

EU Copyright Reform

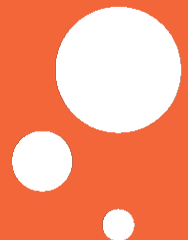
Thoughts on licensing of and access to copyright-protected works

13 September 2017

ECTA Copyright Workshop

Centre for Information and Innovation Law (CIIR)

@schwemer





DIFC

#CPHFTW

Techfestival.



Issue

In-flight music information

ICELANDAIR

Due to significant changes in music licensing requirements, airlines worldwide cannot provide an extensive on-board music selection at this time.

Icelandair apologizes for the inconvenience. The matter is not in our hands, but we hope it will be resolved soon. You can still enjoy various other in-flight entertainment.




Indholdet er blokeret.

Dette indhold er ikke tilgængeligt hvor du befinder dig. Husk du skal være i Danmark og have en dansk IP-adresse for at se Viaplay.

≈ 77%

of subscription-based business models apply geo-blocking

Source: European Commission



NRK har ikke rettigheter til å vise dette programmet utenfor Norge.

Deler av NRK sitt TV-innhold er kun tilgjengelig i Norge. Dette gjelder spesielt program produsert utenfor NRK.

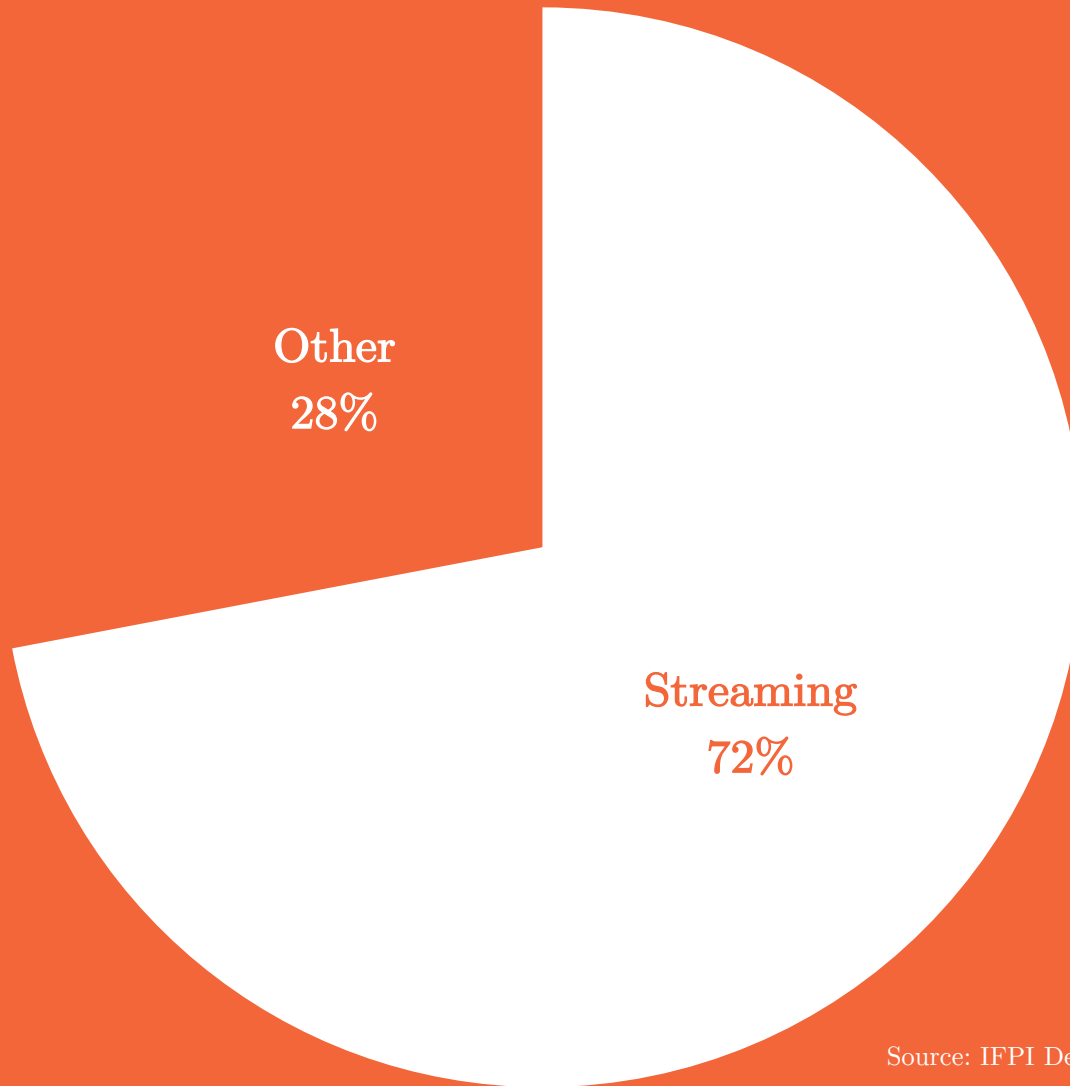
Les mer om våre rettigheter på [hjelpesiden](#).

