

"© the Future" – Developing a Copyright Agenda for the 21st Century **RadioCentre Response**

Background

1. RadioCentre is the industry body for Commercial Radio. Formed in July 2006 from the merger of the Radio Advertising Bureau (RAB) and the Commercial Radio Companies Association (CRCA), RadioCentre's membership comprises the overwhelming majority of UK Commercial Radio stations, who fund the organisation. RadioCentre is governed by a board of eight directors, representing a cross section of the industry and including all the major Commercial Radio groups.
2. The role of RadioCentre is to maintain and build a strong and successful Commercial Radio industry - in terms of both listening hours and revenues. RadioCentre operates in a number of areas including working with advertisers and their agencies, representing Commercial Radio companies to Government, Ofcom, copyright societies and other organisations concerned with radio. RadioCentre also provides a forum for industry discussion, is a source of advice to members on all aspects of radio, jointly owns Radio Joint Audience Research Ltd (RAJAR) with the BBC, and includes copy clearance services for the industry through the Radio Advertising Clearance Centre (RACC).

Executive Summary

Overview

3. Commercial Radio is a crucial part of the UK's creative economy and daily life, forging a powerful relationship with the two thirds of the UK population who tune in to its services each week. Our industry's major interest in the copyright framework results from its use of music in broadcasts.
4. Despite the significant sums paid to secure music rights, Commercial Radio's relationship with the music industry is not the standard rights owner-rights user relationship. In addition to paying royalties, RadioCentre's members add value to music by broadcasting, discussing and promoting it. This engenders a symbiotic partnership between Commercial Radio and the music industry, with shared interests in developing and promoting music and artists.
5. The challenges brought about by the online environment affect creators and users in equal measure. Like the music industry, Commercial Radio is facing challenging adjustments to its business model. Commercial Radio has responded to these challenges by investing in new platforms and services.
6. In addressing the impact of technological change on their respective businesses, ongoing partnership between Commercial Radio and the music industry is likely to be crucial. The key challenge which Commercial Radio and the music industry face together is devising a licensing framework which is economically sustainable for both parties and allows Commercial Radio to build upon its longstanding role as the key shop window for music.

Securing a copyright framework for the digital age

7. RadioCentre believes that the copyright framework requires revision to ensure that it enables rights holders to receive remuneration and recognition without undermining the wider societal, cultural and economic benefit which can be generated through the legal exploitation of creative works. To help achieve this, we suggest that the government and IPO should work together to ensure that the copyright framework is consistent with certain objectives:
 - Enabling and supporting the development of legal and viable business models which make use of copyrighted works
 - Delivering proportionate protection for the creators of copyrighted works

- Providing consumers with access to creative content that exploits the potential of digital platforms
8. We outline some practical examples of how the current legislative framework is not always conducive to the fulfilment of the above objectives, proposing that the IPO should:
- a) Tackle the inefficiencies inherent in 'double charging' by introducing an explicit legal exemption from a public performance fee for radio listening in the workplace;
 - b) Work with the government to consider the impact of copyright term extension on all participants in the copyright framework;
 - c) Ensure that UK broadcasters are afforded appropriate copyright protection within an internationally harmonised legal framework.
 - d) Implement reforms to ensure that the Copyright Tribunal is accessible and affordable for all rights users;
 - e) Reject proposals for rights holders to have equivalent rights to users to refer an issue to the Tribunal for consideration;
 - f) Revise the Copyright Act to protect the viability of licensees whose existence is the result of statutory intervention in support of government policy outcomes. This could be achieved by requiring the Copyright Tribunal to take into account factors such as the need to safeguard the financial health of licensees and a licensee's ability to provide a certain level of remuneration;
 - g) Work with the government to liberalise the copyright framework and enable cross-border licensing;
 - h) Extend the ephemeral right to enable digital storage for broadcast usage of sound recordings acquired via download or CD copying and storage; and
 - i) Consider methods (perhaps via the intervention of Ofcom) to enable broadcasters to acquire rights to broadcast music on all relevant platforms and on a time-shifted basis as part of a single bundle of primary broadcast rights.

Commercial Radio and Copyright: An Overview

9. This section of our response is designed to provide some context to the subsequent discussion of issues raised by this consultation.

