# AER Submission to the Commission Communication on CREATIVE CONTENT ONLINE IN THE SINGLE MARKET

February 29th, 2008

The Association of European Radios (AER) is a Europe-wide trade body representing the interests of over 4,500 commercially-funded radio stations across the EU27 and in Switzerland.

AER has answered to the previous consultation related to "Creative Content Online": "Content Online in the Single Market", on October 13th, 2006. Commercially-funded radio broadcasters are primarily concerned by the development of creative content online: as important content providers, broadcasters need to deliver their programmes on the internet in order to reach their complete audience in modern information society. AER therefore welcomes the opportunity to submit its views on this subject.

**Digital Rights Management**

1) Do you agree that fostering the adoption of interoperable DRM systems should support the development of online creative content services in the Internal Market?

DRM systems have the potential to solve a number of problems, as well as the potential to create a number of new ones. Market developments show major drops in the use of DRM systems. This area should be left to the market to decide.

What are the main obstacles to fully interoperable DRM systems? Which commendable practices do you identify as regards DRM interoperability?

2) Do you agree that consumer information with regard to interoperability and personal data protection features of DRM systems should be improved? What could be, in your opinion, the most appropriate means and procedures to improve consumers' information in respect of DRM systems? Which commendable practices would you identify as regards labelling of digital products and services?

3) Do you agree that reducing the complexity and enhancing the legibility of end-user licence agreements (EULAs) would support the development of online creative content services in the Internal Market? Which recommendable practices do you identify as

regards EULAs? Do you identify any particular issue related to EULAs that needs to be addressed?

4) Do you agree that alternative dispute resolution mechanisms in relation to the application and administration of DRM systems would enhance consumers' confidence in new products and services? Which commendable practices do you identify in that respect?

5) Do you agree that ensuring a non-discriminatory access (for instance for SMEs) to DRM solutions is needed to preserve and foster competition on the market for digital content distribution?

**Multi-territory rights licensing**

AER has previously answered European Commission public consultations on questions related to "multi-territorial licensing":

- "AER Submission to the Communication from the Commission on the management of copyright and related rights in the Internal market" (on June 21st, 2004)
- "AER Submission to the Commission staff working document study on a Community initiative on the collective cross-border management of copyright" (on August 30th, 2005)
- "AER Submission to the call for comments on the Commission recommendation of October 18th, 2005 on collective cross-border management of copyright and related rights for legitimate online music services" (on July 7th, 2007)

Commercially-funded radio broadcasters pay over €325 million per year for music rights. As copyright clearance still constitutes one of the main expenses broadcasters have to face, the points made in the abovementioned submissions remain valid. The first two are enclosed in annex to this submission.

6) Do you agree that the issue of multi-territory rights licensing must be addressed by means of a Recommendation of the European Parliament and the Council?

No, the adoption of a directive on the issue of multi-territory rights licensing seems even more appropriate. Its scope should encompass online *and* offline rights.

Radio broadcasters should be able to clear the usage of rights through one-stop-shops, delivering access to EU global repertoire, if not to worldwide repertoire. Furthermore, a user should be allowed to purchase whatever rights he requires for whatever purpose wherever he wishes to exercise them from any Collecting Society in the EU against clear, published, comparable tariffs. The latter should fulfill similar transparency requirements; i.e., any organization providing access to music rights should publish its tariffs (including split costs of both rights usage and administration induced), the licensing conditions, administrative requirements and the destination of the monies received. Finally, dispute resolution mechanisms should be enabled as appropriate in every Member State in order to prevent abuse of a dominant position by any organization providing access to music rights.

7) What is in your view the most efficient way of fostering multi-territory rights licensing in the area of audiovisual works?

Competition between organizations providing access to music rights, in the case that each of these organizations provide access to all (relevant) music rights.

Do you agree that a model of online licences based on the distinction between a primary and a secondary multi-territory market can facilitate EU-wide or multi-territory licensing for the creative content you deal with?

Any multi-territory licence for online RELATED rights, but limited to the EU-Member States, will not facilitate online activities, unless the user clears all related rights for all 160+ other global territories outside the EU (or finds a way to technically prevent users from outside the EU to access to his offer).

8) Do you agree that business models based on the idea of selling less of more, as illustrated by the so-called "Long tail" theory, benefit from multi-territory rights licences for back-catalogue works (for instance works more than two years old)?

