

A Digital Single Market

for creative works

in the 21<sup>st</sup> century

*quo vadis?*



28.1.2021

UiO MUSEC seminar

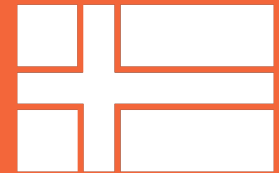
[sebastian.felix.schwemer@jur.ku.dk](mailto:sebastian.felix.schwemer@jur.ku.dk)

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[jura.ku.dk/schwemer](https://jura.ku.dk/schwemer)



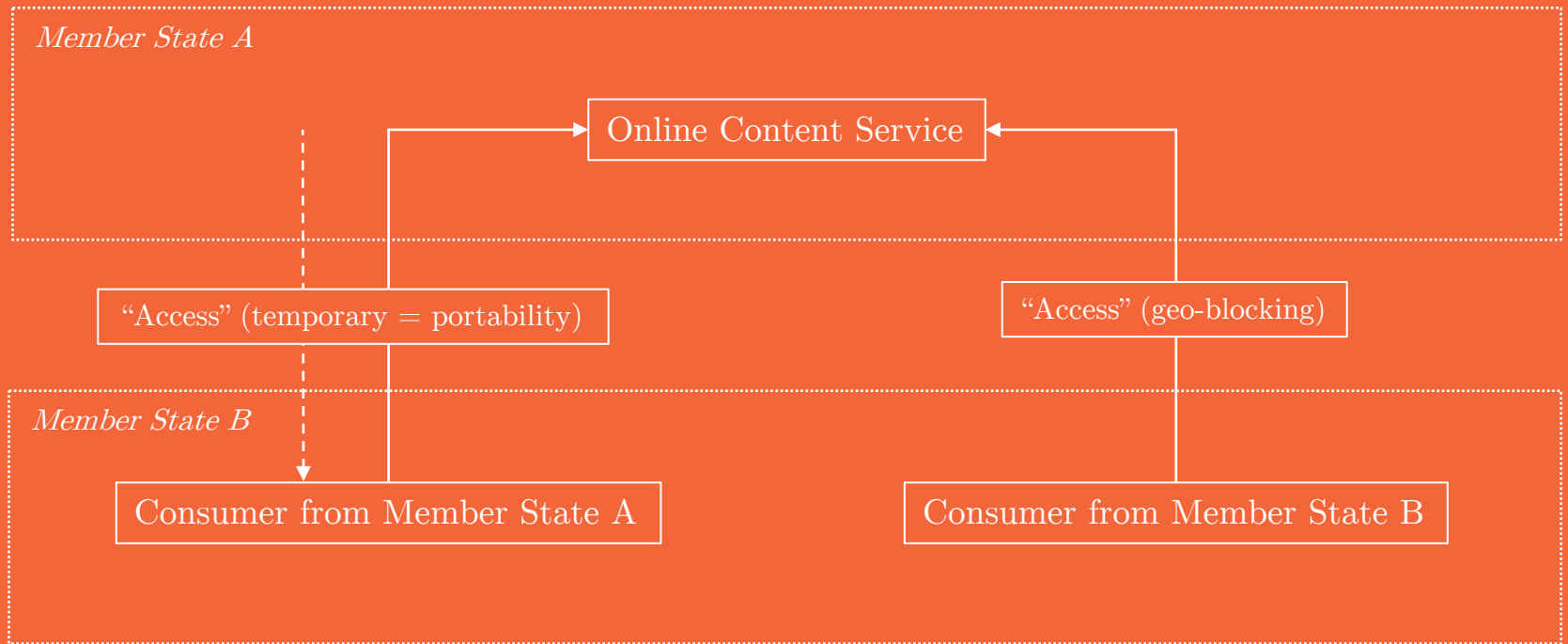
Digital Single Market



27 national markets



# “Access”



≈ “free movement” of consumer

≈ “free movement” of content service