Commercial Radio in the UK

10. Commercial Radio is a crucial part of the UK's creative economy and daily life, with over 350 stations ranging from small, rural services staffed primarily by volunteers, to large, prominent stations serving major metropolitan areas. Its wealth of choice and diversity of output means that Commercial Radio appeals to those sections of society that other media find hard to reach.
11. RadioCentre's members forge a powerful relationship with the two thirds of the UK population who tune in to their services each week and play a key role at the heart of every local community commanding a 77.2% share of all local radio listening in the UK¹. Commercial Radio also performs a valuable economic role in stimulating small business growth through local advertising and employing over 9000 people, with hundreds more involved on a voluntary basis.
12. Whilst Commercial Radio has an important social and economic role, it is nevertheless a small sector, with net turnover of around £490m in 2008². This is particularly striking when compared with competing media and communications businesses – Commercial Radio is less than one thirtieth the size of BT when measured by revenue, and around a tenth the size of

¹ Source: RAJAR Q1 2009.

² Source: RadioCentre estimate.

BSkyB³.

The relationship between Commercial Radio and Music

13. Commercial Radio's major interest in the copyright framework results from its use of music in broadcasts, which is generally of greater significance than the copyright which it itself holds in its broadcast output. The acquisition of music for legal use on reasonable and sustainable terms is a key issue (and a key cost) for each of the UK's Commercial Radio stations. Commercial Radio currently pays around £50m per year on a percentage of revenue basis, (equating to around 10% of net industry revenues) to the licensing bodies PRS, PPL and MCPS, in order to secure the music used in broadcasts.
14. Despite the significant sums paid to secure music rights, Commercial Radio's relationship with the music industry is not the standard rights owner-rights user relationship. In addition to paying royalties, RadioCentre's members add value to music by broadcasting, discussing and promoting it. For 35 years Commercial Radio has been introducing audiences to new and exciting music, whilst reminding them of old favourites. Of the 350+ UK Commercial Radio stations, there is a station to suit everyone's musical taste and every genre of music is represented somewhere, at some time.
15. This link between musicians, composers and publishers and consumers which Commercial Radio provides constitutes an important supplementary benefit to its statutorily-instituted role in delivering public purposes to audiences through speech, news and information programming. Radio continues to be the most vital driver for both discovering new music and stimulating music purchase. In a recent survey, 68% of respondents said that hearing music on the radio influenced them to go out and purchase it, compared to just 24% for the internet and 22% for TV⁴.
16. This engenders a symbiotic partnership between Commercial Radio and the music industry, with shared interests in developing and promoting new music and artists, and sustaining the popularity of established artists through the playing of back catalogue. Commercial Radio supports this partnership through significant annual investment in on-air activity including interviews with artists, competitions, special performances, live concert broadcasts and the promotion and staging of live events.

The impact of technology on Commercial Radio and the music industry

17. The challenges brought about by the online environment affect creators and users in equal measure. Like the music industry, Commercial Radio is facing challenging adjustments to its business model. Whilst exciting for listeners, technological change has increased competition for listeners' time, has provided a distraction for advertisers and has necessitated heavy investment in new services.
18. Commercial Radio stations are facing up to these challenges with creativity and investment in a range of new services and platforms, finding new ways of communicating with audiences increasingly hungry for media accessible on as many platforms and devices as possible. RadioCentre's members have launched around 100 new local analogue services and 100 new DAB services or simulcasts of existing services since 2000. As an industry, Commercial Radio spends around 12% of its net revenues (or £60m per annum) in broadcasting its services via broadcast (both analogue and digital) and other digital platforms. This represents a three-fold increase in costs over the last decade, with the additional incremental cost arising from the dual transmission of services via DAB and analogue broadcast platforms likely to continue for at least another decade⁵.
19. The result of this investment in new platforms and services has been an increase in the importance of digital platforms as a source of radio listening, but no overall increase in listening. Digital platforms now account for nearly 20% of all radio listening⁶, and an online presence has become both a business and consumer-critical component of today's Commercial

³ BT YE 08 revenue: £21.0B; BSkyB YE 08 revenue: £5.0B.

⁴ Source: RadioCentre, 'The Big Listen', 2007

⁵ Source: RadioCentre calculations based on multiplex operator accounts

⁶ Source: RAJAR Q4 2008

Radio stations. Research has shown that radio listening complements online activity more than any other media. At any given moment, a fifth of online users are listening to radio, and 93% of Commercial Radio stations can now be found live on the internet⁷. Despite this, radio listening has remained broadly static with listeners simply demanding greater flexibility and choice in their radio listening. The cost of reaching listeners has therefore increased, with no corresponding increase in income.