If it is about SALES, there is no need for any licencing, be it multi- or single-territory, as the seller will decide autonomously on price and conditions, and the consumer market will decide on the offer's success. If it is about USE of content: Still a little too early to judge. It seems this could be applicable to podcasts of certain radio programs; e.g., a one-year agreement has been concluded in the UK; the results are still to be assessed.

**Legal offers and piracy**

9) How can increased, effective stakeholder cooperation improve respect of copyright in the online environment?

By ensuring that the individual or corporate rights user is treated in a fair way, i.e. one payment / fee / remuneration for any one use of a copyright or a related right, and not a multitude of them – from levy to remuneration to sales price to licence fee to subscription etc.

10) Do you consider the Memorandum of Understanding, recently adopted in France, as an example to follow?

11) Do you consider that applying filtering measures would be an effective way to prevent online copyright infringements?

ENDS
29/02/2008

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# ANNEX

## AER SUBMISSION TO THE COMMUNICATION FROM THE COMMISSION ON THE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS IN THE INTERNAL MARKET

**COM(2004) 261 final – 16.04.2004**

The Association of European Radios (AER) is a Europe-wide trade-body of private and commercial radio broadcasters in France, Germany, Italy, the UK, Greece, Spain, Portugal, the Netherlands, Denmark, Finland, Sweden, Switzerland and Romania. As such, AER represents the interests of over 4.500 radio operators broadcasting to millions of listeners across Europe every day.

**Summary of recommendations**

- Competition in the sale of collective rights can only be truly enhanced by allowing a user to purchase whatever rights he requires for whatever purpose wherever he wishes to exercise them from any Collecting Society in the Community against clear, published tariffs.

- Failing this, statutory licensing and a means of appeal that can be cost-effectively exercised by both Collecting Societies and users should be introduced in every Member State.

- Our sector pays over € 323 million per year for copyright and neighbouring rights and therefore feels entitled to call for transparency and fairness in the management of copyright and neighbouring rights by the collecting bodies.

- No attempt should be made to harmonise or impose minimum, standard or maximum rates.

- Digital simulcasting of analogue broadcasts should not attract any form of extra or additional payment to rights holders.

- Digital rights should not be more expensive that analogue rights.

## 1. Background: AER and collective rights

AER welcomes the publication of this Communication which covers both individual and collective management of rights and considers whether current methods of rights management are hindering the functioning of the Internal Market, especially with the advent of the Information Society. The Communication represents the conclusions of a consultation process which "have confirmed the need for complementary action on those aspects of collective management which affect cross-border trade and have been identified as impeding the full potential of the Internal Market" (3.6). It seems to us that the Commission is asking two principal questions.

> Should it be left to the market to develop Community-wide licensing further while respecting the basic rules of intellectual property protection including its territorial nature?
>
> What sort of Community legislation might facilitate greater Community-wide licensing?

Before we provide answers to these questions, we wish to make the following points.

- European radio stations play a crucial, cultural role as intermediaries between music copyright owners and the public. Radio stations add value to musical works and performances, by broadcasting and thus promoting them and therefore increasing rights holders' income from sales and royalties. This additional income stimulates the creation of new works. Of course, radio stations also benefit from being able to broadcast the creative works of producers, performance artists, arrangers and composers and should pay appropriate amounts to them for the privilege. The relationship between creators, producers and artists on the one hand and radio broadcasters on the other is a virtuous circle.

- AER has often pointed out the lack of competition that exists in rights provision in the Internal Market and the resulting inequities faced by private and commercially funded broadcasters across the EU. These inequities concern rates, administrative processes, control mechanisms, arbitration and the existence of de facto national monopolies.

- At present, radio is migrating towards new technologies such as Internet streaming and digital terrestrial and satellite transmission. It is crucial that a proper balance is struck between the interests of copyright owners, copyright users, consumers and listeners. This is not the time to seek to impose additional or undue costs on radio broadcasters.

- Payment of copyright and neighbouring rights are an important part of our costs and our sector therefore feels entitled to call for transparency and fairness in the management of copyright and neighbouring rights by the Collecting Societies.

