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Conclusions

You better start swimmin'
Or you'll sink like a stone
For the times they are a-changin'.

—Bob Dylan (1964)

This book has focused on the main contractual dynamics of music industry contracts between musicians and their primary corporate partners in the music publishing and recorded music sectors, as embedded in the age of music streaming. It has analysed how the legal framework can contribute to achieving a fair(er) balance between the interests of musicians and their main corporate partners.

Following an introductory Chapter 1 that framed the research project and explained the main methodological choices, Chapter 2 focused on the digital reality with which the music industry value chain is faced and explored several avenues for industry-led change. Particular attention was accorded to the rise of streaming and the main relevant exploitation contracts in the streaming age, as well as the concrete distribution of revenues. Among other things, an argument was made in favour of a transition from the pro rata distribution of revenues on the basis of consumption share to the UCPS method that matches users' subscription fees to the music they listen to.

The music industry is affected by a wealth of factors, such as the digital environment, the inherent complexity and opaqueness of the music value chain and the music industry's propensity towards a winner-takes-all market where luck and leverage have an important role to play. While it is undeniable that a more artist-friendly environment is emerging, with a significant increase in commercial options for musicians to bring their music to a global audience, instances of unfairness remain in practice. An unfair contract may render the (economic) situation for musicians much worse than the inherent characteristics of the music market would in themselves imply in terms of scope, exploitation and remuneration.

Therefore, acknowledging that contractual analysis is by no means a panacea, a balanced and transparent regulatory framework for music contracts would be

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beneficial. Bottom-up change must be intertwined with top-down regulatory efforts. A choice example is the issue of transparency within the music value chain. Indeed, solving this problem not only requires high-performing reporting obligations for corporate partners, but also an effective long-term solution for the fragmentation in music rights and the music metadata issue. Both the legal and commercial layers are necessary to attain the goal of a protective framework that may be leveraged in practice to ensure an appropriate distribution of value among stakeholders.

This book has sought to contribute to such a balanced legal framework, on the basis of an analysis and assessment of the relevant regulatory regimes in Belgium, France, Germany and the Netherlands as influenced by the EU acquis, as well as the relevant provisions in the United Kingdom. Most Member States, including the chosen jurisdictions within the EU, have laid down rules that protect the weaker party to a contract and many of these provisions directly affect the contractual bargain between musicians and their corporate partners.

Chapters 3–6 analysed in detail how the relevant legal framework in the chosen jurisdictions, consisting primarily of copyright contract law and secondarily of general contract law and the law of unfair B2B contract terms and trade practices, regulates music contracts in the streaming age. The bulk of the analysis pertained to the field of copyright contract law, with the law of unfair B2B contract terms and trade practices as well as principles of general contract law functioning as fallback mechanisms that serve a background role.

First, there are certain formal requirements, such as the need for a written document for purposes of proof or validity. Second, the legal framework results in the prohibition of clauses deemed unfair or excessive, such as restrictions relating to rights in future content and/or methods of exploitation. Third, the law imposes substantive obligations on one (or more) of the contracting parties, such as a duty to exploit and/or distribute revenues fairly. For contract performance in particular, an important move towards partial harmonisation in the field of copyright contract law was made with a dedicated chapter in the DSM Directive. In addition to setting minimum benchmarks as to exploitation, remuneration and transparency, this directive paves the way for ADR resolution in the CCIs.

In addition to analysing the law as it currently stands in the chosen jurisdictions, these chapters proposed a number of incremental amendments. Recognising the particular situation of the United Kingdom, a fine line was walked between advocating certain harmonised solutions at the EU level and simultaneously maintaining a sound regulatory basis at the national level where appropriate, as well as between the objectives of providing legal certainty through hard law and of securing a flexible framework that is fit for the streaming age.

Chapter 3 first took a step back, analysing the role of the law in achieving this book's policy objective of moving towards a fair(er) balance in the streaming age. It conceptualised the normative criterion of 'fairness' as the achievement of a fair balance between the interests of the relevant stakeholders that achieves a level

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playing field in the music market. This was done while duly acknowledging that fairness is always 'in the eye of the beholder' and that 'almost all possible solutions are partisan',[1] and also building upon a Rawlsian notion of egalitarian distributive justice. After having stressed the importance of freedom of contract as a central tenet of contract law in the chosen jurisdictions, this chapter then provided a typology of the selected substantive legal regimes, categorising and contrasting the different sets of relevant regulatory regimes on the basis of their substantive, geographical and temporal scope.

