1 Introduction

1.1 Background

Endeavours exploring aspects of digitalisation and law often start with a generic analysis of the multiple transformational effects that the Internet has had on our information society and how the law needs to adapt in one way or another.[1] Let me skip this part – for now – and start by posing the following question: Copyright is territorial. But is the Internet?

Country-code top-level domain names, like '.de' or '.se', provide a somewhat natural geographical delineation of the Internet. But the answer, in technological terms, is 'no'. Yet, the traditional practice of national exploitation of content by its rights holders has continued through the first two decades of the twenty-first century. This delineation, it seems, is at odds with the technological possibilities of the Internet, and even more so with the digital pendant to the internal market, the Digital Single Market, whose completion is the main harmonisation goal of the European Commission in the digital sphere.[2] So, in ten or fifteen years from now, will we still see this territorial delineation of content on the Internet? My hope is that the answer is again likely to be 'no'. What, then, stands between us, in a digital content world consisting of twenty-eight national markets and twenty-four official languages, and this vision of a common European market for online content for the more than 500 million citizens?

The starting point is relatively clear, and so is the goal: from a European Union (EU) regulatory perspective, a Digital Single Market instead of twenty-eight national markets – and, from a right holder's perspective, preserving the exploitation of national markets. But everything in between is complex. This makes for a fascinating topic with intriguing

[1] The same can be observed in the documents on digital copyright by the European legislator: see, e.g., E. Rosati, 'The Digital Single Market Strategy: Too many (strategic?) omissions' (*IPKat*, 7 May 2015), 40: http://ipkitten.blogspot.dk/2015/05/the-digital-single-market-strategy-too.html

[2] See Commission, 'Digital Single Market' (*European Commission*, 25 February 2016): https://ec.europa.eu/digital-single-market/digital-single-market

questions, devoting closer scrutiny to the regulatory framework surrounding content licensing on the Internet.

Let us turn back to the transformational effects of the Internet. The dissemination of copyright-protected content has undergone extensive developments. In recent years, digital technologies have fostered the emergence of new legal and illegal distribution channels for musical and film works, and have challenged traditional business models. According to a study performed in 2014, close to 70 per cent of EU citizens 'download or stream films for free, whether legally or illegally'.[3] Online streaming has become the dominant form of consumption, but there exist only relatively few pan-European music- or film-streaming platforms.[4]

Cross-border activities are becoming more prevalent, too: in a 2015 Eurobarometer survey[5] of 26,000 EU citizens on cross-border access to online content, 3 per cent of the participants indicated having a paid subscription for an online service and having tried to access it in a cross-border situation. Some 5 per cent of participants had, within the preceding twelve months, tried to access audiovisual content (films, TV series, etc.) via an online service that was intended for users of a different Member State. As many as 27 per cent of citizens are interested in accessing audiovisual content or music transmitted from their home country while temporarily abroad.[6] Despite the cultural and industrial fragmentation of the EU audiovisual sector,[7] 19 per cent of citizens are

[3] See Commission, 'Lack of choice driving demand for film downloads' (Press release) IP/14/120, Brussels, 6 February 2014.

[4] According to the EU Commission, more than 2,500 on-demand audiovisual services were available in the EU at the end of 2014 (Commission, 'A Digital Single Market Strategy for Europe – Analysis and Evidence Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions' (Commission Staff Working Document) SWD(2015) 100 final, Brussels, 6 May 2015, 26). This compares with estimates of 700 on-demand and catch-up services in 2010 (KEA European Affairs and Mines ParisTech, *Multi-Territory Licensing of Audiovisual Works in the European Union* (Final Report prepared for the European Commission, DG Information Society and Media 2010), 2).

[5] Commission, 'Cross-border Access to Online Content, Report' (2015) Flash Eurobarometer, 411, TNS Political & Social.

[6] Commission, 'A Digital Single Market Strategy for Europe – Analysis and Evidence Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions', 26.

[7] KEA European Affairs and Mines ParisTech, 3. The European Parliament notes that heterogeneous cultural and linguistic diversity 'should be considered a benefit rather than an obstacle to the single market': see European Parliament, 'Report on the implementation of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (2014/2256(INI))' – Committee on Legal Affairs, Rapporteur: Julia Reda, 24 June 2015, PE 546.580v03-00, A8-0209/2015, Recital 9.

interested in watching or listening to content from other EU countries.[8] These numbers are likely to have continued to grow. The need to create a 'seamless global digital marketplace' is also acknowledged by the World Intellectual Property Organization (WIPO) Director General Francis Gurry.[9]

The market reality looks different, though.[10] In 2012, the European Commission urged the industry 'to deliver innovative solutions for greater access to online content'.[11] According to findings published in March 2016 based on replies of more than 1,400 companies, however, 77 per cent of subscription-based and 82 per cent of publicly funded business models apply geo-blocking.[12] In respect of collective management, Commissioner Michel Barnier commented that many collective management organisations (CMOs) have not been able to meet the challenges, 'resulting in fewer online music services available to consumers'.[13] Towards this reality, in May 2015, the European Parliament urged 'the Commission (. . .) to propose adequate solutions for better cross-border accessibility of services and copyright content for consumers'.[14]

[8] Commission, 'A Digital Single Market Strategy for Europe – Analysis and Evidence Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions', 26.

[9] WIPO Director General Francis Gurry, '2013 Address by the Director General', *WIPO Assemblies* – September 23 to October 2, 2013: www.wipo.int/about-wipo/en/dgo/speeches/a_51_dg_speech.html

[10] Kalimo et al., for example, remark '[i]t seems puzzling that still in the year 2015, not all of the involved stakeholders seem convinced that the commercial possibilities of digitalization surpass what is possible with traditional distribution channels'. H. Kalimo, K. Olkkonen and J. Vaario, 'EU Intellectual Property Rights Law – Driving Innovation or Stifling the Digital Single Market?' in H. Kalimo and M. S. Jansson (eds.), *EU Economic Law in a Time of Crisis* (Edward Elgar, 2016), p. 157.

[11] Commission, 'Copyright: Commission urges industry to deliver innovative solutions for greater access to online content' (Press release) IP/12/1394, Brussels, 18 December 2012. See also economic studies by M. Batikas, E. Gomez-Herrera and B. Martens, 'Geographic Fragmentation in the EU Market for e-Books: The case of Amazon', Institute for Prospective Technological Studies, Digital Economy Working Paper [2015], 2015/13; L. Aguiar and J. Waldfogel, 'Streaming Reaches Flood Stage: Does Spotify Stimulate or Depress Music Sales?' (2015) NBER Working Paper Series, Working Paper 21653: www.nber.org/papers/w21653; E. Gomez-Herrera and B. Martens, 'Language, Copyright and Geographic Segmentation in the EU Digital Single Market for Music and Films', Digital Economy Working Paper (2015), 2015–4.

[12] See Commission, 'Geo-blocking practices in e-commerce; Issues paper presenting initial findings of the e-commerce sector inquiry conducted by the Directorate-General for Competition' (Commission Staff Working Document) SWD(2016) 70 final, Brussels, 18 March 2016, paras. 135–136.

[13] Commission, 'Commissioner Michel Barnier welcomes the trilogue agreement on collective rights management' (Press release) MEMO/13/955, Brussels, 5 November 2013.

[14] European Parliament, 'Report on the implementation of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain

This book deals with access to online content and the challenges of licensing copyright-protected works on the Internet: an area in which the territorial nature of copyright[15] and its traditionally national exploitation collide, given the borderless nature of the Internet.[16] Whereas the territorial exploitation of copyright in the EU is not a novel phenomenon, its associated challenges have been exacerbated. In the information society, consumers' demand for ubiquitous access (cross-border, portable, full-repertoire) to copyright-protected works has emerged. In copyright-heavy industries like the music and film business, online content service providers such as Spotify, iTunes, Netflix, Amazon and the like cannot develop business models without heavy involvement from the respective rights holders. It appears that traditional licensing mechanisms and arrangements, however, have not been able to facilitate rights clearance smoothly in the changed environment.