## 2. Community-wide licensing

*AER supports easing the process of Community-wide licensing.*

a. AER commends the Commission for a brave and useful call to action which seeks to achieve "Community-wide licensing" defined as an "umbrella term to describe the granting of a licence by a single collecting society in a single transaction for exploitation throughout the Community". (1.2.4)

b. The Communication is at some pains to uphold "the territorial nature of copyright and the ability of rights holders to exercise their rights territorially" (1.2.1). However, it points out (1.2.3) that this increases the difficulty of licensing across borders. AER contends that it also substantially reduces the likelihood of any genuine competition between Collecting Societies in the Community. In the Internal Market, Collecting Societies should be free to trade across borders and copyright users should be free to purchase rights in the same way.

c. AER calls for the freedom to buy the use of protected music rights across borders. Community-wide licensing could then be left to the market because music copyright Collecting Societies would compete in the provision to users of broadcasting rights of all kinds, whether designed for cross-border, national or regional services. A Finnish broadcaster, for example, would be able to agree a copyright licence for exercise in Finland with the record producers' French collecting society - if he so wished. The competition in rights provision in the Internal Market that would follow such a development would lead to Collecting Societies with more transparent costs for the rights owners they represent and better offers to radio broadcasters and thus to listeners.

d. Whether this proposal is taken up or not, it is important that copyright blanket agreements or licences, wherever and with whoever they are negotiated, should cover only the needs of the applicant broadcaster and nothing beyond that. In other words, the broadcaster should be able to buy the content he needs and not be obliged to buy more.

e. In addition, if the purpose of any legislative instrument that emerges from this exercise is to be confined to easing the process whereby a Member State's rights user seeks to exploit rights in another Member State, then the arrangement should adhere to the country of origin principle.

## 3. Rates and tariffs

*There is a wide range of rates and tariffs imposed on broadcasters across the EU. The validity of these rates can best be tested by enabling users to buy what they need wherever they want as already described. It would be enormously difficult to harmonise and/or set minimum, maximum, average or universal rates.*

a. As indicated in the Communication, one of the important issues faced by radio broadcasters is the fact that rates as well as the Collecting Societies' administration charges and expenses vary widely throughout the EU. Copyright payments to Collecting Societies in some Member States, especially in the Nordic countries, represent an unduly large and unfair financial burden for commercial radio stations. This weakens the financial situation of stations that nowadays face large investments in new technologies as well as lower advertising revenues.

b. In addition, the way the Collecting Societies currently calculate copyright payments gives some broadcasters in some countries a competitive disadvantage both in their home territory and in comparison with broadcasters in other European countries. This is the case in Denmark where copyright fees – which presently represent approximately 20% of total turnover - are charged according to advertising revenue which cuts in at a high level before which an exorbitant minimum rate is charged. In some cases, in particular for smaller radios, these minimum rates represent a substantially higher fee than if the payment were calculated solely on advertising revenue. There are a number of ways whereby this situation might be eased but AER contends that the current Danish situation is taking too much resource out of the Danish radio industry at a time when it is needed for digital and other developments.

4. **<u>Transparency and efficiency of Collecting Societies</u>**

*AER calls for transparency on the part of the Collecting Societies, clearer procedures and a minimization of costly administrative burdens imposed on users and members.*

a. As pointed out in the Commission Communication, Collecting Societies occupy a key position in the licensing of rights in so far as they provide sole access to a catalogue of rights and thus function as a national "one-stop shop". Nevertheless, significant and frequently unexplained differences exist with respect to legislation and practice and have led to a widespread call for a higher degree of convergence of the conditions under which they operate, in particular in terms of efficiency and transparency.

b. Although understandable from a historical and cultural point of view, the disparity of rules regarding the governance of Collecting Societies is detrimental to users as it leads to different conditions being applied to different users throughout the EU and thus to a lack of transparency as well as legal uncertainty. Furthermore, the level of the amounts demanded by the Collecting Societies has been increasing across the EU in spite of their alleged technological and organizational improvements.

c. AER therefore believes that there should be similar transparency and organizational levels required from Collecting Societies across the EU and that common rules could be a means to achieving this. Collecting Societies should be obliged to publish their tariffs and the licensing conditions they apply. They should grant licenses on reasonable conditions, simplify their administrative requirements and provide clear information regarding the

destination of the received amounts. Users need to know that their payments have reached the correct owners: so do the owners.

