

**Reply to the GREEN PAPER on
“Unlocking the potential of cultural and creative industries”**

ARD welcomes the opportunity to contribute to the consultation on the Green Paper on “unlocking the potential of cultural and creative industries”.

ARD stands for the “Association of Public Broadcasting Corporations in the Federal Republic of Germany”. ARD consists of nine independent broadcasting corporations under state law. The tenth member of ARD is the international broadcasting service Deutsche Welle. The programming provided by ARD and its member corporations covers a wide range of listener and viewer interests including news, education, culture and entertainment.

ARD is a key contributor to Germany’s and Europe’s creative industry by investing more than 500 million Euros in genuine German audiovisual productions alone per year. Public Service Broadcasters (PSBs) are playing a major role in technological development and innovation in terms of quality services and new viewing experiences (e.g. Hybrid TV, HDTV or 3DTV). Thanks to the contribution of European PSBs, the digital market for legal content offers is becoming more and more vibrant. The Online-Mediathek of ARD in Germany is a perfect example in this respect.

Moreover, ARD knows about the value of young creators and start-ups by not only investing more than 30 million Euros in their regional film support organisations but also by giving young innovative directors a platform for their film debut. Whether it is Fatih Akin, Florian Henckel von Donnersmarck oder Tom Tykwer, they all have realised their start in cooperation with ARD.

Beyond our contribution to creativity and innovation, ARD is a reliable partner for the entire creative sector in a challenging economic environment by employing over 23.000 permanent employees.

Against this background, ARD supports the objective of unlocking the potential of cultural and creative industries and the current work of the European Commission on the *Digital Agenda* in order to create a true single market for online content and services.

For ARD, the key policy issues for European action in this respect are spectrum, digital dividend, interoperability, net neutrality and copyright.

While PSB play an important role in Europe’s digital economy, they are facing major challenges and obstacles especially with respect to copyright, such as burdensome rights clearance processes. Our contribution to the Green Paper on “Unlocking the potential of cultural and creative industries” is therefore concentrated on key copyright issues for broadcasters in a digital environment and sets out our priorities for action at European level.

ARD believes the changes PSBs are proposing with respect to European copyright¹ will help the whole creative sector to flourish and will have an important impact on the ability of SME's to grow in a digital environment.

ARD urges the European Commission to include the audiovisual sector in the framework directive for collecting societies to unlock the potential of the whole cultural and creative industries. As time in this sector is running, the European Commission should not miss the opportunity for truly modernising the copyright provisions by establishing an efficient copyright framework for rights clearance and help the audiovisual sector in Europe to succeed in the digital single market.

ARD encourages the European Commission to adopt a single, coherent framework for audiovisual media services. This framework should apply to all **audiovisual media communications to the public**, so that rights clearance for radio and television embraces broadcast-like on-demand services (such as catch-up services, podcasts and vodcasts). For the purpose of rights licensing, non-linear media services which are "broadcast-like" must be differentiated from mere *retail* on-demand services of individual content.

We believe that such a modernised Copyright framework for audiovisual media communications to the public would simplify rights clearance for broadcaster significantly and would reduce administrative costs which could be invested in audiovisual productions.

Technologically neutral extension of cable retransmission principle to all third-party retransmission platforms

One of the main objectives of ARD is to provide licence fee payers with a maximum of choice. This choice not only refers to the variety of content but also to the means of delivery and access.

To fulfil its public service broadcasting remit, ARD needs to be present with its content on all relevant platforms. But so far, there is no European level playing field for these platforms, due to different national interpretations of the Satellite and Cable Directive: In Germany a recent Court ruling stated that the mandatory collective licensing for retransmission of linear broadcasts only applies to cable retransmission, and not to the retransmission via the internet. As a consequence, new business models like the Internet-platform "Zattoo" are called into question. This is for example contrary to practice in the Nordic Countries.

ARD believes that a level playing field for all third-party platforms with respect to retransmission would not only promote diversity throughout Europe, but also enhance the circulation of cultural and creative works in a digital single market.

Therefore, the introduction of technologically neutral retransmission principles for all third-party platforms would be welcomed by ARD.

¹ The EBU has put forward concrete proposals to make copyright licensing future-proof and technology-neutral in its White Paper "*Modern Copyright for Digital Media*". The EBU White Paper can be found at: www.ebu.ch/copyright.