The further legal analysis in this book followed the 'life' of a music industry contract and analysed the rules that apply at different stages in the chosen jurisdictions. Chapter 4 analysed and evaluated the rules that bear relevance to the negotiation and formation stages of the contracts under review. First, the potential relevance of precontractual liability regimes was briefly highlighted. The other findings of Chapter 4 may be characterised as seeking to ascertain, albeit in a piecemeal way, what exactly qualifies as 'fair scope' in the particular context of music contracts in the streaming age.

Then the chapter examined both material and formal requirements pertaining to consent relating to such contracts. Starting from the basic rule of express consent by the parties, exceptions pertaining to the audio-visual industry as well as regarding music made either in an employment context or on commission were reviewed. On a formal level, the analysis focused on the requirements of a written contract that apply in some of the chosen jurisdictions, either for purposes of proof or affecting the validity of the contract. On the basis of the analysis, an argument was made in favour of a generalised requirement of express consent in the music industry, combined with a written – potentially digital – instrument for purposes of proof vis-à-vis the musician(s), similar to the regime that already exists in Belgium, France and Germany.

As to the substance of rights granted, focus lay on both theoretical limitations to the scope of transfers and/or licences and relevant rules concerning the determination of such scope in practice. The regulatory choices made by the chosen jurisdictions in this regard differ significantly. The theoretical limitations under review included the prohibition of the transfer of copyright *sensu stricto* under German law, limitations applicable to the grant of rights in future music and methods of exploitation, as well as complementary limitations based on a reasonability assessment. A full ban on the grant of rights in future music (as applicable under French law) and/or methods of exploitation (as applicable under Belgian law) was labelled as excessive. As to the determination of the scope of rights granted, the duty to specify combined with restrictive interpretation under Belgian and French law was contrasted with the purpose-limitation principle under German and Dutch

[1] Annette Kur, 'Fairness as a Legal Concept – A Guiding Principle for IP?' (Herchel Smith Lecture, online, 5 May 2021).

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law. While the limited substantive effect of restrictions on the grant of rights in future content and/or methods of exploitation should be acknowledged, their applicability to option contracts should be expressly confirmed – especially under Belgian law.

The final topic of the chapter was the regulation of the formation stage of secondary relationships, whereby the rights initially granted to primary corporate partners are further transferred or sub-licensed to a third party, such as a DSP. The balanced regime on the establishment of secondary relationships (either further transfers or sub-licences) under German law deserves a wider hard law application, as it provides a comprehensive framework that also deals with problems that may arise in the context of insolvency of the corporate partner.

The regulatory regimes applicable to the substance of rights granted seek to secure informed consent on the part of the contracting parties – bar the prohibition of transfer under German law, which stems from its monist copyright tradition. However, given that many of the restrictions under review apparently lead to lengthy contractual clauses that stretch the abovementioned theoretical limitations, the substantive effect of these restrictions is limited in practice. More generally, a focus on what musicians receive in return for the grant of rights in terms of exploitation and remuneration has a greater impact on fairness as conceptualised in the context of this book than the substantive scope of rights granted. Therefore, Chapter 5 focused on the regulatory framework that applies to the performance phase of the contract, with separate substantive sections on issues pertaining to exploitation and remuneration.

Regarding the exploitation of rights in music, the extent of corporate partners' duty to exploit was analysed and assessed. The relevant sections zoomed in on applicable direct and indirect duties to exploit (recorded) music to which they have been granted certain exploitation rights. The analysis sought to combine the relevant regimes in the chosen jurisdictions with the applicable harmonising provisions of EU law, most importantly the harmonised use-it-or-lose-it clause set forth in Article 22 DSM Directive. After having reviewed the relevant provisions, a number of guiding criteria were developed that may aid stakeholders in determining whether the grant of rights in the contracts under review is met with 'fair exploitation' on the part of the corporate partner in a given contractual setting. In turn, the analysis focused on substantive, personal, geographical and temporal aspects. In terms of substance, account was taken of both the use of the musician's contribution in the music at issue, the use of the music as such and the overarching impact of digitisation. In addition, relevant sector practices and the potential contribution of collective arrangements were added to the mix. These concrete criteria may be crystallised further by way of a soft law instrument.