Standard contracts (CISAC) .....▶ Competition proceedings .....▶

Recommendation 2005 .....▶

.....▶ Directive 2004/20/EC .....▶

.....▶ Merger proceedings .....▶



.....▶ Consultations .....▶

Licensing agreements / terms of service providers .....▶

.....▶ CJEU (Premier League & Murphy...) .....▶

.....▶ Investigation into pay-TV .....▶

.....▶ Portability regulation 2017/1128 .....▶

.....▶ Geo-blocking regulation .....▶

.....▶ DSM Directive .....▶

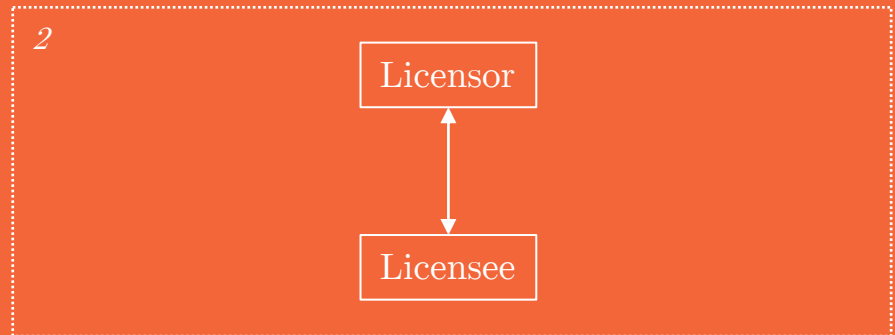
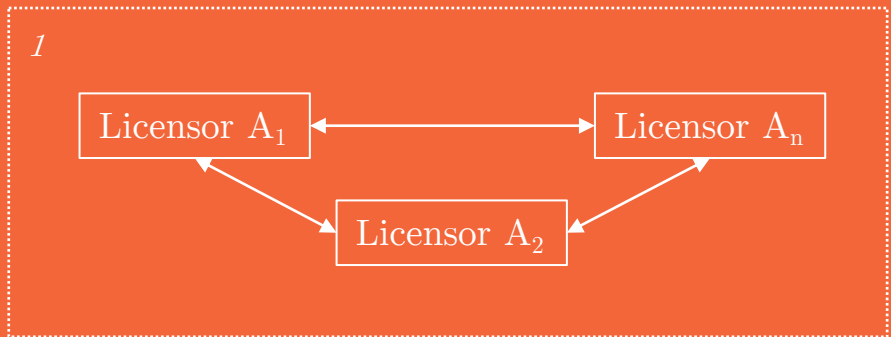
....