Se [her](#) for liste over programmer du kan se i utlandet.

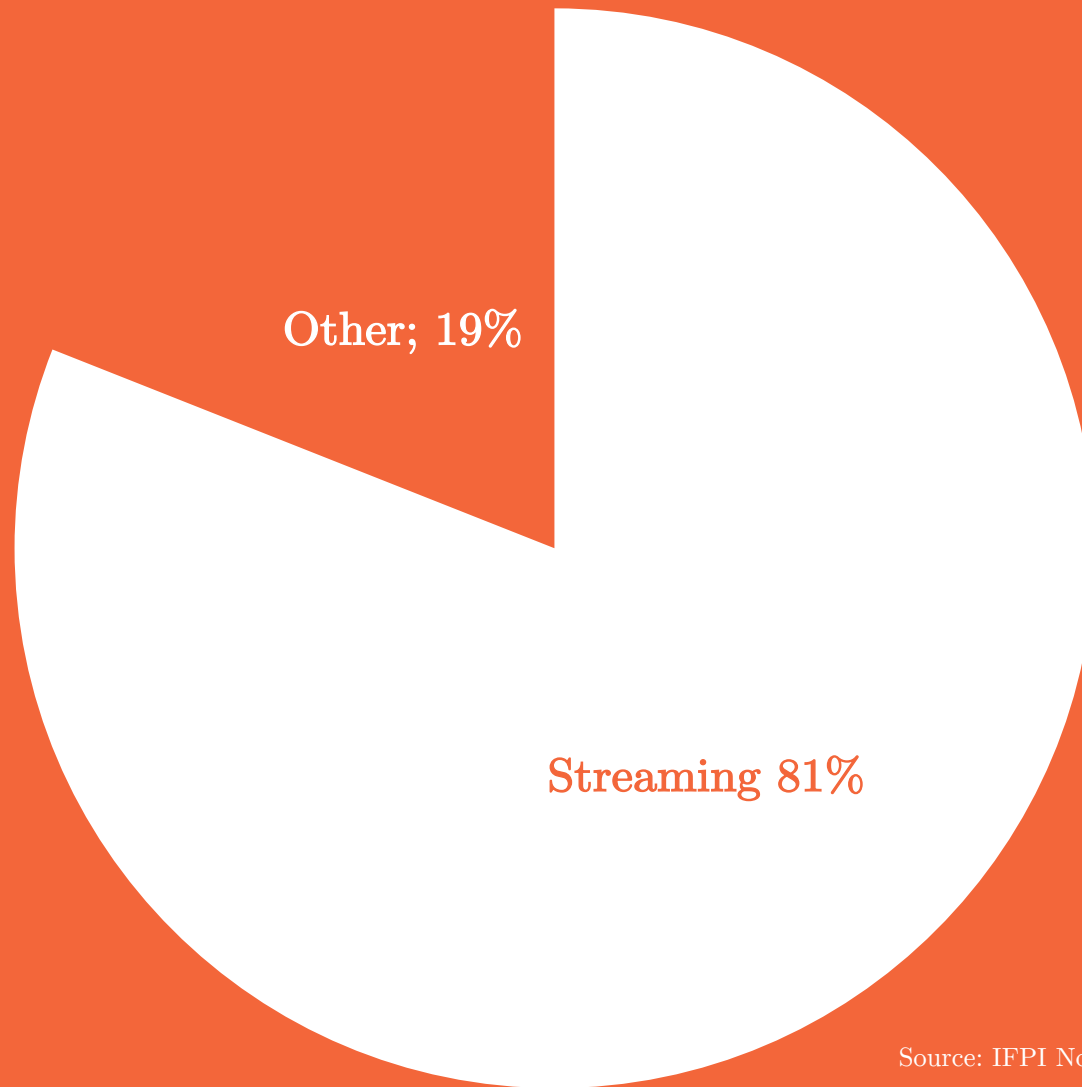
≈ 82%

of publicly funded models
apply geo-blocking

Source: European Commission



Source: IFPI Denmark