First, in a bid to avoid disproportionate encroachment on parties' freedom of contract, a marked preference was noted for indirect over direct duties to exploit. Instead of linking an absence of (sufficient) exploitation with breach of contract and

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an associated right to damages, it is deemed fairer to opt for a high-performing rights reversion mechanism with appropriate procedural and substantive safeguards. In this context, any reference to the word 'copy' or 'copies' in the relevant provisions (as is still the case under Belgian law in particular) should be removed, since this concept is ill-fitted for the streaming age. In a second stage, the perspective was broadened from the contractual relationship between musicians and their primary corporate partners to the secondary relationship with third parties such as DSPs. The inclusion of third-party transferees in the scope of the Dutch use-it-or-lose-it mechanism was evaluated positively, as was the joint and several liability arising under German copyright contract law in case the formation of a secondary contract was not expressly assented to by the musician(s) at issue.

As to the control over exploitation activities undertaken by corporate partners, the role of moral rights protection was stressed, as well as the potential fallback role of general contract law restrictions on the basis of public order and good morals. While noting the limited effect of these regimes in practice, it was considered that further regulatory action risked overly encroaching upon parties' freedom of contract, especially in the context of secondary contractual relationships.

As to matters of remuneration, the book first extensively focused on the requirement of 'fair remuneration', as provided for in the laws of the chosen jurisdictions and as harmonised by the principle of appropriate and proportionate remuneration set forth by the broadly worded Article 18 DSM Directive.

A preliminary conceptual hurdle was to determine whether a lump sum can be 'proportionate' in the sense required by Article 18, or whether this provision requires contracts to include a royalty arrangement – as under French law. Considerations of risk allocation led to the conclusion that the nature of a remuneration arrangement (either a lump sum or a royalty) does not in itself determine its fairness. Other criteria are merited.

The book then took up the challenge of establishing such criteria for stakeholders, seeking a parallel with the criteria used in the context of the determination of fair exploitation. Again, focus first lay with substantive aspects and the impact of digitisation, before bringing in personal, geographical and temporal considerations and invoking both sector practices and collectively bargained solutions as an additional guideline. The soft law harmonisation of the concept of 'fair remuneration' is advocated, again with the conceptualisation in this book as a potential source of inspiration.

A useful specific accompanying hard law measure would be to expressly grant musicians a right to additional remuneration regarding emerging methods of exploitation, as already provided under German and Dutch law. More generally, in order to make full use of the potential of collective bargaining in CCIs such as the music industry, it was proposed to expressly grant freelance musicians the right to bargain collectively, to simplify applicable proceedings and to provide the possibility to extend the mandatory nature of collectively bargained solutions to all stakeholders in a given sector.

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The inherent unpredictability of commercial success in the music industry, combined with continued technological progress that opens up new avenues for digital exploitation, render it hard to establish what exactly qualifies as 'fair' remuneration in advance. Therefore, in addition to taking a static perspective that focuses on the situation at the moment of contract formation, a dynamic perspective on fair remuneration was added through the analysis of applicable contract adjustment mechanisms that allow for renegotiation in case the agreed remuneration arrangement becomes unfair over time. In this regard, both the copyright contract law mechanisms harmonised by Article 20 DSM Directive and the general contract law regimes applicable in case of changed circumstances were reviewed. An effective application of the requirement of disproportionality was said to be a prerequisite for a balanced – and fair – application of such contract adjustment mechanisms. In addition, certain ameliorations to applicable contract adjustment mechanisms were proposed.

