

Unlawful content and intermediaries 2.0

FEMR Marienlyst Konference 2018

24.8.2018

Centre for Information and Innovation Law (CIIR)

sebastian.felix.schwemer@jur.ku.dk

[@schwemer](https://twitter.com/schwemer)





DIFO

#CPHFTW

Techfestival.



A different intermediary

Tackling the safe harbour

Beyond copyright content

Discussion



**A different
"intermediary"**



E.g. Recital 59 InfoSoc Directive

(59) In the digital environment, in particular, the services of intermediaries may increasingly be used by third parties for infringing activities. In many cases such **intermediaries** are **best placed** to bring such infringing activities to an end.

donuts

VeriSign®

.eu

Is there a role for domain registries?

● hostmaster

SIDN

.se

3 year industrial research project



Part 1

**The characteristics
of domain registries
as intermediaries**

Part 2

**Analysis of the legal
framework relevant
for domain registries
as intermediaries**

Part 3

**Solutions: Models for
domain registries' role
in the fight against
unlawful content**



173.194.73.94

google.com

**Lawful
domain
name**



**Unlawful
content**

On Domain Registries and Website Content

Shift in Intermediaries' Role in Light of Unlawful Content or just another Brick in the Wall?

Sebastian Felix Schwemer^{*†}

Abstract

The link of lawful domain names to unlawful content is a phenomenon that until recently has not been very topical. Traditionally, domain registries have been off the radar of content-related debates. Enforcement efforts, public discourse and academic research have focused on other intermediaries such as Internet access service providers, hosting platforms, and websites that link to content.

This article shows that in recent years, however, that the (secondary) liability of domain registries and registrars, and more specifically country code top-level domain registries (ccTLDs) for website content, has been tested in several EU Member States. The article investigates tendencies in the national lower-court jurisprudence and explores to what extent the liability exemption regime of the E-Commerce Directive applies to domain registries.

Legitimacy and the privatization of online enforcement

“Voluntary” content policing arrangements at the domain name / infrastructure layer?

Abstract

Online content is increasingly enforced by private parties. One particular trend in the take-down of unlawful online content is the emergence of models, where trusted third parties are given privileged notification channels for the flagging of infringing content. This article first explores the different shades of trusted notifier models and how the European lawmaker addresses these models in the context of online platforms. In the second part, the article turns towards domain name-related content take-downs. Traditionally, the takedown of domain names has been restricted to the unlawfulness of the domain name *as such*. In recent times, however, also the takedown for content-related reasons has become topical. After a brief revisit of domain name-related takedowns, I sketch tendencies where similar privatized models are introduced. This paper argues that these trusted notifier models are problematic given the broad room of autonomy the legislator has left for private parties. In the field of domain names, these legitimacy issues give rise to even bigger concerns given the special role of domain names and their administration as well as the broader scope of domain-name related remedies, where the take-down of the specific infringing content is not feasible. Finally, the paper criticizes the lack of insights into different models and arrangements and calls for increased transparency.

Keywords: DNS, online enforcement, voluntary take-down, privatization of enforcement, Recommendation (EU)

Tackling safe harbour

The “copyright” problem



Bruxelles, den 9.12.2015
COM(2015) 626 final

**MEDDELELSE FRA KOMMISSIONEN TIL EUROPA-PARLAMENTET, RÅDET,
DET EUROPÆISKE ØKONOMISKE OG SOCIALE UDVALG OG
REGIONSUDVALGET**

På vej mod en tidssvarende, mere europæisk ramme for ophavsret

4. HVORDAN SKABER VI EN VELFUNKTERENDE MARKEDSPADS FOR OPHAVSRET?

Rettighedsindehavernes mulighed for at licensere deres indhold og blive betalt for dem, også når det distribueres online, er en forudsætning for en velfungerende markedsplads for ophavsret. Produktion af righoldigt og divergerende kreativt indhold og innovative onlinetjenester er en del af den samme ligning. Begge dele – både det kreative indhold og onlinetjenesterne – er vigtige for væksten og arbejdspladserne samt for, at internetøkonomien bliver en succes.