*quite*

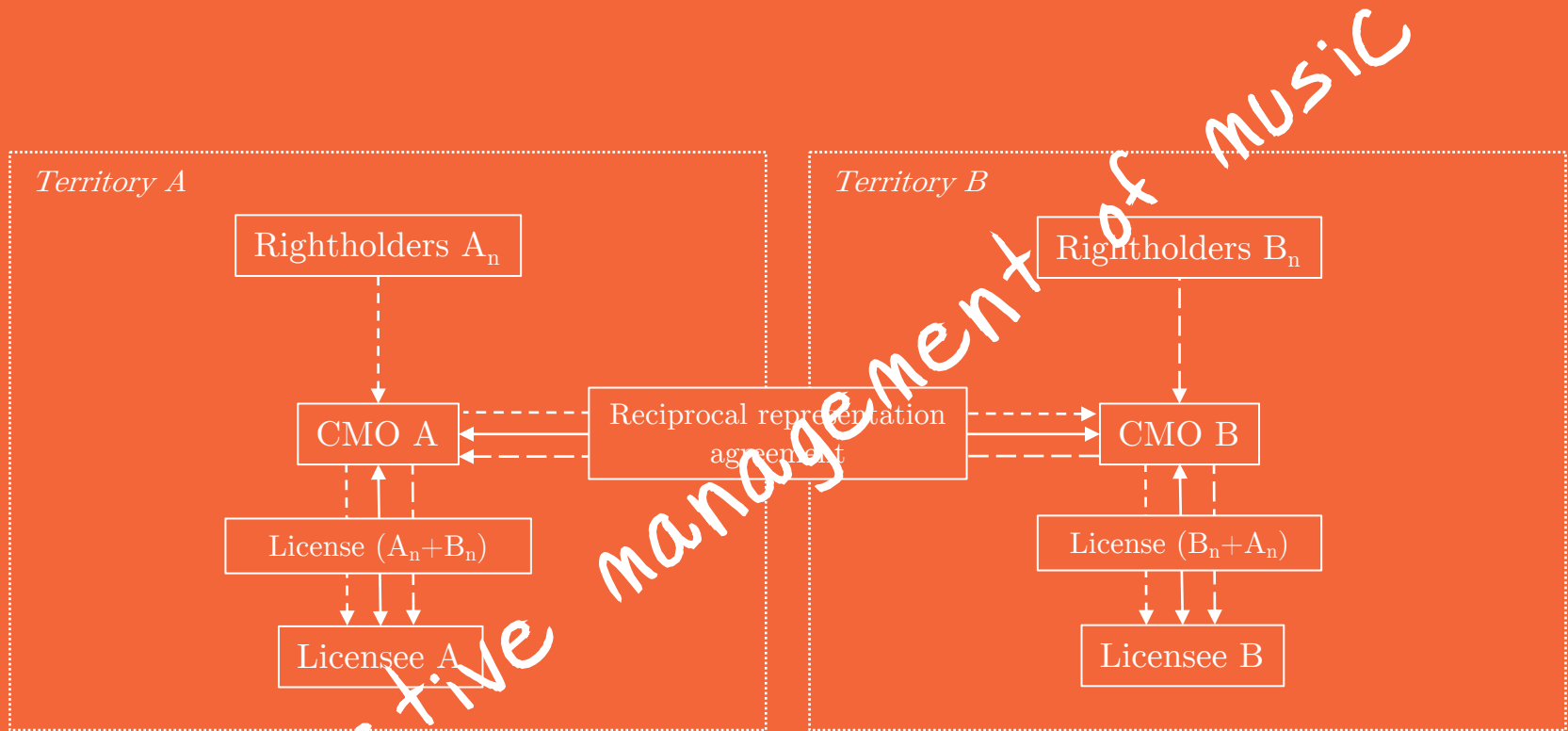
*some*

*action!*

# Competition law angle

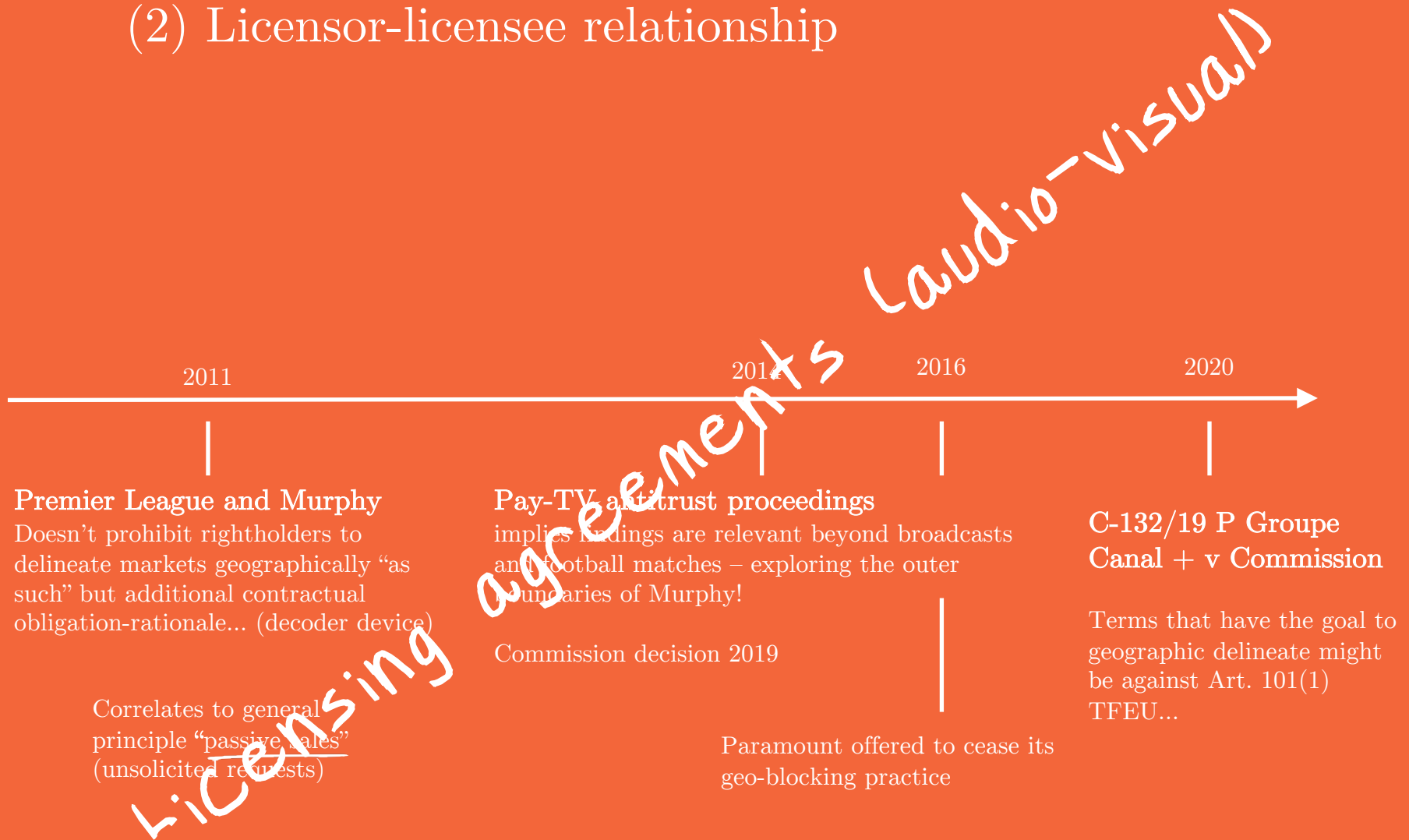


# (1) Licensor-licensor relationship



Problematic from a competition law perspective (Tournier, Luceazeau; CISAC-cases)  
*STIM v Commission*: national territorial limitation in all RRAs cannot be considered as being objectively necessary (para. 92).