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 a Digital Single Market – in part accompanying, refining or codifying industry-led solutions. The territorial delineation of markets along national borders, which has historically found support in EU courts' practice, has been challenged by the courts and the European legislator (specifically, the EU Commission as legislative initiator), who emphasises different policy goals with the aim of introducing more competition and ultimately making more content accessible for consumers – without abandoning the exclusive and territorial nature of rights, though. This is supported by the political goal of increased market integration, notably around (entertainment) content. But how are we to solve the problems of cross-border access to content and its licensing in order to enable the Digital Single Market while maintaining the incentive function of copyright? In this stress field, 'geo-blocking', 'cross-border portability' and 'multi-territorial licensing' come together. In this, despite the novel nature of Internet exploitation and business models, traditional

aspects of copyright and related rights in the information society (2014/2256(INI))', Recital 9.

[15] See Art. 5 of Berne Convention for the Protection of Literary and Artistic Works (Paris Act of 24 July 1971), as amended on 28 September 1979 and the ten EU Directives relating to copyright and related rights. See also Section 2.2.

[16] Or, as the EU legislator puts it in the context of music: 'While the internet knows no borders, the online market for music services in the Union is still fragmented, and a digital single market has not yet been fully achieved' (Recital 38 of Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market [2014] OJ L84/72).

stress fields, competition law and policy and copyright overlap and interfere with another.

1.2 Scope of This Book

This book, studies two phenomena: first, the licensing of – which is ultimately linked to access to – copyright-protected works on the Internet in cross-border situations. This concept of access can be looked at from at least two different viewpoints, which represents two interrelated sides of the same coin: on the one side, consumers who have access to works, and, on the other side, rights holders who make works accessible. Secondly, there is the interplay between regulatory initiatives to support cross-border access to copyrighted material. This translates into the following guiding questions, which this book will address:

> What is the regulatory framework for licensing of – and, related to this – access to online music and audiovisual content in cross-border situations?
>
> How do the different regulatory frameworks interact, what inconsistencies emerge and how could these be resolved?

This book contains expository elements, which centre on investigating the legal framework and functioning of the system of cross-border licensing and access arrangements. Given the complexity of the subject matter, the current practices in the market for collective licensing of online music are analysed and the territorial practices towards consumers, as well as in licensing agreements regarding audiovisual works, are laid out. As regards the regulatory environment, both proceedings under the general competition rules (i.e. *ex post* control by the European Commission in its function as competition authority as well as the courts[17]) and sector-specific regulation (i.e. *ex ante* legislative measures[18]) are examined.

Secondly, this book assesses how these regulatory frameworks interact. Different forms of regulation might be based on different rationales, such as competition, internal market or harmonisation considerations. But how does this interplay unfold, and to what effect? In other words, the

[17] Such as CISAC proceedings; Joined Cases C–403/08 and C–429/08, *Football Association Premier League Ltd and Others* v. *QC Leisure and Others* [2011] ECR I–9159–9245, ECLI: EU:C:2011:631; as well as the Commission's pay-TV investigation.

[18] Such as Directive 2014/26/EU, Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market [2017] OJ L168; Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC [2018] OJ L60I.

guiding questions here are what the relationship between competition law and (legislative) measures directed towards the facilitation of content licensing is, and how the EU's complementing competition and copyright-related sector-regulation routes interact and whether they support each other in achieving their goals (i.e. in overcoming licensing issues based on territoriality). In this context, the book first analyses the different arrangements and regulatory models. In order to identify potential inconsistencies in the regulatory framework, it examines the interplay between the different forms of regulatory initiatives – namely, state-induced, on the one hand, and market developments, i.e. private regulation, on the other. What is regulation, and are licensing structures regulatory instruments that help to shape the market, or are they to be seen as products of regulatory intervention? From these insights, normative considerations are derived as to whether the chosen routes reflect on the goal of EU-wide access, to what extent this has been achieved, and how some of the identified conflicts could be resolved – leading to a more coherent framework for online licensing for EU-wide purposes.

First, however, there exist several key concepts and notions that need to be refined. The scope of this book can be defined along three dimensions: (1) subject matter, (2) legal areas and (3) geographical focus.

Territorial restrictions on content are not a novel challenge, and there have been comparable issues with more traditional forms of exploitation, which are thematically connected to or comparable to those under scrutiny in this work. I have chosen not to follow a traditional past-present-future narrative, though. Instead, this book investigates the provision of so-called 'interactive on-demand services', which means that consumers can actively choose the musical or audiovisual work and the time of consumption (non-linear).[19] This limitation does not preclude drawing on learning from past experiences in different arrangements, where relevant. An exhaustive account and comparison of the different forms of consumption, however, would go far beyond the objective of this book. Other forms of consumption, for example downloads or even physical copies, may involve different arrangements and rights. Additionally, as mentioned above, interactive on-demand streaming has become the prevailing form of consumption of content in most EU Member States, with online service providers such as Spotify, Apple Music, YouTube, Netflix or online libraries of private and public TV channels. In this 'age of access'

[19] As opposed to linear services, where the content is not at the consumer's individual request. See also definition in Art. 1(1)(g) of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services [2010] OJ L95/1.

(Hilty and Köklu), issues of cross-border access have been exacerbated. Thus, streaming is increasingly in the cross-hairs of – otherwise technological neutral – regulatory intervention. Given the multiple differences of commercial services to public broadcasting or cultural heritage institutions, the book will only selectively look over the fence towards these services.

Thematically, this study looks at two different, yet related, industry verticals and forms of online content: audiovisual works and musical works. In the following chapters I first look at the licensor–licensee relationship between online music service providers and CMOs.[20] Secondly, I look at the licensing and contractual relationship between rights holders, online service providers and consumers[21] regarding cross-border access to audiovisual works. This correlates roughly with the differentiation of market participants in a copyright market by Watt, who distinguishes rights holders, commercial users and consumers.[22] But is this an endeavour to compare apples with apples, or apples with oranges? I argue that juxtaposing these two forms of online content is beneficial for several reasons: first, the licensing of interactive on-demand streaming and access to these services has come into the cross-hairs of regulatory activity, which makes them worthwhile studying.[23] Secondly, whereas they invoke fairly similar rights, the

[20] A word on the notion of collective management of rights and its organisations: in earlier economic and legal scholarship such arrangements have often been referred to as 'collecting societies'. Other notions used include rights management organisations (CRMOs), Collective Rights Organisations (CROs), joint copyright management (C. Handke, 'Collective Administration' in R. Watt (ed.), *Handbook on the Economics of Copyright* (Edward Elgar 2014)) or, sometimes, more broadly, intellectual property rights (IPR) exchange institutions (R. P. Merges, 'Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations', *California Law Review*, 84 (1996), 1293), private intellectual property rights organisations (Posner, 'Transaction Costs and Antitrust Concerns'), or intellectual property clearinghouses. For the sake of conformity, I have chosen to refer to these organisations throughout this book as collective management organisations (CMOs). This imposed unitary terminology is to be employed with care, though. Concepts may already exist (as is the case here) and similar terms may be used by different theories for different concepts. See also P. te Hacken, 'Terms and Specialized Vocabulary. Taming the Prototype' in H. J. Kockaert and F. Steurs (eds.), *Handbook of Terminology*, vol. 1 (Jon Bejamins Publishing Co., 2015), p. 4.

[21] Whereas consumers play a key role, e.g., in Regulation (EU) 2017/1128, the regulatory focus in music has been on the horizontal relationship between CMOs and the vertical licensing relationship between rights holders and online service providers.

[22] R. Watt, *Copyright and Economic Theory: Friends or Foes?* (2000), 8.

[23] Van Gestel and Micklitz accuse legal researchers of 'herd behaviour' regarding scholarly work on policy, where 'researchers choose to follow "hot topics" and trends' (R. van Gestel and H.-W. Micklitz, 'Revitalizing Doctrinal Legal Research in Europe: What About Methodology?' in U. Neergaard, R. Nielsen and L. Roseberry (eds.), *European Legal Method – Paradoxes and Revitalisation* (DJØF Publishing, 2011),

situation regarding rights holders and their organisation, as well as the licensing relationship, look quite different for the respective subject matters. Still, some important insights might be gained by opposing these two: economists Liebowitz and Watt have noted that developments in the music industry are seen as 'a likely harbinger of most forms of entertainment, such as movies, computer software, videogames and the like'.[24] In both verticals, streaming is becoming the predominant form of consumption, and in both cases territorial delineation constitutes a prime hurdle towards the establishment of a Digital Single Market. At the same time, rights clearance for online music and audiovisual streaming respectively differ significantly, and solutions may not be 'one size fits all'.