Source: IFPI Norway

28 MS



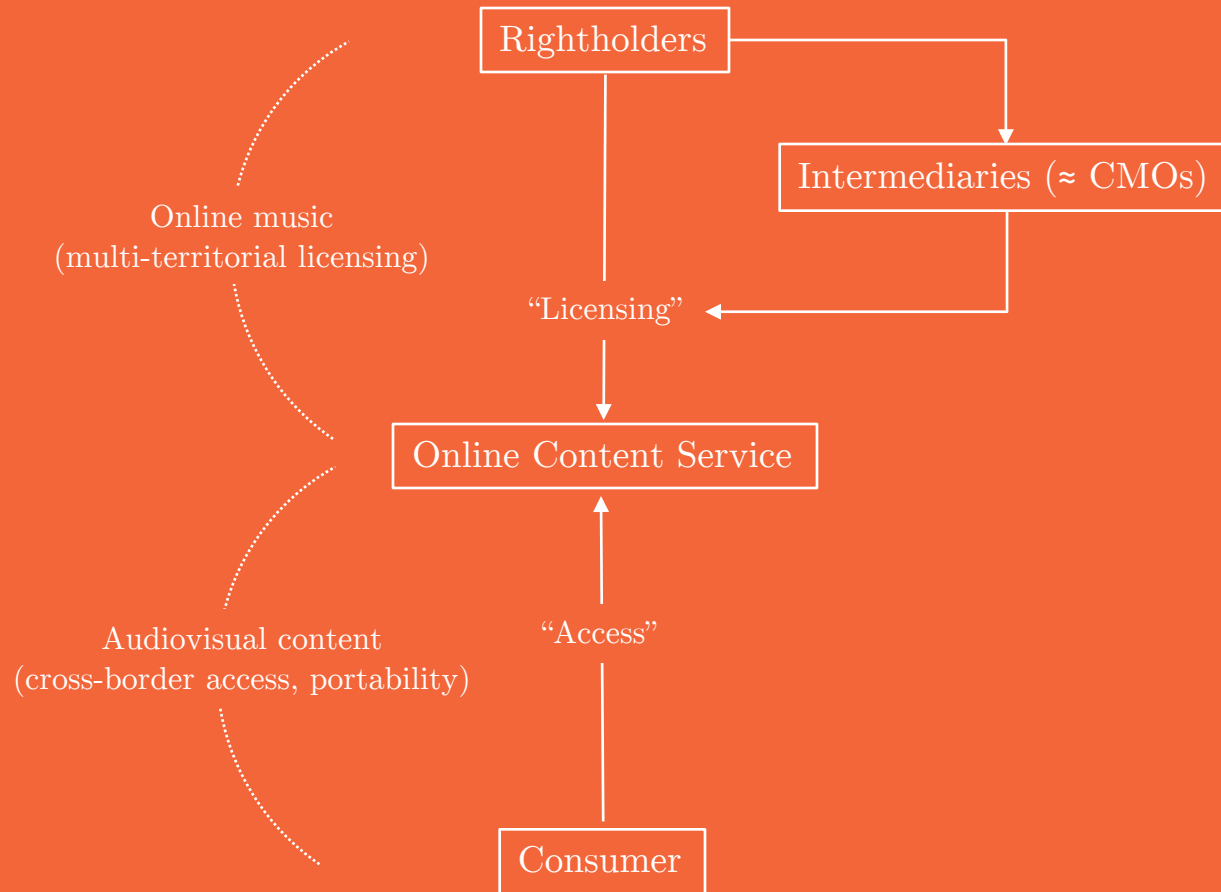
DSM

Copyright's territorial nature/
exploitation

The ubiquitous Internet



Demand for access
(cross-border, portable, full repertoire)