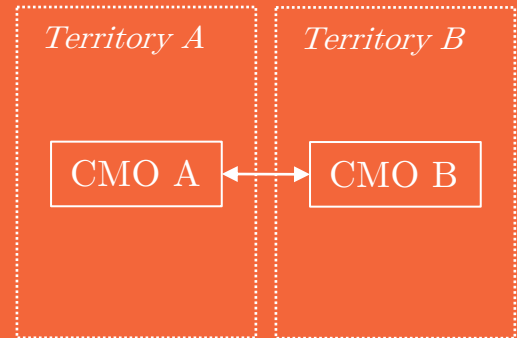
## (2) Licensor-licensee relationship



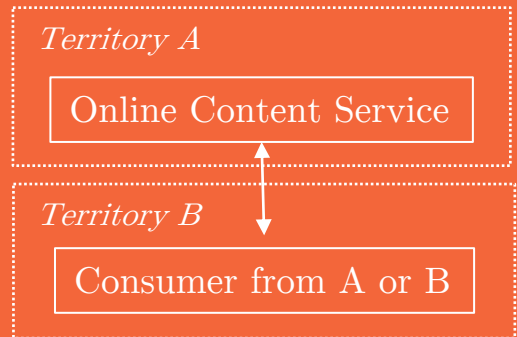


# Legislative angle

**Multi-  
territorial  
licensing  
(CMOs)**



**Cross-border  
access**



**Multi-territorial licensing  
(CMOs)**

**Online Music  
Recommendation**

**Directive (EU) 2014/26**

**DSM Directive (EU) 2019/790**





Tema ▾

Dokument ▾

Aktuelt ▾

Departement ▾

Regjering ▾

Du er her: [Forsida](#) • [Aktuelt ▾](#) • Forslag til ny lov om kollektiv forvaltning av opphavsrett

# Forslag til ny lov om kollektiv forvaltning av opphavsrett

Pressemelding | Dato: 20.11.2020

| Nr: 128/20

Regjeringa la i dag fram ein proposisjon med forslag til ny lov om kollektiv forvaltning av opphavsrett.

Forslaget til ny lov vil blant anna styrke rettshavarane si stilling når dei har overlate forvaltninga av rettane sine til ein kollektiv forvaltningsorganisasjon.



CMOs

Customized licensing  
entities

HUBs (+ X)



Model contracts (RRA)

Recommendation 2005  
CISAC Decision

Directive 2014/26/EU



Mono-territorial  
multi-repertoire

Multi-territorial  
Mono-repertoire

Multi-territorial  
Multi-repertoire

Self-regulation /  
national rules

Soft and case law

Codification /  
EU legislation



**Legal mechanism: European Licensing Passport** for author CMOs, in order to encourage the **(voluntary) re-aggregation** of rights and to **reduce** transaction costs in the right clearance process.