20. In fact, the wider impact of structural change to the UK advertising market has been that Commercial Radio revenue (derived almost exclusively from advertising and sponsorship) has fallen by 20% in real terms since 2003⁸. In the face of an increased cost base and declining revenue, the industry is experiencing an overall reduction in the viability of many of its services. As long ago as 2006, Ofcom had already calculated that 40% of local stations were losing money⁹; today the situation is likely to be even more acute.
21. In addressing the impact of technological change on their respective businesses, ongoing partnership between Commercial Radio and the music industry is likely to be crucial. The key challenge which Commercial Radio and the music industry face together is devising a licensing framework which is economically sustainable for both parties and allows Commercial Radio to build upon its longstanding role as the key shop window for music by exploiting the full potential of new and existing broadcast platforms.
22. Given this, RadioCentre works closely with music licensing bodies and record labels on issues of music licensing, platform usage and remuneration. Whilst we agree that digital technology does not remove the right for music creators to receive payment, equally, digital should not equate to substantial increases in payments or fees. As noted above where radio broadcasting is concerned, digital does not mean more listening, simply listening in a different way.

Securing a copyright framework for the digital age

Objectives for the UK copyright framework

23. Against the backdrop outlined above, RadioCentre believes that the copyright framework requires revision to ensure that it enables rights holders to receive remuneration and recognition without undermining the wider societal, cultural and economic benefit which can be generated through the legal exploitation of creative works. Self-evidently, policy makers cannot strengthen the position of copyright holders if the effect is to weaken the opportunity for copyright users to develop strong legal propositions which make use of third party IP.
24. Yet rather than viewing discussions about copyright legislation as a conflict between opposing interests, RadioCentre believes that a balance can be found which works in the interests of all parties. We firmly believe that the debate about the future of copyright should be refocused on locating a legislative sweet spot which unlocks efficiency and value for all parties whilst commanding the respect of stakeholders and the general public.
25. To help achieve this, we suggest that the government and IPO should work together to ensure that the copyright framework is consistent with certain objectives. We suggest the following, which are consistent with remarks made by the Intellectual Property Minister David Lammy MP at a private lunch organised by CICI on 12 February 2009:
 - Enabling and supporting the development of legal and viable business models which make use of copyrighted works
 - Delivering proportionate protection for the creators of copyrighted works
 - Providing consumers with access to creative content that exploits the potential of digital platforms

⁷ Source: RadioCentre

⁸ Comparison based on revenue figures adjusted to 2008 prices. 2008 weighting based on Government 2004-2007 CPI figures and average CPI for 2008 of 3.5%. See <http://www.statistics.gov.uk/statbase/tsdtables1.asp?vlnk=mm23>. Use of RPI rather than CPI indicates 24% real terms decline between 2003 and 2008.

⁹ Ofcom, 'The Future of Radio: Discussion Document', November 2006.

26. In the following section of our response, we set out short answers to the IPO's consultation questions. This section outlines some very practical examples of how the current legislative framework is not always conducive to the fulfilment of the above objectives. The examples below reveal ways in which the copyright framework is holding back the UK's Commercial Radio sector as it strives to meet listener expectations by delivering innovative ideas which make legal use of copyrighted music. A defining feature of each of the examples below is a failure to fully meet one or more of the above objectives.
27. The examples below also emphasise the importance of establishing a framework which generates economic value and does not place obstacles in the way of legal exploitation of copyright works. This raises questions about the emphasis which copyright legislation places on the 'moral rights' of creators of works. RadioCentre supports the realisation of rights of this kind, for instance by identifying and promoting performers in on-air output. Yet placing too much emphasis on moral rights – such as the right to withhold use – risks detracting attention from efforts to ensure that the copyright system is fundamentally efficient, practical and workable. As the UK adapts to a challenging economic climate, it is more important than ever that the government focuses on realising the overall value which can be delivered for UK businesses and consumers through the use of copyrighted material within a legal framework.