## 5. Arbitration

*AER seeks dispute settlement systems which are easy, speedy and affordable by radio broadcasters.*

a. AER holds that a proper balance needs to be struck between the interests of copyright owners, copyright users, consumers and listeners. For most European radio broadcasters that balance is attempted in negotiation between Collecting Societies and broadcasters. Although in a fair number of countries, the relations between Collecting Societies are good-humoured and productive, this relationship can also be a very one-sided negotiation because Collecting Societies represent a monopoly within each Member State able to dictate terms to those who wish to broadcast music because there is nowhere else for them to go.

b. AER recommends that some form of "statutory licences" should be enabled in every Member State. In our view the fees charged by a monopoly supplier of rights can only be justified or challenged if the rights user is able to purchase the rights he requires elsewhere. Member States may be reluctant to open Collecting Societies within their jurisdiction to competition from societies in other Member States. If this is the case, then the risk of abuse of a dominant position by a Collecting Society can best be prevented by enabling a producer to take out some form of statutory licence to use the material concerned, declaring the price he believes he should pay and proceeding to pay it. If the copyright agency disagrees with the proposed fee, it can then appeal to a court or independent tribunal that can award costs and confirm fees that seem equitable.

## 6. New technologies

*AER opposes the creation of new categories of copyright fees for "simulcasting" analogue on-air content for which stations have already paid via the Internet or any other means. Price band exclusions of this kind undermine the concept of the Information Society for all.*

a. AER opposes the creation of new categories of copyright fees for digitally "simulcasting" on a digital platform analogue on-air content, for which stations have already paid. We believe the only thing that changes is the distribution channel. The content remains the same. In any case, any substantial increase in copyright royalty payments should be first subject to a realistic assessment of the economic implications. It is important to allow radio stations to embark on new technological experiences by keeping early royalties to a minimum. Many European commercial radio stations are already closing down their Internet simulcasts because prices are too high (Finland for example).

b. It seems to AER that rights fees for digital output should be subject to the same percentage of revenue as that applied to analogue output. There is no case for

extra money or a higher price because the output is digital. It is important, however, that, if the output is made available in other Member States (via the Internet for example), then proper arrangements should be made to ensure that the monies raised by the Collecting Societies should find their way back to the rights holders responsible for the broadcast work.

## 7. Digital radio

*AER opposes the introduction of additional fees for a so-called "right of digital diffusion" especially during the transition period from analogue to digital radio.*

a. For some time, radio broadcasters have been under increasing pressure to "go digital". As already pointed out in our response to the Green paper on Copyright in the Information Society of 1995[1], broadcasters have a positive attitude to the possibilities offered by digital radio. However, much depends on the arrangements which have to be made for the transition from analogue to digital radio broadcasting.

b. During the transition period, which may last for anything from five to fifteen years, broadcasters will need to make broadcasts in both analogue and digital forms. Investment alone in introducing digital broadcasting will be expensive enough; operating the two systems simultaneously for a number of years will be a heavy burden. It is an investment which many broadcasters will think it worth making, if other expenses are kept within reasonable bounds. One such expense, which could change the whole nature of the investment, would be the liability to pay additional royalties arising from a new and exclusive right of "digital diffusion". Such a right would discourage many radio broadcasters from investing in digital broadcasting at all. AER thus strongly disagrees with the statement made on the subject of copyright in the Commission's Communication on Digital Switchover (September 2003) in which the Commission says that "digital simulcast of a copyright protected service results in a right to additional copyright payments even though few or no additional viewers are involved".[2]

c. At present, the balance between the interests of the recording industry and the interests of broadcasters, other copyright users, consumers and listeners, is not being evenly maintained. Demands by the recording industry, backed by many small but vociferous copyright protection societies, are winning one concession after another, from the extension of the period of copyright protection to the reinforcement of customs controls over goods infringing copyright. Measures designed to combat piracy are demonstrably in the public interest, many other protective measures are not; and they do not pass the test which needs to be applied to all legislation in this area: that they must be economically sound.

d. There is a promising and economically viable future for new audio-visual technology if the European Commission is really committed to ensuring that the

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[1] **1 October 1995** - A SUBMISSION BY AER TO THE EUROPEAN COMMISSION REGARDING THE GREEN PAPER ON COPYRIGHT AND RELATED RIGHTS IN THE INFORMATION SOCIETY

[2] Communication from the Commission on the transition from analogue to digital broadcasting, COM(2003) 541 final, p. 19.

views of rights users are fairly taken into account by curbing legislation which at present tilts the balance still further in favour of the copyright owners generally and the recording industry in particular. If a fair balance is maintained, radio stands a better chance of succeeding and flourishing in its present as well as it technological future.