Der er dog stigende bekymring for, hvorvidt de nuværende EU-ophavsretsregler sikrer, at den værdi, der bliver genereret af nogle af de nye former for distribution af onlineindhold bliver ligeligt fordelt, især i tilfælde, hvor rettighedsindehaverne kan opstille kriterierne for licensaftalerne og forhandle på en rimelig baggrund med de potentielle brugere. Denne situation er ikke kompatibel med det digitale indre markeds ambition om at levere muligheder for alle og anerkende værdien af indholdet og de investeringer, der bliver gjort i det. Det betyder også, at der ikke er lige vilkår for forskellige markedsaktører, der engagerer sig i lignende former for distribution.



Its about royalties and
negotiation power

Global Recorded Music Revenues Grew By \$1.4 Billion in 2017

But perhaps the biggest story of all is the growth of artists without labels. With 27.2% year-on-year growth this was the fastest growing segment in 2017. This comprises the revenue artists generate by distributing directly via platforms such as Believe Digital's Tunecore, CD Baby and Bandcamp. All these companies performed strongly in 2017, collectively generating \$472 million of revenue in 2017, up from \$371 million the year before. - MIDIA research

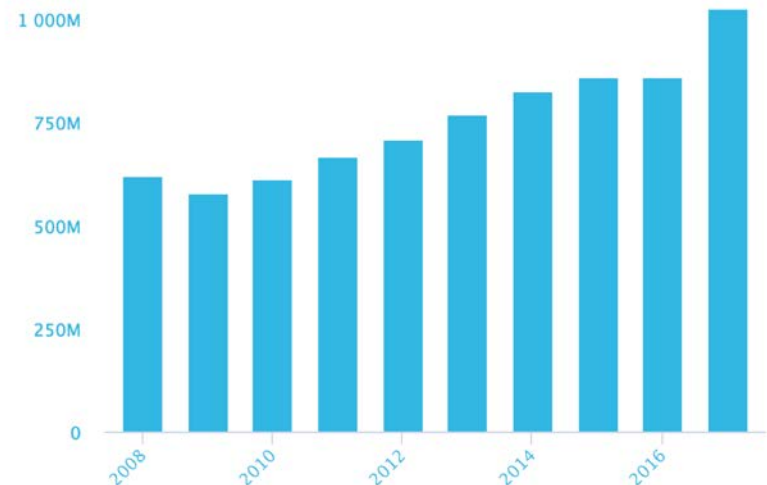
Doesn't look too bad...

Koda leverer rekordregnskab – omsætter for en milliard

Koda omsatte for 1.028 millioner kroner i 2017. Det fremgår af den årsberetning, der udkommer i dag. Selvom noget af fremgangen skyldes efterbetalinger fra tidligere år, er der vækst på en lang række områder i organisationen.

The screenshot shows the CMU (Creative Music Union) website. The header includes navigation links for MUSIC, MUSIC PEOPLE, and MUSIC BUSINESS. The main article headline is "Recorded music revenues grew 8.1% last year, despite the value gap" by Chris Cooke, published on Wednesday 25 April 2018. Below the headline is a large image of the IFPI logo. To the right of the main article is a sidebar titled "EDITOR'S PICKS" with several links to related content.

Kodas indtægter



However, to put this recovery in context, total industry revenues for 2017 were still just 68.4% of the market's peak in 1999.

Against the backdrop of a global market that had endured 15 years of significant revenue decline, record companies are working to fuel the recent return to growth and ensure music creators receive fair value.

But...

- Because of safe harbour rules, user-generated services have an **unfair advantage** when negotiating
- User-generated services **pay** significantly **less** than market price
- Subscription-services have a **competitive disadvantage** when competing with user-generated services
- Right holders have significantly **less income**

