1

Prelude

We have no idea what we are signing,
in an act of legendary mental deficiency.

—Morrissey[1]

1.1 INTRO

Music forms the soundtrack that accompanies and brightens our daily lives. It is one of the very few endeavours that unites us all. Its intrinsic value is undeniable. However, this often does not translate into economic value. In the streaming age, the instantaneous accessibility of music is the norm. It is deceptively easy to forget the artistic and commercial journey a melody must travel before reaching an audience. A fruitful collaboration between a wealth of individuals and companies is required to ensure successful completion of the artistic and commercial process of 'making music'. This process constitutes the common thread of this book, which focuses on the legal aspects of contractual dynamics in the music industry.

A structural difference in relative bargaining power between musicians and their primary corporate business partners characterises the wide array of contractual relationships in the music value chain.[2] This rings especially true at the beginning

[1] Morrissey, *Autobiography* (Penguin Classics 2013) 156.

[2] Séverine Dusollier and others, 'Contractual Arrangements Applicable to Creators: Law and Practice of Selected Member States' (Publications Office of the EU 2014) <https://op.europa.eu/s/zIba> 6, 16; Europe Economics and others, 'Remuneration of Authors and Performers for the Use of Their Works and the Fixations of Their Performances. Final Report' (Publications Office of the EU 2015) <https://op.europa.eu/s/zIa9> 138–39; Isabelle De Voldere and others, 'Mapping the Creative Value Chains. A Study on the Economy of Culture in the Digital Age. Final Report' (Publications Office of the EU 2017) <https://op.europa.eu/s/zIa8> 77; Ananay Aguilar, '"We Want Artists to Be Fully and Fairly Paid for Their Work". Discourses on Fairness in the Neoliberal European Copyright Reform' [2018] JIPITEC 160, 161; Séverine Dusollier, 'EU Contractual Protection of Creators: Blind Spots and Shortcomings' [2018] Colum J L & Arts, 436, 444; Abbe EL Brown and others, *Contemporary Intellectual Property: Law and Policy* (5th edn, Oxford University Press 2019) 222.

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of musicians' musical careers. Parties' bargaining power is not only affected by their negotiating abilities, but also by their prior success, the availability of alternative options and their patience in holding out for a better deal.[3] The imbalance in relative bargaining power is not only affected by the characterisation of the music industry as a winner-takes-all superstar economy, but also by a tenacious information asymmetry, whereby relevant knowledge of corporate partners surpasses that of musicians.[4]

The flexibility of the legal framework, based on the freedom of contract, combined with an oversupply of musicians with low bargaining power, may prevent Coasean bargaining in practice.[5] Put simply, it makes commercial sense for corporate players in the music industry to lean towards exercising their market power in a way that is disadvantageous to musicians.[6] Over the years, moreover, there have been many examples of one-sided, industry-friendly music industry contracts, often leading to dire situations for musicians.[7] Until at least the turn of the century, contracts between musicians and their corporate partners were almost exclusively contracts of adhesion of a 'take it or leave it' nature, with boilerplate language and a list of standard terms which many aspiring superstars were nevertheless eager to sign.[8] Possible sources of unfairness in such contracts include (1) excessive rights granted to and (2) limited obligations on the part of the record company/music

[3] Martin Kretschmer and others, 'The Relationship between Copyright and Contract Law' (2010) <https://ssrn.com/abstract=2624945> 28–32; Europe Economics and others (n 2) 111–12, 120–21.

[4] Cf Europe Economics and others (n 2) 136; De Voldere and others, 'Mapping the Creative Value Chains' (n 2) 143–44; Agnès Lucas-Schloetter, 'The Remuneration of Authors and Performers in Copyright Contract Law' in Paul Torremans (ed), *Research Handbook on Copyright Law* (Research Handbooks in Intellectual Property, 2nd edn, Edward Elgar 2017) 268–69; Morten Hviid and others, 'Digitalisation and Intermediaries in the Music Industry: The Rise of the Entrepreneur?' (2018) 15 SCRIPTed 242, 271; Alan B Krueger, *Rockonomics* (John Murray 2019) 161.

[5] Cf De Voldere and others, 'Mapping the Creative Value Chains' (n 2) 74; Rebecca Giblin and Cory Doctorow, *Chokepoint Capitalism: How Big Tech and Big Content Captured Creative Labor Markets and How We'll Win Them Back* (Beacon Press 2022) 16; Richard Osborne and Hyojung Sun, 'Economics of Streaming: Contract Adjustment and Rights Reversion' (6 February 2023) ch 1.