Country-of-origin principle for online (broadcast-like) services

The rights clearance mechanisms for linear (broadcasting) and non-linear (online) services are of a different nature: For broadcasting services the Satellite and Cable Directive already applies the country-of-origin principle. On the contrary, for non-linear services 27 Member State clearing mechanisms apply. This situation makes it burdensome and inefficient for broadcasters to provide online-services which are, just as satellite broadcasting, also available cross-border.

The right clearance mechanism for the making available right was initially tailored for retail and retail-like services and therefore does not fit for non-linear broadcast-like services of broadcasters. Following the logic of the AVMS Directive and the Cable and Satellite Directive, non-linear broadcast-like services need the same rights clearance mechanism as linear (broadcasting) services.

ARD believes, the technologically neutral extension of the country of origin principle laid down in the Satellite and Cable Directive to online services (broadcast-like) and therefore to all communication of audiovisual media service on all platforms would be the most efficient way for the clearance of rights for audiovisual productions. In applying this principle, European broadcasters could make a significant contribution to the availability of services across borders.

We would like to recall that the Mediathek of ARD and the use of on-demand services such as catch-up services, even though it can be accessed from outside Germany, is a German ('domestic') offer for the German audience as it is the case with satellite. It is not a separate offer for a separate market. In that respect, (mandatory) pan-European licenses would not meet the needs for broadcasting-like offers. Pan-European licenses can only solve licensing problems where different economic markets are concerned.

Extended collective licensing in a Framework Directive for collecting societies

In order to increase access to the online services of broadcasters and to make available more legal creative content online, easier rights clearance systems for online rights are crucial. Collecting societies continue to play a crucial role in order to create a win-win situation for consumers as well as creators and mass users of copyrighted material for content online.

It is of the utmost importance for broadcasters to clear certain rights, especially with regard to the global repertoire, both for linear and for non-linear services, with collecting societies (one-stop-shop).

The introduction of extended collective licensing systems as practised in the Nordic countries would be the best solution to address the complexity in relation to mass use of online rights. An extended collecting licensing system will enable a collecting society or another organisation with a significant representation in a particular category of rights to apply for permission from the government of a Member State to licence all works in that category, including rights-holders who have not specifically signed up to that society or organisation, subject to appropriate safeguards including an opt-out for rights-holders.

ARD believes that extended collective licensing as an optional model for clearing rights for all audio and audiovisual media services where it is deemed necessary and useful

should be incorporated in a European framework for collecting societies. Nevertheless, it would be up to the Member States to decide on the precise scope.

Access to audiovisual archives – extended collective licensing in a Directive on orphan works

ARD would like to make its extensive and culturally rich archives available to its audiences. ARD owns archived material of around 4.2 million hours of radio and TV programmes, going back to the early days of broadcasting.

So far, this can not be done in most of the cases due to the impossibility of identifying all the individual rightsholders involved in a single production in order to clear their rights. In most of the cases, the administrative efforts would be completely disproportionate. In addition, the problem of orphan works remains unresolved. The possibility of one single party involved to block the use of a programme is not merely a theoretical problem but a fact encountered on a daily basis.

Therefore, ARD welcomes the current initiative of an orphan works directive within the context of the modernisation of the European copyright framework. However, we believe that such a Directive should only include the audiovisual sector subject to its specific needs.

We believe that extended collective licensing systems for archives as successfully implemented by a number of Nordic countries would solve not only the orphan works problem for audiovisual productions but, even more crucial, the above mentioned archive problem of broadcasters in Europe.

Framework Directive for collecting societies

For ARD, collecting societies are fundamental in order to have access to the European and global music repertoire and for rightsholders to be remunerated. It is only through collective management that one-stop-shop licensing arrangements for mass use of protected material can be established. Their existence in the various Member States is crucial for cultural diversity.

We would welcome proposals at EU level to increase greater transparency and supervision of collecting societies as we believe this will enhance the trust of rights-holders and users in relation to collective licensing. Therefore, we welcome the initiative of the Commission on a Framework Directive for collecting societies. In this respect we would like to underline that it is vital for any immediate action that such a new Framework Directive is not limited to the mere supervision of music collecting societies, but that it also addresses the rights clearance concerns of the audiovisual media sector in conformity with the scope and principles of the Audiovisual Media Services Directive.