Licensing

Access

Competition

Ex post control

Legislation

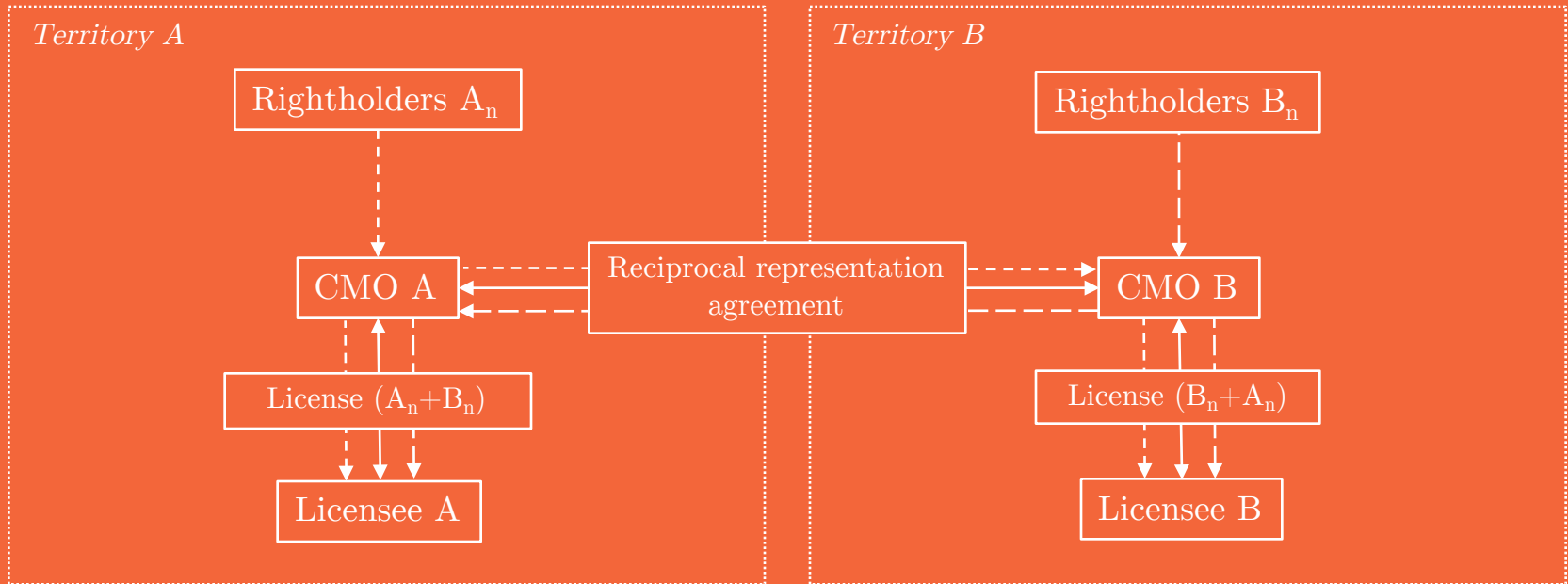
Ex ante regulation

Competition

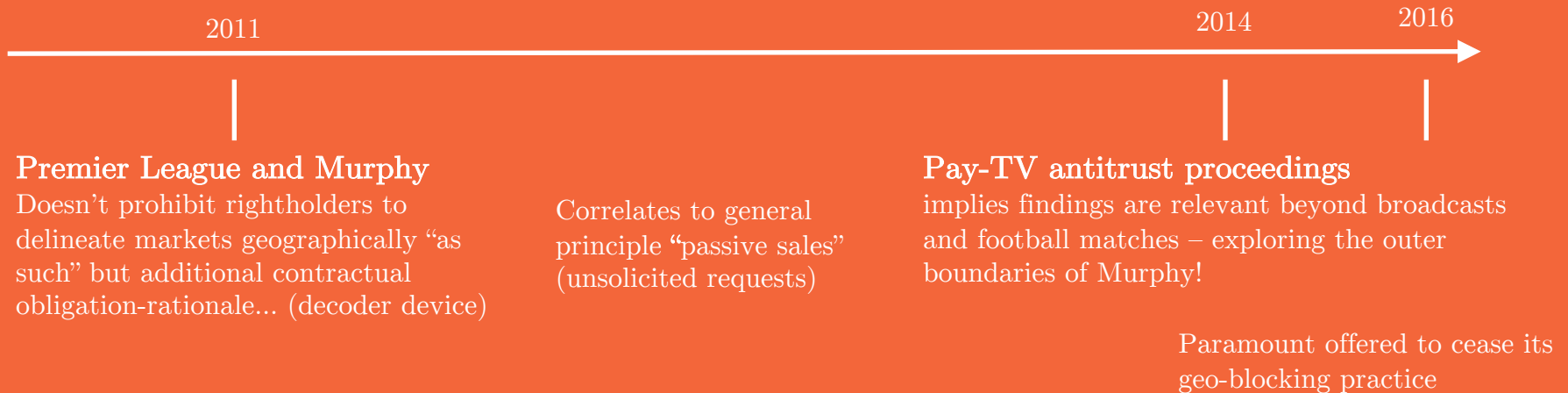
(1) Licensor-licensor
relationship

(2) Licensor-licensee
relationship

(1) Licensor-licensor relationship



(2) Licensor-licensee relationship



Legislation

Multi-territorial licensing
(CMOs)

Cross-border access

**Multi-territorial licensing
(CMOs)**

**Online Music
Recommendation**

Directive 2014/26/EU

**Proposal for Directive on
Copyright in DSM**





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

Negotiation mechanism, Article 10 of Proposal

Member States shall ensure that where parties wishing to conclude an agreement for the purpose of making available audiovisual works on video-on-demand platforms face difficulties relating to the licensing of rights, they may rely on the assistance of an impartial body with relevant experience. That body shall provide assistance with negotiation and help reach agreements.