[6] Cf Phillip W Hall Jr, 'Smells Like Slavery: Unconscionability in Recording Industry Contracts' [2002] Hastings Comm & Ent LJ 189, 190; Krueger, *Rockonomics* (n 4) 160.

[7] Nancy K Baym, *Playing to the Crowd. Musicians, Audiences, and the Intimate Work of Connection* (New York University Press 2018) 65; Krueger, *Rockonomics* (n 4) 164, 170.

[8] Ruth Towse, 'Copyright and Economic Incentives: An Application to Performers' Rights in the Music Industry' (1999) 52 Kyklos 369, 372–73; Hall Jr, 'Smells Like Slavery' (n 6) 201; Abhinay Muthoo, 'Bargaining Theory and Royalty Contract Negotiations' (2006) 3 RERCI 19, 19; Jean-Christophe Lardinois, *Les Contrats Commentés de l'Industrie de La Musique 2.0: Cadre Général et Pratique Contractuelle* (Création Information Communication Pratique 1, 2nd edn, Larcier 2009) 7; Dusollier and others, 'Contractual Arrangements Applicable to Creators' (n 2) 16; Dusollier, 'EU Contractual Protection of Creators' (n 2) 436; Hviid and others, 'Digitalisation and Intermediaries in the Music Industry' (n 4) 260; Bruno Racine, 'L'Auteur et l'Acte de Création' (January 2020) 33; Yannos Paramythiotis, 'Fairness in Copyright Contract Law: Remuneration for Authors and Performers under the Copyright in

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publisher in terms of both the exploitation of the musical content and the remuneration therefor, as well as (3) issues concerning the termination of a contract.

Musicians who seek to enter into a commercial relationship in the recorded music and/or music publishing sector now have a vast array of options at their disposal, much more than a few decades ago. This has led to a markedly more artist-friendly environment, whereby some rules that used to be set in stone, such as a full transfer of rights against a modest flat fee, have become more malleable and open to contractual modulation. However, some corporate music industry habits have proven rather hard to break and, in many cases, the traditional power relationships still seemingly prevail.

This book seeks to address the consequences of this perceived difference in relative bargaining power. Particular focus lies with the contractual relationships between musicians and record companies and/or music publishers. The oversupply of musicians may lead to unfair situations whereby musicians draw the short straw. The digitisation wave and the rise of music streaming add an additional layer of complexity. While musicians may now in theory reach and build their audience in a fully independent way, significant barriers to entry remain. Moreover, analogue contracts have proven to be a difficult fit with technological opportunities in the music market. Music industry professionals are faced with constantly evolving business models to which the principles of past contracts are tough to apply.

Regulating the music industry may be compared to hitting a moving target. The law inherently lags behind technological and economic developments. This should not be cause for despair. Instead, concerted efforts are required to construct a legal framework that is fair, fit for the digital age and sufficiently flexible in the long run. This book seeks to contribute to such a legal framework, that serves as a real and tangible instrument towards achieving a fair(er) balance between the interests of the primary stakeholders in the streaming age. It aims to develop a holistic regulatory approach, seeking an appropriate, fair(er) balance between the interests of musicians and the main corporate actors, while taking account of the interests of users. Thus, the book envisages an application of copyright that enhances musician welfare and is aligned with its original objective, while at the same time ensuring a healthy investment climate and appropriate access to content. The methodology applied in order to achieve this goal is fleshed out below.

1.2 METHODOLOGY

This book analyses the extent to which the law intervenes in the contractual relationship between musicians and corporate partners and the extent to which it

the Digital Single Market Directive' in Tatiana-Eleni Synodinou and others (eds), *EU Internet Law in the Digital Single Market* (Springer International 2021) 78.

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should do so: where the line should be drawn between freedom of contract and the desirability of protecting parties with weaker bargaining power in business-to-business (B2B) situations in the streaming age. The tools available to stakeholders faced with unfair contractual situations as well as legislative developments in Belgium, France, Germany, the Netherlands and the United Kingdom are analysed and evaluated. The book accords attention to both the substantive content of the applicable legal framework and its application in practice.