Ending 'double-charging' for workplace radio listening

28. One of the most important examples of how the copyright framework is hindering Commercial Radio's continued development of legal and viable IP-dependent business models which is the 'double-charging' which the Copyright, Designs and Patents Act 1988 allows rights holders to pursue in collecting royalties for workplace radio listening. Workplaces make an important contribution to overall Commercial Radio listening. The first payment levied by the music licensing bodies PPL and PRS for Music for such listening is that which is imposed on BBC and Commercial Radio stations for the rights to broadcast the musical works held in their respective repertoires. The second payment is a 'public performance' royalty which the licensing bodies charge directly to businesses to permit their staff to listen to the radio or other music at work, whether or not these workplaces are open to the public or the business in question derives a commercial benefit from having the radio on.
29. RadioCentre has recently written to the IPO in detail about this issue (see Annex A), providing evidence that the effect of PPL and PRS's recent intensified efforts to collect a royalty from businesses has been, in the main, to prompt them to switch off the radio in workplaces. This has had a significant impact on Commercial Radio's statutorily inscribed delivery of public purposes to UK radio audiences. Yet as well as harming the interests of listeners and stations, this reduction in radio listening undermines the broadcast royalty and promotional benefits which accrue for artists and performers through airplay of musical works.
30. **The IPO should tackle the inefficiencies inherent in 'double charging' by introducing an explicit legal exemption from a public performance fee for radio listening in the workplace.**

Maintaining the existing copyright term for sound recordings

31. A second issue which threatens to contradict the above objectives and is currently concerning Commercial Radio is the current effort by the music industry to secure an extension to the copyright term for sound recordings via changes to European legislation. RadioCentre has already submitted Commercial Radio's views about the economic, legal and social implications of such a move in a letter to the IPO, which is attached at Annex B. This submission refers to evidence that an extension will not fundamentally help increase the welfare of the poorest performers and session musicians, nor stimulate creativity. Instead, such a proposal will enhance the power which rights owners have over users, many of whom are already facing costly and restrictive licensing regimes in the face of digital developments.
32. Although the adverse impacts on the Commercial Radio sector of such an extension would be predominantly limited to those stations playing larger proportions of older music (specifically the Gold stations), the current debate around this issue underscores the importance of understanding the economic impact of copyright policy proposals, including the impact on the

development of viable and legal business models which make use of copyright works.

33. We believe that the UK government position on copyright term extension for sound recordings should be based on consideration of its likely impact on all participants in the copyright framework. It is unclear whether this is reflected in the willingness expressed by the Secretary of State for Culture, Media and Sport to consider extending the term if the music industry demonstrates the benefit of an extension for individual performers¹⁰. The Secretary of State was silent on the importance of understanding the impact of term extension on other branches of the music purchase value chain, such as broadcasters and consumers. The importance of undertaking a more comprehensive assessment was demonstrated in the 2006 Gowers Review. Gowers referred to a full range of relevant evidence (including a specially commissioned expert study by Cambridge University's Centre for Intellectual Property and Information Law) and found that the case for extending the copyright term is weak¹¹.

34. The IPO should work with the government to consider the impact of copyright term extension on all participants in the copyright framework.

Ensuring copyright protection for broadcasters

35. Through its membership of the Association of European Radios (AER), RadioCentre has become aware of potential inconsistencies within the European Union in the level of protection provided to broadcasters by their domestic copyright legislation. In particular, Commercial Radio broadcasters in countries such as Germany possess superior rights to those in the UK in relation to the public performance and relaying of their own broadcast output by third parties such as cable television platform operators.

36. UK Commercial Radio does not have any interest in restricting free-to-air access to its intellectual property. However, we nevertheless question why music licensing bodies are able to seek public performance royalties from the relaying of radio broadcasts whilst Commercial Radio is not. This issue is discussed further in the section of Annex A which discusses the potentially inequitable treatment of intellectual property associated with 'double charging' for workplace radio listening. This is an area which RadioCentre would appreciate the opportunity to explore further with the IPO following this consultation.

37. The IPO should work to ensure that UK broadcasters are afforded appropriate copyright protection within an internationally harmonised legal framework.

Reforming the Copyright Tribunal

38. Collective management of rights plays an important role in delivering an efficient and orderly marketplace for copyright. The music licensing bodies PPL and PRS for Music constitute one-stop-shops for users to secure a complete package of rights from a single source, rather than from individual right holders. Yet because these bodies are also monopolies, the collective rights management system can lead to imbalances, in light of the power which collecting societies gain from their right to grant or withhold consent licenses to use the repertoire of copyright works which they control.