ENDS
21/06/2004

# AER SUBMISSION TO THE COMMISSION STAFF WORKING DOCUMENT
# STUDY ON A COMMUNITY INITIATIVE ON THE CROSS-BORDER COLLECTIVE MANAGEMENT OF COPYRIGHT
**7 July 2005**

The Association of European Radios (AER) is a Europe-wide trade-body of private and commercial radio broadcasters in France, Germany, Italy, the UK, Greece, Spain, Portugal, the Netherlands, Denmark, Finland, Sweden, Switzerland and Romania. As such, AER represents the interests of over 4.500 private and commercial radio operators broadcasting to millions of listeners across Europe every day.

AER has frequently pointed out to the lack of competition that exists in rights provision in the Internal Market and the resulting inequities faced by private and commercially funded radio broadcasters across the EU. Our sector pays over €325 million per year for copyright and neighbouring rights and as such plays an important part in the funding of the so-called "royalty cake". AER therefore welcomes the Commission's acknowledgement that the current structures for collective management of copyright are inadequate and commends this first – long awaited – attempt to reform the system.

We thank the Commission for its invitation to comment on the Staff Working Document but we contend that the three weeks in the middle of the summer which have been offered to react to the complex commercial, market and legal issues raised by this paper are not acceptable.

While we are happy to submit preliminary reactions, we trust that this is only part of the dialogue which the radio industry wishes to continue developing with the Commission to ensure that final proposals are well-balanced, take fair account of the realities of rights-users in general and radio broadcasters in particular and help rather than hinder the development of a vibrant radio industry in Europe with a strong footing in tomorrows digital technologies.

**Summary of main points**

Before we comment on some of the detail of the proposals, we wish to make the following general points.

- The focus on cross-border collective management of ***online*** music services is extremely narrow. AER supported the Commission's 2004 Communication and its intention to deal with some of the more general and urgent problems linked to collective management of music rights faced by rights users whether in terms of competition, governance or arbitration and is disappointed by the current approach.

- AER believes a key point is missing from this proposal. The Commission study seems to argue that the platform governs the content to be licensed and its cost. The document lacks the understanding that for radio broadcasters ***content is key*** and that a licence should be issued on the basis of ***use*** and ***not the platform*** it will be used on.

- By suggesting a "one-fits-all" solution, the Commission's study also misses the opportunity to distinguish between radio broadcasting services – whether off or on-line – and other forms of on-line services. Radio services (whether simulcasting or webcasting) are by and large targeted at "passive consumption" by the audience. This is very different from pro-active or inter-active services such as music downloads via the Internet or "music-on-demand" in which the audience / consumer plays an active part.

- The focus on rights-holders which seems to drive the Commission's proposals is regrettable as are some of the Working Document's assumptions regarding "powerful commercial users with considerable bargaining power". While radio stations play a key role as intermediaries between music copyright owners and the public and indeed pay large amounts into the "royalty cake", private and commercial radio broadcasters in their vast majority can hardly be considered as "powerful users with considerable bargaining power". Daily experience and an increasing number of litigations show that it is indeed the Collecting Societies in general and the music industry in particular who are increasingly in powerful bargaining positions vis-à-vis radio broadcasters.

- While AER agrees that option 1 is not an option, we note with serious concern that from the three solutions discussed, the Working Paper expresses a preference for option 3. From a radio broadcaster's perspective, this option in its current form shows surprising lack of understanding of the legal, commercial and practical realities of radio simulcasting via the Internet. The separation of on-line rights acquisition from the off-line model suggested in the Staff Working Document is unsustainable for radio broadcasters. Two different legal regimes would apply and this could mean the ***end of radio simulcasting over the Internet***. Surely this cannot be the intention of the European Commission.

- As already stated, in AER's view, the platform is largely irrelevant and ***any proposal to achieve a true one-stop shop for music rights must cover the on-line and off-line as well as all digital transmission platforms used*.**

- AER therefore suggests that option 2 of the Working Paper, although imperfect in its present form, offers the best basis to reach some of the objectives including a one-stop-shop for Community-wide licensing, legal security for rights-users and owners and possibly increased transparency as a result of competition.