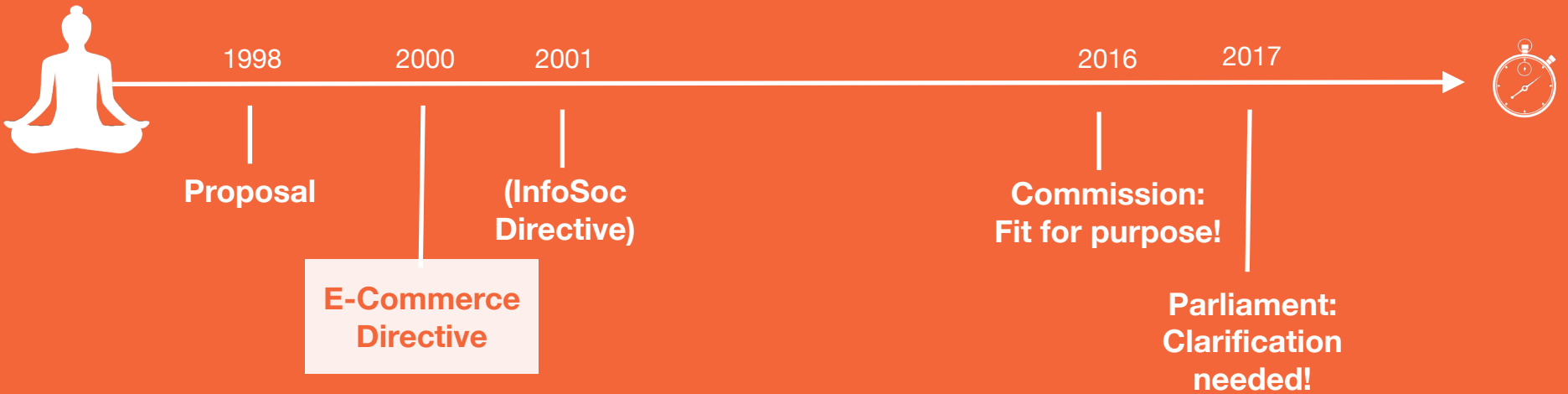
Stan Liebowitz (2018, commissioned research for CISAC)

Liability



**Liability
Exemptions**





Liability Exemption Art. 12-15

Horizontal (criminal, civil and administrative liability for all kinds of illegal activities initiated by third parties – not injunctions)

Scope: Activity is “of a **mere technical, automatic and passive nature**, which implies that the information society service provider has neither knowledge of nor control over the information which is transmitted or stored.” (recital 42)

**Mere
conduit
(Article 12)**

transmission of
information

**Caching
(Article 13)**

intermediate
storage to
accelerate data
transmission

**Hosting
(Article 14)**

storage of
information

Hosting (Article 14)

1. Where an information society service is provided that consists of the **storage of information provided by a recipient** of the service, MS shall ensure that the service provider is **not liable** for the information stored at the request of a recipient of the service, on condition that:

- (a) the provider does **not have actual knowledge** of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or
- (b) the provider, upon obtaining such knowledge or awareness, **acts expeditiously to remove** or to disable access to the information.

**A “copyright”
“solution”?**

EU Commission's Article 13 (September 2016)

Use of protected content by information society service providers storing and giving access to large amounts of works and other subject-matter uploaded by their users

(1) Information society service providers that store and provide to the public access to large amounts of works or other subject-matter uploaded by their users **shall**, in cooperation with rightholders, **take measures to ensure** the functioning of agreements concluded with rightholders for the use of their works or other subject-matter **or to prevent the availability** (...) Those measures, such as the use of effective content recognition technologies, shall be appropriate and proportionate. (...)

EU Council's Article 13 (25 May 2018)

Use of protected content by online content sharing service providers

(1) Member States shall provide that an online content sharing service provider performs an **act of communication to the public** or an **act of making available to the public** when it gives the public access to copyright protected works or other protected subject matter uploaded by its users.

An online content sharing service provider **shall obtain an authorisation** from the rightholders referred to in Article 3(1) and (2) of Directive 2001/29/EC in order to communicate or make available to the public works or other subject matter. Where no such authorisation has been obtained, the service provider **shall prevent the availability** on its service of those works and other subject matter, including through the application of measures referred to in paragraph 4. This subparagraph shall apply without prejudice to exceptions and limitations provided for in Union law.

Online Content Sharing Service Provider



```
graph TD; A[Online Content Sharing Service Provider] --> B[Must license (Art. 13(1) alt. 1)]; A --> C[Must filter (Art. 13(1) alt. 2)];
```

**Must
license (Art.
13(1) alt. 1)**

**Must filter
(Art. 13(1)
alt. 2)**

EU Council's Article 13 (25 May 2018)

Art. 13 (3)

When an online content sharing service provider performs an act of communication to the public or an act of making available to the public, **it shall not be eligible** for the exemption of liability provided for in **Article 14 of Directive 2000/31/EC** for unauthorised acts of communication to the public and making available to the public (...)

