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João Pedro Quintais

On Peers and Copyright: Why the EU Should Consider Collective Management of P2P

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MIPLC Munich Intellectual Property Law Center
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Preface

"*On Peers and Copyright: Why the E.U. should consider collective management of P2P*" corresponds to the dissertation submitted to the Munich Intellectual Property Center in satisfaction of the requirements for the degree of Master of laws in Intellectual Property (LL.M. IP) in September 2011. This dissertation is now published, as updated until January 2012, mostly in light of relevant legislation, case law and some bibliography coming out in the intervening period. As constantly happens in literature regarding copyright and technology, this writing will have likely become outdated before its publication. Nonetheless, given the nature of the text and this publication, we've decided to limit any amendments to a minimum, maintaining the original structure, contents and overall direction of the research.

This book analyzes the E.U.'s approach to P2P, a disruptive and economically significant digital age technology that highlights the tensions between the Internet and a territorial and fragmented copyright law. It aims at providing the necessary legal qualification and context to understand why the E.U. has thus far failed to achieve its deterrence goals and followed a path that represents a financial burden for both Member States and rights holders, while not being able to monetize a vast market, inadequately tapping the innovation and cultural development potential of this technology, damaging the reputation of the content industry and "criminalizing" users.

It is argued that a solution to this conundrum must be based on the use of copyright law and policy as tools for market organization and innovation growth, with respect for rights holders and users (sometimes) opposing interests and the existing legal framework. The best answer to mass online P2P uses seems to be that of collective rights management, as it offers an organized licensing and remuneration system compatible with the interests of stakeholders. This is especially true in the E.U., home to a developed and sophisticated market of CMOs, subject to numerous ECJ and Commission decisions, as well as varying E.U. institutional approaches, all pointing towards a preference for multi-territorial and pan-European licensing models covering mass online uses of copyright content. In this context, this book tests the compatibility of several non-voluntary and voluntary approaches to P2P with international treaties, the *acquis* or simply strategic policy considerations.

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The concept of this book is to offer a modest contribution to the discussion of alternative and workable models, within the framework of copyright law, to address P2P uses in the E.U.

The author would like to thank Professor P. Bernt Hugenholtz for his supervision, comments and suggestions.

Amsterdam, April 2012
João Pedro Quintais

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Acronyms and Abbreviations

ACTA	Anti-Counterfeiting Trade Agreement
ADAMI	Administration des Droits des Artistes et Musiciens Interprètes
ASCAP	American Society of Composers, Authors and Publishers
Berne Convention	Berne Convention for the Protection of Literary and Artistic Works of Sep. 9, 1886, completed at Paris on May 4, 1896, as revised at Paris on Jul. 24, 1971 and amended on Sep. 28, 1979
BMI	Broadcast Media Incorporated
CISAC	International Confederation of Societies of Authors and Composers
CMO(s)	Collective Management Organization(s)
Database Directive	Directive 96/9/EC, of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, 1996 O.J. (L 77/20)
DRM	Digital Rights Management (including TPMs and electronic rights management)
ECJ	European Court of Justice or Court of Justice of the European Union
EFF	Electronic Frontier Foundation
Enforcement Directive	Directive 2004/48/EC, of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, 2004 O.J. (L 195/16)
GEMA	Gesellschaft für musikalische Aufführungs-und mechanische Vervielfältigungsrechte
IFRRO	International Federation of Reproduction Rights Organizations
InfoSoc Directive	Directive 2001/29/EC, of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, 2001 O.J. (L 167/10)
IFPI	International Federation of the Phonographic Industry
ISP(s)	Internet Service Provider(s)

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P2P	Peer-to-Peer file-sharing
Rome Convention	International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations of October 26, 1961
Rental Right Directive	Council Directive 92/100/EEC, of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, 1992 O.J. (L 346/61) as republished and amended by Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 (codified version), 2006 O.J. (L 376/28)
Resale Right Directive	Directive 2001/84/EC, of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art, 2001 O.J. (L 272/32)
RIAA	Record Industry Association of America
Satellite and Cable Directive	Council Directive 93/83/EEC, of 27 September 1993 on the coordination of certain rules concerning copyrights and rights related to copyright applicable to satellite broadcasting and cable retransmission, 1993 O.J. (L 248/16)
SESAC	Society of European State Authors and Composers
Software Directive	Council Directive 91/250/EEC, of 14 May 1991 on the legal protection of computer programs, 1991 O.J. (L 122/42), as republished and amended by Directive 2009/24/EC, of the European Parliament and of the Council of 23 April 2009 (codified version), 2009 O.J. (L 111/16)
Term Directive	Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights, 2006 O.J. (L 372/12), as amended by Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011, 2011 O.J. (L 265/1)
TFEU	Consolidated Version of the Treaty on the Functioning of the European Union, Sep. 5, 2008, 2008 O.J. (C 115) 47

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TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 320 (1999), 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994)
TPM(s)	Technical Protection Measure(s)
U.S.C.	United States Code
VCL	Voluntary Collective Licensing
WCT	WIPO Copyright Treaty, opened for signature 20 December 1996, 2186 U.N.T.S. 121 (entered into force 6 March 2002)
WPPT	WIPO Performances and Phonograms Treaty, opened for signature 20 December 1996, 2186 U.N.T.S. 203 (entered into force 20 May 2002)
WIPO	World Intellectual Property Organization
WIPO Internet Treaties	the WCT and WPPT
WTO	World Trade Organization

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I. Introduction

The coexistence of copyright[1] and technology is uneasy.[2] From the printing press to digital technology, passing through piano rolls, sound recordings, broadcast and photocopiers, copyright's struggle to adapt to disruptive technology has mostly been reactive.[3] P2P is but a recent illustration of such trend, soon to be followed by cloud computing.[4]

The digital age brought about an extension of rights holders' prerogatives through the broadening of the rights of reproduction and communication to the public, and the legal protection of DRM. With it, legislators have created a *de iure* and *de facto* access right, turning the previously "free" acts of (physical) enjoyment into restricted digital acts, unless privileged by an exception and limitation.[5] Adding to the complexity, copyright has kept its territorial blueprint, which is at odds with both its expressional interchangeable nature in the digital world and the transnational character of the Internet.

Such context led to the qualification of most P2P uses as copyright infringement and, consequently, to ever increasing (and largely unsuccessful) deterrence efforts by rights holders. However, such reaction to P2P forgets copyrights' role of market organizer (not preventer), *maxime* in legal systems–like the E.U.–that value strong Competition laws.

Assuming that rights holders should be compensated for uses of their works,[6] this book will focus on the problem of how best to "manage" P2P under E.U.

1 Unless otherwise specified, the term "copyright" and variations thereof refer both to copyright and related rights; likewise, the term "works" makes reference to copyrighted works, including performances and sound recordings.

2 *See* Joseph P. Liu, *Owning Digital Copies: Copyright Law and the Incidents of Copy Ownership*, 42 Wm. & Mary L. Rev. 1245, at 1255 (2001).

3 *See* John O. Hayward, *Grokster Unplugged: It's Time to Legalize P2P File Sharing*, 12 Intell. Prop. L. Bull. 1, at 5-7 (2007) (illustrating this point by describing the relationship between technological innovation and the entertainment industry).

4 For some of the legal issues raised by cloud computing *see* Chris Reed, *Information 'Ownership' in the Cloud*, Queen Mary School of Law Legal Studies Research Paper No. 45/2010 (2010), *available at*: http://ssrn.com/abstract=1562461 (last visited Jan. 31, 2012).

5 *See* Jane C. Ginsburg, *From Having Copies to Experiencing Works: The Development of an Access Right in U.S. Copyright Law*, 50 J. Copyright Soc. U.S.A. 113 (2003) (welcoming such access right has an essential element for the effectiveness of exclusive rights in the digital world). *But see* Thomas Hoeren, *Access right as a postmodern symbol of copyright deconstruction?*, VI Direito Sociedade Informação 9, 18 (2006) (arguing that, also with reference to E.U. secondary law, "[t]here is no such thing as an access right in copyright law").

6 A principle recognized in the E.U., *e.g.*, in Case 62/79, SA Compagnie Générale pour la diffusion d la télévision, Coditel and others v Ciné Vog Films and others, 1980 E.C.R. 881, at para 18.

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secondary law. For this purpose, the necessary technical, economic and legal background will be provided so as to correctly analyze the (in)adequacy of the current territorial exclusive rights model to efficiently address P2P. An examination will then be made of alternative models for P2P uses of works (namely online music)[7] based on collective rights management, especially VCL.[8] Also here, the benchmark for assessment will be compatibility with E.U. law.[9]

Chapter II addresses the technical and economic background of P2P, in an attempt to justify its relevance as a subject matter of study and lay the foundations for the discussion of why a territorial exclusive rights model is ill suited for file-sharing. This Chapter explores the interplay between the evolution of P2P technology and relevant judicial decisions in this area, highlighting the flexible and lasting nature of the former. It further analyzes recent industry reports on P2P "piracy" in connection with Internet uses, as well as its effect on legal business models endorsed by rights holders.

Chapter III provides a legal analysis of P2P under current E.U. secondary law, focusing on the exclusive rights involved and the challenges posed by its digital nature on the territoriality principle. It first scrutinizes the *acquis communautaire* and the E.U. policy's efforts to adjust copyright and its territorial matrix to the digital age. It then proceeds to the identification of the legally relevant P2P uses and their legal qualification under the copyright Directives. Last, it reviews such uses against existing exceptions and limitations in an effort to uncover potentially privileged acts.

7 As online music is at the forefront of discussion in these fields; *see*, *e.g.*, Fred von Lohmann, *Voluntary collective licensing for music file sharing*, 47 Comm. of the ACM (No. 10) 21 (2004) [**Lohmann 2004**], and Lucie Guibault & Stef van Gompel, *Collective Management in the European Union*, *in*, Collective Management of Copyright and Related Rights 135 (Daniel Gervais Ed., Edward Elgar 2nd ed. 2010).

8 Discussing the application of VCL or other forms of collective management to P2P *see*, *e.g.*, William Fisher III, *Promises to Keep: Technology, Law, and the Future of the Entertainment Industry* 199-258 (Stanford University Press, 2004), Neil W. Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 Harv. J.L. & Tech. 2 (2003), Daniel J. Gervais, *The price of social norms: towards a liability regime for file-sharing*, 12 J. Intell. Prop. L. 39 (2004), Lohmann 2004**,** *supra* note 7, Silke von Lewinsky, *Certain legal problems related to the making available of literary and artistic works and other protected subject matter through digital networks*, UNESCO e-Copyright Bull. 1, January-March 2005 issue [**Lewinsky 2005**], Peter K. Yu, *P2P and the future of private copying*, 76 U. Colo. L. Rev. 653 (2005), Meghan Dougherty**,** *Voluntary collective licensing: the solution to the music industry's file sharing crisis?*, 13 J. Intell. Prop. L. 405 (2006), Fred von Lohmann, *A Better Way Forward: Voluntary Collective Licensing of Music File Sharing*, EFF Whitepaper Series (Apr. 30, 2008), http://www.eff.org/files/eff-a-better-way-forward.pdf (last visited Jan. 31, 2012) [**Lohmann 2008**], and Séverine Dusollier & Caroline Colin, *Collective Management of Copyright: Solution or Sacrifice?: Peer-to-Peer File Sharing and Copyright: What Could be the Role of Collective Management*, 34 Colum. J.L. & Arts 809.

9 To the extent possible, this book will not address issues of private international law, jurisdiction, enforcement or Competition law.

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In Chapter IV, collective rights management is analyzed under E.U. law. After clarifying its main operational characteristics, providing a taxonomy of relevant types and framing CMOs' functions, this Chapter focuses on the impact of mass digital uses–such as P2P–on collective management and the role of multi-territorial licensing in providing a solution thereto, briefly mentioning relevant E.U. institutional approaches.

Chapter V further examines the legal compatibility of several collective management proposals of P2P uses with the *acquis*. It tackles first the most restrictive proposals by analyzing the non-voluntary approaches of legal licenses, mandatory collective management and extended collective licensing. This is followed by an in depth look at the voluntary approach of VCL, containing a critical assessment of its main features, benefits and challenges.

We conclude in Chapter VI by suggesting that the problems created by P2P technology to a fragmented and territorially based copyright law in the E.U. can most adequately be solved by implementing a VCL system.

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II. Uncovering the "P2P dilemma": technical and economic background of P2P

This Chapter first discusses the technical nature of P2P against the backdrop of major judicial decisions related thereto, placing special emphasis on the effect of the latter in said technology's evolution over time. This is followed by a brief economic analysis of P2P and additional background, which explores the impact of file-sharing on copyright industries and their business models, in an attempt to ascertain the economic significance of P2P uses. Such analysis will serve as the baseline for the detailed discussion on their legal qualification in the following Chapter as well as for our observations on related policy issues throughout this book.

A. Technical background: jurisprudence driven technology?

P2P software works as a communication infrastructure for users to interact over digital networks, sharing tasks and workloads, typically without recourse to a centralized system or hierarchy.[10]

Interaction occurs via file-sharing of contents (e.g. works) within networks, encompassing–sometimes simultaneous[11]–acts of upload, download and streaming,[12] made possible by the use of specific access enabling software.[13]

10 For different definitions of P2P containing these basic elements *see*: *OECD Information Technology Outlook 2004 Peer to Peer Networks in OECD Countries (Pre-release of Section from Chapter 5 of the Information Technology Outlook)*, 2 (2004), http://www.oecd.org/dataoecd/55/57/32927686.pdf (last visited Jan. 31, 2012) [hereinafter **OECD 2004 Report**]; Lewinsky 2005, *supra* note 8; and Seth Ericsson, *The Recorded Music Industry and the Emergence of Online Music Distribution: Innovation in the Absence of Copyright (Reform)*, 79 Geo. Wash. L. Rev.__, 8 (2011); Max Planck Institute for Intellectual Property & Competition Law Research Paper No. 11-09, *available at* http://ssrn.com/abstract=1850409 (last visited Jan. 31, 2012).

11 *See* Annelies Huygen et al., Ups and downs. Economic and cultural effects of file sharing on music, film and games 52 (TNO Information and Communication Technology Series, 2009), http://ssrn.com/abstract=1350451 (last visited Jan. 31, 2012) (referring that most recent P2P systems have a default automated mechanism that makes downloaded content immediately available to other network users).

12 This book will not address P2P streaming, but only the (currently) more relevant acts of upload and download. Note that considerations made for download will likely be applicable to streaming. On P2P streaming, *see* Ericsson *supra* note 10, at 9, and Rodrigo Rodrigues & Peter Druschel, *Peer-to-Peer Systems,* Communications of the ACM, October 2010, at 74.

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It constitutes a departure from the traditional client-server hierarchic computing model, as all computers in a P2P network share their resources, acting both as clients and servers.

Increased usage of P2P[14] is closely connected with the rise of the Internet and converging technological developments in the fields of digitalization, file compression and broadband access, allowing fast and efficient content transmission, which have greatly impacted the configuration of the content industry.[15]

Architecturally, P2P systems can be categorized under three "generations"[16] coexisting even today of centralized, decentralized and "third generation" systems,[17] the more detailed functioning of which can be seen in **Annex I** *infra*.[18]

Such "generational changes" are to a great extent the result of technology reacting to jurisprudence (and legislation) increasingly expanding the scope of infringement of copyright law, in such notorious cases on both sides of the Atlantic as *Napster*,[19] *MP3.com*,[20] *In re Aimster*,[21] *KaZaA*,[22] Audiogalaxy, *Grokster*,[23] Limewire and *Pirate Bay*.[24] The latter refers to the most popular file-sharing protocol in the world–BitTorrent–,[25] which allows that a final downloaded version of

See also Jay Anderson, *Stream Capture: Returning Control of Digital Music to the Users*, 25 Harv. J.L. & Tech. 159 (2011) (discussing streaming, "stream capture techniques" and applicable alternative compensation mechanisms).

13 *See* Huygen et al., *supra* note 11, at 115 (using a similar 'catch-all' definition of "file-sharing").

14 For an overview of the chronological evolution of P2P *see Timeline of File Sharing*, Wikipedia.com, http://en.wikipedia.org/wiki/Timeline_of_file_sharing (last visited Jan. 31, 2012).

15 *See* Huygen et al., *supra* note 11, at 9 and 118 (linking broadband introduction to the adoption of P2P). *See also* OECD 2004 Report, *supra* note 10, at 10 (connecting availability of broadband with susceptibility of P2P use, despite recognizing that the first is not a precondition for the second).

16 Note, however, that some authors already make reference to a fourth generation (*see*, *e.g.*, M. Sakthivel, *4G Peer-to-Peer Technology – Is it Covered by Copyright?* 16 J. Intell. Prop. Rts. 309 (2011)).

17 *See* OECD 2004 Report, *supra* note 10, at 3.

18 Annex I: P2P "Generations" contains a depiction and description of a *P2P Centralized Model* (Fig. I.1.), a *P2P Decentralized Model* (Fig. I.2.) and of *P2P Third Generation Models* (Figs. I.3.a) and I.3.b)).

19 *A&M Records, Inc. v Napster, Inc* 239 F. Supp. 3d 1004 (9th Circ. 2001) [***Napster***].

20 *UMG Recording, Inc v MP3.com*, Inc 92 F. Supp. 2d 349 (S.D.N.Y. 2000) [***MP3.com***].

21 *In Re Aimster Copyright Litigation* 334 F. 3d 643 (7th Cir. 2003) [***In Re Aimster***].

22 HR Dec. 19, 2003, AN7253, case no.CO2/186 (Buma & Stemra/KaZaA) (Neth.) [***KaZaA***].

23 *Metro-Goldwyn-Mayer Studios, Inc v Grokster, Ltd* 125 S. Ct 2764 [***Grokster***].

24 Tingsrätt [TR] Stockholm [District Court of Stockholm] 2009-04-17 Case no. B 13301-06 (Swed.) [***Pirate Bay***].

25 *See* Envisional Technical report: An Estimate of Infringing Use of the Internet 7 (2011), http://documents.envisional.com/docs/Envisional-Internet_Usage-Jan2011.pdf (last visited Jan. 31, 2012) [hereinafter **Envisional Report**].