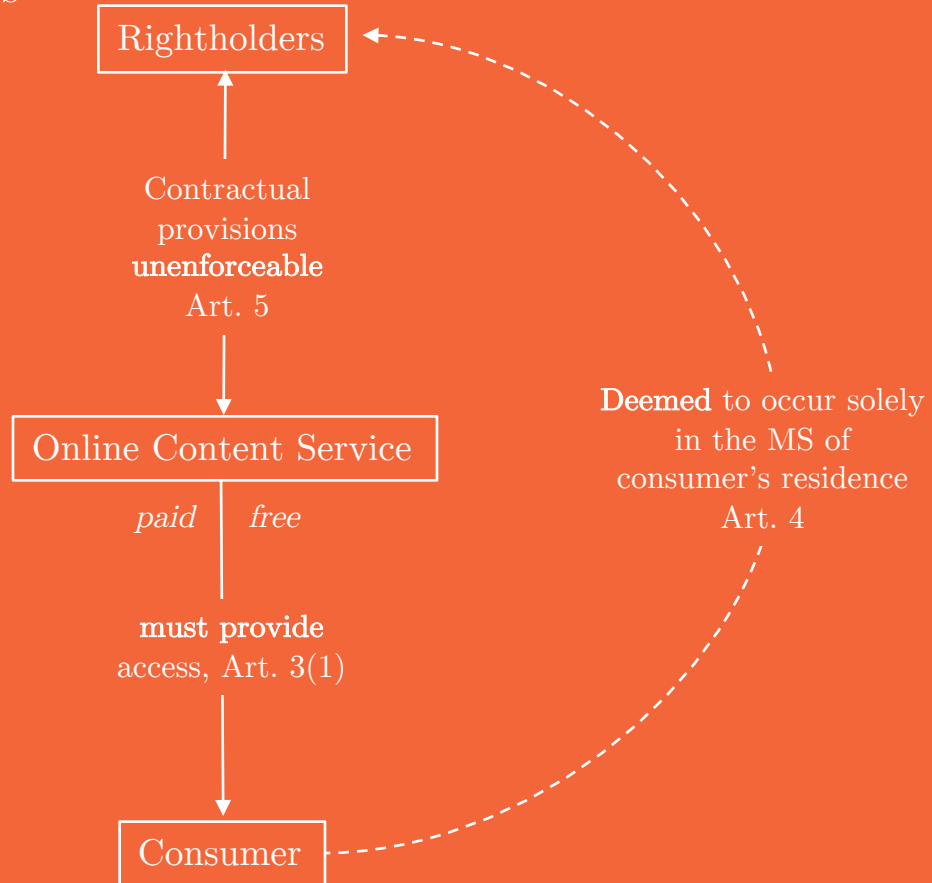
Cross-border access

Portablity regulation (2017)

Geo-blocking proposal (2016)

Broadcasting proposal (2016)

Consumer “temporarily” in a different MS



Thoughts on geoblocking

(...) 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;”

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

Thoughts on geoblocking

Committee on Industry, Research and Energy (ITRE) Proposals in November 2016 (132, 133...): Delete the restriction on copyright “other than...” in Article 4 (1) lit.b

IMCO Report April 2017 (Amendment 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;“

Thoughts

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**?

Characteristics of the regulatory framework

- Fairly complex
- 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)

- Last 15 years: proceedings made clear territorial restrictions by CMOs must be reviewed
- Erosion of the economic efficiency argument
- 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
- “true“ cross-border access
 - Exempt from proposal, not properly addressed in legislative framework
 - Intriguing play of thought: Premier League Murphy & Pay-TV investigation (broader application of passive sales rationale)
 - But: service providers are not obliged to respond to passive sales

Interplay / double approach

Ex ante or *ex post* regulation?

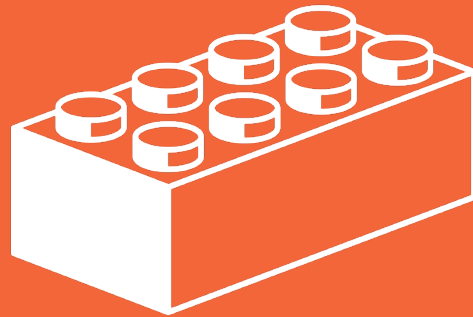
Using competition law to ensure access to copyright protected works

- Competition and legislative intervention support each other!
Why? Necessity to clear the underlying rights!

To some degree well-tuned or intended interplay?

Competition law is taking back some autonomy that copyright-protected subject matter enjoyed in the offline world.

Towards a consumer perspective in access to copyright protected works: limiting contractual freedom?



Thank you

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