Related to this, another dimension of comparing these two forms is how the concepts 'multi-territorial licensing' and 'cross-border access' are related. This will be explored in depth in Chapter 2. The debates in online music have been dominated by 'cross-border' and 'multi-territorial' notions, whereas the more recent debates regarding audiovisual content have been dominated by the notions of 'cross-border portability' and 'geo-blocking'. Whereas these notions are often used to describe similar phenomena, it is necessary to refine them: 'geo-blocking' refers to the use of technologies to limit the accessibility of a content service to certain geographical areas.[25] From a 'copyright-related perspective', this technical practice can be used to limit access to online content services to areas 'where the content owners have licensed the

pp. 38–41). At first glance, my research also falls into this trap of 'pre-programmed research' – seduced by a hot topic – whereas are territorial access restrictions just a luxury problem involving EU officials who are missing access to their favourite TV shows from back home? For example, Commissioner for Competition, Margrethe Vestager, noted in a speech: 'I, for one, cannot understand why I can watch my favourite Danish channels on my tablet in Copenhagen – a service I paid for – but I can't when I am in Brussels. Or why I can buy a film on DVD back home and watch it abroad, but I cannot do the same online.': see Commissioner for Competition, Margrethe Vestager, 'Competition policy for the Digital Single Market: Focus on e-commerce' (Bundeskartellamt International Conference on Competition, Berlin, 26 March 2015): http://europa.eu/rapid/press-release_SPEECH-15–4704_en.htm. However, as is noted above, consumer behaviour has shifted and has put the regulatory framework under pressure. Underneath lie many issues that regard the transition of the legal framework in the new reality, which can justify such research endeavour.

[24] S. J. Liebowitz and R. Watt, 'How to Best Ensure Remuneration for Creators in the Market for Music? Copyright and its Alternatives', *Journal of Economic Surveys*, 20 (2006), 513, 514.

[25] See, e.g., P. Ibáñez Colomo, 'Copyright Licensing and the EU Digital Single Market Strategy', LSE Law, Society and Economy Working Papers 19/2015 (2015), 2: http://ssrn.com/abstract=2697178; M. Trimble, 'The Territoriality Referendum', *World Intellectual Property Organization Journal* [2014], 89, 90.

commercial exploitation of their work'.[26] Cross-border portability, on the other hand, refers to the possibility of a consumer's accessing the content of its service provider from its resident Member State, while being temporarily present in another Member State. The European legislator defines a 'multi-territorial licence' in Article 3(m) of Directive 2014/26/EU tautologically, as a licence that covers the territory of more than one Member State.[27] When taking cross-border licensing as starting point, this can refer to two situations: the licensing of foreign content and licensing domestic content abroad. Suffice it for this section to state that, ultimately, both forms impact on the availability of content for consumers, but with different tools in the downstream relationship. Thus, on a broader level, the concepts can also be seen as two sides of the same coin.

Besides licensing, i.e. copyright-exertion related motives, there exist a variety of other legal and commercial aspects that might hinder the cross-border accessibility of content. These can be common to all online activities (e.g., VAT regime, consumer protection, business decisions) or specific to online content (e.g., release windows, piracy).[28] These causes are outside the scope of this book. Closely related to the study of licensing and access to copyright-protected works is the lack of legitimate access to content and its relation to piracy.[29] This theme has been subject to substantial academic research by both legal scholars and economists.[30]

[26] G. Mazziotti, 'Is Geo-blocking a Real Cause for Concern?', *European Intellectual Property Review*, 38 (2016), 365.

[27] Correspondingly, in Art. 1(d) of Commission Recommendation 2005/737/EC of 18 May 2005 on collective cross-border management of copyright and related rights for legitimate online music services [2005] OJ L276/54.

[28] See, e.g., Commission, 'A Digital Single Market Strategy for Europe – Analysis and Evidence Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions', 28.

[29] See, e.g., Recital 40 of Directive 2014/26/EU, in which the European legislator expresses its expectation that the development of legal music streaming services contributes to the fight against piracy.

[30] Thomes, for example, studies the link between piracy and streaming services and finds 'that an increase in copyright enforcement shifts rents from consumers to the monopolistic provider, and moreover that a maximal punishment for piracy will be welfare-maximizing' (T. P. Thomes, 'An economic analysis of online streaming: How the music industry can generate revenues from cloud computing', ZEW-Centre for European Economic Research, Discussion Paper No. 11-039 (2011): http://ftp.zew.de/pub/zew-docs/dp/dp11039.pdf). Danaher and Waldfogel look at the audiovisual sector in the United States and suggest that 'delayed legal availability of the content abroad may drive the losses to piracy' (B. Danaher and J. Waldfogel, 'Reel Piracy: The Effect of Online Film Piracy on International Box Office Sales', University of Minnesota and NBER (2012): http://ssrn.com/abstract=1986299). Barker suggests that 'P2P downloads have a strong negative effect on legitimate music purchases' (G. R. Barker, 'Assessing the Economic Impact of Copyright Law: Evidence of the Effect of Free

Again, this book takes its starting point exclusively as construing the arrangements around access to content, which is why endeavours regarding piracy- and enforcement-related questions lie outside the scope of this work.

The theme of this book – licensing of and cross-border access to content – touches upon different fields of law, such as copyright law, contract law, competition law and rights of associations, as well as EU law and fundamental freedoms. There exists a plurality of intersections between these different legal domains and their equivalents in economic research and other disciplines. The focus of this book is on copyright and competition law. Within the broader copyright framework, the focus is on arrangements around the exercise of rights. Thus, the aim of this book is to address not the substantive norms of copyright, but the clearance of those rights. Therefore, I will not go into the relevant rights harmonised by the InfoSoc Directive[31] and the respective exceptions and limitations, or the intriguing questions around exhaustion in the digital landscape. Whereas it covers contractual arrangements, contract law as such is not part of this book. Also, licensing arrangements regarding orphan works[32] and for creative uses such as remixes are outside the scope of this work.

Finally, the geographical focus of this work is at the EU level. Cross-border licensing is inherently of an international dimension and has moved into the focus of EU legislative initiatives in order to enable a European Digital Single Market. Whereas copyright legislation is national and whereas I will not cover issues of national implementation, at times, I will resort to national samples as supportive or anecdotal evidence, when needed as examples or for rendering the situation more precisely.[33] As the reader will discover, some of the European (regulatory and market) developments can also be construed in a United States–

Music Downloads on the Purchase of Music CDs'. Centre for Law and Economics, ANU College of Law Working Paper No. 2 (2012)). For a comprehensive overview of the earlier literature, see also M. Peitz and P. Waelbroeck, 'An Economist's Guide to Digital Music', CESifo Working Paper No. 1333 (2004): cesifo.oxfordjournals.org/content/51/2-3/359.full.pdf

[31] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10 (InfoSoc Directive).

[32] Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works [2012] OJ L299/5. See also Commission, 'Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market' COM/2016/0593 final – 2016/0280 (COD), Brussels, 14.9.2016 (Orphan Works Directive).

[33] For example, the incorporation of EU rules into national law in Germany, the United Kingdom and the Scandinavian countries. The selection is largely guided by the author's knowledge of languages and does not follow a specific methodology.

American context.[34] At times, it is therefore useful to look over the European fence to construe developments in a broader context.

1.3 Towards a Digital Single Market

The establishment of the internal market – or the single market as it is referred by EU policymaking[35] – has been the leading political and legislative priority in recent decades at the EU level. It is a prime objective of the EU, as set out in Article 3(3) of the Treaty on European Union (TEU), which confers a legislative obligation on the Union established in Article 26 of the Treaty on the Functioning of the European Union (TFEU) to create an internal market 'without internal frontiers in which the free movement of goods, persons, services and capital (. . .)'. Thereby the European legislator can rely on a variety of legal tools, ranging from non-binding soft law to Directives or Regulations.[36] If one takes harmonisation of the twenty-eight current and different regimes as reference point, much has been achieved by the four fundamental freedoms, implemented by various harmonising Directives and Regulations in the different policy fields, and their interpretation by the courts.