Following the extensive analysis of the concept of 'fair remuneration' from both an ex ante and ex post perspective, this book posited the seminal importance of transparency throughout the performance of the contract for the purpose of ensuring fair remuneration. It then discussed applicable reporting obligations. Distinguishing passive reporting obligations that grant musicians a right to request and obtain relevant information from the active reporting obligations that have been harmonised by Article 19 DSM Directive. In turn, the analysis focused on the scope and content of applicable reporting obligations, delving into the information that is to be provided as well as the specific ways in which the provision of information is to take place. In view of the significant potential contribution of enhanced transparency to both procedural and substantive fairness, the key role that active reporting obligations have to play in achieving the objectives set by this book was stressed. A wait-and-see attitude concerning the active reporting obligations that entered into force in June 2022 was coupled with proactive proposals to further polish these obligations in practice, as well as further shape an effective right to audit in the context of both the primary and secondary contractual relationships under review.

Finally, as was the case for both contract formation and corporate partners' duties in terms of exploitation, the perspective was then broadened to secondary contractual relationships. As to remuneration, revenues collected through the further transfer of rights were distinguished from revenues accrued through exploitation of protected content through sub-licences. As to both strands, a significant leeway for national legislators was found, leaving a margin for improvement in terms of fairness – both fair remuneration as such and associated issues of transparency. In particular, the potential of a resale right for music in granting musicians a claim in profits made through the further sale of their rights was explored, as was the extension of contract adjustment mechanisms to secondary contracting parties.

A separate section was then devoted to the potential of a residual, collectively managed remuneration right for musicians for digital exploitation, as a complementary way to secure a fair division of revenues in the music industry. While the

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decision whether or not to establish such a right will ultimately be based on policy reasons, this chapter weighed the theoretical and practical arguments for and against, ultimately finding in favour of such a collectively managed solution. Theoretical support for the establishment of musician ER follows from the obvious similarities between radio and (playlist and discovery) streaming, where a 50/50 division appears to be the standard in the chosen jurisdictions. As contractual negotiations between contracting parties usually do not lead to such a result, it is hard to deny the benefits in terms of substantive fairness that a generalised move towards musician ER would bring. While the establishment of musician ER would require additional attention to the user interest in not having prices for the consumption of music increase disproportionately, as well as the interests of corporate partners that may be characterised as SMEs, the practical counterarguments are surmountable. However, countries with a strong basis for collective bargaining should be empowered to build further upon this tradition. Moreover, if the choice is made for collective management, sustained attention must be accorded to the transparency and governance of CMOs tasked with amassing and distributing the additional revenues. The ongoing review process of the CRM Directive may provide fruitful ground for debate in this regard.

Chapter 6 investigated the legal framework surrounding the end of the researched music industry contracts. It focused on parties' abilities to terminate the contractual relationships under review. First, it was found that none of the chosen jurisdictions expressly limit contract duration, bar the requirement of reasonability that exists under either copyright contract law or rules concerning unfair B2B contract terms and the principled right to terminate perpetual obligations under general contract law. Second, a brief analysis was included of potential grounds for termination of the contracts under review. Instances of serious breach of contract in case of non-respect of applicable duties of exploitation and remuneration were discussed, as well as the potential termination of the contract if renegotiations following a significant change of circumstances are unsuccessful. Again, diverging national regimes were found. Third, Chapter 5 assessed the consequences of contract termination under the laws of the chosen jurisdictions in terms of scope, exploitation and remuneration, assessing whether these consequences act as switching costs in practice. A lingering sense of legal uncertainty was uncovered, especially regarding the practical follow-on effects of termination on secondary relationships in the digital sphere and the right of musicians to access relevant data in a post-contractual context.

The chapter then assessed and discounted the potential of a more extensive right of withdrawal on the part of musicians. It also studied restrictions on the duration of copyright exploitation contracts in the United Kingdom and United States, in a bid to assess whether such restrictions may contribute to the fairness sought in the context of this book. However, the relevant legal framework in the chosen EU jurisdictions provides musicians with ample opportunities to terminate primary contractual relationships in cases of excessive scope of rights granted and/or

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shortcomings on the part of the corporate partner when it comes to either exploitation or remuneration. In view of this, it was argued that an additional reversion right based on the passing of time alone would not provide significant added value. Finally, regarding the consequences of contract termination, it was found that both the remuneration for potential post-contractual exploitation and musicians' post-contractual right to access relevant audience data should be secured – the latter potentially through an extension of the scope of active reporting obligations to data not directly linked with the exploitation of relevant content.

