

## Licensing and Access to Content in the European Union

Copyright is territorial, but the same cannot be said of the Internet, whose borderless nature has changed the way we consume copyright-protected material. Nevertheless, territorial segmentation of online content remains a reality in the 28 Member States of the European Union. Licensing and access practices do not reflect this digital reality, in which end users demand ubiquitous access to content. For this reason, the territorial nature of copyright and traditional business models based on national exploitation prevents the completion of the Digital Single Market. Sebastian Felix Schwemer provides a unique analysis of the dynamic licensing and access arrangements for audiovisual works and music and shows how they are being addressed by sector regulation and competition law in the Digital Single Market. His analysis, which includes case law of the Court of Justice, the Commission's competition proceedings and various legislative tools, reveals the overlapping nature of legislative and non-legislative regulatory solutions.

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# Licensing and Access to Content in the European Union

*Regulation between Copyright and  
Competition Law*

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## Preface

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Copyright is territorial. But is the Internet? The Internet has changed the way in which we consume copyright-protected material. Yet, territorial segmentation of online content is a reality in the 28 European Union Member States. Licensing and access practices do not reflect the digital reality, in which end users demand ubiquitous access. The territorial nature of copyright, and business models traditionally based on national exploitation, collide with the borderless nature of the Internet. This is recognised by EU policymakers as hampering the development of new business models as well as the goal of the European lawmaker to complete the Digital Single Market (DSM).

National and European authorities and legislators have created a host of – often industry- and sometimes business model-specific – initiatives, proposals and rules in order to facilitate the DSM and reconcile it with the territorial nature of copyright and its business practices, in part accompanying, refining or codifying industry-led solutions. In this, despite the novel nature of Internet uses and business models, traditional stress field, competition law and policy and copyright overlap and interfere.

This book probes the different regulatory (legislative and non-legislative) initiatives that support the facilitation of multi-territorial licensing and cross-border access to online content. It investigates the regulation of two online markets that have recently been subject to scrutiny by the EU institutions: the audiovisual and music sectors. Both are addressed by *ex ante* sector-specific legislation and *ex post* control under competition law. Based on these case studies, the book argues that the interplay between harmonisation efforts and competition proceedings has been helpful in mitigating the effects of licences, thereby enabling cross-border dissemination.

The book, however, reveals that this interplay has not always been coherent. The author argues that more coherent measures are necessary in order to reduce frictions in licensing arrangements and to enable cross-

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border access across the EU. Furthermore, the book suggests that the regulatory interventions to date may have been driven more by a competition and subsidiary harmonisation agenda than by a focus on consumers and innovative service providers.

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## Abbreviations

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AG	Advocate General
AVMSD	Audiovisual Media Services Directive
BGH	Bundesgerichtshof (German Federal Supreme Court)
BIEM	Bureau International de l'Édition Mécanique
BR	Better Regulation
CIIR	Centre for Information and Innovation Law
CISAC	International Confederation of Societies of Authors and Composers
CJEU	Court of Justice (European Union) (formerly European Court of Justice (ECJ))
CMO	collective management organisations
CRM	collective rights management
DG	Directorate-General of the European Commission
DG MARKT	Directorate-General for Internal Market
DG COMP	Directorate-General for Competition
DSM	Digital Single Market
DSMS	Digital Single Market Strategy of the European Commission
DSP	digital service provider
EEA	European Economic Area
ECL	Extended collective licensing
EP	European Parliament
EU	European Union
EULA	End user licensing agreements
FAPL	Football Association Premier League Ltd
IA	impact assessment
IME	independent management organisation
MEP	Member of the European Parliament
MS	Member State(s)
MTL	multi-territorial licensing
NIE	new institutional economics
OJ	<i>Official Journal</i>

## List of Abbreviations

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OLG	Oberlandesgericht (German District Court)
RRA	reciprocal representation agreement
SO	statement of objections
SVOD	Subscription video-on-demand service(s)
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TPM	technological protection measures
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UrhG	Urheberrechtsgesetz (German Copyright Act)
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organization
WPPT	WPO Performances and Phonograms Treaty

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- OSA – Ochranný svaz autorský pro práva k dílům hudebním o.s. *v.* Léčebné lázně Mariánské Lázně a.s. (Case C-351/12) [2014] ECLI:EU:C:2014:110, 45, 55, 107, 164

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 BIEM – ‘Barcelona Agreements’ (Case COMP/C-2/38.377) Notification of cooperation agreements [2002] OJ C132/18, 81–83, 223  
 IFPI – ‘Simulcasting’ (Case COMP/C2/38014) Commission Decision 2003/300/EC of 8 October 2002 [2003] OJ L107/58, 50–51, 76, 80, 83–86, 223–224  
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