39. The power which collective rights management gives to collecting societies underlines the importance of the checks and balances in place to ensure that the objectives outlined above are not undermined. The most important of these is the Copyright Tribunal. This works to ensure the availability of licences to enable the development of legal and viable business models which provide access to copyright works for consumers whilst delivering adequate protection to creators. The need for reform of the Copyright Tribunal has been much discussed over the last three years, specifically the context of reviews by the IPO and the House of Commons Innovation, Universities, Science and Skills Committee. This latter review drew a response from the government in May 2008, although final government proposals are still awaited. We suggest three areas which would merit reform:

¹⁰ Andy Burnham's speech to the UK Music Creator's Conference, London, 11 December 2008, http://www.culture.gov.uk/reference_library/minister_speeches/5685.aspx

¹¹ Centre for Intellectual Property and Information Law, University of Cambridge, 'Review of the Economic Evidence Relating to an Extension of the Term of Copyright in Sound Recordings', 2006.

40. **Affordability and accessibility:** Despite efforts to limit the resources required to engage in a Copyright Tribunal review, the potential cost and time commitment associated with a Tribunal proceeding are such that they can serve to deter referrals, so undermining the development of legal and viable business models which make use of licensed IP. This is reflected in the 2007 Decision on the Joint Online Licence (JOL), originally promulgated by the MCPS-PRS Alliance, which draws attention to the significant costs and work incurred by both parties. If a potential licensee judges that a proposed licence is unfair, and cannot confidently establish that the potential benefit of referring that licence to the Copyright Tribunal would outweigh the potential cost, then the result may be a decision not to acquire the licence in question, with the result that the idea lying behind it is not developed.
41. **Exclusive right of referral for licensees:** In addition, and along with other broadcasters, we maintain that users should retain the exclusive right to make the initial reference of schemes to the Tribunal. This is due to the absence of any clear need for rights holders to have an equivalent right, in view of the Tribunal's duty to be fair and impartial, and the likelihood that such a provision could lead to licensing bodies referring schemes to the Tribunal for approval, without market testing them through negotiations. This bears cost implications for licensees and for the Tribunal.
42. **Protecting the viability of licensees:** Our final proposed reform of the Copyright Tribunal is revision of the 1988 Copyright Act to ensure access to IP on reasonable and affordable terms for businesses whose existence is the result of statutory intervention in support of government policy outcomes. This is designed to be applicable to the Commercial Radio sector, which is licensed by Ofcom to deliver public purposes in accordance with the 1990 and 1996 Broadcasting Acts and the 2003 Communications Act, although there may be other relevant applications.
43. A specific way in which the government could revise the Copyright Act along these lines would be to grant new responsibilities to the Tribunal requiring it to take into account factors such as the need to safeguard the financial health of licensees or a licensee's ability to provide a certain level of remuneration. This responsibility could relate specifically to businesses who owe their existence to statutory intervention in support of government policy outcomes. We believe that this proposal complements the wider work by the government as part of its 'Digital Britain' review to secure Commercial Radio's ongoing viability and broadcast distribution whilst delivering public purposes in areas such as media plurality, format diversity, news provision and local content delivery.
44. The intention of this proposal is to achieve greater balance between rights-holders and rights users in the context of the Copyright Tribunal and in particular in respect of business models whose scope and structure is restricted by their origin in statute and emphasis on delivering public policy objectives. This currently manifests itself in licensing bodies' ability to promulgate commercially unattractive terms and maintain practices that arguably no longer reflect commercial realities. In proposing this measure, we are not suggesting that the Tribunal's impartiality should be undermined to the detriment of rights holders. Neither do we propose rewarding businesses which are unviable due to management incompetence or depleted consumer interest. Instead, we are seeking to ensure that the Tribunal is further empowered to deliver viable and sustainable licensing solutions based on public interest considerations.
45. **The IPO should implement reforms to ensure that the Copyright Tribunal is accessible and affordable for all rights users.**
46. **The IPO should reject proposals for rights holders to have equivalent rights to users to refer an issue to the Tribunal for consideration.**
47. **The Copyright Act should be revised to protect the viability of licensees whose existence is the result of statutory intervention in support of government policy outcomes. This could be achieved by requiring the Copyright Tribunal to take into account factors such as the need to safeguard the financial health of licensees and a licensee's ability to provide a certain level of remuneration.**