**The Working Document proposals – impact on private and commercial radio Internet simulcasting**

AER agrees with the Commission that Option 1 – Do Nothing – is not an option. We are concerned however that the Commission is expressing its preference for Option 3 – Give

rights-holders the choice to authorise a collecting society of their choice to manage their works across the entire EU.

AER has strong reservations – some of which are outlined below - regarding the feasibility and practicality of Option 3. We believe it could be detrimental to the radio industry in general and to any attempts for this industry to make the best use of the Internet or any other new technologies for the benefit and enjoyment of all stake-holders including listeners and users of radio services.

## A. Current situation of radio simulcasting over the Internet and rights clearance

- Because the Working Document focuses on *on-line music services* it fails to take into account the specificity of ***simulcasting*** as the *process of* ***simultaneous broadcasting*** *of the* ***same content*** *off-line and on-line* and the way in which the rights for simulcasting are cleared. Radio broadcasters do not operate in the same way than "online music content providers" and suggesting a "one-fits-all approach" is unrealistic.

- The vast majority of private and commercial radios broadcast to local, regional and national audiences. An increasing number across Europe simulcast their analogue or digital free-to-air output over the Internet. This practice is perceived by radio broadcasters better to enable listeners to access their services, via the state-of-the art means of the listeners' own choice. The target audience remains the same. *Accessibility outside the intended market* (so-called "multi-territoriality of Internet simulcasting") is from the point of view of private and commercial broadcasters an unintended consequence of the ubiquity of the Internet and *has no revenue value* for these broadcasters.

- Fees for music rights are most often calculated on the basis of advertising revenue. In some countries, audience figures are also taken into account.[3] If additional income is generated from Internet activities, Collecting Societies AUTOMATICALLY get their share, since the payments are being made as a percentage of the broadcaster's income.

- Some collective agreements are negotiated by national radio associations with Collecting Societies and increasingly with representatives of the music industry (IFPI). In some cases, fees are part of a general agreement which *includes free-to-air analogue broadcasting, cable simulcasting and Internet simulcasting of the same content*.[4] Collecting Societies however are using the introduction of new technologies – such as Internet simulcasting – to charge differentiated or additional fees which sometimes are reasonable and sometimes not.

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[3] This approach poses problems when potential reach is high, the advertising market – and thus revenues - is small, and that fees are calculated on the basis of the two criteria. The percentage charged to the broadcaster can in some instances reach 20% of the stations revenues which in our view is unsustainable. This is for example the case in Denmark.

[4] While CRMs through their network of reciprocal agreements provide rights to the global repertoire, this is not always the case with IFPI. Indeed, IFPI (who are not a Collecting Society but a trade-body bringing together some – but not all – rights holders) CANNOT provide the world-wide rights it claims to provide because its members do not have reciprocal agreements with the respective rights holders in all territories in the world and they do not have agreements with all official Collecting Societies for related rights.

- In addition to attempting to introduce special "simulcasting tariffs", representatives of the music industry are arguing that the fees charged to radio broadcasters should also be based on accessibility outside the intended market. This claim however is nonsensical for most private/commercial radio broadcasters since Internet accessibility outside of the intended market has no revenue value for these broadcasters who, by their local nature, do not have global brands which might appeal either to listeners or to advertisers.

- The current situation thus requires urgent legal clarification (on European and at international level). The Commission's proposal however might exacerbate this situation by making purchasing the rights for simulcasting in the EU even more complex, expensive and legally insecure for radio broadcasters.

## B. Administrative and financial consequences of option 3 for private and commercial radio broadcasters

- The Commission proposal suggests that rights-holders should be able to withdraw certain categories of rights (in particular categories of rights linked to online exploitation) from their national CRMs and transfer their administration to a single rights manager of their choice. For that to work, the online rights will have to be withdrawn from the scope of reciprocal agreements as well.[5]

- This means that radios will continue to be restricted to the national CRM for off-line rights and will have to deal with 2 or 3 (or more) CRMs elsewhere to find the equivalent on-line content. If the rights are "unbundled" and indeed the content split up between 2, 3 or more "on-line" CRMs elsewhere in the remaining 24 EU Member States, it will be very difficult – indeed virtually impossible - for most radios (or associations representing them) - to get access to the repertoire they need at a reasonable cost. There are the obvious language and cultural barriers as well as the added travel and administrative costs which radios or radio associations in smaller markets will be unable to bear.

