available on a voluntary basis and co-exist with national titles".[101] However, such suggestion comes with advice for a thorough examination of the "feasibility, actual demand for, and the tangible advantages of, such a title, together with the consequences of its application alongside existing territorial protection", thus hinting at the potential problems arising from the overlap between national and E.U.-based rights.[102]

B. Legally relevant P2P acts and exclusive rights

Although often occurring in the same economic context, we can identify three legally relevant acts in the "technical constitution" of P2P:

(i) The making of a copy of a work in a first user's computer memory;
(ii) The making available of a copy of a work (upload) to other users on a P2P network; and
(iii) The download of a copy of a work by such other users in the network.[103]

Despite the absence of international harmonization for exclusive economic rights, most existing differences relate to scope.[104] The Berne Convention sets forth minimum standards for some economic rights, namely translation, reproduction, public performance, broadcasting, public recitation, and adaptation.[105] The P2P relevant acts of download and upload might call into question the application of the Berne Convention rights of *reproduction* and *communication to the public* (i.e. public performance and recitation), and the WCT-WPPT *making available right*.[106]

101 *See* Green Paper on Online Distribution of Audiovisual Works, at 13.
102 *Id.*
103 *See* Lewinsky 2005, *supra* note 8, at 5.
104 Silke von Lewinsky, International Copyright Law and Policy 54-55 (Oxford University Press 1st Ed. 2008) [**Lewinsky 2008**].
105 *See*, respectively, arts. 8, 9, 11, 11*bis*, 11*ter* and 12 Berne Convention.
106 *See* arts. 8 WCT, 10 and 14 WPPT.

The WIPO Internet Treaties have been implemented in the E.U. by the InfoSoc Directive,[107] which "horizontally harmonized" several economic rights, adjusting them to the digital age.[108]

Article 2 of this Directive contemplates a broad right of reproduction:[109]

> Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part:
>
> (a) for authors, of their works;
> (b) for performers, of fixations of their performances;
> (c) for phonogram producers, of their phonograms;
> (d) for the producers of the first fixations of films, in respect of the original and copies of their films;
> (e) for broadcasting organisations, of fixations of their broadcasts, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite.

This right covers all digital reproduction acts made over the Internet, except transient copies, as art. 5(1) InfoSoc Directive sets forth the "transient copying" mandatory limitation,[110] the main purpose of which is enabling transmission by ISPs or lawful use by end users.[111]

Additionally, art. 3 of this Directive contains a right of communication to the public, including the right of "making available online":

107 *See* Recital (15) InfoSoc Directive: "The Diplomatic Conference held under the auspices of the… WIPO…led to the adoption of… the "WIPO Copyright Treaty" and the "WIPO Performances and Phonograms Treaty"… Those Treaties update the international protection for copyright and related rights significantly, not least with regard to the so-called "digital agenda", and improve the means to fight piracy world-wide. The Community and a majority of Member States have already signed the Treaties and the process of making arrangements for the ratification of the Treaties by the Community and the Member States is under way. This Directive also serves to implement a number of the new international obligations".

108 Ansgar Ohly, *Economic rights*, *in*, Research Handbook on the Future of EU Copyright 212, 214 (Estelle Derclaye Ed., Edward Elgar 2009) (noting that "vertical harmonization" of the reproduction right had occurred for specific subject matter in the context of the Software Directive-art. 4(a)-, Database Directive-art. 5(a)-and the repealed 1992 version of the Rental Right Directive-previous art. 7-, in respect of related rights).

109 Note also that Recitals 9 and 11 seem to favor a "in dubio pro autore" interpretation of this right (*see* Ohly, *supra* note 108, at 217).

110 Art. 5(1) reads: "Temporary acts of reproduction referred to in Article 2, which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable: (a) a transmission in a network between third parties by an intermediary, or (b) a lawful use of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2".

111 *See* P.B. Hugenholtz et al., The Recasting of Copyright and Related Rights for the Knowledge Economy, Final Report 68-69 (2006), http://ec.europa.eu/internal_market/copyright/docs/studies/etd2005imd195recast_report_2006.pdf (last visited Jan. 31, 2012) (arguing that this is a technical and not a normative approach).

1. Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.
2. Member States shall provide for the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them:

(a) for performers, of fixations of their performances;
(b) for phonogram producers, of their phonograms;
(c) for the producers of the first fixations of films, of the original and copies of their films;
(d) for broadcasting organisations, of fixations of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.

3. The rights referred to in paragraphs 1 and 2 shall not be exhausted by any act of communication to the public or making available to the public as set out in this Article.

Under Recital (23), the right of communication to the public covers communication *inter absentes* and not *inter praesentes*.[112] As for the right of "making available", it does not demand simultaneous reception of the work by the public and is independent of whether and how often the work is accessed.