Cross-border licensing

48. Another important means of addressing the potential imbalances inherent in collective rights management would be to support Europe-wide efforts to enable cross-border copyright licensing. This would in effect create alternative sources of legal rights for users not dependent on voluntary and time-limited agreements between collecting societies, without undermining the benefits which flow from rights being available from a single one-stop-stop. We summarise the principal benefits of this below. Further detail is provided in a letter, enclosed at Annex C, which was sent to Madam Kroes, Directorate-General for Competition at the European Commission, by the Association of European Radios on 15 October 2008 on behalf of its members, of which RadioCentre is one. This letter followed the July 2008 decision by the European Commission in this area, which is currently subject to legal challenge by the collecting societies.
49. Firstly, cross-border licensing would overturn the historical model which has traditionally forced creators and commercial users to deal separately with the national collecting societies of each territory in which they seek rights. This obliges content providers to segment their services based on national boundaries – increasingly an inefficient and burdensome way to deliver content over the internet, which is, by its very nature a global phenomenon. UK Commercial Radio is currently focused on national markets. However, the costs and time involved in securing cross-border rights reduce what incentive there might be in the future for international internet simulcasting of radio programming.
50. Secondly, cross-border licensing would introduce competition between collecting societies in areas such as overheads, efficiency and service delivery. Competition among collecting societies is one of the most effective levers to improve operational efficiency through market forces, and would be to the benefit of all parties – owners, users and to the consumers that access the music. To function effectively, this revised competitive framework would need to provide users and rights holders with a choice of genuine 'one-stop-shops' which can guarantee all respective rights, regardless of label or affiliation. Each collection agency would also need to publish clear, published, comparable tariffs for all music rights enabling rights owners and users to choose which society to deal with based on the terms available.
51. **We urge the government to support liberalisation of the copyright framework to enable cross border licensing.**

Use and retention of sound recordings for use in broadcasting

52. One of the key features of the November 2006 Gowers Review of Intellectual Property was recognition that copyright legislation must reflect practical realities. In order to be workable, the system must reflect the business models and consumer expectations of today, and of the future. This is reflected in recent debate about the appropriate legal response to the widespread practice of private format shifting. As the government notes in the recent Interim Digital Britain report, "There is a clear and unambiguous distinction between the legal and illegal sharing of content which we must urgently address. But, we need to do so in a way that recognises that when there is very widespread behaviour and social acceptability of such behaviour that is at odds with the rules, then the rules, the business models that the rules have underpinned and the behaviour itself may all need to change."¹²
53. Similar questions around the practical application of the copyright framework arise in relation to the use and retention of sound recordings by Commercial Radio stations for broadcast use. RadioCentre's members obtain the music used in their broadcasts directly from record labels, who benefit from the cost savings and convenience created by new technology by generally sending digital, rather than physical, copies of tracks to radio stations. These copies are provided on a free basis by record labels in recognition of the promotional benefit of radio airplay for both new and established songs and artists. The labels themselves invest significant sums in encouraging Commercial Radio stations to play their tracks through 'plugging' and other activities. Despite this, music licensing bodies have sought to claim a payment from Commercial Radio stations for retaining electronic copies of these tracks in databases ready for seamless play-out in their broadcasts ('dubbing').

¹²BERR / DCMS, 'Digital Britain: The Interim Report', January 2009, p. 39.

54. We believe that this represents an attempt by rights holders to overlook technological and practical realities in order to extract unjustifiable new revenues from users. The key right involved in Commercial Radio's use of music is the right to broadcast, as reflected in the payments which Commercial Radio stations make to secure these rights. Digital databases are crucial to transmission in this digital age (as defined in the broad terms outlined in paragraphs 56 to 60) but storage has no independent economic significance for Commercial Radio stations because the storage itself generates no additional revenue.
55. **We propose that the IPO works with the government to extend the ephemeral right to enable digital storage for broadcast usage of sound recordings acquired via download or CD copying and storage. We suggest that this is achieved within the terms of the InfoSoc Directive and Section 28A of the Copyright Act by expanding the current definition of 'transient and incidental'.**

Opportunity for broadcasters to secure broadcast rights which match listener expectations