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a file is constituted by the combination of contributions of several uploaded files.[26]

This evolution of P2P systems can therefore be viewed has an attempt to escape the grasp of judicial decisions through legal or judicial safe harbors (e.g., *Sony v. Universal*[27] in the U.S.), be it from the more straightforward decisions of direct infringement (*Napster*), to the increasing more complex cases of secondary infringement, under theories of contributory infringement (*Napster, In re Aimster* and *KaZaA*), vicarious liability, inducement liability (*Grokster*) and, in some instances, criminal sanctions (*Pirate Bay*).[28] Although this writing does not focus on the liability of P2P software providers or ISPs, it is essential to have this issue in mind when discussing P2P networks and their evolution, not in the least given its continued actuality, as recently shown in much publicized cases, such as *UMG v Veoh*[29] (in the U.S.) and *Scarlet Extended* (in the E.U.).[30]

By all accounts, this technological flexibility of P2P has meant not only remarkable innovation but also its survival for over a decade–a lifetime in Internet age–, there being no signs that the foreseeable future will bring its obsolescence.

B. Economic background

Considered in isolation, file-sharing is a lawful activity representing an innovative technological solution with potential for further lawful uses[31] and raising consumer

26 See **Annex I** for further details. *See also*, for a description of the Pirate Bay service, Jerker Edström & Henrik Nilsson, *The Pirate Bay Verdict – Predictable and Yet…*, 31 Euro. Intell. Prop. Rev. 9:483, 483-484 (2009).

27 Sony Corp v Universal City Studios, Inc 464 U.S. 417, at 423, 104 S. Ct 774 (1984) [***Sony v. Universal***].

28 For an overview of the mentioned decisions prior to *Groskster, see* Patricia Akester, *Copyright and the P2P Challenge*, 27 Euro. Intell. Prop. Rev. 106, 106-110 (2005). For an analysis of *Grokster see* Paul Ganley, *Surviving Grokster: Innovation and future of Peer-to-Peer,* 28 Euro. Intell. Prop. Rev. 15 (2006). For an analysis of *Pirate Bay see* Edström & Nilsson, supra note 26, at 487-487.

29 *UMG Recordings, Inc., v. Veoh Networks, Inc*., Nos. 09-55902, 09-56777, 10-55732, 2011 U.S. App. WL 6357788, (9th Cir. Dec. 20, 2011).

30 Case C-70/10, Scarlet Extended SA v. Sabam, 2011 (*available at*: http://curia.europa.eu) [***Scarlet Extended***]. In *Scarlet Extended* the ECJ held that, under E.U. law, it is not possible for a national court to impose on ISPs (here: an access provider) an injunction requiring it to install (at its own cost), a comprehensive system for filtering all electronic communications containing protected works passing via its services, in particular those involving the use of P2P software, with the purpose of blocking the transfer of infringing files.

31 *See* Bart Cammaerts & Bingchun Meng, Media Policy Brief 1: Creative Destruction and Copyright Protection – Regulatory Responses to File-sharing 9, LSE Media Policy Project (2011), http://www.scribd.com/doc/51217629/LSE-MPPbrief1-creative-destruction-and-copyright-protection (last visited Jan. 31, 2012).

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welfare.[32] However, its relevance as an object of legal study depends upon its economic significance, chiefly when most P2P uses are deemed copyright infringement and labeled as "piracy".[33]

There is a wealth of economic data available on P2P and a detailed study of the same would go beyond the scope of this book. Hence, references will primarily be made to two 2011 reports, which focus on infringing uses of works on the Internet and include data on related P2P uses: the Envisional Report and the IFPI 2011 Report.[34, 35] Where justified, references will be made to the more recent IFPI 2012 Report.[36]

All Reports mentioned are considered with reservations, such as those related to methodology, quality of data, accuracy of results,[37] and source of origin.[38] Neither is all encompassing of this reality, as some relevant networks are not monitored,[39] nor do they shed light on usage in hidden or private networks ("darknets").[40] This implies, without great stretch of the imagination, that actual numbers for (infringing) file-sharing are higher than current estimates show. However, these Reports offer a good overview of the relative position of P2P in the context of Internet traffic and online uses of works, which is essential for understanding its economic significance.

The Envisional Report estimates the proportion of infringing traffic on the Internet on a global basis by cross analyzing its own researched data with that of other

32 *See* Huygen et al., *supra* note 11, at 3 & 120 (referring that positive short and long-term welfare effects are felt when P2P is practiced by consumers lacking purchasing power).

33 *See* World Intellectual Prop. Org., WIPO Intellectual Property Handbook 51 (2d ed. 2004) (defining piracy as "the unauthorized copying of copyright materials and the unauthorized commercial dealing in copied materials").

34 *See* IFPI Digital Music Report 2011: Music at the touch of a Button (2011), http://ifpi.org/content/library/DMR2011.pdf (last visited Jan. 31, 2012) [hereinafter **IFPI 2011 Report**].

35 IFPI data is particularly relevant as the Commission also takes it into in its policy making, as can be seen, *e.g.*, in *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, on a Single Market for Intellectual Property Rights boosting creativity and innovation to provide economic growth, high quality jobs and first class products and services in Europe*, COM(2011) 287 final (May 24, 2011) [hereinafter **IPR Strategy**], at 5 & n.10, 10 & n.19.

36 *See* IFPI Digital Music Report 2012: Expanding Choice. Going Global (2012), http://www.ifpi.org/content/library/DMR2012.pdf (last visited Jan. 31, 2012) [hereinafter **IFPI 2012 Report**].

37 *See* Envisional Report, *supra* note 25, at 56 (recognizing some of these caveats).

38 The Envisional Report was commissioned by NBC and the IFPI Reports originate from a CMOs' Federation, both pro-rights holders sources.

39 *See* Envisional Report, *supra* note 25, at 54 (exemplifying with Ares, DirectConect, Kad, Gnutella 2 and MP2P).

40 *See* Ericsson, *supra* note 10, at 13-14 (contending that implementation of anti-detection technologies may have the effect of decreasing P2P use, while making it harder to tackle). *See also* Annemarie Bridy, *Why pirates (still) won't behave: regulating P2P in the decade after Napster*, 40 Rutgers L.J. 565, 594-596 (2009) (referring the difficulties in monitoring encrypted networks, especially through deep packet inspection).

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major studies.[41] It concludes that "23% of all internet bandwidth is devoted to the transfer of infringing and non-pornographic content".[42] Infringing content is divided into three major areas: P2P networks (focusing on BitTorrent, eDonky, Gnutella and Usenet); cyberlockers (i.e., file-hosting sites); and other web-based networks (e.g., streaming video).[43]

P2P accounts for about 25% of global Internet traffic, over 17% of which is estimated to be infringing copyright.[44] The major portion of content shared relates to video with music representing a small part of the total amount,[45] a discrepancy justified by video files occupying much more bandwidth than music files.[46] In fact, the most downloaded content worldwide in the P2P context seems to be precisely music.[47]

Although this Report does not clearly define regional P2P data for the E.U., at least one of the studies analyzed advances that file-sharing constitutes about 30% of all Internet traffic in the "old continent", with BitTorrent being the most popular network.[48]

The IFPI 2011 Report focuses on digital music and the emerging online market for its legal licensing. It classifies P2P as a mostly infringing activity, which constitutes 23% of users' activities when accessing the Internet across the top five E.U. markets, while confirming the prevalence of BitTorrent.[49]

Legally licensed music is presented as a significant emerging market (with 400 licensed digital music services worldwide) where partnerships with ISPs and mobile operators are viewed as essential, given their existing billing relationships with the scalable consumer market.[50]

41 *See* Envisional Report, *supra* note 25, at 27-42 (analyzing the "Sandvine: 2009 Global Broadband Phenomena", the "Arbor Networks: ATLAS Observatory 2009 Annual Report", the "Cisco: 2009 Visual Networking Index Usage Study" and the "iPoque: Internet Study 2008/2009").

42 *Id.* at 55.

43 *Id.*

44 *Id.* at 2-3 and 47-48.

45 *Id.* at 10-11 and 25 (for example, in what concerns BitTorrents alone, films amount for 85,5% of analyzed torrents, while music is limited to 2,9%, although it is the most popular content on some networks, such as Gnutella).

46 Although noting a relative decrease in favor of other types of files between 2002 and 2003, audio files were still in the lead of the most shared files in monitored P2P systems in OECD countries in that period; note, however, that already in 2004 P2P included much more than MP3 files, being "applied for all types of on-line information, data distribution, grid computing and distributed file systems" (*see* OECD 2004 Report, *supra* note 10, at 12).

47 *See* Huygen et al., *supra* note 11, at 118.

48 *See* Envisional Report, *supra* note 25, at 30.

49 *See* IFPI 2011 Report, *supra* note 34, at 14-15.

50 *Id.* at 3-8. In 2012 the number of licensed digital music services worldwide is of 500, offering up to 20 million tracks (*see* IFPI 2012 Report, *supra* note 36, at 10).

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Amid positive indicators[51] this Report emphasizes some "negative" numbers perceived to be caused by piracy/P2P, such as:

(i) The 31% decline in the value of the global recorded music industry (in 2010);
(ii) An estimated fall of 77% in debut album unit sales in the global top 50 in the period of 2003-2010;
(iii) A 12% fall in the revenues of the global top 50 tours in 2010;
(iv) A projected 1.2 million jobs to be lost in the European creative industries by 2015; and
(v) A whopping € 24 billion of estimated cumulative lost retail revenues to the European creative industries within 2008–2015.[52]

These numbers are highlighted despite massive offering of diversified legal licensing models,[53] leading to the conclusion that P2P is the primary culprit of the industry's economic losses.[54]

Other than its apparent lack of solid economic background, this Report deserves particular criticism due to its presentation/bundling of data not clearly (or at least convincingly) interrelated–such as online piracy and revenue decreases in debut albums, musical tours, number of employed musicians and jobs in the creative industries–, all of which underline the very debatable idea that P2P is a direct cause of loss of revenue of the music industry.[55]

It also presents data indicating a negative impact on unknown and upcoming artists, neglecting to discuss the visibility benefits related with P2P's inherent "sampling" effect.[56]

51 *See* IFPI 2011 Report, *supra* note 34, at 5 and 12 (highlighting, *inter alia*, a 1000% increase in the value of the digital music market).
52 *Id.* at 5. Note that IFPI's numbers in earlier surveys have been criticized as being "often based on the wishful thinking of rights holders", which wrongly assume "that most unauthorized copies would be replaced by the sale of a legitimate product if file-sharing was effectively controlled" (*see* Cammaerts & Meng, supra note 31, at 5).
53 *See* IFPI 2011 Report, *supra* note 34, at 14.
54 *Id.* (identifying other less relevant components as "alternative forms of illegal distribution such as cyberlockers, illegal streaming services and forums…").
55 Arguing that no such direct correlation has been clearly established *see*: Lewinsky 2005, *supra* note 8, at 4-5 (referring to CD sales); Huygen et al., *supra* note 11, at 115 and 120; Cammaerts & Meng, *supra* note 31, at 2 (pointing out other factors such as "changing patterns in music consumption, decreasing disposable household incomes for leisure products and increasing sales of digital content through online platforms"). *But see* Norbert J. Michel, *The Impact of Digital File Sharing on the Music Industry: An Empirical Analysis*" 6 Topics Econ. Analysis & Pol'y (Iss.1) Article 18 (2006), 11, http://www.bepress.com/bejeap/topics/vol6/iss1/art18 (last visited Sep.10, 2011) (concluding, based on a analysis of the micro-level from the consumer expenditure survey, that P2P "may have reduced album sales (between 1999-2003) by as much as 13 percent for some music consumers" and that there is "no evidence that file sharing led to a widespread increase in music purchases").
56 *See* Huygen et al., *supra* note 11, at 121.

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Finally, the policy oriented nature of the IFPI 2011 Report is made clear on those sections where statistical and economic data is used as a justification for political rhetoric. The IFPI, it seems, believes that to establish a market for legal online music distribution copyright law must be strengthened and more effective enforcement is required, as only this combination will prevent P2P piracy. Rhetoric surfaces when such point is made through an unconvincing case study of file-sharing in Sweden, post-implementation of the Enforcement Directive and following the decision on *Pirate Bay*.[57] The Report uses such example to praise the adoption of "graduated response" type of legislation in the E.U., most notably the Hadopi laws in France[58] and the Digital Economy Act in England.[59]

In general, this approach seeks to implement a system where ISPs monitor users' potentially infringing actions (and/or act upon notice thereof by rights holders), serving notifications and warnings on said users to stop infringing. Should a user not stop after a legally pre-determined number of warnings, sanctions are applied, ranging from penalties to time-limited bans on Internet access.[60]

However, the IPFI 2011 Report makes no reference to significant problems that may arise when implementing such systems, namely concerning its compatibility with principles of freedom of expression and privacy, especially where the "right of access to the Internet" can be terminated by an administrative authority without previous judicial intervention; in fact, it was precisely this point that motivated the

57 *See* IFPI 2011 Report, supra note 34, at 11. *See also* Adrian Adermon & Che-Yuan Liang, *Piracy, Music and Movies: A Natural Experiment* 2 (Research Inst. of Indus. Econo., IFN Working Paper No. 854, 2010) *available at* http://www.ifn.se/wfiles/wp/wp854.pdf (last visited Jan. 31, 2012) (analyzing the effects of illegal P2P on music and movie sales in Sweden following the implementation of the Enforcement Directive, concluding that "pirated music is a strong substitute for legal music whereas the substitutability is less for movies").

58 For an analysis of French legislation leaning up to and including the Hadopi laws, highlighting its complexity, repressive potential, compatibility with the European Convention on Human Rights and general appropriateness, see Christophe Geiger, *Honorable Attempt but (Ultimately) Disproportionate Offensive against Peer-to-peer on the Internet (HADOPI) – A Critical Analysis of Recent Anti File-Sharing Legislation in France* (2011), 42 Int'l Rev. Intell. Prop. & Competition L. 457 (2011).

59 *See* IFPI 2011 Report, *supra* note 34, at 19 (highlighting the legal settlement between Eircom and IRMA in Ireland, which led to implementation of a pilot graduated response program). *See also* IFPI 2012 Report, *supra* note 36, at 18 (providing further information on Eircom's graduated response system and the parallel offer of a fully authorized streaming and download service named MusicHub).

60 For an explanation of the specific workings of graduated response system under the Hadopi laws *see* Geiger, *supra* note 58, at 466 et seqs.

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refusal by the French Constitutional Council of the Hadopi 1 law and the shift to the Hadopi 2 law.[61]

The need for judicial intervention is also viewed as essential by the European Parliament, which in a resolution of 2010–concerning the ACTA negotiations and referring to an amendment to the Directive on common regulatory framework for electronic communications networks and services–, considered that

> in order to respect fundamental rights, such as the right to freedom of expression and the right to privacy, while fully observing the principle of subsidiarity, the proposed agreement should not make it possible for any so-called 'three-strikes' procedures to be imposed, in full accordance with Parliament's decision on Article 1.1b in the (amending) Directive 2009/140/EC calling for the insertion of a new paragraph 3(a) in Article 1 of Directive 2002/21/EC on the matter of the 'three strikes' policy; considers that any agreement must include the stipulation that the closing-off of an individual's Internet access shall be subject to prior examination by a court.[62]

The IFPI 2012 Report is in many aspects similar to its predecessor. On the one hand, it highlights growth in digital music revenues to record companies,[63] an increase of 17% in downloads and a broad segmentation of this market into consumption models of "ownership" and "access", thus attempting to show the industry's capability to adapt its business models to the digital age.[64] On the other hand, it singles out "digital piracy" as the major danger to these markets, stating that more than a quarter of internet users globally "access unauthorized services on a monthly basis",[65] around half of which via P2P networks.[66]

IFPI's strategy to tackle this perceived danger can be summarized as an approach involving "an inclusive combination of graduated response, site blocking and other [*mostly enforcement*] measures", with a great deal of focus placed on the role of

61 *Id.* (further noting additional problems arising from Hadopi 2, such as the possibility of accumulation of penalties applying both to users and ISPs). For an analysis of the French Constitutional Council's decision and the shift to the Hadopi 2 law against the backdrop of a broad constitutional concept of freedom of speech that includes Internet access, *see* Nicola Lucchi, *Regulation and Control of Communication: The French Online Copyright Infringement Law (HADOPI)*, 19 Cardozo J. Int'l & Comp. L.__ (2011); Max Planck Institute for Intellectual Property & Competition Law Research Paper No. 11-07. *Available at SSRN*: http://ssrn.com/abstract=1816287.

62 *See* European Parliament, *Resolution of on the transparency and state of play of the ACTA negotiations*, P7_TA(2010)0058, 2010, *available at*: http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2010-0058&language=EN [hereinafter **EP Resolution on ACTA Negotiations**], at para. 11.

63 *See* IPFI 2012 Report, *supra* note 36, at 6 (noting the first ever year-on-year growth the IFPI has reported, with an 8% increase in 2011 alone, to an estimated US$5.2 billion).

64 *Id.* at 6, 7 and 10.

65 *Id.* at 9 (citing an Nielsen/IFPI study).

66 *Id.* at 16 (indicating that in Europe this percentage is of 27%, according to Nielsen/IFPI, November 2011 data).

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intermediaries, such as ISPs, "payment providers, advertisers, mobile service providers and search engines".[67]

Much effort goes into detailing these measures and promoting graduated response systems "as the most proportionate and effective solution to address the major problem of P2P piracy", arguing that such systems effectively change consumer behavior.[68] The Hadopi laws in France are once again highly praised as a successful example to be followed,[69] as are its counterparts in other areas of the world, namely the U.S., such as the agreement struck between rights holders and ISPs for a system of "copyright alerts" notifying internet subscribers of infringing uses made via their accounts, as well as the "Stop Online Piracy Act" (SOPA) and the "Protect IP Act" (PIPA).[70]

As with its predecessor, this Report does not mention the legal challenges that come with the implementation of such systems, being equally oblivious to its economic costs. The latter are simple to understand when one considers the enormous investment required by the administrative structure of the system, together with the judicial management of related litigation and the legal interpretation costs it creates, which risk becoming exponential given the fast obsolescence of these pieces of legislation.[71] Furthermore, the economic weight of this approach can only grow in a context of user resistance to adoption, a factor ever more clear to rights holders and legislators in the wake of the extraordinary backlash experienced by the U.S. government when discussing the SOPA and PIPA–which eventually led to its demise (at least under the current format)[72]–and the E.U. with the discussions on

67 *Id.* at 9 and 16-26 (although the Report mentions its own three-pronged approach, consisting of "[p]roviding attractive legitimate services and conducting public education campaigns", together with "the ability of the industry to effectively enforce its rights", we believe that the its content clearly emphasizes enforcement measures such as those described above).