The central research question is formulated as follows: how can the legal framework contribute to achieving a fair(er) balance between the interests of musicians and the main corporate partners in the music industry in the context of the streaming age? This question is addressed through the following sub-questions:

1. What are the main interests involved in the music industry, how do these interests converge/conflict in practice and how should the goal of achieving a fair(er) balance between those interests be understood, particularly in the streaming age?
2. How does the relevant legal framework in Belgium, France, Germany, the Netherlands and the United Kingdom, consisting primarily of copyright contract law and secondarily of the law of unfair B2B contract terms and trade practices and general contract law, seek to contribute to achieving such a balance?
3. Does the legal framework actually achieve a fair balance in practice?
4. How may the existing legal framework be improved in order to ensure a fair(er) balance in the music industry in the streaming age?

The research method consists of a critical literature review and content analysis, applying an integrated intradisciplinary, interdisciplinary and comparative approach. First, as to the separate sub-questions, several fields of law are analysed. Second, the complexity of the music industry and the many interests involved require the book to be interdisciplinary. Moreover, this book aims higher than a merely descriptive outcome. To the extent it is useful and relevant, in addition to authoritative positivistic legal sources, non-legal research is included. Third, a comparative analysis between five different national jurisdictions constitutes one of the main building blocks of this book. Below, the methodological choices made in the context of each sub-question are explained further.

The first sub-question is defining, descriptive and explanatory and, importantly, specifies the normative framework. This question entails an analysis of the dynamic power structures in and the effects of digitisation on the music industry. Given the legal focus of this book, it presents these industry developments in the context of the copyright framework in the broad sense. Finally, the normative aspect of this first sub-question asks how the concept of a 'fair balance' should be interpreted in the music industry, particularly in the age of streaming. As this book focuses on music,

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it does not treat the debate surrounding the exploitation of music in audio-visual form and, in particular, the issue of buyouts in the audio-visual sector.[9]

The relevant sources for all aspects of this first sub-question include authoritative legal sources such as legislation and legal doctrine as well as non-legal research, with a focus on cultural economics literature, cultural music studies and reports on the structure and functioning of the music industry.[10] In addition, popular literature has been sourced, including blogs, interviews and news items.

The second sub-question is descriptive and explanatory. It focuses on how the legal framework in Belgium, France, Germany, the Netherlands and the United Kingdom seeks to contribute to achieving a fair(er) balance between artistic and commercial interests in the streaming age.

The third sub-question evaluates the existing framework in the selected jurisdictions, with the objective of achieving a fair(er) balance as defined in the normative aspect of the first sub-question.

The fourth, normative sub-question treats whether and how the existing legal framework, as analysed and evaluated in the context of the second and third sub-questions, may be improved in light of the objective of achieving a fair(er) balance, both in theory and in practice.

The relevant legal framework includes authoritative legal sources such as legislation, legal doctrine and case law of higher courts relating to the fields of copyright contract law, principles of general contract law, competition law and related applicable rules that curb B2B contract terms and trade practices characterised as unreasonable. Focus lies with copyright contract law as the pertinent *lex specialis*.

[9] See ia Jean-Christophe Lardinois, *Les Contrats Commentés de l'Industrie Audiovisuelle: Cadre Général et Pratique Contractuelle* (Création Information Communication Pratique 3, Larcier 2007); Cécile Despringre and others, 'Audiovisual Authors' Rights and Remuneration in Europe' (SAA White Paper, 2015); Raquel Xalabarder, 'International Legal Study on the Implementation of an Unwaivable Right of Audiovisual Authors to Obtain Equitable Remuneration for the Exploitation of Their Works' (2018); Raquel Xalabarder, 'The Equitable Remuneration of Audiovisual Authors: A Proposal of Unwaivable Remuneration Rights under Collective Management' [2018] RIDA 5; Stéphanie Carre, Stéphanie Le Cam and Franck Macrez, 'Buyout Contracts Imposed by Platforms in the Cultural and Creative Sector' (Publications Office of the EU 2023) <https://shorturl.at/bhsNR>; Amélie Lacourt, Justine Radel-Cormann and Sophie Valais, 'Fair Remuneration for Creators in Exploitation Contracts' (European Audiovisual Observatory 2023) <https://shorturl.at/dwT68>.