- Furthermore, the ability for rights holders to move from one CRM to another on short notice would make clearing rights for radio simulcasting simply impossible since the licensed content could alter from one day to the next as a result of rights holder movements.

- The Working Document also suggests that option 3 would allow premium content to be priced higher because it gives the CRM who has succeeded in attracting such content a very strong bargaining position vis-à-vis commercial users.[6] This is clearly a serious concern considering that Collecting Societies (and indeed the music industry) today already are monopolies with extremely strong bargaining positions vis-à-vis radio broadcasters and in some instances with no appropriate arbitration systems.

- More generally, the idea regarding "premium pricing" of certain music or artists is questionable. Private and commercial radio caters to local audiences and language

[5] P.56 – Commission Staff Working Document
[6] P.43 – Commission Staff Working Document

plays an important role. Our radio product does not travel well. Therefore a "premium artist" for one radio station / format can be a non-premium for another. For example, a Finnish or Latvian premium artist might be considered as "premium" in Finland or Latvia but will probably not be considered as such in other EU-Member States. In addition, this cannot be in the interest of creators of cultural content; broadcasters with limited financial means would be unable to include expensive "premium content" in their programmes. This would decrease, not increase, the income of "premium" rights holders.

## C. Consequences of focus on rights-holders and assumption that commercial users have considerable bargaining power

- While improving the situation for rights-holders (RHs) in terms of empowering them to pick and chose the CRM which offers the best price and service is commendable and in tune with free access and provision of services across borders, AER however wonders what category of RHs will actually take advantage of this opportunity and whether it is really in their interest. We also question whether the Collecting Societies would appreciate being reduced down to 3 or 4 entities whether they are genre-specific or not.

- The Working Document clearly suggests that its proposals could lead to the emergence of limited amount of (3 or 4) powerful CRMs for on-line licensing who effectively defend right-holders interests vis-à-vis powerful commercial users at a pan-European level.[7] The system would foster consolidation of the rights administered into one CRM and make possible mergers of small CRMs with larger ones for on-line activities while continuing off-line as before.[8] It would also allow for premium content to be priced higher because it gives the CRM who has attracted such content a very strong bargaining position vis-à-vis commercial users.[9]

- Depending on what the Working Document means by "major commercial user", this assumption if it relates to private and commercial radio broadcasters is not correct. While radio stations play a key role as intermediaries between music copyright owners and the public and indeed pay large amounts into the so-called "royalty cake", they cannot possibly be considered as "powerful users at pan-European level" or as being part of "vertically integrated media conglomerates". Daily experience and an increasing number of litigations show that it is indeed the Collecting Societies in general and the music industry in particular who are in increasingly powerful bargaining positions vis-à-vis radio broadcasters for all music rights. The consolidation process suggested under option 3 would lead into de facto additional on-line music rights monopolies at EU level in addition to the national monopolies which already exist at national level.[10]

[7] P.42 – Commission Staff Working Document
[8] P.45 - Commission Staff Working Document
[9] P.43 - Commission Staff Working Document
[10] P.42 - Commission Staff Working Document

## D. Consequences on transparency and accountability of CRMs

- In its submission to the Commission's Communication of April 2004, AER called for transparency on the part of the CRMs, clearer procedures and a minimization of costly administrative burdens imposed on users and members.[11] As the Commission rightly noted, AER would support the development of any system which improves transparency with regard to where the funds go and if they are effectively paid to the rights holders[12], but at the condition that this be balanced against similar rights and advantages for users.

- By allowing CRMs to compete for rights-holders on the basis of better service criteria, the Working Document argues that it would achieve this aim at the benefit of both rights-holders and users. It is suggested that CRMs would compete for rights-holders in being more innovative as to the methods in which copyright fees are determined (flat fees as opposed to usage-specific fees or fees based on users' revenue).[13]

- This raises the question of the criteria on which CRMs would determine copyright fees for on-line rights. AER questions to what extent the system will really benefit the users and whether the users will have a say with regard to the criteria on which the fees will be determined.