56. A further area of the copyright framework which requires revision to reflect technological realities is the scope of broadcast rights as defined under current legislation. RadioCentre believes that the scope of these rights should reflect consumer-usage, which determines how radio businesses need to operate in order to be successful in the digital age. In recent years, Commercial Radio stations have discovered that listeners expect the traditional ubiquity, intimacy, mobility, ease-of-use and free-to-air nature of radio to extend to its availability on all platforms and device, and at the time and location of their choosing.
57. Although recent amendments have enabled Commercial Radio stations to extend their music licenses to cover new digital listening platforms, the scope of traditional broadcast rights does not extend to 'time-shifted' listening, podcasts and certain types of online simulcasting. As we outlined in paragraph 13, new ways and modes of consuming radio have not led to new listening – instead they enable existing listening to be maintained. In light of this, we believe that these new ways of listening should be licensed by extended the existing revenue-share licences which have traditionally covered live Commercial Radio listening. There should be no additional payment for including these rights within the existing agreements, given that remuneration is provided through a share of associated revenues. Imposing an additional payment for these rights would amount to 'double-charging', which would have the same damaging effects as the double-payment currently imposed by music licensing bodies for workplace radio listening, as detailed in paragraphs 28 to 30 and at Annex A.
58. Everyday consumer practice is already demonstrating the copyright framework's failure to keep pace with technological change in this area. Personal Video Recorders and DAB radios with recording functions have gained increasingly high market penetration in recent years, allowing consumers to record and replay live radio at a later date. Listeners' interest in time-shifted listening to radio programming is further highlighted by the success of the BBC's iPlayer, which relies on a music license broader in scope to that possessed by Commercial Radio.
59. There are also precedents in the rights packages acquired by the BBC and television broadcasters suggesting that the government should consider ways to enable Commercial Radio to acquire rights to broadcast time-shifted online audio streams as part of a single package of broadcast rights. RadioCentre understands that the television Public Service Broadcasters have as part of the Terms of Trade process generally succeeded in including 'catch-up' rights within their primary rights purchased, with Ofcom's commissioning guidelines assisting in their classification as a primary right. Given the absence of an equivalent regulatory precedent allowing Commercial Radio to acquire similarly bundled rights, we believe that the government should provide an explicit acknowledgement that catch-up listening is in the interests of radio audiences.
60. **The Government should consider methods (perhaps via the intervention of Ofcom) to enable broadcasters to acquire rights to broadcast music on all relevant platforms and on a time-shifted basis as part of a single bundle of primary broadcast rights.**

Responses to Consultation Questions

Q. Does the current system provide the right balance between commercial creativity and the rights of creators and creative artist? Are creative artists rewarded / protected through their existing rights?

61. The current copyright framework gives disproportionate protection to copyright holders at the expense of Commercial Radio stations in certain specific ways which we outline above. We urge the IPO to work with government in taking our proposed changes forward.

Q. Is our current system too complex, in particular in relation to the licensing of rights, rights clearance and copyright exceptions? Does the legal enforcement framework work in the digital age?

62. The complexity of the current copyright framework is best measured by the ease with which the objectives we outline above can be delivered – not by the length of legislation itself. Delivering a logical, coherent, fair and practical legal framework is reliant on specific exceptions to account for particular scenarios which might not be covered under a blanket provision. We have proposed ways in which certain legal provisions relating to Commercial Radio's use of copyright works should be streamlined through amendments to the copyright framework.

Q. Does the current copyright system provide the right incentives to sustain investment and support creativity? Is this true for both creative artists and commercial rights holders? Is this true for physical and online exploitation? Are those who gain value from content paying for it (on fair and reasonable terms)?

63. Commercial Radio believes that creators are entitled to fair and reasonable compensation for the use of their works, and as such pays significant sums (£50million p.a) to rights holders in order to secure the use of music in broadcasts. We have outlined concerns about the incentives for investment and creativity generated by the current framework above.

Q. What action, if any, is needed to address issues related to authentication? Is considering the rights of creative artists and other rights holders is there a case for differentiation? If so, how might we avoid introducing a further complication in an already complicated world?

64. RadioCentre has not considered a response to this question at this stage, but we look forward to examining any ideas which the IPO or other stakeholders choose to propose, with a view to assessing their impact on the delivery of the objectives we outline above.

RadioCentre, February 2009

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