[10] See ia Jim Rogers, *The Death & Life of the Music Industry in the Digital Age* (Bloomsbury 2013); Mark Mulligan, *Awakening: The Music Industry in the Digital Age* (Createspace 2015); Kenneth W Barr, 'Music Copyright in the Digital Age. Creators, Commerce and Copyright. An Empirical Study of the UK Music Copyright Industries' (University of Glasgow 2016); Ananay Aguilar, 'Distributed Ownership in Music: Between Authorship and Performance' (2018) 27 Social & Legal Studies 776; Aguilar, 'We Want Artists' (n 2); Chris Cooke, *Dissecting the Digital Dollar* (3rd edn, Music Managers Forum and CMU Insights 2020); Stef van Gompel and others, 'Evaluatie Wet Auteurscontractenrecht: Eindrapport' (2020) <https://bit.ly/3UBZrh4>. See also <www.copyrightevidence.org>.

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As UK law does not expressly contain a copyright contract law framework, the applicable rules of contract law bear particular relevance for this jurisdiction.

The national level retains importance in the field of copyright law, in view of the essentially territorial nature of copyright law, which means that its application is limited to the confines of a certain country.[11] In view of the digitised, globalised nature of our present-day society, many – if not all – of the contracts under review have a link with several national legal systems. This gives rise to questions as to the court having jurisdiction for a certain dispute and the law applicable to a given situation. Associated issues of private international law fall outside the scope of this book.[12]

The book analyses the pertinent national legislation as applicable and amended since the turning of the millennium in 2000. In Belgium, the copyright framework is included in the general *Wetboek van economisch recht*[13]/*Code de droit économique* (in English: Code on Economic Law), in particular in Book XI, Title 5, entitled *Auteursrecht en naburige rechten* (in English: Copyright and Neighbouring Rights). This book refers to that code as the Belgian CEL. While France's *Code de la Propriété Intellectuelle*[14] (in English: Code of Intellectual Property) brings together the various IP rights in one act, both Germany and the Netherlands have legislation that is uniquely devoted to copyright law. Hereinafter, the French CPI, of which Part I contains the legal regime on copyright and neighbouring rights, is referred to as the French IP Code. The German national framework contains two separate relevant acts on copyright law. The main substantive act is the *Gesetz über Urheberrecht und verwandte Schutzrechte (Urheberrechtsgesetz)*[15] (abbreviated as UrhG, in English: Act on Copyright and Neighbouring Rights (Copyright Act). In this book, it is referred to as the German Copyright Act. There is also a specific act concerning collective management, entitled *Gesetz über die Wahrnehmung von Urheberrechten und verwandten Schutzrechten durch Verwertungsgesellschaften (Verwertungsgesellschaftengesetz)*[16] (abbreviated as VGG, in English: Act on the Management of Copyright and Neighbouring Rights by Collective Management Organisations). This text is referred to below as the German CMO Act. The relevant acts of German law are subdivided into parts (*Teile*), subsections (*Abschnitte*) and

[11] Paul Goldstein and P Bernt Hugenholtz, *International Copyright. Principles, Law and Practice* (2nd edn, Oxford University Press 2010) 95–99.

[12] See Jozefien Vanherpe, 'Copyright Contracts at the Frontiers: A Closer Consideration from a Conflict of Laws Perspective' in Simon Geiregat and Hendrik Vanhees (eds), *Copyright Contracts Tomorrow* (LeA 2023).

[13] Full text at <www.ejustice.just.fgov.be>.

[14] Text at <https://bit.ly/3mMpIs5>.

[15] *Gesetz über Urheberrecht und verwandte Schutzrechte*, text at <www.gesetze-im-internet.de/urhg>.

[16] *Gesetz über die Wahrnehmung von Urheberrechten und verwandten Schutzrechten durch Verwertungsgesellschaften*, text at <www.gesetze-im-internet.de/vgg>.

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paragraphs (§). For the sake of uniformity, this book refers to the relevant paragraphs as 'Articles'.

The Netherlands has three copyright-specific acts. First, the *Auteurswet*[17] (in English: Copyright Act) contains the substantive provisions of copyright law *sensu stricto*. It is referred to below as the Dutch Copyright Act. Second, the *Wet op de naburige rechten*[18] (in English: Act on Neighbouring Rights) is specific to neighbouring rights protection. It is referred to as the Dutch Neighbouring Rights Act. Third, Dutch law comprises an act specific to collective management, namely the *Wet toezicht en geschillenbeslechting collectieve beheersorganisaties auteurs- en naburige rechten*[19] (in English: Act on Management and Dispute Resolution regarding Collective Management organisations of copyright and neighbouring rights). It is referred to below as the Dutch CMO Act.