Focusing our attention on the right of reproduction, which is the paradigm of copyright,[113] it should be noted that, on the international level, art. 9(1) Berne Convention provides the authors of works the exclusive right of authorizing its reproduction, "in any manner or form".[114] Article 1(4) WCT stipulates that the "Contracting Parties shall comply with Articles 1 to 21 and the Appendix of the Berne Convention", being that the Agreed Statement thereto qualifies "the storage of a protected work in digital form in an electronic medium" as a "reproduction within the meaning of Article 9 of the Berne Convention".[115]

The above-mentioned provisions clarify that the reproduction right applies without restriction in the digital environment–arguably including all forms of incidental, transient or technical copies–, so that the storage of a file containing a work in the memory of a computer (e.g., the making of a copy by the initial P2P user and the download act of the subsequent user) constitutes a restricted act.[116]

Similarly, the InfoSoc Directive's reproduction right increasingly applies to online dissemination of content, of which reproduction is an essential constituent.

112 *See* Ohly, *supra* note 108, at 225.
113 Paul Goldstein & P. Bernt Hugenholtz**,** International copyright: principles, law, and practice 300 (Oxford University Press 2nd ed. 2010) (2000).
114 In the context of related rights, the reproduction right is provided for in arts. 7, 10 and 13 Rome Convention.
115 The Agreed Statements to arts. 7 and 11 WPPT contain similar provisions for performances and phonograms.
116 *See* Lewinsky 2005, *supra* note 8, at 5.

Such broad interpretation of this exclusive right is clear not only from the letter of art. 2 but also from related ECJ decisions, which seem to apply a wide interpretation of the concept of reproduction.[117] This application is sometimes counterintuitive, given its overlap with the right of communication to the public, either as online broadcasting or making available of protected works.[118]

Under E.U. law, although the reproduction right is granted both to authors and related rights owners, performers and broadcasters have a specific right of first fixation,[119] meaning that the general reproduction right only applies to the reproductions of those fixations.[120] This should not affect our considerations for P2P purposes, as most shared works will usually correspond to copies of first fixations.

Turning our attention to the right of communication to the public/making available, we note that no similar discrepancy affects the same, as such right is horizontally harmonized for all categories of rights holders.

On the international level, the Berne Convention itemizes the right of communication to the public into specific rights to perform, broadcast and recite.[121] Art. 8 WCT extends the Berne Convention's subject matter and scope to the right of making works available to the public "in such a way that members of the public may access these works from a place and at a time individually chosen by them",[122] thus effectively including interactive and on-demand transmissions under copyright's umbrella.

Art. 3 InfoSoc Directive grants a wide communication right (including making available) solely to authors; related rights owners are granted only the specific and narrower right of making available under art. 3(2). Although notable difficulties

117 *See* Case C-5/08, Infopaq International A/S v. Daske Dagblades Forening, 2009 E.C.R. I-6569 [***Infopaq I***] (applying a such broad interpretation), Case C-302/10, Infopaq International A/S v. Danske Dagblades Forening, 2012 (interpreting narrowly exemptions for temporary acts of reproduction) and even *Premier League* (interpreting the reproduction right in art. 2(a) InfoSoc Directive as extending to transient fragments of the works within the memory of a satellite decoder and on a television screen, although exempting such acts under art. 5(1)). On *Infopaq I see* Estelle Derclaye, *Wonderful or Worrisome? The Impact of the ECJ ruling in Infopaq on UK Copyright Law*, 32 Euro. Intell. Prop. Rev. 5:247 (2010).

118 *See* Eechoud et al., *supra* note 91, at 88.

119 Under art. 7 Rental Right Directive ("Fixation right"), which reads: "1. Member States shall provide for performers the exclusive right to authorise or prohibit the fixation of their performances. 2. Member States shall provide for broadcasting organisations the exclusive right to authorise or prohibit the fixation of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite. 3. A cable distributor shall not have the right provided for in paragraph 2 where it merely retransmits by cable the broadcasts of broadcasting organisations.".

120 *See* Ohly, *supra* note 108, at 214-215 (raising formal and substantive objections to this legislative technique).

121 *See* Goldstein & Hugenholtz, *supra* note 113, at 317-318.

122 *Id.* at 318. Arts. 10 and 14 WPPT respectively contain identical provisions for performers and phonogram producers.

exist in distinguishing the making available right from that of broadcasting under the *acquis*,[123] the level of interactivity in P2P is clearly above the threshold of distinction. Therefore, the upload act in P2P must be considered under the making available right species of the right of communication to the public.