Capacity to process multi-territorial licenses,  
Art. 24 Directive 2014/26/EU



Tag-on obligations + tag-on opportunities,  
Art. 30 Directive 2014/26/EU

Direct licensing

Independent management entities

Armonia

ICE

## DSM Directive (EU) 2019/720

Out-of-commerce works (cultural heritage organisations), Art. 8

Extended collective licensing, Art. 12

Negotiation mechanism (audiovisual works on VOD platforms), Art. 13

Cross-border access

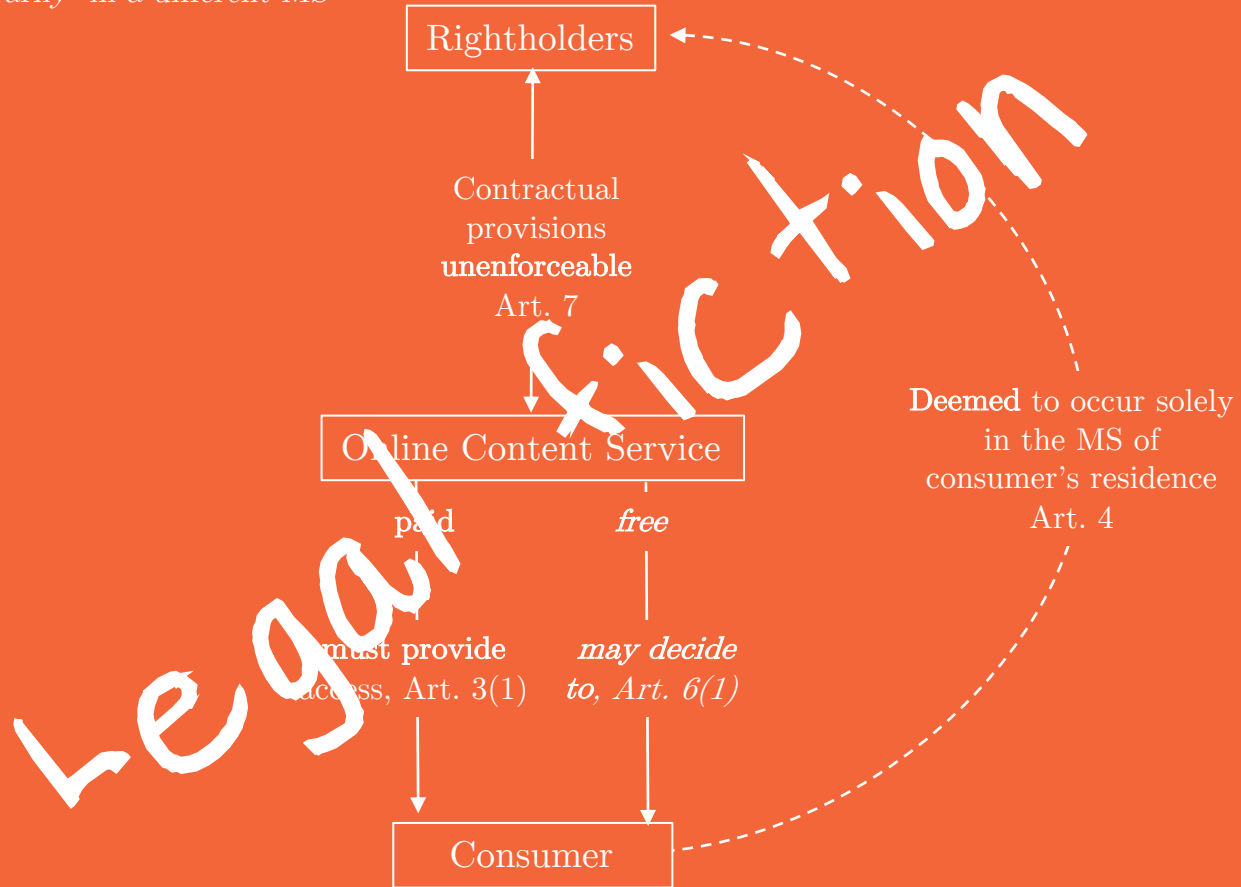
Portability regulation (2017)

Geo-blocking regulation (2018)

*(Broadcasting)*

Applies since 1 April 2018!

*Consumer “temporarily” in a different MS*





unjust

## Geoblocking Regulation (EU) 2018/302

A trader shall not apply different general conditions of access to their goods or services (...)

“other than services the main feature of which is the provision of access to and use of copyright protected works or other protected subject matter, including the selling of copyright protected works or protected subject matter in an intangible form;”

Article 4(1)(b); Review clause (2 years) in Article 9(2)

But:

“A trader shall not, through the use of technological measures or otherwise, block or limit a customer’s access to the trader’s online interface for reasons related to the customer’s nationality, place of residence or place of establishment.”

Article 3(1)

## From the legislative process...

Parliament Committee on Industry, Research and Energy (ITRE) November 2016 (132, 133...): Delete the restriction on copyright “other than...”

IMCO Report April 2017 (55) new addition: „(b a) where the trader provides electronically supplied non-audio-visual works or services the main feature of which is the provision of access to and use of copyright protected works or other protected subject matter in respect of which the trader has the rights or has acquired the licence to use such content for all relevant territories;“

...to the review (December 2020)

**“Possible extension of the scope of the Geo-blocking Regulation**

The report also considers the possible extension of the scope of the legislation, including with regard to copyright-protected content (such as audio-visual, music, e-books and games). It highlights potential benefits for all consumers in Europe, notably in the availability of a wider choice of content across borders if the Regulation were to be extended to cover audio-visual content. (...) but concludes that it needs to be further assessed.



**Stakeholder dialogue...**

So...