As regards copyright and related rights, between 1991 and 2018, several Directives have been adopted to harmonise aspects of national laws.[37] When the first copyright-related Directive[38] entered into force in 1991, harmonisation efforts had to accommodate just twelve Member States, compared with twenty-eight today. Notably, collective

[34] Whereas licensing and access arrangements, and notably CMOs, look different, today's content industry is heavily influenced by North American rights holders and service providers.

[35] Notably, this notion is used by the European Commission, not the Treaties; the Treaty of Rome from 25 March 1957 and the Maastricht Treaty on European Union (92/C 191/01) refer to the 'common market'. With the Lisbon Treaty the notion 'internal market' was introduced: see also Art. 26(2) TFEU. A nuanced reflection on the different concepts is offered by the Court of Justice, which states: 'The concept of a common market as defined by the Court in a consistent line of decisions involves the elimination of all obstacles to intra-community trade in order to merge the national markets into a single market bringing about conditions as close as possible to those of a genuine internal market'. See Case 15/81, *Gaston Schul Douane Expediteur BV* v. *Inspecteur der Invoerrechten en Accijnzen, Roosendaal* [1982] ECR 1409, ECLI:EU:C:1982:135, para. 33.

[36] Art. 288 TFEU.

[37] For an overview of policy initiatives in the United States and some of the parallel developments, as well as differences, see S. Perlmutter, 'Making Copyright Work for a Global Market: Policy Revision on Both Sides of the Atlantic', *Columbia Journal of Law & the Arts*, 38 (2014), 49.

[38] Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs [1991] OJ L122/42 (repealed).

management of copyright and related rights has been on the legislative agenda of the European Commission for at least twenty years. In 1995, for example, the Commission commented on the regulation of collective rights management in its *Green Paper on Copyright and Related Rights in the Information Society*.[39] As will be seen in the following chapters, though, until the more recent interference by competition authorities and Directive 2014/26/EU on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, collective management has been anything but a level playing field and remained largely unaddressed.

More recently, the establishment of a 'Digital Single Market' has joined the EU policy goals. By definition, territorially segmented digital markets are at odds with a Digital Single Market without internal frontiers. In its *Communication on content in the Digital Single Market* of 2012, the previous Commission laid out its two parallel tracks of action, which ensure an effective single market in the area of copyright.[40] These two trajectories consist of: (1) the 'on-going effort to review and to modernise the EU copyright legislative framework' and (2) the facilitation of 'practical industry-led solutions' to issues on which rapid progress was deemed necessary and possible.[41] Also, the assessment of the existing copyright framework and its fitness in the digital setting have been topical for some time. In 2014, for example, the seventeen-year-old InfoSoc Directive, with its framework based on the minimal protection approach, was placed under review by the European institutions. Under the previous Commission, also, a major, general consultation on copyright was conducted from December 2013 to March 2014,[42] following the 'Licenes for Europe' stakeholder initiative and the EU Commission's *Communication on content in the Digital Single Market*. The consultation contemplates that '[d]espite progress, there are continued problems with the cross-border provision of, and access to, services. These problems are most obvious to consumers wanting to access services that are made available in Member States other than the one in which they live'.[43]

[39] Commission, 'Green Paper on Copyright and Related Rights in the Information Society' COM(95) 382 final, Brussels, 19 July 1995, 69ff.

[40] Commission, 'Content in the Digital Single Market' (Communication) COM(2012) 789 final, 2.

[41] Ibid., 2–3.

[42] Commission, 'Public Consultation on the review of the EU copyright rules' (23 July 2014): http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/index_en.htm. The deadline was extended by one month.

[43] Commission, 'Public Consultation on the review of the EU copyright rules' (2013), 7: http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/consultation-document_en.pdf

The consultation resulted in more than 9,500 replies, with roughly 59 per cent of respondents being consumers and roughly 25 per cent authors or performers.[44] The prominently featured first question asked: 'Why is it not possible to access many online content services from anywhere in Europe?'[45]

In a leaked draft of the White Paper *A Copyright Policy for Creativity and Innovation in the European Union* from June 2014, the European Commission considered cross-border dissemination of creative content in the single market and effective tools for a functioning marketplace and value-chain as two of the three main areas for review. Here, the Commission considered that obstacles of ubiquitous cross-border access 'can derive from both issues related to the definition and to the exercise of rights'.[46] In the internal draft, it continues both to consider the definition of the act of making available on the Internet, in suggesting that this could be done by introducing a country of origin principle or localisation of the act in Member States towards which the activity is directed, and the introduction of a single unitary copyright title, notably as a substitute for the current system of national copyright titles.[47] As regards the exercise of rights, the internal draft suggests that 'addressing restrictions of cross-border access to content resulting from purely contractual arrangements could be envisaged'.[48] Notably, that is an aspect that has found its way forward in the form of the Portability Regulation under the current Commission.

The updated *Digital Single Market Strategy for Europe*, dating from 6 May 2015,[49] too, focused on 'Better online access for consumers and businesses across Europe'. However, compared with the previous Commission's Digital Single Marketplace roadmap, multi-territorial licensing and cross-border access were featured less prominently. It proposed 'Better access to digital content – A modern, more European copyright framework', in which it focuses on 'unjustified' geo-blocking and specifically announced the making of a legislative proposal to address the cross-border portability.[50]

[44] See Commission, 'Public Consultation on the review of the EU copyright rules'. The high volume of responses was caused by several popular initiatives such as Fix Copyright! and Creators for Europe and Copywrongs.eu. See E. Rosati, 'BREAKING: Report on responses to Public Consultation on EU copyright now available' (*IP Kat*, 23 July 2014): http://ipkitten.blogspot.dk/2014/07/breaking-report-on-responses-to-public.html

[45] Commission, 'Public Consultation on the review of the EU copyright rules', 7.

[46] Commission, 'A Copyright Policy for Creativity and Innovation in the European Union' (2014) White Paper, Internal Draft, 6, made available via: http://ipkitten.blogspot.dk/2014/06/super-kat-exclusive-heres-commissions.html

[47] Ibid. [48] Ibid., 7.

[49] Commission, 'A Digital Single Market Strategy for Europe' (Communication) COM (2015) 192 final.

[50] Ibid., 7–8. See also Mazziotti, 'Is geo-blocking a real cause for concern?', 365.

Some of these thoughts from the White Paper have been adapted in the European Commission's follow-up on copyright in its Communication *Towards a Modern, More European Copyright framework*,[51] which was published concurrently with the proposal for the Portability Regulation on 9 December 2015. The Commission reflected that

> [t]he ultimate objective of full cross-border access for all types of content across Europe needs to be balanced with the readiness of markets to respond rapidly to legal and policy changes and the need to ensure viable financing models for those who are primarily responsible for content creation.[52]

Therefore, the Commission proposed 'a gradual approach to removing obstacles to cross-border access to content and to "the circulation of works"'.[53] Ultimately, however, this incremental approach is expected to lead to the realisation of the single market. In recalling the difficulties and long lead-times that have accompanied the harmonisation of trade-mark and patent law, the Commission states that the complexities of a full harmonisation of copyright in the EU 'cannot be a reason to relinquish this vision as a long-term target'.[54] In order to ensure wider access to content across the EU, besides its proposal on content portability, the Commission considered legislative proposals in three areas, for adoption in spring 2016:

> - Enhancing cross-border distribution of television and radio programmes online in the light of the results of the review of the Satellite and Cable Directive;
> - Supporting right holders and distributors to reach agreement on licences that allow for cross-border access to content, including catering for cross-border requests from other Member States, for the benefit of both European citizens and stakeholders in the audiovisual chain. In this context, the role of mediation, or similar alternative dispute resolution mechanisms, to help the granting of such licences, will be considered;
> - Making it easier to digitise out-of-commerce works and make them available, including across the EU.[55]

Notably, the Commission also considers financial and other support measures of public authorities to be vital, referring to, inter alia, the Creative Europe programme.

