed, just as museums, live performance institutions, which usually also receive public funding, and have a non-profit legal status, do also have a duty to make publicly available the archive material. Live performance institutions also desire with a view of preservation for the future generations old recorded live
events (audio and/or video) as well as recent performances. This is important for art historians, and other researchers.

An exception for libraries and archives of any kind should be maintained, as they have without any discussion an important role to play in the democratization, participation, and access to culture. This distinction should be clearly made with publishers whose aim is to make profit, even if their product happens to have a cultural dimension. The argument for publishers is clearly an economic argument for which -in strictu senso- one can't have any objections, on the condition that public institutions or organizations that are funded by public money, can put available information to the widest possible public.

- **Exception to reproduction:** It is important that the exception to reproduction is expanded allowing for copying as well as format shifting to safeguard a number of copies. With regard to the latter, Pearle is of the opinion that it concerns an adaptation to the changes in the technical environment, thus allowing for a digitized version of a live event. This has nothing to do with the reproduction aiming at putting available a work to the public. Subsequently, it should be possible to make a reasonable number of copies under the exception. This means: enough copies which are necessary for research purposes and with a view to its preservation.

- **Dissemination of works for teaching and research purposes and for disabled persons:** It can be important for teachers to use archived material in the class room. Pearle is of the opinion that – with a view to promoting arts education – it should be possible that digitized live events are available for education purposes. The educational tools support the educational goals of teachers, who want to learn students to look at different facets of the live performance (a play, a concert, dance or ballet, opera, or other live event). As a consequence, In this regard, the exception to allow for reproduction should be expanded.

Equally so, access to digitized works of live events for disabled persons must be encouraged. Pearle would be against disclosing the access to particular categories of disabled persons as there is many research available that music and theatre are important for the well-being of disabled persons. This would lead to discrimination in favor of one group against another.

- **User-created content:** The Commission takes the UK Gowers Review as a basis to ask the opinion of stakeholders whether it is desirable to amend the Directive with a view to include an exception to favour innovative uses of works and to stimulate the production of added value. In principle, a framework which stimulates new creations, even when those are based on existing copyright protected work, is to be encouraged. A creator is always influenced by work produced in the past, whether he/she is actively aware of this or not. When a creator deliberately chooses to transform an existing work is an option which should be possible. Pearle has explained in its response\(^3\) to the Commission following the consultation on Creative Content Online how this is applied in the performing arts sector. Unfortunately, due to the fact that copyright protected works are often in the hands of rigid heirs of composers or writers who died, creators today are confronted with difficult, burdensome and lengthy processes of rights clearance. The Commission should carefully consider arguments in favour of promoting a legal framework which allows for creating new content and which also looks at good functioning new business models, whereby copyright is not hindering the creativity. To promote this easy (user-friendly) and efficient rights clearance should be possible under the creation of an exception in the Directive.

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\(^3\) Response from Pearle\(^*\) of 29 February 2008 to the Communication from the European Commission on Creative Content Online in the Single Market COM(2007) 836 final
4. **Conclusion**

The Commission should seek a fair balance which reflects the role of cultural organizations and institutions in society and the protection of the interests of the rights holders.

The objectives formulated in article 151 of the Treaty should go hand in hand with the objectives formulated in the Lisbon strategy to make Europe the most dynamic and competitive knowledge-based economy in the world.

Preservation, and digitization of works is an objective that is formulated in the i2010 package. The initiative to develop a Digital Libraries tool must necessarily be supported by a legislative framework which allows this important initiative from the Commission become fully realized.

To promote a fifth freedom on knowledge flexibility must necessarily be built into the legislative framework which allows for new content to be generated and disseminated.