68 *Id.* at 16-17. For a list of countries that have enacted legislation comprising some form of graduated response systems, *see* Dusollier & Colin, *supra* note 8, at 812 & n13.

69 *See* IPFI 2012 Report, *supra* note 36, at 9, 16-18 and 20 (noting studies that show a decline of 26% of overall P2P use since notices started being sent in October 2010 and a positive impact on iTunes sales in France).

70 *Id.* at 21.

71 One need only look at the example of France and its complex regulation calling for the need of multiple legislative pieces, the ground-up creation of an administrative authority and its implementation (including the necessary and costly management systems), the thousands of notices to users, the related administrative and judicial litigation, the public advertisement and education campaigns, etc. On the complexity, legal interpretation costs and obsolescence risks of the French system, *see* Geiger, *supra* note 58, at 469 et seqs. *See* also IPFI 2012 Report, *supra* note 36, at 27 (noting a € 3 Million cost of a campaign to support the launch of Hadopi).

72 See *Reid Statement On Intellectual Property Bill* (Jan. 20, 2012, 9:17 AM), http://democrats.senate.gov/2012/01/20/reid-statement-on-intellectual-property-bill/ (last visited Jan. 31, 2012) and *Statement from Chairman Smith on Senate Delay of Vote on PROTECT IP Act* (Jan. 20, 2012), http://judiciary.house.gov/news/01202012.html (last visited Jan. 31, 2012).

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the adoption of ACTA and the possibility of it being referred to the ECJ for compatibility with E.U. law.[73]

On the other hand, IFPI's focus on the role of ISPs as gatekeepers[74] may to some extend be undermined in the E.U. by the decision in *Scarlet Extended*, as well as rules on privacy, personal data and e-commerce–with emphasis on the forthcoming framework for "for notice and action procedures"[75]–applying to intermediaries, leaving some doubts as to what role will ISPs be willing to play in the context of social and economically costly "repressive" measures towards digital piracy.

Interestingly, neither of the 2011 or 2012 IFPI Reports make reference to DRM, a former flagship of rights holders in the fight against infringement, an omission that is however understandable, given its generalized failure to produce any significant impact on digital piracy.[76]

Be that as it may, the inescapable conclusion to be drawn from all reports mentioned is the enormous economic significance of P2P, a fact amplified by its promotion as a "tool of rhetoric" in the E.U. copyright policy debate.[77]

73 On the issue of E.U. competence to negotiate ACTA *see* Ana Ramalho, *The European Union and ACTA – Or Making Omelettes without Eggs (Again)*, 42 Int'l Rev. Intell. Prop. & Competition L. 97 (2011). For background and main issues raised by ACTA in the E.U., *see also* the EP Resolution on ACTA Negotiations.

74 *See* IPFI 2012 Report, *supra* note 36, at 19 and 24-26.

75 *See Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions – A coherent framework for building trust in the Digital Single Market for e-commerce and online services*, COM(2011) 942 (Jan. 11, 2012) [hereinafter **Communication on E-commerce and Online Services**], at 13-15.

76 See Huygen et al., *supra* note 11, at 116 (noting that "the music industry's initial defensive strategy of legal measures and DRM protection has not succeeded in stemming the swelling tide of music sharing and that the industry has failed to come up with an early answer to today's new digital reality").

77 Examples are abundant, but perhaps none more impressive then the creation of "Pirate Parties" (political spin-offs from the P2P debate and *Pirate Bay* in particular) in several E.U. countries which even, in the case of the Swedish chapter, managed to obtain a seat in the European Parliament (*see*, *e.g.*, http://news.bbc.co.uk/2/hi/8089102.stm, last visited Jan. 31, 2012). Another interesting example is that of the recognition in Sweden of the Missionary Church of Kopimism as a religious organization by the competent authorities; this religion defines itself as the "absolute opposite" of the "Copyright Religion" (*see* Det Missionerande Kopimistsamfundet, http://kopimistsamfundet.se/english/, last visited Jan. 31, 2012).

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III. Copyright, territoriality and P2P

This Chapter explores the challenges placed on the territorial nature of copyright by digital age technology, in particular P2P. It begins, in section A, by putting copyright law and its territoriality principle into perspective, especially in the E.U. framework, in an effort to understand the context in which P2P uses and collective management must be analyzed. Section B provides a legal qualification of P2P uses under the exclusive rights categories of reproduction and making available. Section C then proceeds with a similar treatment of P2P related exceptions and limitations. The analysis carried out in this Chapter provides the essential legal framework for understanding file-sharing under the *acquis* and, as such, the necessary foundations for the examination of collective management made in Chapter IV and of potential collective rights management solutions for P2P discussed in Chapter V.

A. Territoriality and harmonization

Implementing an alternative design for P2P in the E.U. requires assessing its legal *status quo* under the *acquis*. This is greatly influenced by international copyright law, namely the WIPO Internet Treaties, which are in turn part of a more complex system featuring the Berne Convention and TRIPS.

The TRIPS and the Berne Convention establish international minimum standards for copyright protection.[78] Higher levels of protection are available under the WIPO Internet Treaties, both signed and ratified by the E.U. and each of its Member States.

It has been a long standing ambition of the E.U. to solve the problem of territoriality of copyright through the harmonization of Member States' laws.[79] Such ambition set in motion an harmonization program since the 1980's that has spawned

78 Art. 9(1) TRIPS incorporates the Berne Convention's most relevant substantial provisions. TRIPS further encompasses copyright subject matter not covered by the Berne Convention in arts. 10 (computer programs) and 11 (rental rights).

79 On the problem of territoriality in E.U. copyright law *see*, for all, P. Bernt Hugenholtz, *Copyright without frontiers: the problem of territoriality in European copyright law*, *in*, Research Handbook on the Future of EU Copyright 12 (Estelle Derclaye Ed., Edward Elgar 2009).

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a remarkable number of Green Papers (and respective Follow-ups),[80] Resolutions,[81] Communications,[82] Studies,[83] Recommendations,,[84] Reports,[85] and, most

80 *See Commission Green Paper on Copyright and the Challenge of Technology*, COM (88) 172 final (June 7, 1988), *Commission Follow-up to the Green Paper 1988 – Working Programme of the Commission in the Field of Copyright and Neighbouring Rights*, COM (90) 584 final, (Jan. 17, 1991), *Commission Green Paper on Copyright and Related Rights in the Information Society*, COM (95) 382 final (July 19, 1995), *Commission Follow-up to the Green Paper on Copyright and Related Rights in the Information Society*, COM (96) 568 final (Nov. 20, 1996), and the *Commission Green paper on the online distribution of Audiovisual works in the European Union: opportunities and challenges towards a single digital market*, Brussels, COM (2011) 427 final (July 13, 2011) [hereinafter **Green Paper on Online Distribution of Audiovisual Works**].

81 *See* European Parliament, *Resolution on a Community framework for collective management societies in the field of copyright and neighbouring rights* (2002/2274(INI)), P5_TA(2004)0036, 2004 O.J. (C 92) [hereinafter **Community Framework Resolution**], European Parliament, *Resolution of 13 March 2007 on the Commission Recommendation of 18 October 2005 on collective cross-border management of copyright and related rights for legitimate online music services (2005/737/EC)*, P6_TA(2007)0064, 2007, *available at*: http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2007-0064&language=EN [hereinafter **EP Resolution OMR**], European Parliament, *Resolution of 25 September 2008 on collective cross-border management of copyright and related rights for legitimate online music services*, P6_TA(2008)0462, 2008, *available at*: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2008-0462+0+DOC+XML+V0//EN [hereinafter **EP Resolution CCBM**] and European Parliament, *Resolution of 16 November 2011 on European cinema in the digital era* (2010/2306 (INI)), P7_TA(2011)0506, 2011 *available at*: http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2011-0506 [hereinafter **EP Resolution Cinema in Digital Era**].

82 *See Communication from the Commission to the Council, the European Parliament and the European and Social Committee – The Management of Copyright and Related Rights in the Internal Market*, COM (2004) 261 final (Apr. 16, 2004) [hereinafter **Communication on Management of Copyright**], *Communication from the President in agreement with Vice-President Wallström – Commission Work Programme for 2005*, COM (2005) 15 final, (Jan. 26, 2005) [hereinafter **Commission Work Programme 2005**], *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, on Creative Content Online in a Single Market*, COM (2007) 836 final (Jan. 3, 2008) [hereinafter **Creative Content Online Communication**], the IPR Strategy and the Communication on E-commerce and Online Services.

83 *See Commission Staff Working Document – Study on a Community Initiative on the Cross-Border Collective Management of Copyright* (July 7, 2005) *available at*: http://ec.europa.eu/internal_market/copyright/docs/management/study-collectivemgmt_en.pdf [hereinafter **Study CBCM 2005**].

84 *See* Commission Recommendation 2005/737/EC of 18 Oct. 2005 on collective cross-border management of copyright and related rights for legitimate online music services, 2005 O.J. (L 276); Corrigenda, 2005 O.J. (L 284) [hereinafter **Online Music Recommendation**].

85 *See Commission Report on the Monitoring of the 2005 Music Online Recommendation*, (Feb. 7, 2008), *available at*: http://ec.europa.eu/internal_market/copyright/docs/management/monitoring-report_en.pdf [hereinafter **OMR Monitoring Report**] and *Commission Final Report on the Content Online Platform* (May 2009), *available at*: http://ec.europa.eu/avpolicy/docs/other_actions/col_platform_report.pdf [hereinafter **Final Report Content Online Platform**].

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importantly, seven E.U. Directives (all during the 1991-2001 decade)[86] exclusively related to copyright and related rights–namely the Software Directive, Rental Right Directive, Satellite and Cable Directive, Term Directive, Database Directive, InfoSoc Directive and the Resale Right Directive–as well as the broader Enforcement Directive (of 2004), which also applies to copyright.

In this process of "upwards harmonization" the copyright Directives managed to not only tackle the better part of the issues addressed in the Green Papers, but also to surpass the minimum standards set forth in the Berne Convention and the Rome Convention, to which the Member States are parties, all with the purpose of removing disparities amounting to barriers to the free movement of goods and services.[87] Among the non-harmonized areas, collective rights management features prominently.

However, harmonization efforts have hitherto failed to address the main underlying reason for such disparities–the territoriality principle–, which is both enshrined in art. 5(2) Berne Convention and confirmed by E.U. case law.[88] This has prompted some authors to propose a more fundamental approach to the territoriality conundrum and achieve the Internal Market goal: introducing of a Community copyright modeled upon the existing unitary Community Trademark[89] and Community Design,[90] to be implemented through a Regulation (using art. 118 TFEU as the relevant legal basis).[91] To be sure, this is the only path to effectively unify (rather than merely harmonize) a right which is fragmentary by nature.

Putting things in perspective by way of example: for an E.U.-wide user of digital musical works, the territorial matrix of copyright implies the need to get a license on each divisible use (e.g. reproduction and making available online) in each of the twenty seven Member States. This amounts both to a competitive disadvantage vis-à-vis other competing markets (e.g., U.S.)[92] and to a negative impact on online uses

86 Although some Directives have since been amended, most notably the Rental Right Directive (in 2006), the Software Directive (in 2009), and the Term Directive (in 2006 and 2011).

87 *See* Hugenholtz, *supra* note 79, at 17.

88 *Id.* at 18. *See also* Case C-192/04, Lagardère Active Broadcast v. SPRE and Others, 2005 E.C.R. I-7199 [***Lagardère***].

89 *See* Council Regulation 207/2009 of 26 February 2009 on the Community trade mark (codified version), 2009 O.J. (L 78/1).

90 *See* Council Regulation 6/2002/EC of 12 December 2001 on Community designs, O.J. (L3/1), as amended.

91 *See* Hugenholtz, *supra* note 79, at 25-26, and M.M.M. van Eechoud, P.B. Hugenholtz, S. van Gompel, L. Guibault & N. Helberger, Harmonizing European Copyright Law: The Challenges of Better Lawmaking, 19 Info. L. Series, 316-325 (Kluwer Law International 2009). In this context, a group of scholars (the Wittem Group) has produced a draft version of a European Copyright Code (*see* Wittem Group, *European Copyright Code*, 33 Euro. Intell. Prop. Rev 76 (2011)). For a critical analysis of this draft *see* Jane C. Ginsburg, *"European Copyright Code" – Back to First Principles (with Some Additional Detail)*, Colum. Pub. L. & Legal Theory Working Papers, Paper 9193 (2011), http://lsr.nellco.org/columbia_pllt/9193 (last visited Jan. 31, 2012).

92 *See* Hugenholtz, *supra* note 79, at 12.

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of works (and, *ergo*, P2P uses), as already noted by the Commission, particularly in the field of online music distribution.[93]

In its 2011 IPR Strategy, the Commission proposes a strategy to shape the future for intellectual property rights in the E.U., focusing on the design of "enabling legislation" for the regulation and optimization of the relationship between creators, service providers and consumers, with the aim of achieving a true single market.[94] On online content uses (potentially impacting P2P) it refers to the creation of a comprehensive framework for copyright in the digital singe market.[95]

This includes the presentation of a "proposal to create a legal framework for the collective management of copyright to enable multi-territorial and pan-European licensing", in particular in the music sector; such framework containing common rules on transparent governance and revenue distribution (e.g., by incentivizing the creation of European "rights brokers").[96] Such proposal was initially foreseen for the second semester of 2011,[97] which proved to be an overly optimistic deadline; at the time of this writing, the Commission expected to present said draft proposal for a framework Directive on "online copyright licensing of multi-territorial and pan-European services" by "early 2012".[98]

The IPR Strategy further states the intention to amend the Enforcement Directive so as to better combat infringements of intellectual property rights via the Internet, with the aid of ISPs and respecting user's fundamental rights.[99]

The Commission goes however one (surprising) step further, setting forth the foundations for a veritable "jump" from the harmonization approach of the last three decades towards a unification approach, by expressly recognizing the admissibility (and future examination) of a "more far reaching overhaul of copyright at the European Level" through the "creation of a European Copyright Code… on the basis of Article 118 TFEU"–along the lines proposed by the Wittem Group–while also opening the door for the review of the InfoSoc Directive's exceptions and limitations.[100] This intention is also mentioned and developed in the Green Paper on Online Distribution of Audiovisual Works, where it is suggested that a "a unitary European Copyright Code could be based on a codification of the existing EU copyright directives", and that the E.U. will examine the feasibility of "an optional unitary copyright title on the basis of Article 118 TFEU", which "could be made

93 *See*, *inter alia.*, the Online Music Recommendation.
94 *See* IPR Strategy, at 6.
95 *Id.* at 9-14.
96 *Id.* at 10-11 and 23-24.
97 *Id.*
98 *See* Green Paper on Online Distribution of Audiovisual Works, at 12. *See also* Communication on E-commerce and Online Services, at 6-7.
99 See IPR Strategy, at 19.
100 *Id.* at 11.

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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.

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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).

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> 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.

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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.

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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).

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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).

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However, this test currently extends to all economic rights, by virtue of arts. 13 TRIPS, 10 WCT (and its Agreed Statements) and 16 WPPT.[139]

The InfoSoc Directive contains a single narrow mandatory exception and limitation for temporary and transient copying–in art. 5(1)–, as well as a catalogue of twenty optional exceptions and limitations spread through arts. 5(2) and 5(3).[140] According to Recital (33), temporary copying includes acts of browsing and caching, provided these "are an integral and essential part of a technological process" and "have no independent economic significance".[141]

It must be borne in mind that the referred mandatory exception does not apply to software or databases[142] meaning, *inter alia*, that software reproduction or making available is not covered by any exception and limitation, as any reproduction of a computer program would be a restricted act under art. 4 Software Directive.

This rigid catalogue does not include any flexible "escape valves" (e.g., fair use[143] or fair dealing[144] provisions) allowing for evolutionary adjustment of exceptions and limitations to cultural, technological and social demands, thus balancing the scope growth of economic rights, *maxime* in the digital environment. [145] Furthermore, the application by Member States of any exception and limitation is subject to the three-step test, under a broad art. 5(5),[146] according to which

> The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.

It should be noted that the three-step test also applies to the Software Directive–art. 6(3) –, Database Directive–art. 6(3)–, and Rental Right Directive (by virtue of art. 11(2) InfoSoc Directive).

139 E.g., art. 13 TRIPS reads: "Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder".

140 *See* Michael Hart, *The Copyright in the Information Society Directive: An Overview*, 24 Euro. Intell. Prop. Rev. 2:58, 59 (2002).

141 On the difficulty of giving operational meaning to these criteria, *see* Hart, *supra* note 140, at 59 (2002).

142 By virtue of art. 1(2).

143 *See* 17 U.S.C. § 107.

144 *See* §§ 29-30 UK Copyright, Designs and Patents Act 1988,.

145 *But see* P. Bernt Hugenholtz & Martin R.F. Senftleben, *Fair use in Europe. In Search of Flexibilities* (Nov. 2011), *available at*: http://www.ivir.nl/publications/hugenholtz/Fair%20Use%20Report%20PUB.pdf (last visited Jan. 31, 2012) (arguing that the prototypical nature of the list of exceptions leaves Member States with "broad margins of implementation" and that the ample unregulated space regarding other rights than reproduction and communication to the public, together with the three-step test, could "effectively lead to a semi-open norm almost as flexible as the fair use rule of the United States").

146 *See* Eechoud et al., *supra* note 91, at 117-118 (pointing out the implementation issues raised by this provision).

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In the context of P2P, the private use/copying exception and limitation potentially applies to the initial and subsequent reproduction by users.[147] Such exception and limitation is designed (inconsistently) in art. 5(2)(b) InfoSoc Directive as optional, but with sole application to the reproduction right:[148]

> Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases:
> (…)
> (b) in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned.