In a draft version of a Communication on *Online Platforms and the Digital Single Market, Opportunities and Challenges for Europe*, leaked in April 2016, the Commission notes that, in the next copyright package, which was envisioned to be adopted in autumn 2016, it aims at 'ensuring fair allocation of the value generated by the online distribution of

[51] Commission, 'Towards a modern, more European copyright framework' (Communication) COM(2015) 626 final.
[52] Ibid., 5. [53] Ibid. [54] Ibid., 12. [55] Ibid., 6.

copyright-protected content by online platforms whose businesses are based on the provision of access to copyright-protected material'.[56] On 14 September 2016, then, the Commission proposed its modernisation of EU copyright rules, consisting of two proposals for Regulations and two Directives.[57]

The European Commission, and especially the former Directorate-General Internal Market and Services (DG MARKT), which was headed by Commissioner Michel Barnier from 2010 to 2014, in 2014 underwent major structural changes[58] that are noteworthy in the context of this book: Unit MARKT D1 (Copyright), which was headed by Maria-Martin Prat, together with the part of Unit MARKT D3 (Fight against counterfeiting and piracy) dealing with copyright enforcement and the part of Unit MARKT D4 (Online and postal services) dealing with online services, were moved to the Directorate-General for Communications Networks, Content and Technology (DG CONNECT), which was headed by Commissioner Günther Oettinger until 2016, who succeeded Neelie Kroes.[59] Furthermore, inter alia, unit EAC E3 (Creative Europe Programme – MEDIA) was relocated to DG CONNECT. In addition, the former Prime Minister of Estonia, Andrus Ansip, served as Vice President for the European Commission and is Commissioner for the Digital Single Market, in that he heads the project team 'A Connected Digital Single Market' consisting of the Commissioners of different Directorates General. The relevant implications of these structural changes are twofold: first, the restructuring led to an upgrading of the digital agenda within the Commission. Secondly, the copyright unit moved closer to the other units working on Internet- and internal

[56] Commission, 'Online Platforms and the Digital Single Market, Opportunities and Challenges for Europe' (2016) Communication from the Commission, Draft, 10, made available via: www.politico.eu/wp-content/uploads/2016/04/Platforms-Communication.pdf

[57] E.g., Commission, 'State of the Union 2016: Commission proposes modern EU copyright rules for European culture to flourish and circulate' (Press release), IP/16/3010, Strasbourg, 14 September 2016, Commission, 'Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market'; see also Commission, 'Proposal for a Regulation of the European Parliament and of the Council laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes' COM/2016/0594 final – 2016/0284 (COD), Brussels, 14 September 2016.

[58] See Commission, 'The Juncker Commission: A strong and experienced team standing for change' (Press release) IP/14/984, Brussels, 10 September 2014.

[59] The Directorate-General Enterprise and Industry (DG ENTR) merged with the remainder of DG MARKT, hereunder notably Units MARKT D2 (Industrial Property) and the remaining parts of Unit MARKT D3 (Fight against counterfeiting and piracy) under the Directorate General for Internal Market, Industry, Entrepreneurship and SMEs (DG GROWTH).

market-related aspects, while at the same time losing its traditional proximity to the units working on intellectual property related aspects. I will return to these observations in Chapter 6.

1.4 Traditional and New Modes of Governance in the EU

1.4.1 Analysing the Framework for Licensing and Access

Much has been, and much could be, written about different concepts and approaches of law-making and how to analyse the recent regulatory developments in this field. Contributing to this discourse is outside the scope of this book. Instead, let me introduce some considerations for this specific endeavour. As noted, this book studies two phenomena: first, the recently introduced regulatory set-up for licensing of and access to copyright protected works (i.e. music and audiovisual works) on the Internet, and secondly the interplay between the different regulatory initiatives. In other words, this book contains both descriptive and normative elements.[60]

In order to understand the licensing regime and access practices, this book investigates the functioning of and the relationship between the recently introduced online licensing framework in relation to multi-territorial licensing and geographical fragmentation. In other words, it finds its starting point in the *de lege lata* situation, i.e. the status quo of the law. Thus, the research first looks at the relevant provisions related to competition law stemming from the TFEU and its application, as well as the relevant provisions relating to copyright found in the relevant Directives and Regulations. For both verticals, music and audiovisual content, the relevant literature is reviewed, and data analysed in terms of competition proceedings, case law, soft law and codifications as well as the contractual arrangements (i.e. standard contracts between CMOs and terms regarding cross-border situations between online service providers and consumers). This book is roughly structured along the line of competition proceedings, on the one side, and other regulatory (legislative) interventions on the other.[61] On a broader note, Posner remarks that the licensing of intellectual property rights presents 'challenging issues (. . .) in which law, economics, finance, business and technology

[60] In a similar vein, Cryer et al. differentiate between expository and evaluative scholarship (R. Cryer, T. Hervey and B. Sokhi-Bulley, *Research Methodologies in EU and International Law* (Hart Publishing, 2011), p. 9). Methodologically, the book based on a combination of traditional doctrinal analysis (legal positivism) and 'law in context' analysis (multi-level governance and new institutionalism).

[61] On chosen structure, see also Section 1.5.

are inextricably intertwined'.[62] In order to understand the licensing and access arrangements better, the underlying basic economic rationales also become crucial.[63]

Based on the survey of solutions, I identify how the EU's complementing competition- and copyright-related routes interact and whether they support each other in achieving their policy goals, such as overcoming licensing issues based on territoriality. In order to examine how the legal framework interacts with market developments, in connection with the current law-making approach by the EU Commission, multi-level governance, coined as 'Better Regulation', helps to construe the interplay of the different regulatory arrangements (private, legislative and non-legislative). Based on these considerations, I analyse interactions, identify weaknesses and inconsistencies of the system, and pinpoint solutions that respond to the challenge of mitigating the effect of the fragmented content market, based on twenty-eight versions of copyright law in the EU, on dissemination of content on the Internet.

1.4.2 Different Modes of Regulating

Access to content is governed by licensing agreements, which are subject to contractual freedom. What, then, governs or regulates the underlying (institutional) agreements? From a doctrinal perspective based on a positivist view, *legal* regulation is (implicitly or expressly) sometimes simply understood as a type of *legal* normative instrument. The principal validation of this view stems from the validity of the legal norm.[64] In the absence of specific legislation, the general rules constitute the relevant legal framework. But are these private institutional arrangements and agreements

[62] R. A. Posner, 'Transaction Costs and Antitrust Concerns in the Licensing of Intellectual Property', *John Marshall Review of Intellectual Property Law*, 4 (2005), 325.

[63] The combination of law and economics is a research stream that has been applied fruitfully to the analysis of copyright-related questions. While economic theory has proven to be a viable means in law and economics to justify, or to discuss the necessity or the breadth of copyright protection and its collectivised exercise respectively, these themes are not at the centre of attention of the book. Rather, this analysis is based on the existing copyright protection and study of the exercise and exploitation of the rights. For a comprehensive literature review, see, e.g., R. A. Posner, 'Intellectual Property: The Law and Economics Approach', *Journal of Economics Perspectives*, 19 (2005), 57; Liebowitz and Watt, 'How to Best Ensure Remuneration for Creators in the Market for Music?'; R. Towse, C. Handke and P. Stepan, 'The Economics of Copyright Law: A Stocktake of the Literature', *Review of Economic Research on Copyright Issues*, 5 (2008), 1; and Watt, *Copyright and Economic Theory: Friends or Foes?*

[64] Legal positivism is based on the principle that 'all law is created and laid down (. . .) by human beings and that the validity of a rule of law lies in its formal legal status, not its relation to morality or other external validating factors' (Cryer, Hervey and Sokhi-Bulley, *Research Methodologies in EU and International Law*, p. 37).

(such as licensing agreements or standard contracts) simply the product or the result of regulatory intervention, or can they themselves also be seen as regulatory instruments that shape the market? And what about other regulating factors? In the present field, in which specific legislation has been introduced only recently, proceedings under competition law have been one regulating factor. But, also, 'soft law' instruments and industry initiatives seem to have shaped the arrangements and institutions.