EU Council's Article 13 (25 May 2018)

Instead of Article 14 ECD, **not liable** when Art. 13(4):

(a) it demonstrates that it has made best efforts **to prevent the availability** of specific works or other subject matter by implementing effective and proportionate measures, (...), to prevent the availability on its services of the specific works or other subject matter identified by rightholders and for which the rightholders have provided the service with relevant and necessary information for the application of these measures;

and

(b) upon notification by rightholders of works or other subject matter, it has acted expeditiously to **remove or disable access** to these works or other subject matter **and** it demonstrates that it has made its best efforts to **prevent their future availability** through the measures referred to in point (a).

EU Council's Article 13 (25 May 2018)

(5) The measures referred to in point (a) of paragraph 4 shall be effective and proportionate, taking into account, among other factors:

- (a) the nature and size of the services, in particular whether they are provided by a microenterprise or a **small-sized enterprise** (...), and their audience;
- (b) the **amount and the type of works** or other subject matter uploaded by the users of the services;
- (c) the **availability and costs of the measures** as well as their effectiveness in light of technological developments in line with the industry best practice referred to in paragraph 8.

EP JURI's Article 13 (29 June 2018)

(-1) “**shall conclude** fair and appropriate licensing agreements with rightholders”

(1) “(...) shall take appropriate and proportionate measures **to ensure the functioning of licensing agreements** where concluded (...). In the absence of licensing agreements with rightholders online content sharing service providers shall take, in cooperation with rightholders, appropriate and proportionate **measures leading to the non-availability** on those services of works or other subject matter infringing copyright or related-rights, while non-infringing works and other subject matter shall remain available.”

- Still “**effective technologies**” (recital 38, recital 39b)
- **No** Article 14 safe harbour (recital 38) and no alternative model
- Suddenly also Art. 13b on *Use of protected content by information society services providing **automated image referencing***

EP JURI's Article 13 (29 June 2018)

More safeguards, see e.g. Article 13(1a), (1b) and (2)

Recital 39: “Since the measures deployed by online content sharing service providers in application of this Directive could have a negative or disproportionate effect on legitimate content that is uploaded or displayed by users (...) online content sharing service providers should be required to offer a **complaints mechanism** for the benefit of users whose content has been affected by the measures.”

Recital 37a: “does not cover service providers that act in a non-commercial purpose capacity such as **online encyclopaedia**, and providers of online services where the content is uploaded with the authorisation of all rightholders concerned, such as **educational or scientific repositories**. Providers of cloud services for individual use which do not provide direct access to the public, **open source software developing platforms**, and **online market places** whose main activity is online retail of physical goods, should not be considered online content sharing service providers within the meaning of this Directive.”

Leading Academics: Article 13 is incompatible with EU law and must be deleted

European Copyright Society

General Opinion on the EU Copyright Reform Package

24 January, 2017

Forskere: Det åbne internet bør ikke ofres på ophavsrettens alter

DEBAT 16. marts 2018 kl. 1:30 | 0 kommentarer

Martin Senftleben*

EU Copyright Reform and Startups – Shedding Light on Potential Threats in the Political Black Box

The GitHub Blog

EU wants to require platforms to filter uploaded content (including code)

Mar 14, 2018 vollmera Policy

```
$ git push
...
remote: Resolving deltas: 100% (2/2), completed with 2 local objects.
remote: error: GH013: Your push could infringe someone's copyright.
remote: If you believe this is a false positive (e.g., it's yours, open
remote: source, not copyrightable, subject to exceptions) contact us:
remote: https://github.com/contact
```

Open Letter: The EU Copyright Directive is failing

Posted on April 26, 2018 by admin

Academics from 25 leading Intellectual Property research centres in Europe have today published an open letter, expressing grave concerns at the legislative direction of the proposed copyright directive.

26 April 2018 – Copyright Reform: Open Letter #2 from European Research Centres – <http://bit.ly/2Duf5y7>

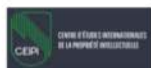
Amsterdam, Barcelona, Berlin, Bonn, Cambridge, Florence, Glasgow, München, Paris, Strasbourg, Tilburg, Tübingen

The Copyright Directive is failing

(Open Letter to Members of the European Parliament and the Council of the European Union)

We are independent legal, economic and social scientists from leading research centres in Europe.