Chapter 7 discussed the tools that are available to enforce the substantive provisions discussed in Chapters 3–6. First, the chapter discussed the possibility for contracting parties to contractually deviate from the protective provisions under review. It stressed the merits of qualifying certain aspects of the protective legal framework as mandatory law, in order to prevent excessive contractual deviations under the influence of imbalances in relative bargaining power.

Second, it delved into the potential conflict between the objective of securing transparency throughout the music value chain and the qualification of relevant audience data as trade secrets. It was also found that musicians' low bargaining power is likely to translate into a lack of – material and/or moral – means to challenge the fairness of contracts, either in court or in an extra-judicial context. In addition to often not having access to the funds required to secure legal relief, the fear of retaliation and the ensuing chilling effect on their musical career is likely to deter artists faced with unfair situations. Cases that do reach the courtroom are often settled on confidential terms. The lack of case law may dissuade other musicians from challenging the fairness of their contracts.

Subsequently, opportunities for individual empowerment and the enhancement of a collective voice were put forward. First, on the individual level, the importance of knowledge creation and dissemination was highlighted as a countering force against persisting information asymmetries. Second, the potential of the collective as a positive force for change was mined. It was found that representative groups such as CMOs, trade unions, guilds and other representative entities may play an important role in providing a collective voice for the heterogeneous groups of stakeholders active in the music industry. Collective interest groups may not only provide support for individuals, but also substantively affect copyright policy and engage in self-regulation, including through recourse to collective bargaining. Moreover, collective enforcement has the potential to enhance transparency throughout the music value chain and counter musicians' fear of commercial retaliation.

The chapter then assessed the potential of ADR as an alternative avenue to settle disputes pertaining to the contracts under review – as promoted (and even required) by Article 21 DSM Directive. In the pre-DSM era, both France and the Netherlands have already taken significant steps in extra-judicial dispute resolution in the CCIs, with the appointment of the *médiateur de la musique* and the *Geschillencommissie Auteurscontractenrecht*. However, neither mechanism appears to have been widely

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used in practice so far. Several measures may boost the uptake of ADR mechanisms in practice. First, an expansion of its scope to all disputes relating to copyright exploitation contracts may be envisaged – with a combination of the situations in France, Germany and the Netherlands as a potentially optimal solution. In addition, sustained attention to quality control is required. Finally, it is vital to further incentivise stakeholders to participate in relevant ADR mechanisms, while safeguarding their right to submit a dispute to a judge.

The road towards a level playing field for all music industry stakeholders in the streaming age is long and somewhat rocky. While the partially harmonising provisions of the DSM Directive definitely constitute a step in the right direction, they are by no means a panacea. In this regard, several final overarching considerations may be noted.

First, the use of broad, abstract concepts – while a necessary corollary of political compromise – is not conducive to either procedural or substantive fairness, since this allows significant divergences between Member State laws to persist. Second, similar consequences stem from the fact that many aspects of the contractual relationship remain unharmonised at the EU level, such as those relating to the negotiation and formation phase of the contract, as well as its termination. Third, while the title of the DSM Directive promises a legal instrument fit for the digital age, its chapter on copyright exploitation contracts pays little to no attention to the specifics of digital exploitation of protected content – arguably a missed opportunity.[2] This book made an attempt to mitigate these three obstacles, by operationalising the broad applicable concepts using concrete criteria that take due account of the ubiquity of the digital sphere.

An equally regrettable element is the lack of full clarity on the temporal application of the harmonising rules of the DSM Directive, which seems to allow Member States to adopt a conservative application of these rules to ongoing contracts. The immediate or even retroactive effect of a progressively more protective legal framework negatively affects legal certainty and risks resulting in a chilling effect for corporate partners. Thus, if a measure results in an excessive encroachment upon the freedom of contract, considerations of fairness argue in favour of a conservative application in time. However, while the harmonising provisions on copyright exploitation contracts are not fully ideal, they have been evaluated as being both procedurally and substantively fair. Therefore, their temporal application to ongoing contracts is deemed justifiable. Any legislative choices for a conservative application in time may be considered as a missed opportunity to right past wrongs.