Given P2P's economic background[149] there seems to be no strong case to argue that its uses support research, teaching or other acts covered by the remaining exceptions and limitations to the reproduction or communication to the public rights under arts. 5(2) and 5(3).[150]

As such, two conclusions must be drawn here:

(i) P2P reproduction acts are admissible absent consent of the right holder only if privileged under private use; and
(ii) No exceptions and limitations cover the acts of making available, meaning that the acts of *upload* to a P2P network are absolutely restricted.

The optional nature of art. 5(2)(b) also raises concerns, as some Member States have not fully implemented this exception and limitation.[151] Hence, any P2P reproduction in such territories would in principle be restricted.

Where art. 5(2)(b) has been implemented, it is subject to payment of "fair compensation". This concept is not defined in the Directive–although limited guidance

147 *See* Lewinsky 2005, *supra* note 8, at 7-8. *See also* Goldstein & Hugenholtz, *supra* note 113, at 370-373 (raising the questions of whether private copying levies should also compensate for unlawful uses, such as P2P, and whether such levies and corresponding exemptions should survive in a DRM controlled digital environment).

148 *See* Eechoud et al., *supra* note 91, at 113-114 (pointing out inconsistencies of this exception and limitation under the Directive and remaining *acquis*). *See also* Stephan Bechtold, *Commentary on the Information Society Dir.* art.5, note 6, in Concise European Copyright Law (Thomas Dreier & P.B. Hugenholtz eds., Kluwer Law International 2006) (comparing the considerable broader scope of the Directive's three-step test provision with that of art. 9(2) Berne Convention).

149 *See supra II.B.*

150 *See* Lewinsky 2005, *supra* note 8, at 6-7 (concluding that the P2P acts of upload will usually not be covered by national exceptions and limitations, while download may be covered by private use exceptions and limitations).

151 *See* Eechoud et al., *supra* note 91, at 118 (exemplifying with the UK and Ireland).

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is provided in Recital (35)[152]–and constitutes an attempt to approximate the continental levy-based "equitable remuneration" system and the UK and Ireland non-levy system, against an E.U. backdrop of divergent levy systems.[153] Both the Recital and the provision further demand that such compensation takes into consideration the application of TPMs, but provide no guidance on how to do so. ECJ case law on this matter has also been unhelpful on the articulation of "fair compensation" and TPMs.[154] In our view, this reference can be construed as meaning that, where TPMs substantially hinder a user's possibility of exercising its private copy exception and limitation, no fair compensation is due.[155]

Considering the broad scope of the reproduction right and narrow application of the private copying exception and limitation, it seems that P2P acts of reproduction are seldom privileged. To be sure, where the initial reproduction on a user's computer is made for purposes of subsequent upload to a P2P network, it cannot qualify as private use; similarly for those cases where, due to the P2P software's design, a copy of the file is automatically made available for other users to download in a network, because no reasonable argument can be made as to the private nature of this reproduction.[156] Such interpretation renders infringing most P2P downloads in systems with automated upload design features.

However, if such intent is not established or can reasonably be inferred by the nature of the P2P system, the opposite conclusion must be reached, and the exception and limitation applies. In fact, where national law does not establish otherwise, an initial private use reproduction should not change its privileged character if the user subsequently makes the copy of the work available in a P2P network, if for no other reason than these are *de iure* and *de facto* distinct acts, and legal certainty would not "digest" well a contamination of the reproduction right and *ex tunc* in-

152 The relevant part of this Recital reads: "…When determining the form, detailed arrangements and possible level of such fair compensation, account should be taken of the particular circumstances of each case. When evaluating these circumstances, a valuable criterion would be the possible harm to the rightholders resulting from the act in question. In cases where rightholders have already received payment in some other form, for instance as part of a licence fee, no specific or separate payment may be due. The level of fair compensation should take full account of the degree of use of [*TPMs*]. In certain situations where the prejudice to the rightholder would be minimal, no obligation for payment may arise.".

153 *See* Eechoud et al., *supra* note 91, at 118, and Hart, *supra* note 140, at 60.

154 In fact, altough relevant for purposes of defining the concept of "fair compensation" and the powers of Member States in implementing arts. 5(2)(b) and 5(5) InfoSoc Directive, neither *Padawan* (Case C-467/08, Padawan v SGAE, 2010, *available at*: http://curia.europa.eu) nor *Stichting de Thuiskopie v Opus* (Case C-462/09, Stichting de Thuiskopie v Opus Supplies Deutschland GmbH, Mijndert van der Lee and Hananja van der Lee, 2011, *available at*: http://curia.europa.eu) satisfactorily address the interrelation between the use of TPMs and the private copying exception.

155 In a similar sense, although more restrictive, *see* Eechoud et al., *supra* note 91, at 118.

156 *See* Lewinsky 2005, *supra* note 8, at 7. Note however that Member States' laws may value differently the knowledge and intent elements for purposes of infringement, thus reaching different conclusions.

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validation of an exception and limitation by an *a posteriori* act of making available.[157]

Similarly, where Member States' laws are silent, the subsequent acts of download by a user in network (without an automated upload process) can be considered as private copying. Nonetheless, some Member States have passed legislations aimed at combating P2P that contradict this interpretation, by making this exception and limitation dependent upon a qualification of the source of the reproduction or making available acts: if the source is obviously illegal (e.g., the current majority of P2P systems) the exception and limitation does not apply.[158]

Finally, a brief reference should be made to the systemic normative tension between exceptions and limitations and DRM, insofar as the latter constitutes a form of content control that can technologically prevent individual users from exercising legitimate private uses, such as those potentially applicable to P2P.[159] A detailed analysis of this complex issue is beyond the scope of this book; suffice it to say, at this stage, that such tension is amplified in the E.U. by the "WCT-plus" implementation carried out in arts. 6 and 7 InfoSoc Directive.[160]

157 *Id.* at 7-8 (raising the issue).

158 *See, e.g.,* § 53(1) German Copyright Act. *See also* Geiger, *supra* note 58, at 461 (referring additionally that the "Spanish and Finnish legislators clearly exclude downloading from an unlawful source from the scope of the private copy exception").

159 *See* Bridy, *supra* note 40, at 578. On the conflict between private copy and DRM in the E.U., *see* Séverine Dusollier & Caroline Ker, *Private copy levies and technical protection of copyright: the uneasy accommodation of two conflicting logics*, *in*, Research Handbook on the Future of EU Copyright 349 (Estelle Derclaye Ed., Edward Elgar 2009).

160 For an overview of these provisions and their implementation by the Member State *see* Eechoud et al., *supra* note 91, at 131-179, and Hart, *supra* note 140, at 61-64.

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IV. Collective management of copyright

This Chapter examines, first, the general features of the operation of collective rights management and its essential types. This is useful to provide a basic understanding of how collective management functions and how it articulates with the concepts introduced in the previous Chapters. Furthermore, the basic taxonomy provided hereunder will supply the foundations for the analysis, in the following Chapter, of the possible alternatives to apply collective management to P2P uses. Such taxonomy is provided mostly with reference to E.U. legislation so as to afford an adequate overview of the *acquis* in this respect.

Second, the Chapter aims to link the existing collective rights management schemes to the digital age, by making reference to the reality of mass online uses brought about by the Internet (e.g., P2P) and the increasing need felt to address them through multi-territorial licensing-type of systems, illustrating this point with a brief overview of the E.U.'s institutional approaches in this area.

A. Operation and types of collective management

1. General considerations

Collective rights management is a deviation from the general principle of exclusivity under copyright law, according to which any authorization for uses of a work must come from the rights holder; it thus works as an alternative (and limitation) to full individual exercise.[161] It addresses the issue of transaction costs inherent to the copyright paradox and the fragmented, informal, transferable and territorial nature thereof.[162]

E.U. secondary law, more concretely the Satellite and Cable Directive, defines a "collecting society" (or CMO) as "any organization which manages or administers copyright or rights related to copyright as its sole purpose or as one of its main purposes".[163] CMOs are mostly private entities that act as licensing intermediaries,

161 *See* Dusollier & Colin, *supra* note 8, at 817-818 (arguing that "the limitation only extends to the method of exercising one's copyright").

162 *See* Daniel Gervais, *Collective Management of Copyright: Theory and Practice in the Digital Age*, *in*, Collective Management of Copyright and Related Rights 1 (Daniel Gervais Ed., Edward Elgar 2nd ed. 2010) [hereinafter **Gervais 2010**].

163 Art. 1(4) Satellite and Cable Directive.

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royalty collectors, rights enforcers and, more recently, also develop social and cultural functions.[164]

Their establishment sometimes depends on government authorization and requires acquisition of authority to license works, collect royalties, as well as to create a repertoire of works; such authority can have its basis on legal provisions, contracts with rights holders and/or reciprocal repertoire cross-license representation agreements with other countries' CMOs.[165]

Authority to license is typically granted by rights holders (e.g. music composers, publishers or performers) to CMOs by assignment, agency or licensing. The latter can be exclusive or non-exclusive, thus granting (or not) to a CMO a monopoly on the right to license the specific work(s). Users of works are then licensed by CMOs on the basis of agreed tariffs and rights holders are paid by CMOs after usage data is collected and processed.[166] **Annex II** provides a representation of the role of CMOs as intermediaries between rights holders and users in a two sided market.

The applicable licensing terms and tariffs are set in accordance with a combination of state intervention and CMO regulation, the level of which varies greatly depending on the territory.[167]

In the E.U., the majority of CMOs are either *de iure* or *de facto* monopolies.[168] The two main umbrella organizations representing them are CISAC[169] and IFRRO,[170] with most collective management music agreements being based on the CISAC model contract, which follows a complex territorial licensing structure of fragmented rights and types of uses, coupled with reciprocity clauses.[171] **Annex III** depicts the CISAC model for cross-border licensing and highlights the use of reciprocal representation agreements between CMOs in different territories, allowing them to grant multi-repertoire licenses for each of the territories they represent, with respect to works of rights holders of different Member States.

By removing part of the rights holders' freedom to exercise their exclusive rights, collective rights management amounts to a restriction thereof. It is therefore important to categorize its main types, so as to understand which are best suited to cover P2P uses under current E.U. secondary law.

164 *See* Gervais 2010, *supra* note 162, at 3-5.
165 *Id.* at 6-7.
166 *Id.* at 7-9.
167 *Id.* at 7-8.
168 *Id.* at 13.
169 For an overview of CISAC's activities *see* www.cisac.org (last visited Jan. 31, 2012).
170 For an overview of IFRRO's activities *see* http://www.ifrro.org/ (last visited Jan. 31, 2012).
171 *See* Tanya Woods, *Multi-territorial Licensing and the Evolving Role of Collective Management Organizations*, *in*, Collective Management of Copyright and Related Rights 105, 108-109 (Daniel Gervais Ed., Edward Elgar 2nd ed. 2010).

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Based on the type of restriction imposed to the rights holder, we can consider three main types of collective rights management, from the least restrictive to the most restrictive:[172]

– VCL;
– Blanket licenses; and
– Mandatory collective management.

2. Voluntary collective licensing

In voluntary collective management licensing systems a contract is formed between the CMO (representing rights holders) and users or, depending on how the system might be set up, with intermediaries–such as ISPs–which obtain licenses for the benefit of its subscribers, i.e. the actual users of the works.[173] VCL is thus one of the least restrictive forms of collective rights management.[174] It's voluntary for rights holders and users.[175] The former are free to join a CMO and to decide which of their works are to be managed by the organization. Moreover, nothing prevents them from directly concluding licensing contracts with users, despite having joined a CMO. On the other hand, users can decide whether to obtain a license from a CMO or directly from the rights holder.

VCL is a typical rights management model in the E.U., albeit not for P2P.[176] It is the standard form of collective management allowing rights holders an efficient way to make available their works and users an easy way to obtain rights on such works, thus optimizing licensing activities.[177]

172 *See* Gervais 2010, *supra* note 162, at 26-27 (defining with more detail six levels of restriction, where the lowest level 0 corresponds to *full individual exercise* and the highest level 5 to *exceptions and limitations* or *compulsory license with no tariff*).

173 *See* Dusollier & Colin, *supra* note 8, at 823-824 (arguing that the latter contactual stipulation is known in civil law jurisdictions as a "stipulation for another person"). It is arguable however that, where the ISP itself is deemed to be using said works, this contractual relationship can be qualified as a license with the right to sublicense, a qualification that will vary however on the specifics of the agreement and the applicable law. The authors seem to place this latter model as well as models where ISPs act as mere "contractual inermediaries" between CMOs and users as a type of blanket license outside the category of VCL.

174 *See* Gervais 2010, *supra* note 162, at 26.

175 *See* Lohmann 2008, *supra* note 8, at 2.

176 *See* Lewinsky 2005, *supra* note 8, at 15 (indicating that "[t]his model is already practiced to some extent, in particular European countries", implying that such application covers P2P, without however naming specific countries).

177 *See* Daniel Gervais, Collective Management of Copyright and Neighbouring Rights in Canada: An International Perspective 83 (2001), http://works.bepress.com/cgi/viewcontent.cgi?article=1028&context=daniel_gervais (last visited Jan. 31, 2012).

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Where collective rights management is possible, VCL will not apply only if the governing law prescribes a different type of collective management, such as blanket licenses or mandatory collective management.

In this respect and in the E.U., it should be noted that the P2P uses of reproduction (except when qualified as a private copy) and making available are not subject to mandatory or exclusive collective licensing, thus opening room for the application of a VCL system thereto.

3. Blanket licenses

Another type of collective management allows the offering of blanket licenses for quasi universal repertoires, on the basis of two legal techniques.

The first is a *guarantee or presumption based system*, whereby the entitlement of CMOs to license non explicit subject matter derives from statutory or case law, and where users are extended either a guarantee that they will not be sued by rights holders or an indemnification undertaking if they do.[178] In such system, CMOs guarantee fair, reasonable and non-discriminatory treatment of works of rights holders who did not explicitly consent to collective management.[179]

Under the second legal technique–termed *extended collective licensing*–, if a CMO is authorized to manage certain rights by a qualified majority of domestic and foreign right holders, thus meeting a *representativeness criterion*, a statutory presumption operates to extend its representation rights to rights holders not under contract with it.

In the E.U. it is characteristic of the Nordic countries,[180] being also under consideration in Central and Eastern Europe, Africa and Canada.[181]

Mentions to extended collective licensing in the *acquis* are sparse. Art. 3(2) Satellite and Cable Directive contains the outline of such a system between CMOs and broadcasting organizations by using the "may" language,[182] thus indicating a limited possibility for Member States to introduce this system; such interpretation

178 *See* Mihály Ficsor, *Collective Management of Copyright and Related Rights from the Viewpoint of International Norms and the Acquis Communautaire, in*, Collective Management of Copyright and Related Rights 29, 61 (Daniel Gervais Ed., Edward Elgar 2nd ed. 2010).

179 *Id.* at 61 (arguing that the absence of an opt-out mechanism makes this system's compatibility with international law questionable).

180 *See* Tarja Koskinen-Olsson, *Collective Management in the Nordic Countries*, *in*, Collective Management of Copyright and Related Rights 283 (Daniel Gervais Ed., Edward Elgar 2nd ed. 2010).

181 *See* Gervais 2010, *supra* note 162, at 21.

182 Art. 3(2) reads: "A Member State may provide that a collective agreement between a collecting society and a broadcasting organization concerning a given category of works *may* be extended to rightholders of the same category who are not represented by the collecting society, provided that…" (emphasis added).

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is consistent with arts. 3(3) and 3(4) of the same Directive, according to which such system seems to be justified only insofar as it is indispensable or when individual exercise by rights holders is too onerous.[183]

Art. 3(3) confirms this by indicating a category of works (cinematographic works) where extended collective licensing is neither indispensable nor relatively non-onerous in the above sense. Art. 3(4) introduces a specific notification procedure for Member States, whereby the latter must inform the E.U. Commission of the identity of the broadcasting organizations to which extended collective licensing applies, thus underscoring the exceptional character of this licensing scheme.[184]

This interpretation is further strengthened by the fact that Recital (18) of the InfoSoc Directive mentions that it "is without prejudice to the arrangements in Member States concerning the management of rights such as extended collective licensing", i.e. those arrangements made under art. 3 Satellite and Cable Directive.[185]

4. Mandatory collective management

Under our proposed taxonomy in this Chapter, mandatory collective management is the most restrictive type of collective rights management, as it does not allow the rights holder to directly exploit his works, but instead imposes (through legal provisions) that the same be managed by a CMO.

Mandatory collective management is believed to be adequate solely when it is the only possible way to exercise the right, and examples of it can be found in several Member States in the fields of artist's resale right, public lending, private copying, and cable retransmission.[186]

At the international level, arts. 11*bis*(2) and 13(1) Berne Convention[187]–on compulsory licenses–provide that each country's legislation shall decide which *conditions* to determine for the exercise of certain exclusive rights, as long as these are expressly imposed and safeguard authors' rights to equitable remuneration.

In other words, it is admissible for a country to determine it to be mandatory to *exercise the rights in a certain way*, *exploit them in a certain manner* and *only through a certain system*, e.g., by imposing a mandatory collective management system.[188]

183 *See* Ficsor, *supra* note 178, at 62-63.
184 *Id.* at 63.
185 *Id.* at 63-64.
186 *See* Gervais, *supra* note 177, at 37-38.
187 Incorporated by reference in both TRIPS and WCT.
188 *See* Ficsor, *supra* note 178, at 42-44.

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However, the Berne Convention provides for this possibility in an exhaustive way:[189]

– For rights of remuneration *per se*;[190]
– Where the restriction of an exclusive right is allowed;[191] and
– For "residual rights".[192]

Under the *acquis*, mandatory collective management provisions can be found in the Rental Right Directive, Satellite and Cable Directive and Resale Right Directive.

Under E.U. secondary law, rental is defined as the "making available for use, for a limited period of time and for direct or indirect economic or commercial advantage".[193] Art. 5 Rental Right Directive provides for an unwaivable right to equitable remuneration, which allows for the possibility–through the use of the word "may" in paragraphs (3) and (4)–of Member States imposing mandatory collective management for the exercise of this residual right. These paragraphs read:

> (3) The administration of this right to obtain an equitable remuneration may be entrusted to collecting societies representing authors or performers.
> (4) Member States may regulate whether and to what extent administration by collecting societies of the right to obtain an equitable remuneration may be imposed, as well as the question from whom this remuneration may be claimed or collected.