Two issues are at stake here: first, regulation coming from within the traditional law-making arena by traditional institutional actors, but outside traditional legal instruments. Secondly, outside traditional institutional actors, regulation induced by arrangements by private actors.[65] In a traditional legal dogmatic endeavour, neither form would matter.[66] But even the strictest representatives of a traditional positivist view must be inclined to acknowledge that non-legislative measures, such as soft law issued by governmental bodies, are capable of influencing market behaviour. What would be the rationale of non-binding legal instruments, such as Recommendations, which have a firm anchor in the Treaties in the first place, if not exactly that?[67] For the purpose of this book, in any case, in order to construe the existence of the arrangements and uncover inconsistencies in the regulatory framework, it seems necessary to examine the interplay between the different forms of regulatory initiatives, namely state-induced measures on the one hand (in the form of legislative or non-legislative measures), and market developments (i.e. private regulation) on the other.

[65] E.g., Peters notes that: 'From a formal legal perspective, neither type of corporate self- and co-regulation produces ordinary hard (international) law. However, all these shades of hybrid regulation are functionally equivalent to state or inter-state hard law when they do influence behaviour and are complied with.': A. Peters, 'Membership in the Global Constitutional Community' in J. Klabbers, A. Peters and G. Ulfstein (eds.), *The Constitutionalization of International Law* (Oxford University Press, 2009), p. 249.

[66] This is not the place thoroughly to discuss justifications for the different schools of thought. Legal dogmatics, for example, has been criticised as practical jurisprudence, which is uncommon outside European scholar community (A. Peczenik (ed.), *Legal Doctrine and Legal Theory*, vol. 4: Scientia (Springer, 2005), p. 2). Others question the significance of hard law and its exclusive scrutiny in the contemporary phase of European integration (J. Hunt and J. Shaw, 'Fairy Tale of Luxembourg? Reflections on Law and Legal Scholarship in European Integration' in D. Phinnemore and A. Warleigh-Lack (eds.), *Reflections on European Integration, 50 Years of the Treaty of Rome* (Palgrave Macmillan, 2009), p. 3). Schools integrating non-legal sources in their research endeavours based on broader notions of regulation, on the other hand, are criticised that regulation is 'less than law' (J. Black, 'Critical reflections on regulation', Centre for Analysis of Risk and Regulation, London School of Economics and Political Science (2002), 23: eprints.lse.ac.uk/35985). Suffice it to note here that both views have advantages and disadvantages.

[67] The available policy instruments at an EU level are, besides hard, legally binding rules, soft regulation, education and information as well as economic instruments.

This leads me to the notion of 'regulation': in considering more than just the terminology, in the context of this book let us understand 'regulation' conceptually. There seems to be no canon as to what regulation embraces as either concept or terminology.[68] Black notes that the conceptualisation of 'regulation' often depends on the issue on which a scholar is focusing.[69] She further comments that there frequently exists 'an implicit or explicit assumption that the target of regulation is an economic actor'.[70] One conceptual definition understands regulation 'as the means by which the state 'seeks to encourage direct behaviour which it is assumed would not occur without such intervention' and as such should be seen as distinct from the operation of the markets, even though the latter is underpinned by legal rules'.[71]

In this definition, however, the state is the central actor. Others have expanded both the objects of regulation and the subject, i.e. regulators, to other actors (e.g., firms) and other factors (e.g., norms or culture). Black argues that regulation is increasingly 'being seen as "decentred" from the state, and even from the well-recognised forums of self-regulation'.[72] In fact, many streams in legal and economic research address the interplay between different regulatory factors. One renowned approach to construing regulators other than law was coined by Lessig as 'New Chicago School'. There, he identifies four factors (or 'modalities'): law, social norms, markets and architecture.[73] Yet another, related, approach is suggested by Riis as 'user generated law', which I have applied to the field of collective management in previous work related to this research.[74] According to this framework, which builds on von Hippel's theory on user innovation, law that 'accommodates the needs of the knowledge society' is characterised by: (1) flexible norms; (2) with cross-border scope; and (3) which are industry- and subject-specific.[75] In previous work, I revisited the developments in the field with regard to licensing arrangements, and tested whether user-generated law methodology can construe the emerging legal regulatory (based on contracts and laws) and non-regulatory models (based on technology and social norms). I have argued that the development of cross-border online

[68] For an overview of different regulatory concepts, see Black, 'Critical reflections on regulation', 12.
[69] Ibid., 9. [70] Ibid., 10. [71] Ibid., 1. [72] Ibid.
[73] L. Lessig, 'The New Chicago School', *Journal of Legal Studies*, XXVII (1998), 661.
[74] See S. F. Schwemer, 'Emerging models for cross-border online licensing' in T. Riis (ed.), *User Generated Law, Re-Constructing Intellectual Property Law in a Knowledge Society* (Edward Elgar, 2016).
[75] See T. Riis, 'User Generated Law: Re-constructing Intellectual Property Law in a Knowledge Society' in T. Riis (ed.), *User Generated Law, Re-Constructing Intellectual Property Law in a Knowledge Society* (Edward Elgar, 2016), pp. 2–3.

music licensing models, for example, can, to a large extent, be construed as interplay between regulatory activity and private mechanisms.[76] In the case of online music, novel licensing arrangement and entities have emerged: sometimes influenced or accompanied by regulatory action and sometimes not. For the sake of this book, in any event, let us rely on a broad view of 'regulation', which embraces contractual arrangements, industry measures and soft law, as well as competition proceedings and *de lege* regulation in form of hard law, i.e. rule setting by means of legislation and other means that govern the behaviour of the different arrangements.

New Modes of Governance

According to Trubek et al., governance arrangements 'that operate in place of, or along with, the "hard law" that arises from treaties, regulations' are often described under the concept of 'soft law'.[77] There has been a 'growing awareness of the European Commission to use and test regulatory techniques which (. . .) introduce new modes of law-making and enforcement'[78] that has dated back to the 1980s. This development is argued to have led to the

> (. . .) far-reaching politicization of law-making and enforcement, politicization here being understood as circumvention or overruling "law" as the decisive means for shaping the European integration process. Traditional legislation became less popular to the advantage of self-regulation, co-regulation and other "new" modes of governance.[79]

[76] See Schwemer, 'Emerging models for cross-border online licensing', p. 79.

[77] D. M. Trubek, P. Cottrell and M. Nance, '"Soft Law", "Hard Law" and EU Integration' in G. de Búrca and J. Scott (eds.), *Law and Governance in the EU and the US* (Hart Publishing, 2006), p. 65. However, the notion of soft law is not unproblematic, given its ambiguity (see G. de Búrca and J. Scott, 'New Governance, Law and Constitutionalism' (2006), 5: www.ucl.ac.uk/laws/clge/docs/govlawconst.pdf) and contested as regards non-binding measures (see, e.g., C. Barnard and S. Peers, *European Union Law* (Oxford University Press, 2014), pp. 102–103). Notably, the European Parliament, in its Resolution from 2007 on cross-border collective copyright management refers to the Online Music Recommendation as a 'soft law' approach: see European Parliament, 'Resolution of 13 March 2007 on the Commission Recommendation of 18 October 2005 on collective cross-border management of copyright and related rights for legitimate online music services (2005/737/EC) (2006/2008(INI))' P6_TA(2007)0064 [2006] OJ C301 E/64 at lit C. See also L. Marchegiani, 'Le licenze multiterritoriali per l'uso online di opere musicali nella disciplina comunitaria della gestione collettiva dei diritti d'autore e dei diritti connessi', *Osservatorio del diritto civile e commerciale*, 2 (2013), 293, 297.

[78] van Gestel and Micklitz, 'Revitalizing Doctrinal Legal Research in Europe: What About Methodology?', p. 45.

[79] Ibid., p. 46.

Van Gestel and Micklitz continue that '"integration through law" (. . .) did not come to an end, but as the dominant paradigm it was replaced by "integration without law"'.[80] This trend towards 'post-regulatory', non-traditional forms of governance and 'democratic experimentalism' has attracted significant scholarly attention.[81] This literature stream has drawn attention to the emerging use of non-legislative forms of regulation by means of soft law and other informal governance instruments in the EU.[82] These new modes of governance raise democratic legitimacy problems, and the question of co-existence between voluntary modes of governance and compulsory regulation.[83] The concept of new governance is not settled.[84] Pierre defines 'governance' as 'sustaining co-ordination and coherence among a wide variety of actors with different purposes and objectives such as political actors and institutions, corporate interests, civil society, and transnational governments'.[85] According to de Búrca and Scott, for example, new governance is 'a construct which has been developed to explain a range of processes and practices that have a normative dimension but do not operate primarily or at all through the formal mechanism of traditional command-and-control-type legal institutions'.[86]

Hunt and Shaw explain that

[80] S. Weatherill, 'The Challenge of Better Regulation' in S. Weatherill (ed.), *Better Regulation* (Hart Publishing, 2007), p. 47. This resembles what de Búrca and Scott present as their hybrid thesis: see 'New Governance, Law and Constitutionalism', 9–10.