It can hardly be denied that the DSM Directive may be considered somewhat of a missed opportunity for a holistic approach. In the words of Professor Séverine Dusollier:

[2] Séverine Dusollier, 'An Effective and Comprehensive Contractual Protection of Creators and Performers' (Copyright in the Digital Single Market, Brussels, 30 January 2020). See also Daniel Johansson, 'Streams & Dreams: A Fair Music Economy for All, Part 2' (2024) <https://bit.ly/3Sh3D5R>.

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> The Directive on copyright in the digital single market fails to deliver on its promise of a more ambitious copyright reform. Another piece of legislation was just piled up to an already entangled puzzle of legal provisions. It was time to profoundly revise the acquis. Instead, the construction of an effective single market in cultural and entertainment products and services, but equally importantly of a digital society where all have access to creative works, information and knowledge, and where artists get a fair remuneration, still relies on 27 different national copyright frameworks, partly outdated notions, intricate practical solutions, and unsolved issues.[3]

At the very end of this book, it is time to circle back to its overarching objective: to move towards a fair(er) balance in the contracts between musicians and their primary corporate partners in the streaming age. Has this goal been attained? Honesty requires us to give a nuanced answer.

On the one hand, looking at the substantive legal framework in the chosen jurisdictions in the EU in particular, the overall assessment is rather positive. The relevant regulatory regimes in Belgium, France, Germany and the Netherlands provide detailed rules on how contracting parties' freedom of contract is limited in a bid to further considerations of distributive justice. These national laws seek to work to the advantage of those 'least fortunate' in the Rawlsian sense of the word, as understood here to encapsulate a group of people (musicians) that are often at the losing end of the contracting equation and suffer from a systemic imbalance in bargaining power. While there is a clear margin for improvement, as evidenced by the proposals for incremental amelioration discussed above, the essence of the legal framework may be said to engender hopefulness. On a substantive level, therefore, we are clearly moving in the right direction, towards enhanced fairness. It is hoped that the UK legislator, too, may find inspiration in the regulatory framework offered by the continental EU jurisdictions under review in this book.

On the other hand, there is no straight line between the ideal that this book aspires to and modern-day music industry practice. Similar to the hurdles that arise in the context of the application of abstract legal theory to a specific legal field such as (copyright) contract law, the road towards actual implementation of the relevant legal framework in practice is rather bumpy. Additional ambition is therefore merited. If the application of the legal framework 'in action' is found wanting, what is the point of a balanced, well-thought-out law 'in the books'? From this perspective, further bolstering the development and application of 'fair trade' principles in music contracts and encouraging stakeholders to speak up in case of unfairness – be it on the judicial or extra-judicial stage – is key. Moreover, if efforts in this direction prove to be insufficiently fruitful, the only credible solutions left may be to further collectivise the exploitation of music through (mandatory) collective bargaining and (equally mandatory) collective management.

[3] Séverine Dusollier, 'The 2019 Directive on Copyright in the Digital Single Market: Some Progress, a Few Bad Choices, and an Overall Failed Ambition' [2020] CML Rev 979, 1029.

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With some imagination, the legal framework surrounding the music industry may be likened somewhat to a mixing desk, with multiple channels and inputs, as well as filters and equalisers. There are many stakeholders whose voice deserves to be heard – and sometimes even amplified – while some influencing factors, such as the winner-takes-all nature of the music industry and its tendency towards the mainstream, should be somewhat filtered out in order for an equalised, level playing field to emerge. Just like sound engineers, we must continuously bear in mind that minor adjustments may have major consequences, as well as be weary of excessive compression of input that does not do justice to the diversity in the music industry.

Contrary to what is the case for sounds, therefore, legal 'engineering' requires a continuous feedback loop with industry stakeholders, whereby regulatory action is guided and inspired by empirical evidence. This book has identified a number of avenues for potential bottom-up initiatives as well as possible regulatory action, opting for incremental modifications to the legal framework instead of the proverbial 'mic drop'. May the analysis, assessment and proposed amelioration of the legal framework advanced by this book contribute towards a more balanced legal soundtrack for the music industry in the streaming age.

Fine

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