Thus, Member States are entitled to impose a system whereby authors and performers cannot directly administer their right to obtain equitable remuneration for rental. This right is instead administered by CMOs, who are to claim or collect such remuneration from parties to be identified by law, typically producers and rental shops. For illustration purposes, a depiction of the mandatory collective management model under this Directive is contained in **Annex IV**.

Art. 9 Satellite and Cable Directive imposes mandatory collective management for cable retransmission, as well as rules for concentration of rights in CMOs' repertoires.[194] This Directive defines cable retransmission as the "simultaneous, unaltered and unabridged retransmission by a cable or microwave system for re-

189 *Id.* at 44-46 (arguing that, as a result, absent an international provision supporting it, mandatory collective management is only acceptable with E.U. legislative permission).
190 I.e., the resale right under art. 14*ter* Berne Convention and rights of performers and producers of phonograms (*see* art. 12 Rome Convention, which resembles art. 15 WPPT).
191 *See* art. 9(2) Berne Convention for the right of reproduction (e.g., private copy remuneration).
192 I.e., the right to remuneration (usually of authors and performers) that survives transfer of some exclusive rights (and which is only applicable after said transfer).
193 Art. 2(1)(a) Rental Right Directive.
194 In the field of copyright, this provision is allowed by art. 11*bis* Berne Convention. For related rights, neither the Rome Convention nor the any other international treaty grants exclusive rights for cable retransmissions.

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ception by the public of an initial transmission from another Member State, by wire or over the air, including that by satellite, of television or radio programmes intended for reception by the public".[195]

Art. 9 makes it clear that CMOs manage the right to grant or refuse authorization to a cable operator for cable retransmission, even if a rights holder has not transferred the management of his rights to a CMO. In this case, the CMO which manages rights of the same category is deemed mandated to manage his rights; if more than one of such CMOs exists, then the rights holder may freely choose that which is mandated to manage his rights.[196]

Art. 10 contains an exception to this rule for cable retransmission of rights of broadcasting organizations (in respect of their own transmissions) on the grounds that these are less numerous, hence making individual rights management possible.[197]

Finally, because the resale right is a mere right of remuneration,[198] art. 6(2) Resale Right Directive[199] provides for a "residual right" and allows for compulsory or optional collective management of the royalty.[200]

B. Mass online uses and multi-territorial licensing

The emergence of mass individual uses on the Internet, such as P2P, has brought about a reshaping of the copyright landscape, making it apparent that, short of expelling users from the Internet (e.g., through graduated response systems), there is no effective way to prevent file-sharing.[201]

Moreover, quashing P2P uses will not translate into increased economic welfare to rights holders, quite the opposite, as the "copyright industry does well historically when it focuses on maximizing authorized use".[202]

Therefore, for mass online uses, E.U. policy should use copyright to fulfill its goal of market facilitator, organizing access to works by bringing P2P uses under the umbrella of a licensing and remuneration system, respecting the interests of

195 Art. 1(3) Satellite and Cable Directive.
196 See art. 9(1) and (2).
197 *See* Ficsor, *supra* note 178, at 46.
198 *See* art. 14*ter* Berne Convention.
199 Art. 6(2) reads: "Member States may provide for compulsory or optional collective management of the royalty provided for under Article 1.".
200 *See* Ficsor, *supra* note 178, at 48 (sustaining that art. 6(2) of this Directive confirms the validity of a restrictive interpretation as to the application of mandatory collective management).
201 *See* Gervais 2010, *supra* note 162, at 16.
202 *Id*.

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creators, right holders and users; absent a non-foreseeable technological revolution, collective management seems the most adequate tool for this purpose.[203]

By helping users to internalize copyright rules, as opposed to pushing them towards deviant practices, this is the solution most attuned with the aforementioned market organization goal and that which provides the most workable model (within the copyright system) to cover and monetize massive Internet uses, particularly if based on "multi-territorial licensing".[204]

This concept refers to the possibility of users contracting multiple territorial licenses required to secure Internet wide flow of works. It has the potential to remove significant obstacles to rights clearance processes, allowing CMOs to bridge the gap between content providers' fear of infringement liability and their commercial dependence on "millennial"-type of users.[205]

Within the E.U., the major milestones of CMOs' pursuit of multi-territorial licensing are the Santiago Agreement, the *CISAC Decision*,[206] *IFPI Simulcasting*[207] and the Online Music Recommendation (which gave rise in Germany to the *MyVideo Case*).[208] For a better understanding of the same, **Annexes V**, **VI** and **VII** provide a depiction and brief overview of the collective rights management models proposed, respectively, under the Santiago Agreement, *IFPI Simulcasting* and the Online Music Recommendation, with the latter including also a representation of the *MyVideo Case*.[209] Some additional considerations on the same are also relevant for our purposes.

Following efforts to adjust to technological development, such as that of CISAC's Sydney Addendum in the field of broadcasting, five CMOs (BMI, BUMA, GEMA, PRS and SACEM) attempted to develop a new licensing model–under the form an amendment to existing CISAC type model contracts–, adopted in 2001 in Santiago, Chile.

The Santiago Agreement was a multi-territorial and multi-repertoire non-exclusive agreement intended to facilitate licensing for works and sound recordings on the Internet, covering authors' rights of online communication to the public and

203 In a similar sense, *see id.* at 28.
204 *Id.* at 27-28.
205 *See* Woods, *supra* note 171, at 110-114 (where the author defines "millenials" as "younger new users that tend to focus on convenience and interactivity as opposed to ownership").
206 Commission Decision of Jul. 16, 2008 relating to a proceeding under art. 81 of the EC Treaty and art. 53 of the EEA Agreement regarding Case COMP/C2/38.698 – CISAC, 2003 O.J. (L 107) [***Cisac Decision***].
207 Commission Decision 2003/300/EC of 8 October 2002 relating to a proceeding under art. 8 of the EC Treaty and Art. 53 of the EEA Agreement regarding Case COMP/C2/38.014, 2003 O.J. (L 107) [***IFPI Simulcasting***].
208 Landgericht München [District Court of Munich] Jul. 25, 2009, No. 7 O 4139/08 – MyVideo Broadband S.R.L. v CELAS GmbH (Ger.) [***MyVideo Case***].
209 *See* Annex V: Santiago Agreement Model, Annex VI: IFPI Simulcasting Model, and Annex VII: The Online Music Recommendation Model, Celas and MyVideo.

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making available (in reference to music downloading or streaming).[210] It did not encompass the reproduction[211] or simulcasting[212] rights in these works, and was drafted as a template for bilateral agreements between CMOs to provide worldwide licenses through representation schemes.[213]

On the grounds that it contained anti-competitive provisions causing and preserving territorial exclusivity for local CMOs, this agreement was objected to by the Commission, eventually leading to its expiry and non-renewal at end of 2004.[214]

In *IFPI Simulcasting* the reciprocal agreement under analysis provided for licensing of related rights for simulcasting of phonograms, i.e., the simultaneous transmission by radio and TV stations via the Internet of sound recordings included in their broadcasts of radio and/or TV signals.[215] Simulcasting constituted a novelty insofar as it encompassed transmission over several territories. This agreement was defined as "experimental" until 2004, and essentially stated that each participating CMO could issue multi-territorial licenses for online users established in their Member State.[216]

The Commission objected and put the agreement under the test of art. 101 TFEU. Although it considered that the agreement unjustifiably partioned markets on the online environment, thus preventing the cross-border provision of services,[217] and caused a lack of transparency and competition in pricing,[218] the Commission concluded that the agreement gave rise to a new product–a broad multi-territorial and multi-repertoire simulcasting single license–, which facilitated rights clearance for broadcasters with benefits for consumers on the point of access.[219] As such, it qualified the restriction as indispensable under art. 101(3)(a) TFEU and granted an individual exemption until the end of 2004, at which date the agreement expired.[220]

As for the 2005 Online Music Recommendation, it is a non-binding document directed at Member States and CMOs, inviting them to promote a regulatory environment for legitimate online music services.[221] It contains provisions that apply

210 *See* Woods, *supra* note 171, at 116.
211 Covered by the BIEM/Barcelona Agreement.
212 Covered by the IFPI Simulcasting Agreement.
213 *See* Woods, *supra* note 171, at 117.
214 *Id.* at 117 (noting that the Commission's main concern was with the "economic residency clause", as it facilitated territorial licensing market exclusivity.).
215 *See IFPI Simulcasting*, at para 2.
216 *Id.* at paras 14 et seq.
217 *Id.* at paras 61 and seq.
218 *Id.* at paras 67 et seq.
219 *Id.* at paras 84 et seq.
220 *See IFPI Simulcasting*, at paras 96 et seq.
221 *See* Online Music Recommendation, arts. 2 (which does not establish any deadlines in this context) and 16 (not establishing any sanctions for non-compliance).

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either solely to Member States or jointly to Member States, CMOs and other "economic operators".[222]

This Recommendation was subject to widespread criticism for falling short of the Communication on Management of Copyright and applying solely to the online environment, thus carrying potential legal certainty problems.[223] The European Parliament in particular criticized the Recommendation's lack of democratic legitimacy and the need for it to be involved in the legislative process of the initiative of creative content online, where multi-territorial licensing is identified as a main area for E.U. intervention.[224]

Despite the criticism, the Recommendation does follow up on the Study CBCM 2005 by establishing that rights holders can select a CMO of their choice to manage their E.U.-wide rights.[225] However, it does not effectively address the need for "blanket licensing", as several E.U.-wide multi-territorial licenses might still be required to address users' needs.[226] Consequently, there is a risk that users might opt for the simpler solution of acquiring licenses only for the most popular repertoires, leading to further concentration and decreased presence of local repertoires online.[227]

This concentration effect has already been noted with the move of some CMOs and music publishers to present online aggregated offers,[228] with the result that some major music publishers have withdrawn their online rights from all other CMOs in the E.U. not party to those deals.[229]

CELAS is a particularly good example, as it recently gave rise in Germany to the *MyVideo Case*.[230] CELAS is a company jointly owned by MCPS, PRS and GEMA, and boasts being the "first organization of its kind to offer pan-European licenses for its repertoire, including Anglo-American repertoire from the world's largest music publisher, EMI".[231] The German company MyVideo "provides an

222 The Online Music Recommendation contains, *inter alia*, provisions on the relationship between right holders, CMOs and commercial users (arts. 3 to 9), equitable distribution and deductions (arts. 10 to 12), non-discrimination and representation (art. 13) and accountability (art. 14).
223 *See* Guibault & Gompel, *supra* note 7, at 156.
224 *See* EP Resolution OMR, at Whereas A-C, EP Resolution CCBM, at paras 3-6, and Creative Content Online Communication.
225 *See* Online Music Recommendation, art. 3, and EP Resolution CCBM, at paras 1-2.
226 *See* Annex VII, Fig. VII.1. ("The Online Music Recommendation and CELAS Model (multi-territorial & single repertoire; no one-stop shop)").
227 *See* Guibault & Gompel, *supra* note 7, at 160.
228 *See* OMR Monitoring Report, at 5 et seq. (identifying a series of E.U.-wide licensing platforms that have been announced or formed, such as Alliance Digital, ARMONIA, CELAS, PEDL and SACEM-UMPG).
229 *See* Guibault & Gompel, *supra* note 7, at 161-162 (noting that local CMOs may suffer a significant economic impact from this move, under the form of lost royalties, with negative effects for the creation of local works and cultural diversity).
230 *See* Annex VII, Fig. VII.2. ("MyVideo Case").
231 *See* http://www.celas.eu (last visited Jan. 31, 2012).

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ad-financed website in German (myvideo.de) that, just like Youtube, enables the streaming of user-provided video content over the internet".[232]

The *MyVideo Case* concerns the potential infringement by MyVideo of mechanical reproduction rights for online uses of the EMI repertoire administered by CELAS.[233] The latter did not invoke infringement of the making available rights because these were managed by national CMOs, such as GEMA.[234] The District Court of Munich invalidated the license system set up by CELAS for use of content on the Internet, considering that German Law does not allow for a partition of the rights (such as mechanical reproduction and making available), when their economic online use is indivisible, as such severability would lead to legal uncertainty for online users.[235] This case is currently on appeal to the German Federal Court of Justice (*Bundesgerichtshof*).

The above mentioned "collective management milestones" have been complemented by a body of jurisprudence developed by the ECJ and Commission testing the potential anticompetitive behavior of CMOs under (now) arts. 101 and 102 TFEU, as well as by several Commission and European Parliament documents,[236] all of which translate the concern to secure effective cross border licensing of works and the inability of the CMO market thus far to efficiently implement multi-territorial licensing.[237]

Notwithstanding, this system remains a goal of the Commission, which not only identified it as a main area requiring E.U. action in 2009,[238] but also set a timeframe for proposing legislative action–currently expected to come out in 2012–, to create a collective rights management framework enabling multi-territorial licensing on a pan-European level.[239]

This proposal, together with the decisions of the General Court in *CISAC Decision* and the German Federal Court of Justice in the *MyVideo Case* will provide

232 *See* M. von Albrecht & J.N. Ullrich, *Munich District Court Holds Pan-European Copyright Licensing Model of Joint Venture CELAS Invalid* (2009), http://www.klgates.com/files/Publication/7f1d2609-940e-470e-a22e-23116314b599/Presentation/PublicationAttachment/b6762a28-143f-4681-9f3c-5492d20d4752/Alert_TMT_CELAS.pdf (last visited Jan. 31, 2012).

233 *Id.*

234 For an overview of GEMA's activities *see* www.gema.de, (last visited Jan. 31, 2012).

235 *See* Albrecht & Ullrich, *supra* note 233 (concluding that CELAS has no right to prohibit reproductions of the EMI repertoire for online uses in Germany).

236 *E.g.*, the Community Framework Resolution, Communication of the Management of Copyright, Commission Work Programme 2005, Study CBCM 2005, IPR Strategy, the Green Paper on Online Distribution of Audiovisual Works and the EP Resolution Cinema in the Digital Era.

237 *See* Guibault & Gompel, *supra* note 7, at 135-137 and 149. As these documents mostly address Competition law issues their analysis is beyond the scope of this book.

238 See Final Report Content Online Platform, at 3.

239 *See* IPR Strategy, at 10-11 and 23-24, Green Paper on Online Distribution of Audiovisual Works, at 4 and 12, and Communication on E-commerce and Online Services, at 6-7.

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the "shape of things to come" in the field of online collective rights management, and thus the basic structure governing P2P uses in this context, which to be sure will be based on multi-territorial licensing.[240]

240 *See* Guibault & Gompel, *supra* note 7, at 166-167.

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V. Collective management of P2P: a viable alternative?

A. In general

The current model of copyright is inadequate to deal with P2P.[241] It stifles innovation without preventing infringing uses–despite remarkable enforcement efforts–and fails to monetize a large market, to the detriment of rights holders' interests.[242]

Copyright policy should be structured towards maximization of perceived benefits and minimization of related harms.[243] Academic literature and stakeholders have for some time proposed alternative models for P2P, either through VCL or other forms of "legalization", mostly encompassing variations of legal licenses in combination with statutory remuneration rights.[244]

In general, the following alternative options are possible, most of which fall under our preferred category of "P2P collective management solutions":

(i) legal license for P2P uses with or without the application of a remuneration right;
(ii) Mandatory collective management thereof;
(iii) Extended collective licensing of the rights of reproduction and communication to the public;
(iv) VCL of said exclusive rights.[245]

The above categories mirror to some extent the taxonomy discussed in the previous chapter[246] and can be divided into non voluntary (options *(i)* trough *(iii)*) and voluntary (option *(iv)*) approaches to collective rights management of P2P.

This Chapter analyzes these approaches from the viewpoint of the restrictions they operate to rights holders' ability to exercise their exclusive rights and compatibility with the *acquis*, beginning with the most stringent option and working its

241 *See* Netanel, *supra* note 8, at 5.
242 *Id.* at 19-22 (labeling the struggle between P2P infringement and inefficient enforcement as a "logjam").
243 *See* Fisher III, *supra* note 8, at 37, and Hayward, *supra* note 3, at 16.
244 *See* Lewinsky 2005, *supra* note 8, at 13.
245 *Id.* at 13 (with a similar list of options).
246 *See* section IV.A. *supra*.

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way to that which is least restrictive. Section B *infra* addresses non voluntary[247] approaches to P2P (starting with legal licenses–with and without statutory remuneration–, then mandatory collective management and finally extended collective licensing) and section C contains an in depth analysis of VCL. Where relevant, mentions will be made to applicable provisions of international copyright law, as any "P2P licensing system would cover both domestic and foreign works", thus triggering the application of the Berne Convention.[248]

B. Non voluntary approaches to P2P

1. Legal license

a) Without statutory remuneration or "digital abandon"

The basic proposition here is simple: P2P uses should be free and unrestricted, both from exclusive and remuneration rights, as such freedom is beneficial to all but copyright industries. If we assume that no justification exists for extending copyright towards personal free use zones, it follows that noncommercial uses should be unrestricted. "Digital abandon" would increase author's incentives–via audience tipping, sales promotion, and product placement–, and conversely deter the interests of content distributors, which P2P technology renders obsolete in their role as intermediaries.[249]

However valid these arguments may be, they cannot be accepted.

First, this proposal is incompatible with current international and E.U. law, as it foregoes copyright's institutionalized structure as an exclusive right and provides for a *praeter legem* utopian solution that does not seem to rest on solid economic or cultural ground.

As international copyright law and the *acquis* now stand, the legal qualification of most P2P uses affects exclusive rights,[250] which does not articulate well with a scheme premised upon the elimination of such exclusive character.[251] From this

247 *See* Alexander Peukert, *A Bipolar Copyright System for the Digital Network Environment*, 28 Hastings Comm. & Ent L.J. 1, 18-19 (2005) (using the term "non voluntary licenses" in a generic way so as to encompass statutory licenses-remunerated via levies–and compulsory licenses–remunerated through taxes).

248 *See* Dusollier & Colin, *supra* note 8, at 824-825 (highlighting the restrictions imposed on compulsory licensing and the three step test).

249 *See* Netanel, *supra* note 8, at 74-77 (making a synthesis of these positions–defended by the authors Raymond Ku, Jessica Litman, Glynn Lunney and Mark Nadel–, and labeling them as "digital abandon").