[81] de Búrca and Scott, 'New Governance, Law and Constitutionalism'; D. Kennedy, 'The Mystery of Global Governance' in J. L. Dunoff and J. P. Trachtman (eds.), *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge University Press, 2009), p. 50.

[82] See W. H. Simon, 'Toyota Jurisprudence: Legal Theory and Rolling Rule Regimes' in G. de Búrca and J. Scott (eds.), *Law and Governance in the EU and the US* (Hart Publishing, 2006); Hunt and Shaw, 'Fairy Tale of Luxembourg?', 98. For an interesting discourse on the distinction between law and 'non-law' and 'presumptive law' in public law, see J. Klabbers, 'Law-making and Constitutionalism' in J. Klabbers, A. Peters and G. Ulfstein (eds.), *The Constitutionalization of International Law* (Oxford University Press, 2009) especially pp. 97ff and 111ff. The concept is also relevant in the United States but 'this development has occurred in a more self-conscious and more closely scrutinised fashion in the EU': see de Búrca and Scott, 'New Governance, Law and Constitutionalism', 2.

[83] van Gestel and Micklitz, 'Revitalizing Doctrinal Legal Research in Europe: What About Methodology?', pp. 47–48. See also de Búrca and Scott, 'New Governance, Law and Constitutionalism'; and Y. Papadopoulos, 'Problems of Democratic Accountability in Network and Multi-Level Governance', *European Law Journal*, 13 (2007), 469.

[84] de Búrca and Scott, 'New Governance, Law and Constitutionalism', 3.

[85] J. Pierre, 'Introduction: Understanding Governance' in J. Pierre (ed.), *Debating Governance* (Oxford University Press, 2000), pp. 3–4.

[86] de Búrca and Scott, 'New Governance, Law and Constitutionalism', 3.

> The umbrella term "new governance" covers a range of non-legislative interventions – including soft law, the open method of coordination, (. . .), the rise of executive power in the EU, seen with the use of comitology and an increasing involvement of agencies.[87]

In defining *new* governance, Walker points towards a 'common starting point (. . .) in terms of a departure from the Classic Community Method of norm generation and of governance more generally (. . .)'.[88] Another, more general, starting point refers to the non-legislative, or only marginally legislative, character, which 'comes close to defining new governance as the antithesis of *legal ordering*'.[89] Yet another, more abstract, starting point refers to the 'general properties of new governance, such as participation and power-sharing, multi-level integration, diversity and decentralisation, deliberation, flexibility and revocability of norms, and experimentation and knowledge-creation'.[90] Also, here, however, as Walker sums up, these '"new" properties explicitly or implicitly acquire definition from their contrast with a model of "old" government based on representation, singular authority, centralised command and control, rigidity and stability of norms, and the uniform application of a received regulatory formal'.[91] In this context, de Búrca and Scott note:

> New governance processes generally encourage or involve the participation of affected actors (stakeholders) rather than merely representative actors, and emphasize transparency (openness as a means to information-sharing and learning), as well as ongoing evaluation and review.[92]

This brings me to the role of the European Commission, which plays a central role for the topic of this book, both as legislative initiator and as competition authority. Traditionally, a large body of legal research on the EU focuses on the role of the Court of Justice.[93] In this context the so-called 'Better Regulation' approach by the European Commission becomes relevant. In 2001, the EU Commission published its White Paper on 'European Governance',[94] which has been

[87] Hunt and Shaw, 'Fairy Tale of Luxembourg?', 98.
[88] N. Walker, 'EU Constitutionalism and New Governance' in G. de Búrca and J. Scott (eds.), *Law and New Governance in the EU and the US* (Hart Publishing, 2006), pp. 21–22, with further references.
[89] Ibid., 22, also de Búrca and Scott, 'New Governance, Law and Constitutionalism', 7.
[90] Walker, 'EU Constitutionalism and New Governance', p. 22, with further references.
[91] Ibid.
[92] de Búrca and Scott, 'New Governance, Law and Constitutionalism', 6.
[93] However, as Hunt and Shaw track, other institutions have also been considered in research endeavours. See Hunt and Shaw, 'Fairy Tale of Luxembourg?', 4; Cryer, Hervey and Sokhi-Bulley, *Research Methodologies in EU and International Law*, p. 17.
[94] Commission, 'European governance – A white paper' (2002) White Paper, COM/2001/0428 final, OJ C 287/1.

marked as a shift in the law-making approach and contains the 'Better Regulation' programme as a key element.[95] The 'Better Regulation' approach was refined in May 2015, when the Better Regulation Agenda was adopted.

According to the Better Regulation Guidelines, 'better regulation' means 'designing EU policies and laws so that they achieve their objectives at minimum cost',[96] while it 'is not about regulating or deregulating'.[97] This approach is deemed 'necessary to ensure that the Union's interventions respect the overarching principles of subsidiary and proportionality'.[98] Better regulation 'consider[s] both regulatory and well-designed non-regulatory means as well as improvements in the implementation and enforcement of existing legislation'.[99] In this iterative approach, close collaboration with stakeholders is key. In this context, a multitude of non-legal factors can influence legal decision making.[100] Stakeholder consultations,[101] for example, can constitute an anchor regarding the initial design of policy interventions and can improve the acceptance of the initiative.[102] This is also underlined, by the interest shown in the public consultation on the review of the EU copyright rules, especially from citizens, as noted by the EU Parliament's Committee of Industry, Research and Energy.[103] However, varying degrees of engagement can be observed: in the public consultation regarding copyright there were more than 8,000 responses, whereas the consultation on the SatCab Directive resulted in little more than 250 responses.[104] Also, the *ex ante* assessment of the impact of regulation is

[95] van Gestel and Micklitz, 'Revitalizing Doctrinal Legal Research in Europe: What About Methodology?', p. 47.
[96] Commission, 'Better Regulation Guidelines' (latest edition, 19 May 2015) SWD(2015) 111 final, 5.
[97] Ibid. [98] Ibid.
[99] Commission, 'Better regulation for better results – An EU Agenda' (Communication) COM(2015) 215 final, 6.
[100] See Peczenik, *Legal Doctrine and Legal Theory*, pp. 14–15, referring inter alia to viewpoints formulated by international organisations, private organisations or civil society.
[101] Stakeholder consultations are a duty under Art. 11 TEU (Consolidated Version of the Treaty on European Union [2010] OJ C831/01).
[102] Commission, 'Synopsis Report on the Responses to the Public Consultation on the Review of the Satellite and Cable Directive', 4 May 2016, 63–64.
[103] European Parliament, 'Opinion of the Committee on Industry, Research and Energy for the Committee on Legal Affairs on the implementation of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (2014/2256 (INI))', Committee on Industry, Research and Energy, Rapporteur: José Blanco López, 20 April 2015, Recital 4.
[104] Commission, 'Synopsis Report on the Responses to the Public Consultation on the Review of the Satellite and Cable Directive'.

relatively novel.[105] In the context of this book it is thus interesting to test whether new governance and the 'Better Regulation' approach can construe some of the interplay between both legislative and non-legislative or private mechanisms.[106]

This also informs the choice of sources: in the context of the current and the recently introduced law, preparatory works and reports can serve as a key resource for interpreting the provisions and construing the ideas of the regulator.[107] Explanatory memorandums, which are required to accompany all legislative proposals by the EU Commission, do not form part of the legislative act, but again offer important reflections on the proposal.[108]As described above, this area of the Digital Single Market is addressed by a variety of soft law measures, such as Recommendations, which, despite their non-binding nature, are also regularly recited in judicial proceedings or by the legislator. Finally, other non-binding documents by the EU institutions have been considered. Given the contractual nature of licensing, agreements and other contractual arrangements are central. Generally, the study of these arrangements, however, proves difficult because most agreements are confidential.[109] Thus, the main insights are derived from publicly available information such as the terms of service, other public information from organisations, and information provided in case law or other scholarly reports. The cut-off date for information collection was 30 March 2018.