To the question of whether Internet individualized on-demand uses are to be considered "public", the InfoSoc Directive is clear in answering in the affirmative, by placing these acts under the rights holders control.[124] Thus, irrespective of broad or narrow definitions of "public" in national laws of Member States, the P2P acts of upload are to be qualified as restricted acts of communication to the public and/or making available online, subject to rights holders consent.[125]

It is our view that a different conclusion is not warranted where P2P protocols (e.g., BitTorrent) cause the uploaded file to be broken in several parts during the transfer process, in such a way that one specific peer only effectively "transmits" part of the work to be downloaded by subsequent users.[126] To be sure, the character of the uploading act is not changed, given that the decisive activity of offering of a protected work on a network for (individual) access has effectively occurred.[127]

Art. 3(3) InfoSoc Directive clarifies that neither communication to public nor the making available right are subject to exhaustion, which coupled with the territoriality principle implies that online offering of works in the E.U. (such as online music distribution or P2P uploads) requires licenses for each Member State. This is a "multiplier" both for users' infringement risks and for the complexity of online dissemination mechanisms.

Furthermore, the amplitude of the InfoSoc Directive's reproduction and making available rights raises compatibility concerns that impact P2P and collective management.[128]

123 *See* Eechoud et al., *supra* note 91, at 91 (stressing the relevance of such distinction for related rights owners, which do not have a right to prohibit the broadcast of works but a mere remuneration claim).

124 *Id.* at 92-93, emphasizing that the notion of "public" is not defined under E.U. Law and that ECJ case law on communication to the public- *Lagardère*, *Mediakabel* (Case C-89/04, Mediakabel v. Commissariat voor de Media, 2005 E.C.R. I-4891)*, Egeda* (Case C-293/98, Entidad de Gestión de Derechos de los Produtores Audiovisuales v. Hostelería Asturiana SA, 2000 E.C.R. I-629) and *SGAE* (Case C-306/05, SGAE v. Rafael Hoteles, 2006 E.C.R. I-11519) [***SGAE***]–is not very helpful, although *SGAE* clarifies that communication rights must be interpreted broadly. More recently, the right of communication to the public has been the subject of ECJ decisions in *Premier League* and *Airfield v SABAM and AGICOA* (Joined Cases C-431/09 and C-432/09, Airfield NV, Canal Digitaal BV v Sabam and Airfield NV v Agicoa Belgium BVBA, 2011, *available at*: http://curia.europa.eu), which maintain a broad interpretation of the right of communication to the public.

125 *See* Lewinsky 2005, *supra* note 8, at 6.

126 *See* Annex I, Figs. I.3.a) and I.3.b).

127 *See* Huygen et al., *supra* note 11, at 52 (concluding similarly).

128 *See* Eechoud et al., *supra* note 91, at 89 (arguing that such broad rights cannot coexist and that a wide reproduction right adds complexity to and affects the transparency of the tasks of CMOs).

First, most CMOs administer the right of reproduction but not that of making available, which may give rise to issues of rights clearance.[129] Such issues may have spillover effects in scenarios of collective management of P2P, such as the need for CMOs to secure representation of the making available right to cover uploads in P2P networks.

Second, such overlap causes legal uncertainty in the context of rights clearance, as the line between acts of reproduction that occur during and as a consequence (i.e. the download) of P2P is difficult to draw.[130] The point deserves serious consideration, particularly given CMOs practice of "overrepresentation" of acts involved in online uses of content.[131]

C. Exceptions and limitations

Exceptions and limitations act as internal limits to copyright and can in general terms be qualified as statutory exceptions,[132] compulsory licenses[133] or exceptions for developing countries.[134]

The Berne Convention recognizes uncompensated and compensated exceptions and limitations (or statutory licenses).[135] Mandatory compensation is imposed for three broad cases: broadcasting and communication,[136] authorization to make sound recordings of a musical work[137] and the Berne Convention Appendix. Notwithstanding, many countries implemented compensation requirements also for uncompensated exceptions and limitations, such as private use.[138]

Exceptions and limitations are in general subject to the three-step test, which originally applied to the reproduction right, as stated in art. 9(2) Berne Convention:

> It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

129 *See* Ohly, *supra* note 108, at 217.
130 *Id.* at 225.
131 *See* Eechoud et al., *supra* note 91, at 88-89.
132 *E.g.*, art.10(1) Berne Convention.
133 *E.g.*, arts. 11*bis*(2) and 13 Berne Convention.
134 *E.g.*, arts. II and III of the Berne Convention Appendix.
135 *See* Goldstein & Hugenholtz, *supra* note 113, at 360.
136 Art. 11*bis* Berne Convention.
137 Art. 13 Berne Convention.
138 *See* P.B. Hugenholtz & R.L. Okediji, Conceiving an International Instrument on Limitations and Exceptions to Copyright 55 et seq., Institute for Information Law University of Amsterdam/University of Minnesota Law School (2008), http://www.ivir.nl/publicaties/hugenholtz/finalreport2008.pdf (for a detailed list of mandatory exceptions and limitations in existing international intellectual property instruments).