250 *See supra III.B.*

251 In a similar sense, *see* Lewinsky 2005, *supra* note 8, at 13.

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perspective, it seems unrealistic that such a scheme would ever be accepted at the international level.

This is further amplified by the absence of data and studies that adequately demonstrate the economic and cultural benefits of digital abandon, namely to an extent sufficient to compensate for the loss of incentives that have been for long associated with the recognition of exclusive rights.[252]

Second, the assumption that P2P involves solely or mostly "private" acts can be challenged, as the current tendency of P2P systems is towards a more "public" architectural approach (e.g., systems with automated upload process).[253] If technology makes it increasingly difficult to draw the line between private and public use, the justification for digital abandon is weakened, as copyright systems tend to cover "public" uses of works through exclusive rights.[254]

Third, it rests on the assumption that P2P uses are not commercial by nature, which is not only legally disputed,[255] but mostly forgets the natural tendency of the market to create business models around them.[256] In fact, it is increasingly common for P2P systems to include monetizing features,[257] thus undermining the foundations of the digital abandon theory, intended to cover noncommercial uses;[258] in any event, should commercial uses be at stake, the compatibility of such a solution with the three-step test would be greatly compromised, namely in what concerns compliance with the second step as it relates to conflicts with rights holders' normal exploitation of the work.[259] Furthermore, the legal definition of what is "commercial" and "noncommercial" is far from harmonized and hard to conciliate with the dynamic market of P2P, a fact casting additional doubts on the applicability of this model.

Finally, arguing that copyright primarily serves the interests of content distributors is not best solved by eliminating the rights of authors; we would not go so far as to contend that "strengthening the position of creators" is the solution, but we do agree that merely relying on non-rights related sources of revenue is *per se* inadequate to compensate creators in the absence of an exclusive or statutory remuneration right.[260] A case in point is provided by certain categories of works that depend on significant investment of time and resources (e.g., motion pictures) and whose large scale creation is only possible via adequate compensation mechanisms

252 *See* Lewinsky 2008, *supra* note 104, at 36-40.
253 *See supra II.B., III.B and III.C and* Annex I.
254 *See* Lewinsky 2005, *supra* note 8, at 13.
255 *Id.* at 13.
256 E.g., the company Dropbox advertises itself and including, *inter alia*, services of online file-sharing, https://www.dropbox.com/tour (last visited Jan. 31, 2012).
257 *See* Hayward, *supra* 3, at 4 & n.19 (providing several examples).
258 *See* Lewinsky 2005, *supra* note 8, at 13.
259 *See infra V.B.1.b)* for a brief analysis of the three-step test.
260 *See* Lewinsky 2005, *supra* note 8, at 14.

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for rights holders; digital abandon would seriously under incentivize their creation, thus proving an inadequate model for significant categories of creative works.[261]

b) With statutory remuneration

Legal licenses combined with statutory remuneration, levies or "taxes" have mostly been discussed in U.S. literature[262] and present the benefits–when transposed to the E.U. landscape–of eliminating enforcement costs and compensating rights holders through CMOs; additionally, such systems have been tried and tested in the E.U., in fields like reprography and private copying.[263]

The first of such proposals envisages fundamentally a "governmentally administered reward system".[264] This would work by imposing a "tax" on digital media devices and ISP services, relating to both commercial and noncommercial P2P uses of works (mostly audio and video recordings). For a work to deserve consideration, it would have to be registered with the Copyright Office, which would attribute it a unique filename, later used by a government agency to track all transmissions of digital copies thereof and estimate its usage. The same agency would periodically pay rights holders on the relative basis of such usage. Post-implementation, copyright law would be amended in such a way as to effectively transform most exclusive rights into remuneration rights. This would entail the following benefits: cost savings and increased access for consumers; fair compensation for creators; increased incentives for and *ergo* creation of works; greater possibility for transformative and disseminative uses; increased demand for devices, which would offset their price rise; for society as a whole, reduced litigation and transaction costs.[265]

Another proposal comes under the form of a *noncommercial use levy* to be imposed on consumer products, which value is deemed to be substantially enhanced by P2P,[266] and the amount of which is to be determined by a Copyright Office tribunal according to a predetermined calculation method based on the "fair return" standard set forth in the U.S. Copyright Act for specific compulsory licenses. This *levy* would apply only in relation to noncommercial copying, modification, adaptation and distribution of previously released works. Rights holders would be compensated in proportion of the usage of their works and "remixed" versions thereof,

261 *See* Netanel, *supra* note 8, at 75.
262 *Id.* at 35-67. *See also* Fisher III, *supra* note 8, at 199-258, and Hayward *supra* note 3.
263 *See* Lewinsky 2005, *supra* note 8, at 14 (noting that such compensation would possibly be higher than if resulting from exclusive rights).
264 *See* Fisher III, *supra* note 8, at 202.
265 *Id.* at 199-258 (arguing that while this system would at first be voluntary, it would ultimately replace the current copyright law).
266 E.g., Internet access, P2P software and services, computer hardware, consumer electronic devices used to copy downloaded files, and storage media devices.

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as measured by state of the art technology. The system presents obvious benefits to users–namely those of exploring, sharing and modifying works–and would be setup in such a way as to minimize its administrative costs. Moreover, the *non-commercial use levy*'s method of calculation would assure that rights holders receive adequate remuneration, in any event higher than the current average.[267]

Yet another variant solution (applying only to music sharing) would be to promote a statutory and voluntary blanket license, allowing rights holders to opt-out of the system, preferably through a regulated government agency, which would manage a flexible "payment mechanism designed to compensate creators [*not rights holders*] and to bypass unnecessary intermediaries"; from the consumers perspective, the system would operate on a "presumption of shareability", i.e., unless works indicate otherwise via a DRM format (e.g., *.drm file) containing copyright management information, they may be shared.[268]

Although valuable as contributions, all such proposals seem to collide with a major barrier–the three-step test–,[269] which "marks the borderline between exclusivity and non-voluntary licenses".[270]

In fact, that which is the justification for most of such proposals, namely the technological and cultural benefits of P2P translated into its enormous economic relevance, seems at the same time to be its major legal impediment.[271]

Under art. 5(5) InfoSoc Directive, exceptions and limitations to the rights of reproduction and communication to the public/making available

> shall only be applied in certain special cases [*first step*], which do not conflict with the normal exploitation of the work [*second step*] and do not unreasonably prejudice the legitimate interests of the rightholder [*third step*].

Art. 5(5) InfoSoc Directive has been modeled on homologous international provisions,[272] such as the art. 13 TRIPS "embodiment" of the three-step test, which has been subject to interpretation by a WTO Panel in 2000.[273] Therein, the Panel clarified that this provision can only have a narrow or limited operation,[274] while at the same time supplying an itemized interpretation of each one of the steps, which are

267 *See* Netanel, *supra* note 8. *See also* Dusollier & Colin, *supra* note 8, at 814 (referring that "Netanel's proposal bears much resemblance to the system of compulsory licensing used in Europe for private copy").
268 *See* Jessica Litman, *Sharing and Stealing* (2003), http://ssrn.com/abstract=472141 or doi: 10.2139/ssrn.472141 (last visited Jan. 31, 2012).
269 For a detailed analysis of the compliance of non-voluntary licenses regarding P2P with the three-step test *see* Peukert, *supra* note 247 and Dusollier & Colin, *supra* note 8.
270 *See* Peukert, *supra* note 247 at 27.
271 *See* Lewinsky 2005, *supra* 8, at 14.
272 *See* Hugenholtz & Senftleben, *supra* note 145, at 18.
273 Panel Report, United States—Section 110(5) of US Copyright Act (US – Copyright), WT/DS160/R (Jun. 15, 2000) [***WTO Panel Report***].
274 *Id.* at 6.97.

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to be applied cumulatively and successively.[275] According to the *WTO Panel Report*:

– The first step implies legal certainty,
– The second is of essentially economic nature, and
– The third equates "prejudice" to "not unreasonable", allowing for normative considerations such as public interest (and thus opening the door for equitable remuneration).[276]

It can be argued that a legal license with remuneration is in compliance with the first step if geared towards clearly defined noncommercial P2P uses, as it holds benefits for the dissemination of knowledge, namely in what concerns works of difficult availability.[277]

However, a different conclusion might be reached as per the second step.[278] The *WTO Panel Report* has interpreted it as meaning that a conflict exists with the normal exploitation of the work when uses previously covered by the exclusive right (here: reproduction and making available) "enter into economic competition with the ways that right holders normally extract economic value from that right to the work... and thereby deprive them of significant or tangible commercial gains".[279]

Given the abundance of legal business models based on online music distribution, the increasing tendency for P2P based content models and the undeniable economic significance of the same,[280] there is a strong argument that a legal license model, by preventing rights holders from directly exploiting their exclusive rights, presents a conflict with the latter's economic interest in exploring alternative revenue generating avenues.[281] Such conclusion would be further strengthened for those cases where the system's design also restricts "DRM plus anti circumvention provisions".[282]

275 *See* Peukert, *supra* note 247, at 30.
276 *See* Goldstein & Hugenholtz, *supra* note 113, at 365-366.
277 *See* Peukert, *supra* note 247 at 32. *But see V.B.1.a) supra*, on the difficulties of defining P2P uses as "non-commercial".
278 *See* Dusollier & Colin, *supra* note 8, at 829 (recognizing that this "is typically the most complicated prong in the test").
279 *See WTO Panel Report*, at 6.183.
280 We refer mostly to our considerations in *II.B* and *V.B.1.a) supra*.
281 *See* Peukert, *supra* note 247, at 34. *See also* Dusollier & Colin, *supra* note 8, at 829-830 (interpreting this step in the P2P licensing context as a requirement to "measure the effect of the exempted uses on markets controlled by copyright owners" and further stating that such interpretation "does not yield a definitive answer").
282 *See* Peukert, *supra* note 247, at 43 (arguing that Netanel's proposal would not be compliant with the second step precisely on this point).

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Thus, the existence of such a conflict would lead to the conclusion that legal licensing options are hardly compliant with the three-step test.[283] Conversely, it is arguable that legal licenses with statutory remuneration that are both optional, on the one hand, and apply to noncommercial P2P uses, on the other, would be compliant with the second step as there would be no relevant conflict with rights holders' economic interests.[284]

Compliance with the third step would greatly depend on national legislation's ability to balance interests of rights holders and the public.[285] To be sure, for those alternatives that pass the second step and do not encroach rights holders capability of relying on DRM, an argument can be made that they are "not unreasonable" as they have the benefits of "not outlawing p2p technology, improving the dissemination of knowledge and guaranteeing compensation for authors".[286]

It should be noted that the design of art. 5(5) InfoSoc Directive can be interpreted (and in fact *has been interpreted* in some E.U. countries) has placing "additional constraints on national exceptions", thus leading to a "restrictive application" of the three-step test.[287] Such interpretation would make the compliance of the legal licensing model with the test all the more difficult. Despite this fact, there are increasing arguments defending a different, more flexible and enabling interpretation of art. 5(5)–in particular when in articulation with international provisions–that could open the door for the acceptance of legal licenses models (especially with the afore mentioned caveats) as compliant with the three-step test.[288]

283 *See* Lewinsky 2005, *supra* note 8, at 14-15 (adding that such systems may be difficult to enforce in the E.U., as shown by the private copying example). *But see* Peukert, *supra* note 247 at 35-41, 51 & 62-68 (agreeing that this would constitute a violation of the three-step test but arguing that, in general terms, both Litman and Fisher III's proposals are compatible with the three-step test because–like his own "bipolar copyright system"–they relate to an optional levy/tax system on non-commercial P2P uses; however, for this author, Litman and Fisher III's opt-out features would not be compatible with the Berne Convention no formalities principle).

284 *See* Peukert, at 35-41, 51 & 62-68. *See also* n283 above.

285 *See* Dusollier & Colin, *supra* note 8, at 830-831 (concluding that a "compulsory license geared at noncommercial uses in P2P networks would probably not pass the three-step test, as it would deprive the copyright owners of their ability to control file sharing and to directly compete with legal online platforms").

286 *See* Peukert, *supra* note 247 at 43.

287 *See* Hugenholtz & Senftleben, *supra* note 145, at 18-20 (exemplifying with Dutch and French decisions).

288 *Id.* at 21-26. *See also* C. Geiger, J. Griffiths & R. M. Hilty, *Declaration on a Balanced Interpretation of the 'Three-Step Test' in Copyright Law*, 39 Int'l Rev. Intell. Prop. & Competition L., 707 (2008).

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2. Mandatory collective management

Mandatory collective management is a particularly enticing model for P2P as it addresses the problem of rights holders' lack of willingness to rely on CMOs to administer their rights.[289]

It reduces such a risk to zero by making it mandatory for the rights of reproduction and making available in a P2P network to be managed by CMOs, without the possibility of rights holders opposing.

Likewise, users are able to lawfully engage in P2P uses merely by obtaining a license from CMOs and not each rights holder (an impracticable scenario), having additional assurance against infringement liability, as no doubts arise regarding CMOs' entitlement to grant such licenses.

Notwithstanding these benefits, objections can be raised to the adoption of a mandatory collective management model, namely whether it is compatible with international treaty provisions and, consequently, the *acquis*.

Some authors sustain that there is no such incompatibility, as mandatory collective management is compliant with minimum rights and exceptions and limitations at international and E.U. level, as well with the principles of no formalities and national treatment.[290]

On the one hand, it is argued that mandatory collective management is not an exception and limitation–as it only affects the exercise of the exclusive rights–and arts. 11*bis*(2) and 13(1) Berne Convention do not include limitations of the exclusive rights concerned. As such, these provisions do not take away from the authors any possibility of exercising their exclusive rights, such as the making available right. In fact, mandatory collective management would more adequately protect authors' interests against the stronger bargaining position of industry stakeholders, with ultimately more beneficial results.[291] Under this configuration, such manda-

289 *See* Lewinsky 2005, *supra* 8, at 15.

290 *See* Silke von Lewinski, *Mandatory Collective Administration of Economic Rights – A Case Study on its Compatibility with the International and EC Copyright Law*, at 4 et seq. UNESCO E-COPYRIGHT BULL. 1, January-March 2004 issue [hereinafter **Lewinsky 2004**] (discussing this issue in relation to several exclusive rights, including the making available right but not the online reproduction right). *See also* Christophe Geiger, *The Role of the Three-step Test in the Adaptation of Copyright Law to the Information Society*, UNESCO E-COPYRIGHT BULL. 1, 9-11, January-March 2007 issue (arguing that mandatory collective management cannot be qualified as a limitation of exclusive rights as no provision in international treaties restricts national legislators in this field).

291 *See* Lewinski 2004, *supra* note 290, at 5-9 (indicating that, by being a CMO member, the author can influence the licensing terms and/or royalty distribution, with the consequence that remuneration rights might be more beneficial to authors than exclusive rights, as recognized in Bundesgerichtshof [BGH] Jul. 11, 2002, ZU M 2002, 7 40 (Ger.)).

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tory scheme would be compliant with the minimum rights system of the Berne Convention, TRIPS and WCT.[292]

Even if one were to consider mandatory collective management an exception and limitation, it would be compliant with the three-step test,[293] thus rendering it the best model to cover the P2P acts of reproduction and making available.[294] Its compliance would stem from rights holders keeping their exclusive rights with the added value of legalizing "P2P uses by easy-to-handle blanket licenses" and solving the problem (attributed to VCL) of rights holders distrust of CMOs.[295]

This is not however a unanimous position and arguments have been made to sustain the opposite conclusion.[296] In fact, it is possible to argue that, if mandatory collective management is permitted only in by international provisions as implemented in the *acquis*,[297] and the P2P rights of online reproduction and making available are not included there under, then mandatory collective management cannot cover such uses.[298]

Mandatory collective management differs from other forms of collective rights management insofar the exclusive right is enforced by CMOs.[299] It transforms the relationship between CMOs, authors and users: authors lose the right to decide how their works are used and users deal directly with CMOs; the rights of authors are thus restricted in its essence of "negative rights", which triggers the question as to the admissibility of such restriction under international treaties.[300]

Mandatory collective management is admissible in this sense either by reason of the nature of the rights to which it applies (remuneration rights) or because the Berne Convention allows–in exceptional cases–for determination or imposition of conditions for the exercise of the exclusive rights concerned.

As such, it can be argued that all other mandatory collective management cases outside this narrow scope conflict with international law, meaning that this system cannot apply, *inter alia*, to the rights of (unprivileged) online reproduction and

292 *Id.* at 10.
293 *Id.* at 10-11, 13-14 & n.36 (arguing that mandatory collective management is not an exception and limitation either under the Berne Convention or under art. 5 InfoSoc Directive, reminding that such a qualification was not even discussed–either for mandatory collective management or for non-voluntary licenses–when drafting the Directive, and concluding that "if this argument is true for non-voluntary licenses, where an obligation to conclude a contract with a user exists, it must be all the more true for [*mandatory collective management*]").
294 *Id.* at 10.
295 *Id.* at 15.
296 *See* Ficsor, *supra* note 178, at 48 et seq.
297 *See IV.A.*4. *infra*.
298 *See* Ficsor, *supra* note 178, at 53.
299 *Id.* at 54.
300 *Id*.

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making available to the public; for these rights, it is possible to have VCL or extended collective licensing (as long as with an opt-out possibility).[301]

We are satisfied that this last interpretation–that which prevents application of mandatory collective management to the P2P uses of reproduction and especially making available–, although perhaps not definitive, is the most compatible with both international law and the *acquis*.[302] Therefore, on these grounds, mandatory collective management cannot be deemed as the most adequate collective management solution for P2P.[303]

Conversely, it is our view that objections raised to mandatory collective management on the basis of the "national treatment"[304] and "no formalities" principles are not valid.[305]

The principle of "national treatment is set forth in arts. 5(1) Berne Convention, 3 TRIPS and 3 WCT. The first of these provisions states that:

> Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention.

It is our contention that the application of a mandatory collective management system does not impose membership of a CMO, as its mandatory nature implies an extension of its effects to non-members. Furthermore, this system promotes no discrimination in what regards foreign rights holders or works, which means that there is no violation of the principle of national treatment.[306]

The principle of no formalities is enshrined in art. 5(2) Berne Convention:

> The enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work. Consequently, apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed.