[105] Formal Impact Assessments, for example, have been carried out by the European Commission only since 2003. See F. Chittenden, T. Abler and D. Xiao, 'Impact Assessment in the EU' in S. Weatherill (ed.), *Better Regulation,* vol. 6: *Studies of the Oxford Institute of European and Comparative Law* (Hart Publishing, 2007), p. 284.

[106] And to a certain degree infra- and intra-institutional interplay. The EU Commission, for example, refers to Better Regulation in its Recommendation 2005/737/EC (see Commission, 'Impact Assessment reforming cross-border collective management of copyright and related rights for legitimate online music services' (Commission Staff Working Document) SEC(2005) 1254, Brussels 11 October 2005, 39).

[107] See, e.g., M. Bryde Andersen, *Ret og metode* (Gjellerup, 2002), pp. 144–145.

[108] Impact Assessments (IA), for example, provide an 'ex ante analysis of social economic and environmental impact for a variety of purposes including coordination within the Commission, openness to external stakeholders and transparency in decision-making. (. . .) Finally, IAs explain why action is necessary and the regulatory response is appropriate, or alternatively why no action should be taken'. See Chittenden, Abler and Xiao, 'Impact Assessment in the EU', p. 276.

[109] Other researchers share this obstacle. See G. Mazziotti, 'New Licensing Models for Online Music Services in the European Union: From Collective to Customized Management' Public Law & Legal Theory Working Paper Group 7 Paper Number 11–269, Columbia Law School: http://ssrn.com/abstract=1814264; Rethink Music, 'Fair Music: Transparency and Payment Flows in the Music Industry, Recommendations to Increase Transparency, Reduce Friction, and Promote Fairness in the Music Industry' (2015) Rethink Music, Berklee ICE, Boston, 14: www.rethink-music.com/research/fair-music-transparency-and-payment-flows-in-the-music-industry

1.5 Outline

This book is divided into six chapters. This first chapter consists of an introduction to the topic and the need for cross-border licensing and access solutions for musical and audiovisual works by addressing why territorial segmented markets are problematic in view of the EU's policy goals. It introduces the Digital Single Market and the modes of governance in the EU, of which the lawmaker has made use when addressing cross-border content distribution on the Internet.

Against this backdrop of recent policy developments, Chapter 2 first explores the relationship between cross-border access and multi-territorial licensing. Then it describes the evolution of territorial delineation by author CMOs and the emergence of novel music licensing arrangements, and puts forward essential aspects of the underlying economic rationales and the market context. Finally, it examines territorial practices and licensing arrangements regarding audiovisual works.

Chapter 3 contains a study of how territorial restrictions in access or licensing arrangements have been dealt with from a competition law stance. First, it provides a case study of territorial restrictions of music in the licensor–licensor relationship, which has been dominated by model contracts. Then, it looks at the licensor–licensee relationship regarding territorial restrictions in licensing contracts for audiovisual content.

Chapter 4 looks at how multi-territorial licensing of music has been addressed by the European lawmaker. It analyses the development from voluntary to binding measures in the distinct European setting of harmonisation and market integration. The survey of the community *acquis* concludes with proposed solutions for the licensing of audiovisual content.

Chapter 5 turns towards the recent legislative initiatives regarding multi-territorial access, notably geo-blocking and portability. It also puts these initiatives into the context of preceding consultations on the SatCab Directive and the proposed rules under the copyright package of the European Commission.

Figure 1 provides an overview of the different licensing (and access-related) aspects analysed in Chapters 3 to 5.

The delineation between Chapter 3, on the one hand, and Chapters 4 and 5, on the other, roughly follows the different instruments of regulation – namely competition decisions and judgments (*ex post* control by the European Commission in its function as competition authority as well as the relevant case law of the Court of Justice and the General Court) on the one hand, and the institutional legal framework based on non-binding and binding legal instruments or acts (on *ex ante* the sector-specific

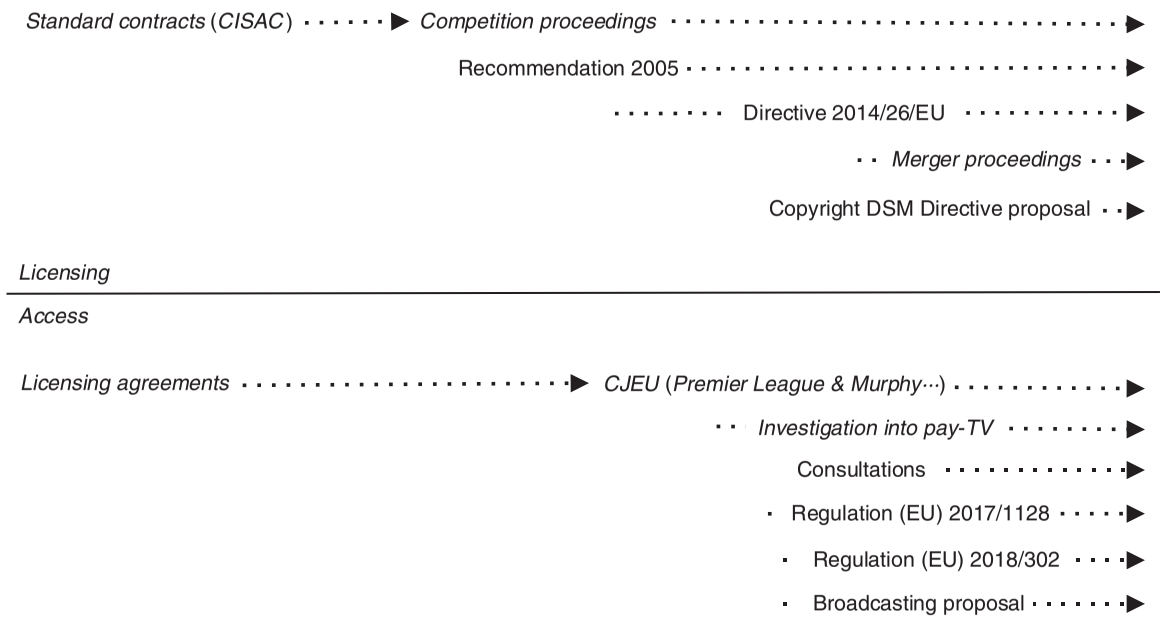

Figure 1: Overview of licensing and access-related aspects

(legislative) initiative of the European Commission) as measures aimed at the harmonisation or promotion of market integration for the Digital Single Market, on the other.[110] Naturally, there exists a certain overlap between proceedings under general competition rules and sector-specific regulation (which may regulate not only behaviour but also competition). Thus, lines might well be more blurred than is provided for in this book's structure.[111]

Finally, Chapter 6 analyses the characteristics of the licensing systems and the EU's sector-regulation/competition approach vis-à-vis private market solutions in order to map overlaps and inconsistencies. The chapter examines the interaction between the legal framework and market developments and discusses how territoriality can be reconciled with borderless access to audiovisual and music content. Chapter 6 concludes with broader considerations on the regulatory patchwork, transferability of findings and suggestions for further research.

[110] This delineation is also used by others. See, e.g., R. M. Hilty and T. Li, 'Control Mechanisms for CRM Systems and Competition Law', Max Planck Institute for Innovation and Competition Research Paper No. 16–04 (Max Planck Institute for Innovation and Competition, 2016), 1: http://ssrn.com/abstract=2772482; L. Guibault and S. van Gompel, 'Collective Management in the European Union' in Daniel Gervais (ed.), *Collective Management of Copyright and Related Rights*, 2nd edn. (Kluwer Law International, 2010), p. 149.

[111] The chosen division for the normative analysis serves to provide more clarity when navigating the complex landscape. Instead of the suggested structure, one could also base the analysis on a purely problem-based approach, in which the respective instruments would be jointly assessed under each thematic heading. I find that the chosen delineation for the normative analysis of the different institutional arrangements and regulatory initiatives provides a more useful basis for the discussion that follows, and additionally more clarity than a clean problem-based approach.