Censorship machines are coming: It's time for the free software community to discover its political clout





Heini Zachariassen

@heinizach

Follow



There probably wouldn't be a Vivino if Article 13 was in effect when we started @BrianMikkelsenC



Allied for Startups @Allied4Startups

Heini Zachariassen, founder of DK's Vivino, home to the world's largest wine community, speaks up for innovation & against upload filters 🙌 #fixcopyright #copyright4startups innovatorsact.eu @DKinEU @rohde_jens @DKambEU_DPR @AxelVossMdEP ...

4:48 PM - 26 Apr 2018

2 Retweets 10 Likes



1



2



10



Content filters for user uploads is a bad idea, we have 600 million user uploads. We need the current liability regime of the E-commerce Directive

Heini Zachariassen, Founder Vivino



8:51 AM - 26 Apr 2018

25 Retweets 43 Likes



der of DK's Vivino, largest wine community, & against upload filters [copyright4startups](#)

[DKambEU_DPR](#)
ach

- **Heavy critique** from academia, startups and organisations
- More clarity (compared to Commission's proposal)
- But not a good solution (carve-out from ECD, chilling effects, freedom of expression...)
- Back to the problem: Value-gap and music: **does it solve something?**
- **Filter:** big players already have filter-systems, a new entry-barrier for new players?



2000

2001

September 2016

*E-Commerce
Directive*

*InfoSoc
Directive*

Proposal for
Directive on
copyright in the
DSM
COM(2016)0593

25 May 2018
Presidency of
EU Council
(Bulgaria):
Negotiation
mandate

21 Juni 2018
EP JURI:
Vote

5 July 2018
EP: Vote

12 .9. 2018
EP: Vote

report VOSS A8-0245/2018

Digital Single Market

👉 627

+ 278

— 318

○ 031



**Beyond
copyright**

Let's look beyond copyright...

September 2017

**Communication:
Tackling Illegal Content
Online, Towards an
enhanced responsibility
of online platforms**



1 March 2018

**Commission
Recommendation
(EU) 2018/334
of 1 March 2018
on measures to
effectively tackle
illegal content online**



Recommendation (EU) 2018/334

Directed towards Member States **and** hosting service providers

Focus on hosting services (i.e. Article 14 E-Commerce Directive)

Horizontal approach: “all types of illegal content” + “terrorist content”

Chapter 2: general
recommendations
relating to all types of
illegal content

Chapter 3: Specific
recommendations relating to
terrorist content

Proactive measures

“Hosting service providers should be encouraged to take, where appropriate, proportionate and specific **proactive measures** in respect of illegal content. Such proactive measures could involve the use of **automated means for the detection** of illegal content only where appropriate and proportionate and subject to effective and appropriate safeguards, in particular the safeguards referred to in points 19 and 20.”

Chapter 2, point 18

Trusted notifiers / flaggers

‘trusted flagger’ = “an individual or entity which is considered by a hosting service provider to have particular expertise and responsibilities for the purposes of tackling illegal content online;” (see Chapter 1, point 4 lit. (g))

“Cooperation between hosting service providers and trusted flaggers **should be encouraged**. In particular, **fast-track procedures** should be provided to process notices submitted by trusted flaggers.” (Chapter 2 point 25)

“Those conditions should aim to ensure that the individuals or entities concerned have the **necessary expertise** and carry out their activities as trusted flaggers in a diligent and objective manner, based on respect for the values on which the Union is founded.” (Chapter 2 point 27)

Trusted notifiers / flaggers

Council of Europe's Committee of Ministers on 7 March 2018: *Recommendation CM/Rec(2018)2 on the roles and responsibilities of internet intermediaries*, point 2.1.3:

“Any interference by intermediaries with the free and open flow of information and ideas, be it by automated means or not, should be based on clear and transparent policies and be limited to specific legitimate purposes, such as restricting access to illegal content, as determined either **by law** or **by a judicial authority** or other **independent administrative authority** whose decisions are subject to judicial review, or in accordance with their **own content-restriction policies** or codes of ethics, which may include flagging mechanisms.”

Scope of the Recommendation

“Providers of hosting services play a particularly important role in tackling illegal content online, as they store information provided by and at the request of their users and give other users access thereto, often on a large scale. This Recommendation therefore **primarily** relates to the activities and responsibilities of those providers. However, where appropriate, the recommendations made can also be applied, **mutatis mutandis**, in relation to other affected online services providers.”