- Complex regulatory framework!
- Depending on subject matter / institutional arrangements
- Territoriality issues addressed on different levels of the exploitation chain:
  - Music: Territorial exploitation by intermediaries
  - Audiovisual: Territorial exclusive licenses

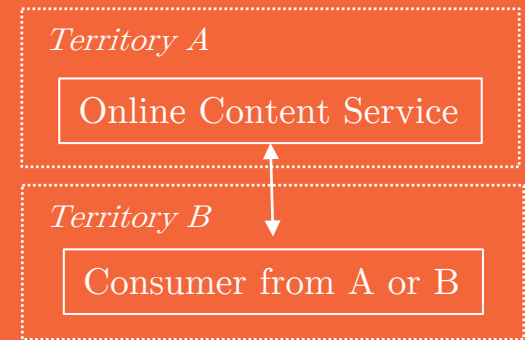
## 1. Licensor-licensor relationship (CMOs)

- Proceedings of last 15 years: territorial restrictions by CMOs must be reviewed
- Competition between CMOs over repertoire as means (*ex ante* regulation and *ex post* control fairly consistent)
- Directive promotes an oligopolistic structure (horizontal aggregation of functions and some re-aggregation?)

## 2. Regulation of cross-border access

Portability regulation as intriguing model but what about “true” cross-border access?

- Exempt from Regulation, not properly addressed in legislative framework (yet? never?)
- Intriguing play of thought: Murphy & Pay-TV investigation (broader application of passive sales rationale...)

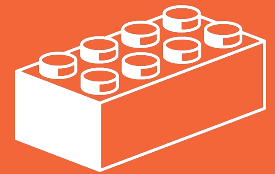




# Interplay: competition law & sector regulation + more...?

*Ex ante* vs. *ex post* regulation – using competition law to ensure access to copyright protected works?

Towards a consumer perspective in access to copyright protected works (but contractual freedom)?



### Creative commons attribution

Scale by Amelia (Noun Project)

Denmark by P Thanga Vignesh from the Noun Project

thunder by Lara from the Noun Project

Puzzle by Adrien Coquet from the Noun Project

Stopwatch by Veronika Krpciarova (Noun Project)

filter By Eucalyp (Noun Project)

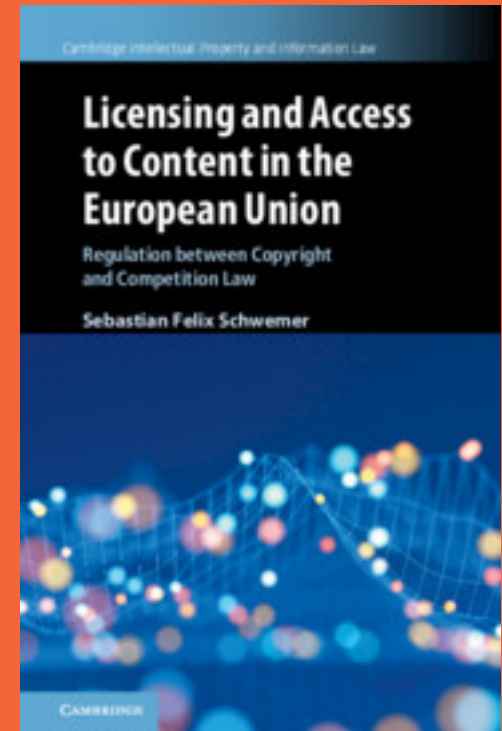
yoga by Mariia Nisiforova (Noun Project)

european union by Federico Panzano, IT (Noun Project)

screws by Oleksandr Panasovskiy (Noun Project)

### Related writing:

- Schwemer, S.F. (2019). 'Licensing and Access to Content in the European Union: Regulation between Copyright and Competition Law' (Cambridge University Press).
- Schwemer, S.F. (2016). 'Emerging Models for Cross-border Online Licensing' in T. Riis (ed.) User Generated Law (Edward Elgar).
- Schwemer, S.F. (2017). 'SKAM-ophavsretlige grænser på det grænseløse Internet?' in Nordisk Tidsskrift for Informationsvidenskab og Kulturformidling
- Schwemer, S.F. (2015). 'Kollektiv forvaltning i informationssamfundet og det nye regime under direktivet 2014/26/EU'



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