Finally, in the United Kingdom, the copyright framework is included in the Copyright, Designs and Patents Act 1988 (CDPA). This book refers to this code as the UK CDPA. The UK CDPA is subdivided into Parts, Chapters and Sections. As for German law, this book refers to the relevant sections as 'Articles'.

Further, since the chosen jurisdictions include four Member States of the European Union, the EU regulatory level is integrated into the analysis. The EU legislator has drafted a significant number of harmonising legal texts in the field of copyright law.[20] As of yet, the *acquis communautaire* consists of twelve directives, two regulations and a significant body of ECJ case law.[21] The primary directive that recurs throughout this book is the Digital Single Market (DSM) Directive.[22]

On the international level, several relevant international conventions apply in all five chosen jurisdictions. These conventions primarily contain general principles and minimum standards.[23] This overarching legal framework leaves a significant

[17] *Auteurswet*, text at <https://wetten.overheid.nl/BWBR0001886>.

[18] *Wet op de naburige rechten*, text at <https://wetten.overheid.nl/BWBR0005921>.

[19] Text at <https://wetten.overheid.nl/BWBR0014779>.

[20] Lionel Bently and others, *Intellectual Property Law* (5th edn, Oxford University Press 2018) 51–54, 56–57; Justine Pila and Paul Torremans, *European Intellectual Property Law* (2nd edn, Oxford University Press 2019) 229–39. Cf Rec 2 DSM Directive.

[21] See <https://bit.ly/30U8ITq>. See Michel M Walter and Silke von Lewinski (eds), *European Copyright Law. A Commentary* (Oxford University Press 2010); Thomas Dreier and P Bernt Hugenholtz (eds), *Concise European Copyright Law* (2nd edn, Kluwer Law International 2016); Irini Stamatoudi and Paul Torremans (eds), *EU Copyright Law. A Commentary* (Elgar Commentaries, 2nd edn, Edward Elgar 2021). See as to the ECJ Eleonora Rosati, *Copyright and the Court of Justice of the European Union*, vol 2 (Oxford University Press 2023).

[22] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L130/92 (DSM Directive).

[23] See Sam Ricketson and Jane Ginsburg, *International Copyright and Neighbouring Rights. The Berne Convention and Beyond* (2nd edn, Oxford University Press 2006); Silke von Lewinski, *International Copyright Law and Policy* (Oxford University Press 2008); Goldstein and Hugenholtz, *International Copyright* (n 11).

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margin for regional and national differences. Applicable provisions of international copyright law are referenced throughout this book where deemed relevant.

1.3 OUTRO

This book is structured in eight chapters, including the present 'Prelude'. Chapter 2 analyses the structure and functioning of the music industry value chain in the streaming age and explores several different avenues for industry-led change. The book then goes on to analyse the protective legal regimes that are aimed at securing a fair(er) balance in contractual situations, applied in particular to the contracts entered into between musicians and record companies and/or music publishers.

Chapter 3 explores the role of the law in the regulation of the music industry in the streaming age and provides a typology of the relevant substantive legal regimes. It analyses their scope in substance, place and time, as well as the interplay between them. It also discusses various options to shape future policy initiatives that may contribute to a fair(er) balance in the streaming age.

In the subsequent three chapters, focus shifts to the substantive content of the relevant legal framework. The division into three chapters is based on the three stages of the 'life' of a contract, namely its formation, its performance and, ultimately, its termination. Chapter 4 treats the negotiation and formation stage of the contract. It analyses limitations on the scope of rights granted at the outset of the contractual relationship and the regulatory framework applicable to the determination of this scope in practice. Chapter 5 analyses the performance phase of the contract, focusing on the extent of corporate partners' duty to exploit the music at issue and fairly remunerate the musician(s). Chapter 6 inquires further regarding the end of the contracts under review, assessing the potential grounds for and consequences of contract termination in the streaming age.

Chapter 7 discusses the tools that are available to enforce the substantive provisions discussed in Chapters 3–6 in practice, both in a judicial and extra-judicial context. Chapter 8 brings together the research findings in a concluding 'Coda'.

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