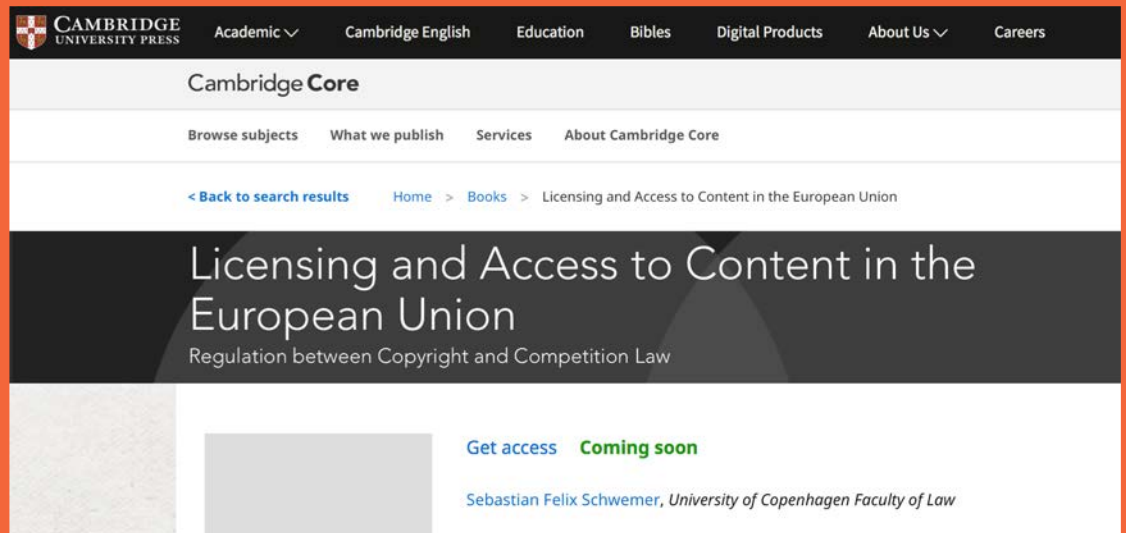
(recital 15)

Changing winds!

- Sector-specific legislative ECD carve-out and soft law
- Trend towards **pro-active** and **privatized** measures (despite E-Commerce Directive)
- “Practical” approach but does it make sense?
- Is it the right **balance**?

Discussion

and shameless
marketing:



The screenshot displays the Cambridge Core website interface. At the top, the Cambridge University Press logo is on the left, and navigation links for Academic, Cambridge English, Education, Bibles, Digital Products, About Us, and Careers are on the right. Below the navigation bar, the 'Cambridge Core' logo is centered. A horizontal menu contains links for Browse subjects, What we publish, Services, and About Cambridge Core. A breadcrumb trail shows the path: < Back to search results, Home, > Books, > Licensing and Access to Content in the European Union. The main content area features a dark header with the title 'Licensing and Access to Content in the European Union' and the subtitle 'Regulation between Copyright and Competition Law'. Below this, there are two placeholder images (one light gray, one dark gray) and a 'Get access' button followed by the text 'Coming soon'. At the bottom, the author's name 'Sebastian Felix Schwemer, University of Copenhagen Faculty of Law' is listed.

CAMBRIDGE
UNIVERSITY PRESS

Academic ▾ Cambridge English Education Bibles Digital Products About Us ▾ Careers

Cambridge Core

Browse subjects What we publish Services About Cambridge Core

< Back to search results Home > Books > Licensing and Access to Content in the European Union

Licensing and Access to Content in the
European Union

Regulation between Copyright and Competition Law

Get access Coming soon

Sebastian Felix Schwemer, University of Copenhagen Faculty of Law

Credits

Creative commons attribution

hacker by Valeriy, RU from Noun Project
problem by Gregor Cresnar from Noun Project
Denmark by Chameleon Design, IN from Noun Project
Stopwatch by Nick Holroyd, US from Noun Project
article by Miguel C Balandrano, MX from Noun Project
meditation by Pavel N., RU from Noun Project
Europe Flag by Xinh Studio from Noun Project

Centre for Information and Innovation Law (CIIR)

sebastian.felix.schwemer@jur.ku.dk

@schwemer