## E. Legal consequences

- In AER's view, the copyright law applicable to broadcasting/communication to the public has always been that of the country where the transmission of the signal takes place/originates. This is enshrined in Article 11bis of the Berne Convention and was later confirmed by the 1993 Cable & Satellite Directive. Currently, however, there is no European legal text confirming that this principle applies to Internet simulcasting as well although simulcasting is widely accepted (by legislators and Collecting Societies) as being an act of broadcasting and that the rights (of authors, composers, performers and record producers) used during this act are therefore submitted to *collective management*.

- There is a situation where certain rights holders – mainly the music industry and their representatives – are increasingly claiming that a *country of destination theory* should be applied to Internet simulcasting and – as stated earlier - are using this claim to create special Internet fees or increase their tariffs unreasonably.

- The Commission's Working Document says that "the principle of territoriality merely determines which law applies to the act of use or exploitation: this is typically the law of the place of exploitation. Rights may be licensed with any territorial scope that is chosen by rights-holders".[14]

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[11] AER submission p.4.
[12] P.52 - Commission Staff Working Document
[13] P.35 - Commission Staff Working Document
[14] P.29 - Commission Staff Working Document

- If rights-holders can choose the territorial scope, they could differentiate between off-line and on-line as well as the platform on which they would want to make their content available. This could mean different territorial scopes and criteria for the same content whether off or on-line and thus different legislations for the clearance of off-line and on-line music rights for radio simulcasting.

- This makes any attempt to simulcast off-line content over the Internet legally insecure for radio broadcasters. AER therefore contends that the European Commission should use this opportunity to clarify that mere reception of real-time streams such as Internet simulcasts of free-to-air broadcasts has no relevance for the applicable law. In this way any remaining confusion or legal uncertainty or – incidentally – undue pressure on radio broadcasters by the music industry can be avoided.

## F. Option 2+

We believe we have raised some of the main issues that spring to mind when looking at the proposed Option 3 and suggest that any further proposal should take option 2 as a starting point.

In our view, option 2 – a network of reciprocal agreements between CRMs without territorial restrictions – is the closest response to what AER is asking: *a single Community-wide license granted by a single collective rights manager in a single transaction for exploitation of the rights granted throughout Europe*.[15] However, this option should take the following, non exhaustive, points into account:

- The separation of on-line from off-line rights is unsustainable. It makes neither business nor legal nor common sense for radio broadcasters to buy their off-line content at their national CRM and to have to shop around the EU for the identical on-line content.

- It is important that copyright blanket agreements or licenses, wherever and with whoever they are negotiated, should cover only the needs of the applicant broadcaster and nothing beyond that. In other words, the broadcaster should be able to buy the content he needs and not be obliged to buy more.

- The urgent problems linked to collective management of music rights faced by radio broadcasters whether in terms of competition, governance or arbitration, should be dealt with as a priority.

## G. Conclusions

While AER strongly supports the Commission in its decision to reform cross-border collective management of copyright, it regrets that the narrow focus "on-line distribution in Europe" has prevented it from recognising and thus supporting the important role that radio stations are playing also with regard to on-line distribution of music.

[15] P.53 - Commission Staff Working Document

A recently published OECD report on Digital Broadband Content[16] notes the immense rise in popularity of new digital distribution channels and proposes recommendations to support that trend. At the same time, it notes that "consumers do not often purchase music with which they are unfamiliar and that airtime on the radio or other means of exposure for a particular artist or band is important". It also states that "radio remains the most important medium in 2004 despite digital distribution outlets".[17]

In its option 3, the Commission shows a surprising lack of understanding for the issues at stake for copyright users in general, and radio broadcasters in particular. After all, radios pay a very large share of the eggs, sugar and flour of the "royalty cake". The Commission also shows surprising lack of insight into the potential consequences of its proposals on this industry. If implemented in its present form, option 3 could lead to the end of radio simulcasting over the Internet. We are convinced that this cannot be the intention of the Commission and are prepared to continue working with the Copyright Unit to ensure that any future proposals will provide balanced and fair proposals to improve the management of copyright and related rights in the Internal Market.

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[16] *Digital Broadband Content: Music*, OECD Working Party on the Information Economy, 8 June 2005
[17] *Digital Broadband Content: Music*, OECD Working Party on the Information Economy, 8 June 2005, p.38, 44