301 *Id.* at 54-59.

302 This position is in line with the argument that, in principle, mandatory collective management should apply merely when it is the only way to exercise the right, being voluntary forms of collective rights management preferable in all other circumstances (*see* Gervais, *supra* note 186, at 38).

303 *But see* Dusollier & Colin, *supra* note 8, at 827 (concluding that "mechanisms authorizing P2P file sharing, although not explicitly provided for by the Berne convention under a compulsory licensing or other scheme, could still be enacted if they pass the three-step test…".).

304 *See* arts. 5(1) Berne Convention, 3 TRIPS and 3 WCT.

305 *See* Lewinsky 2004, *supra* note 290, at 11-12.

306 *Id.* at 12.

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Our interpretation of the provision is that: ***(i)*** this principle only applies in the international context;[307] ***(ii)*** author's rights come into existence and are recognized absent any formalities (*enjoyment*); ***(iii)*** authors have the possibility of enforcing their rights under the Berne Convention (*exercise*); ***(iv)*** the term "formalities" is to be understood in a broad sense, but only if related to copyright-specific requirements.[308]

Under this interpretation, examples of prohibited formalities would be: "registration; deposit; filing of copies with a authority; placement of a copyright notice on the work; payment of fees for registration; or the submission of any declarations".[309]

The fact that mandatory collective management applies despite the need for a rights holder to fulfill any formality of this kind and affects solely the way a right is *exercised* (and not its *existence* or *enjoyment*) leads to the conclusion that it is not in violation of the principle of no formalities.[310]

Finally, mandatory collective management presents an additional problem in the current and prospective market place, which is that of effectively preventing the existence and creation of content licensing business models outside the scope of collective management.

The current "legal" online offerings for content, which depend on the rights of reproduction or making available, occupy a relevant market share, with growing tendencies.[311] Mandatory collective management would jeopardize this, with obvious negative consequences, as it lacks the necessary flexibility to adapt to a dynamic market of online content delivery.[312]

3. Extended collective licensing

The basic workings of an extended collective licensing system, as a type of blanket licensing collective rights management, have already been explained above.[313] The possibility of application of this system in the digital environment is admitted in

307 Note that no Member State applies formalities to copyright in its territory.
308 For a brief analysis of the principle of no formalities, touching on the points mentioned, s*ee* Lewinsky 2008, *supra* note 104, at. 117-118.
309 *Id.*
310 *See* Lewinsky 2004, *supra* note 290, at 12. *See also* Dusollier & Colin, *supra* note 8, at 832 (classifying as "somewhat radical" Peukert's position of treating an opt-out regime as a prohibited formality).
311 *See supra II.*B.
312 *See* Lewinsky 2004, *supra* note 290, at 15 (recognizing that "the industry might prefer to… individually manage rights in order to best benefit from the market").
313 *See supra IV.A.*3.

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Recital (18) InfoSoc Directive, which applies both to existing and future extended collective licensing provisions.[314]

Extended collective licensing is based on the voluntary licensing or transfer of rights to CMOs coupled with an extension effect to non-members right holders[315] (domestic, foreign and deceased), thus allowing for efficient licensing of mass online uses; differently from a compulsory or legal license, rights holders can opt-out of the system.[316]

In the context of P2P, an extended collective licensing system could efficiently address the problem of acquisition of rights, namely via its extension effect. It is a particularly adequate model for well-organized and informed countries–such as most of the E.U.'s Member States–to manage mass Internet uses, given that it reduces the high transaction costs for obtaining individual licenses, with the added benefit of facilitating royalties' collection.[317]

Moreover, P2P networks are populated by works of unidentified and unidentifiable authors, whose authorization is virtually impossible to obtain. Like mandatory collective management, extended collective licensing would efficiently include such works under a P2P blanket license, thus enhancing public welfare through the dissemination of works.[318]

In the E.U., there have been proposals for application of extended collective licensing to the P2P act of making available, in conjunction with a statutory remuneration right for the download act (deemed as private copy).[319] Under such a configuration, the law would entitle CMOs and consumer organizations to conclude contracts on extended collective licensing, subject to the payment of a statutory remuneration for user downloads, to be incorporated in ISP access fees and fixed by the existing CMO in charge of private copying in the respective country.[320] However, proposals including also the act of download (reproduction) are likewise foreseeable, namely where such act is not privileged under the private copy exception and limitation as per the applicable law.[321]

314 *See* Koskinen-Olsson, *supra* note 180, at 303 (noting that the implementation of the Directive in the Nordic Countries widened the scope of extended collective licensing provisions in the areas of digital copying in education and library uses).

315 *Id.* at 294-295 (explaining that the guarantees extended to non-represented right holders are twofold: an opt out/veto right, with a different design in each country; and a right to claim individual remuneration).

316 *See* Gervais, *supra* note 162, at 26-27.

317 *Id.* at 21-22.

318 *Id.* at 27.

319 *See* Lewinsky 2005, *supra* note 8, at 15 & n.93 (making reference to the proposal by the French performers' organization ADAMI). *See also*, outside the E.U., Daniel Gervais, Application of an Extended Collective Licensing Regime in Canada: Principles and Issues Related to Implementation (2003), *available at*: http://works.bepress.com/daniel_gervais/29/ (last visited Jan. 31, 2012).

320 This set-up follows the specifics of the ADAMI proposal.

321 *See* Lewinsky 2005, *supra* note 8, at 15.

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A theoretical objection might be raised against the compliance of extended collective licensing with international law, namely with the principle of no formalities.[322] The issue here is whether or not such a system imposes prohibited formalities in the E.U., given that its intra-Community effect necessarily affords it an international context meriting application of the principle.

We are of the opinion it does not. Extended collective licensing provides CMOs with the immediate ability to license all or almost all works that users may require but does not affect the scope of exceptions and limitations (ensuring that uses beyond such scope are remunerated), and could assist in the goal of promoting the public interest side of the copyright paradox equation, by allowing effective Internet dissemination of works via P2P systems.[323]

The formalities prohibited by art. 5(2) Berne Convention relate in essence to "registration with a governmental authority, deposit of a copy of the work or similar formalities when they are linked to the existence of copyright or its exercise, especially in enforcement proceedings"; they do not relate to the action (mandatory or not) of joining a CMO, as this is a normal act of rights holders towards the exploitation of works.[324]

Similarly, we do not believe that the obligation to opt-out of the system for those rights holders that wish to preserve their exclusive right can be qualified as a formality under art. 5(2) Berne Convention, as it does not pertain to the *enjoyment* (existence) or *exercise* (enforcement) of its rights.[325]

In fact, art. 5(2) Berne Convention does not include "all civic and judicial formalities" connected with the exploitation of works.[326] It should also not include "formalities" that are not government-related, meaning that it should not extend to extended collective licensing's opt-out feature, as most CMOs are private entities.[327]

Properly designed, extended collective licensing guarantees efficient repertoire exploitation against adequate compensation, while offering authors the option of

322 *See V.B.*2 *supra* for a brief analysis of this principle regarding mandatory collective management of P2P. For a discussion of whether extended collective licensing can be qualified as an exception and limitation, *see* Dusollier & Colin, *supra* note 8, at 828 (concluding in the negative, but arguing that "[n]evertheless, employing the three-part test might be beneficial, given that these solutions are not otherwise formally recognized by the Berne Convention: compliance with the three-part test could only lend them greater legitimacy").

323 *See* Gervais 2010, *supra* note 162, at 27.

324 *Id.* at 24-25. Also arguing that extended collective licensing is compliant with international law, *see* Lewinsky 2005, *supra* note 8, at 15-16.

325 *See* Gervais 2010, *supra* note 162, at 22-27 (supporting its arguments on the basis of a thorough analysis of the drafting history of art. 5(2) Berne Convention). *See also* Koskinen-Olsson, *supra* note 180, at 303-304 (discussing the legislation of Denmark and arguing that the opt-out mechanism exists to ensure conformity with international Treaties and E.U. Directives).

326 *See* Gervais 2010, *supra* note 162, at 25-26.

327 *Id.* at 26.

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going back to full individual exercise of their rights via simple notice, "perhaps even as simple as an e-mail".[328] This, in our view, cannot be considered a prohibited formality under the Berne Convention.[329]

Attractive as it may be, extended collective licensing presents two potential problems, which theoretically make it less adequate than VCL for covering P2P uses in the E.U.

First, its imposition would require some legal changes to the *acquis*. Specific secondary legislation imposing extended collective licensing for defined P2P uses and categories of works would have to be enacted, so as to lay the foundations for the system and facilitate the necessary amendments to the InfoSoc and (possibly) Software Directives.

In general terms, extended collective licensing would entail the following alterations to the InfoSoc Directive:

– The exclusive rights of reproduction (art. 2) and making available (art. 3), as well as the catalogue of exceptions and limitations (art. 5) would require modifications allowing for the creation of a remuneration right for P2P uses;
– The provisions on DRM (arts. 6 and 7) should be adjusted to allow for an extended collective licensing system for P2P uses, as works shared therein would have to be at least TPM-free (given that users should not be subject to a levy/tax if rights holders are allowed to restrict access to their works and afforded anti-circumvention protection within such system).

In addition, amendments to the Software Directive would be required in the event P2P transfer of computer programs were to be included in the extended collective licensing model.

The need for such amendments–which can prove notoriously difficult to agree upon and implement at E.U. level–makes extended collective licensing a comparatively less appealing proposition than other alternatives (like VCL), which have inferior impact and implementation costs to the *acquis*.[330]

Second, if the idea is to bring P2P uses under the umbrella of collective management, this might be the wrong strategic approach. In fact, given the current existence of a booming licensing market rivaling with the "illegal" one of P2P,[331] the natural tendency of industry scale rights holders will be to immediately opt-out of the extended collective licensing system so as to preserve their business model. This will not only render such system as a failure at an early stage, because

328 *Id.* at 27.
329 For a contrary position, *see* Peukert, *supra* note 247, at 66-68.
330 *See* Peukert, *supra* note 247, at 52-53 (discussing, at the international treaty level, the political and practical challenges of alternative proposals that require changes to existing legislative texts).
331 *See supra II.*B.

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users will be deprived of the perceived benefits thereof, but also diminish the relevant repertoire in such a way as to prevent the fulfillment of the *representativeness criterion*[332] and, consequently, the operation of the extension effect that characterizes extended collective licensing, stopping it from gathering any momentum and rendering it *de facto* useless.

As such, from a policy perspective, the legal design of extended collective licensing seems not to be the most adequate for the current market, as it lacks one of two necessary attributes: either the binding nature of mandatory collective management (so as to prevent the escape from the system of major portions of repertoires) or the flexible character of VCL, which allows for adaption to existing and prospective business models.

C. Voluntary collective licensing

1. Basic proposal and features

VCL of P2P uses of music was proposed as far back as 2003 by the EFF in the U.S.,[333] based on the premises that rights holders are entitled to fair compensation, P2P is not going away, "fan-based" online music distribution is more efficient than music industry dissemination and market driven solutions are preferable to government intervention.[334]

In the U.S., the precedent for VCL is that of broadcast radio, managed by performance rights organizations–ASCAP,[335] BMI[336] and SESAC–,[337] acting pursuant to consent decrees, and which grant broadcasters and other licensees blanket licenses for performance rights in exchange for membership fees.[338] **Annex VIII** contains a depiction of ASCAP's VCL model.

The U.S. origin of the EFF proposal is not without relevance, as it translates into at least two significant differences in relation to the eventual application of VCL in the E.U. First, the proposal assumes that the rights involved in P2P are those of

332 *See* Koskinen-Olsson, *supra* note 180, at 293-294 (providing an overview of this criterion).
333 For the original proposal by the EFF *see* Lohmann 2004, *supra* note 7; for a revised "Version 2.1" *see* Lohmann 2008, *supra* note 8.
334 *See* Lohmann 2008, *supra* note 8, at 1.
335 For an overview of ASCAP's activities *see* http://www.ascap.com/ (last visited Jan. 31, 2012).
336 For an overview of BMI's activities *see* http://www.bmi.com/ (last visited Jan. 31, 2012).
337 For an overview of SESAC's activities *see* http://www.sesac.com/ (last visited Jan. 31, 2012).
338 *See* Lohmann 2008, *supra* note 8, at 2, and Dougherty, *supra* note 8, at 410-417.

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digital performance and not reproduction and making available, as in the E.U.[339] Second, the E.U. CMO market is more evolved, diversified and with a broader scope of activities (e.g., of social and cultural nature) than its U.S. counterpart, a fact which must be taken into account when analyzing this option under a European framework.[340]

Notwithstanding, the EFF proposal provides an adequate matrix to analyze VCL under E.U. law. It contains the following main features:

(i) Non-profit CMOs represent rights holders and exploit the relevant exclusive rights;
(ii) Users are offered a blanket license (multi-repertoire and, *mutatis mutandis* for the E.U., multi-territorial) covering relevant P2P uses against the payment of a flat fee;
(iii) Payment is possible through an array of mechanisms, either directly via a website or bundled;[341]
(iv) Royalties are distributed to rights holders on the basis of relative content popularity, to be determined using (privacy respecting) rights management methods and technology.[342]

2. Benefits

VCL implementation is beneficial insofar as it requires close to no direct intervention by public authorities, either national or at E.U. level.[343]

Furthermore, it presents a significant upgrade for rights holders, as they get additional income (where previously they had none), access to inexpensive promotional channels, and (in some cases) improved bargaining positions.[344]

What's more, VCL would spur technological development and investment in the field of P2P and content distribution, both in related products/services and at infrastructural level.[345]

339 *See* Dougherty, *supra* note 8, at 420-421 & n.114 (explaining the discussion and implications of this qualification of P2P uses as "interactive services", generally within the exclusive right of 17 U.S.C. § 106(6)).
340 *See* EP Resolution OMR and EP Resolution CCBM (both illustrating the relevance given in the E.U. to CMOs role on promoting social and cultural interests).
341 E.g., in regular ISPs fees, in University fees as part of network access costs, or subscription fees of P2P software vendors. Note that "bundling" partnerships with ISPs and telecommunications companies is already viewed currently as a "key route to the mass market for digital services" (*see* IFPI 2012 Report, at 12).
342 *See* Lohmann 2008, *supra* note 8, at 1-3.
343 *Id.* at 2 (making the same point for the U.S.).
344 *Id.* at 3-4. *See also* Dougherty, *supra* note 8, at 426.
345 *See* Lohmann 2008, *supra* note 8, at 3 (exemplifying with the growth of broadband).

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For users and society, this means increased availability of works[346] and competition in the market place, reduced transaction costs and legal certainty.[347]

3. Compatibility

In principle, VCL is compliant with both international and E.U. law, allowing lawful P2P uses–reproduction and making available–in consideration of an equitable remuneration.[348]

However, specific compatibility issues may arise, in particular under E.U. secondary legislation. These issues are analyzed below.

a) E.U. secondary legislation

In general, VCL presents few compatibility concerns with the copyright Directives.

First, the P2P exclusive rights of reproduction and making available should be licensed together as they mostly correspond to a single economic use.[349] However, this may be problematic when a Member State's law qualifies the download act as private copying, given that monetization thereof may be unjustified.[350] A definitive solution to this problem would require a fact intensive Member State-by-Member State analysis, which is beyond the scope of this writing.

Nevertheless, grounded on the principle of legal certainty, a reasonable approach could be to (by default) license both rights and leave the fixation of royalties to market forces and Competition law supervision. This does not solve the problem of double payment by *certain users* (which are making a private copy) in *certain countries* (where such exception and limitation is implemented and covers the specific P2P act in question). However, absent real E.U.-wide harmonization of the private copy exception and limitation and given the non-mandatory nature of VCL,

346 *See* Netanel *supra* note 8, at 3 (mentioning P2P as a "vehicle for finding works that are otherwise not available"); *See* also Yu, *supra* note 8, at 701 (emphasizing the rights clearance difficulties raised by many "out-of print songs… currently available in P2P networks").

347 *See* Lohmann 2008, *supra* note 8, at 3, and Dougherty, *supra* note 8, at 426-427.

348 *See* Lewinsky 2005, *supra* note 8, at 15.

349 *See MyVideo Case* and Commission Decision of Aug. 12, 2002 regarding Case C2/37.219 Baghalter & Honem Christo v SACEM, available at: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_37219. *See also* **Annex VII**.

350 Underlying this problem is the InfoSoc Directive's overlap of the broad exclusive rights of reproduction and making available, which may give rise to "unjustified claims for 'double payment'" (see Eechoud et al., *supra* note 91, at 303).

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it seems a low-impact "collateral damage" if true competition exists in the market.[351]

Second, the complex DRM regulation of arts. 6 and 7 InfoSoc Directive also presents challenges to VCL. It is possible that "DRM-works" are shared in a P2P network, raising the question of whether it is legitimate for rights holders to distribute such works within this system. Concerns arise mainly with TPMs, as reasonable electronic rights management information may be a good complement to a VCL system.

TPMs afford the rights to control access to and uses of a work, the work's integrity and usage level.[352] They thus impact on both "P2P rights" of reproduction and making available.

As previously mentioned,[353] tensions might arise between the application of TPMs and national exceptions and limitations to the reproduction right, namely private copy, mostly due to the wording of art. 6(4) InfoSoc Directive, which on this specific point reads:

> (…) [*second subparagraph*] A Member State may also take such measures in respect of a beneficiary of an exception or limitation provided for in accordance with Article 5(2)(b), unless reproduction for private use has already been made possible by rightholders to the extent necessary to benefit from the exception or limitation concerned and in accordance with the provisions of Article 5(2)(b) and (5), without preventing rightholders from adopting adequate measures regarding the number of reproductions in accordance with these provisions.
> (…) [*fourth subparagraph*] The provisions of the first and second subparagraphs shall not apply to works or other subject-matter made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them.

In fact, not only art. 6(4) does not impose on Member States any obligation to enforce the private copy limitation against TPMs, but it also does not apply to works made available online "on agreed contractual terms".[354]

It is not within the scope of this book to analyze the "convoluted and complex… imprecise and ambiguous" text of art. 6 InfoSoc Directive.[355] However, this article

351 At the E.U. level, such solution would probably require an overhaul of the private copy exception, which might occur within the near future, as it is addressed in the context of the Digital Agenda for Europe and expected to be reported in 2012 (*see* IPR Strategy, at 11).
352 *See* Eechoud et al., *supra* note 91, at 132-133.
353 *See III.*C. *supra.*
354 *See* Eechoud et al., *supra* note 91, at 168-169.
355 *Id.* at 154.

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clearly states that protection is granted against circumvention of "effective"[356] TPMs designed to prevent or restrict acts not authorized by the rights holder. To be sure, by joining a P2P VCL system, rights holders would in fact be authorizing the reproduction and making available of their works by users within such system.

This implies that "VCL-works" should not contain TPMs that restrict the afore mentioned P2P uses–including the instrumental *access* to the work–, as in most cases rights holders have entered into a contractual relationship with CMOs–and sometimes with users (depending on how CMOs are set up in the specific Member State)–allowing for such uses.

That being said and absent future amendments, the InfoSoc Directive does not prevent the rights holders from including "TPM-works" in VCL repertoires. What happens then if users circumvent such works? Here too a definite answer would depend on the analysis of national implementations of the Directive, which vary greatly, as well as the specific CMOs' constitution.[357]

From the legal standpoint and in very general terms, the contractual relationship between rights-holders, CMOs and users can be viewed as granting users a contractual right to circumvent TPMs preventing P2P uses, assuming the underlying work had lawfully been "integrated" in the system. For this identification purpose, electronic rights management information could assume a pivotal role. Moreover, it is also arguable that, in some Member States, users may raise defenses based on breach of an objective good faith principle, amounting to a form of *venire contra factum proprium*, as rights holders had at least implicitly authorized such P2P uses and possibly received royalties there from, thus confirming a contractual relationship with users.[358]

Notwithstanding, given the commercial failure of DRM,[359] there are compelling reasons to believe that "regulation by market"[360] would probably prevent inclusion of TPM-works in the system from becoming a standard feature and render this a non-issue in the VCL equation.

Finally, there are issues of "market overlap". Imagine user *A* downloads an mp3 file of Bowie's "A Space Oddity" from Apple's iTunes and then uploads it to Pirate Bay; further imagine that the original file came with TPMs. *Quid iuris?*

356 According to 6(3) *in fine*, "Technological measures shall be deemed "effective" where the use of a protected work or other subject-matter is controlled by the rightholders through application of an access control or protection process, such as encryption, scrambling or other transformation of the work or other subject-matter or a copy control mechanism, which achieves the protection objective.".

357 *Id.* at 175.

358 For a comparative analysis of the *venire* figure, *see* Ernst A. Kramer & Thomas Probst, *Defects in the Contracting Process*, *in* 7 International Encyclopedia of Comparative Law (Ch. 11) 1, 143-146 (Arthur T. von Mehren ed. 2001).

359 *See* Bridy, *supra* note 40, at 610 ("On the music side… songs sold through authorized online distributors are no longer locked by DRM").

360 *See* Lawrence Lessig, Code Version 2.0, 123 et seq. (Basic Books 2006).

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Here, an argument could be made that VCL adequately covers all stakeholders' interests:

(i) *A* would be paying for the song twice (to Apple and to CMOs under the VCL scheme);
(ii) Rights holders would further be compensated by additional usage within the P2P networks under the VCL system–therefore balancing any lost profits from their online store licensing model–, losing incentive to enforce their rights against *A* and other users for copyright infringement and circumvention of TPMs; and, consequently
(iii) Users' (*A* and others) exposure to infringement risks would be lower.

b) Participation

VCL of file-sharing is most useful where CMOs can manage significant parts of the available repertoire.[361]

One of the major criticisms to VCL lies in the notion that content industries are unwilling to entrust management of their making available rights to CMOs–even if through an easily revocable mandate–, preferring to enforce them individually.[362] This problem is amplified in P2P by its technical characteristics, which require cooperation amongst users.[363]

Optimists regard this has a changing trend, especially for online music distribution, indicating an increased availability of the industry to consider VCL's blanket licensing options through ISPs.[364]

However, even from a pragmatic perspective, the mere fact that VCL promises revenues from uses that previously generated none should suffice to attract rights holders in sufficient number to make it a viable option,[365] especially in the E.U., where the quasi-universal representativeness of CMOs makes VCL a logistically simpler proposition.

It is arguable whether the majority of Internet and P2P users are willing to pay for VCL. However, convincing arguments can be made that they will:[366]

361 *See* Lewinsky 2005, *supra* note 8, at 15.
362 *Id.* at 15 (arguing this to be true mainly for film and phonogram producers).
363 *See* Dougherty, *supra* note 8, at 428.
364 *See* Lohmann 2008, *supra* note 8, at 4-5.
365 *See* Dougherty, *supra* note 8, at 428-429. *But see* Dusollier & Colin, *supra* note 8, at 833-834 (highlighting the potential problems caused by the "fragmentation of copyright management" on participation in collective rights management of P2P–including VCL–and the need for consensus of all stakeholders involved).
366 *See* Gervais, *supra* note 8, at 73 (arguing that the EFF proposal of a $5 monthly flat rate is optimum and would accelerate VCL user adoption).

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(i) being the fee on fair, reasonable and non-discriminatory terms, users would be motivated to seriously consider it;
(ii) in some cases, fees would be paid by intermediaries, rendering the problem of user acceptance inexistent;[367]
(iii) in other cases fees will be made "invisible" by the practice of bundling, which will effectively lead to their acceptance.

Irrespective of whether users perceive their actions as illegal and hence lack incentive to adhere to VCL,[368] there is a growing perception (and evidence) in the online music distribution field that, given the right mix of pricing, user freedom and accessibility, users will "pay a contribution".[369]

A high number of participants will diminish risks posed by free-riders, against whom enforcement remains possible.[370]

c) Free riding

Some authors consider the existence of free-riders the Achilles heel of VCL, ultimately leading to its break down; as this system facilitates free riding (e.g., by multiple users sharing one membership) it reduces royalties collected and removes incentives for membership.[371] It is our view that this argument is flawed.

First, it does not account for those users not engaging in such practices, based on ethical and practical considerations. As competing offers make P2P technology accessible on fair, reasonable and non-discriminatory terms to an increasing user base and educational efforts bring copyright issues to the forefront of consumer concerns, a significant number of users will "internalize" the system and not circumvent it. Additionally, the market will provide for multi-user solutions at differentiated pricing, further avoiding deviant practices.

Second, VCL adoption presupposes some coexistence with DRM, especially privacy compliant electronic rights management systems (the appropriate level of which will be defined by the market), a factor bound to deter some forms of free riding.

367 *See* Lohmann 2008, *supra* note 8, at 5 (indicating ISPs, universities and software vendors as examples of intermediaries). On the practical challenges of involving ISPs in such a system, *see* Dusollier & Colin, *supra* note 8, at 833.
368 *See* Dougherty, *supra* note 8, at 429-430 (pointing out the low risk of an infringement suit and comparing P2P uses to jaywalking).
369 *See* Cammaerts & Meng, *supra* note 31, at 13-14 (arguing that such contribution might come from levies on devices, equipments or bundled in ISP access fees).
370 *See* Lohmann 2008, *supra* note 8, at 5.
371 *See* Yu *supra* note 8, at 715.

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Finally, VCL is always a comparatively superior situation to the *status quo*, as it provides added remuneration to rights holders (and savings from enforcement costs), together with inexpensive CMO sponsored liability insurance to previously "uncomfortable" users.[372]

d) Logistics and implementation

Concerns have been voiced that managing a system with so many users will be too costly and not feasible.[373]

However, given E.U. CMOs track record and the technological developments in this field, coupled with the fact that intermediaries will assume a significant part of the task, such concerns seem minor.

Besides, they produce the positive externality of raising consumer welfare by providing additional market differentiators for users to choose from when purchasing their "P2P subscriptions".

e) Royalties

Fixation and collection of royalties under the terms described above seem unproblematic[374] under E.U. law, as long as inter-CMO competition exists, pricing is objectively justifiable and its structure is transparent (e.g., by differentiating management fees from royalty tariffs).[375]

As for methods of calculation and distribution of royalties,[376] the EFF's proposal demands transparency, together with a preference for sampling and anonymous monitoring systems, as these take into consideration users' privacy rights.[377] This would be equally valid in the E.U. framework.[378]

372 *See* Dougherty, *supra* note 8, at 432-433.
373 *Id.* at 429.
374 *See* Lohmann 2008, *supra* note 8, at 6 (arguing that enforcement costs alone would be motivation enough for CMOs to practice reasonable royalties).
375 *See IFPI Simulcasting*, at paras 67 et seq.
376 *See* Dougherty, *supra* note 8, at 431 (identifying this as the main concern under U.S. law).
377 *See* Lohmann 2008, *supra* note 8, at 4. Note also the Commission's decision on the Santiago Agreement, which took into consideration the need to respect privacy laws.
378 See IPR Strategy, at 23-24 (indicating the importance of transparent rules in revenue distribution).

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f) Cross-subsidization

There's a potential risk that low-volume users subsidize rights holders and high volume users, motivating the first to opt-out, thus reducing VCL's attractiveness.[379]

The rhetorical power of such argument should not be ignored, as it has been in first instance used by the U.S. music industry to disqualify VCL as a viable option for P2P.[380]

Nevertheless, the system's voluntary nature coupled with the psychological comfort of a blanket license makes this a low level risk.[381]

g) Coexistence

VCL's flexibility is one of its great advantages, allowing for its coexistence with alternative rights management schemes.[382]

Such coexistence is in fact a feature of the current Internet landscape where paid subscription services "live" alongside free of charge sites, e.g. in the news and information[383] and online music distribution markets.[384]

Such coexistence should be unproblematic absent potential strategic market decisions by rights holders (*maxime* content industries), which would however have to seriously consider a model that allows for creation of previously inexistent revenue streams.

379 *See* Yu, *supra* note 8, at 715, and Dougherty, *supra* note 8, at 431-432.
380 *See* Litman, *supra* note 268, at 33-34 & n.136 (citing industry representatives referring to VCL as "either…unfair because the few consumers who participated would subsidize the many who continued to rely on free downloads, or it would be voluntary only in name").
381 *See* Dougherty, *supra* note 8, at 431 (qualifying this risk as "only of marginal concern").
382 *See* Lohmann 2008, *supra* note 8, at 6 (arguing that such services would gain by adopting P2P architectures, as would end users).
383 *See* Litman *supra* note 268, at 43 (concluding that if such "peaceful coexistence" can be duplicated for "digital music, it seems sensible to try to do so").
384 *See supra II.*B. *See also* https://creativecommons.org/legalmusicforvideos (last visited Jan. 31, 2012) (by making digital music freely available for noncommercial purposes under an alternative licensing schemes, Creative Commons provides an adequate illustration of the above-mentioned coexistence).

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h) "Remixes"[385]

The making and sharing of adapted versions of works (derivative works, "mash-ups" or "remixes")[386] is part of the practices of P2P users.[387] However, we believe a proposal for a VCL system in the E.U. should not encompass remixes. Irrespective of whether a Member State's copyright law follows the *droit d'auteur* or monistic matrix of copyright, P2P remixes call into question the exclusive economic right of adaptation and, in cases of extensive modifications of a work, the moral right of integrity.

The right of adaptation is mostly unregulated at E.U. level,[388] thus providing no solid basis for an effective collective rights management scheme.[389] Furthermore, the inalienable nature of moral rights in some Member States[390] would raise thorny challenges that might prove insurmountable.

From a different perspective, exceptions and limitations could apply in some Member States to (at least noncommercial) remixes, rendering any authorization to perform such acts unnecessary, thus raising issues of "double payment".[391]

In the U.S., such "remixes" could be qualified as derivative works[392] and warrant the application of the doctrine of (transformative) fair use.[393] In the E.U., art. 5 InfoSoc Directive's exceptions and limitations do not cover such uses. Absent harmonization and subject to the three-step test (when applicable),[394] as well as national provisions on moral rights, Member States are free to institute exceptions and limitations for the right of adaptation covering certain categories of noncommercial remixes. In fact, some authors have noted that the adaptation right constitutes a flexible area (external to the *acquis*) for Member States in what concerns exceptions and limitations, thus allowing for the implementation of permissive

385 This subsection will only briefly touch upon the issue of "remixes" and the right of adaptation, as a detailed analysis of the same is beyond the scope of this book.

386 On the "remix" phenomenon in general and its legal, social and cultural implications, *see* Lawrence Lessig, Remix: Making Art And Commerce Thrive In The Hybrid Economy (Penguin Press 2008).

387 *See* Netanel, *supra* note 8, at 3, and Dougherty, *supra* note 8, at 430-432.

388 *See* Eechoud et al, *supra* note 91, at 84.

389 *See* Daniel Gervais, *The Tangled Web of UGC: Making Copyright Sense of User-Generated Content*, 11 Vand. J. Ent. & Tech. L. 841, 848-849 (2009) [hereinafter **Gervais 2009**] (noting that CMOs do not typically license the right of adaptation, least of all to individual users).

390 *See* Michel M. Walter & Silke von Lewinsky, European copyright law 1473 (Michel M. Walter and Silke von Lewinski Ed., Oxford University Press 2010).

391 *See supra V.3.a)* & n.350.

392 *See* 17 U.S.C. §§ 101, -106(2).

393 *See* Gervais 2009, *supra* note 389, at 861-870.

394 *See* Hugenholtz & Senftleben, *supra* note 145, at 26 (arguing that the regulation of the right of adaptation, understood as the *"corpus mysticum* of a …work – is left to national law making", being that the InfoSoc Directive only applies to "literal reproduction").

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provisions that privilege uses of works, such as several types of transformative uses (e.g. in the area of user generated content).[395]

For the Member States that do so, the question remains of how to consider such remixes in a VCL system when the underlying work is recognizable.[396] Should rights holders be entitled to compensation? What about the author of the remixed work? What if the applicable law only allows non-commercial remixes?[397]

We do not intend to provide answers to these questions here, but merely to illustrate the complex web of issues generated by the introduction of an adaption right in the VCL equation, thus justifying our option (at least at an initial stage) to exclude such a right from a VCL solution to P2P.

395 *Id.* at 26-27 (noting different approaches to user-generated content in Germany and the Netherlands).

396 *See* Fisher III, *supra* note 8, at 234-236 (proposing a method to monetize such uses under his alternative compensation system).

397 *See* Dougherty, *supra* note 8, at 430-431 (concluding that if VCL does not cover such uses "the industry risks perpetuating underground file sharing services on which such remixes can be traded").

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VI. Conclusions

P2P is a phenomenon of great economic significance that is not going away.[398] Our analysis highlights right holders "wealth of lost revenue" derived from inability to monetize P2P uses, but also a "long-running failure of both public and private regulation" in this area.[399]

P2P's *generational* evolution and innovative flexibility in the face of adverse judicial decisions,[400] together with its aptitude to resist and even flourish in an increasingly stringent legal environment[401] and competition from legal online licensing services, leads us to conclude that current approaches to file-sharing are largely ineffective, inclusive in the E.U.

Implementing and enforcing complex legal mechanisms–such as DRM and graduated response systems–translates into economic losses deriving from the implementation itself, damage to the content industry's reputation[402] and consequent alienation of current and prospective consumers from alternative legal markets. Furthermore, severe lost profits result from the complete failure to monetize such massive online uses of works–in the E.U. alone, 30% of all Internet traffic relates to P2P.[403]

Assuming that rights holders should receive reasonable compensation for the online uses made of their works, the current policy and industry approaches fail to understand where the balance between copyright and innovation should be struck in the P2P "arena".[404]

Lessons taught by the ghosts of copyright past, such as *Sony v. Universal* or the more recent DRM debacle,[405] should be remembered: most new technologies are

398 *See* Huygen et al., *supra* note 11, at 121 (noting that "file sharing is here to stay", "people that download are… important customers of the music industry", and "[t]he point of no return has been reached and it is highly unlikely that the industry will be able to turn the tide").

399 *See* Bridy, *supra* note 40, at 566.

400 *E.g.*, *Napster*, *Grokster*, *Pirate Bay*. *See also* Bridy, supra note 40, at 604 ("As an empirical matter, the mass lawsuits appear to have had only a transitory deterrent effect").

401 *E.g.*, the InfoSoc Directives triad of broad exclusive rights, narrow exceptions and limitations and DRM, the Enforcement Directive and, at a national level, legislative efforts to implement graduated response systems, such as Hadopi (in France), the Digital Economy Act (in England) and even the so-called "Sinde" Law (in Spain).

402 *See* Ericsson, *supra* note 10, at 15 (arguing that the recorded music industry as "suffered almost irreparable harm to its image as a result of its crusade against P2P").

403 *See* Envisional Report, *supra* note 25, at 25.

404 *See* Cammaerts & Meng, *supra* note 31, at 2.

405 *See* Huygen et al., *supra* note 11, at 116.

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disruptive in nature and development of new business models is a (desired) result of industry's efforts of adaptation, not of repressive legislation.[406]

In a balanced system, copyright should function as an innovation facilitator and market organizer. Promotion of P2P and the establishment of a legislative framework that is both conducive to that goal and user friendly, while safeguarding right holders interests (by securing adequate compensation where they now have none) and users' interests (by ensuring access to works instead of "criminalizing" them),[407] is the most adequate response for the E.U. legislator from the cultural, economic and policy perspectives.[408]

As with any complex problem, a comprehensive answer to the P2P "conundrum" cannot be given solely by the law, but instead relies on its combination with "market forces, technological architectures, and social norms", bearing in mind "Internet's structural resistance to control".[409]

As the recent rise of cloud computing demonstrates, technology moves at lightning speed and has the potential to quickly render entire legal frameworks obsolete. What is needed is a middle ground between "law shaping technology" and "technology shaping law": a law that is flexible enough to encompass technological change.[410]

To be sure, collective rights management is theoretically copyright law's best answer to mass online uses such as P2P, especially if we circumscribe such uses to manageable categories of exclusive rights, such as online reproduction and making available. In the E.U., where a highly developed CMO market exists, which has been subject to numerous decisions and institutional approaches in the field of Competition law, there is solid ground on which to seriously consider a collective management solution to P2P.

In such context, the best available alternative seems to be the implementation of a VCL system to manage P2P uses on a non-exclusive, multi-territorial, multi-repertoire and pan-European level.[411] VCL is compatible with international and

406 *See* Cammaerts & Meng, supra note 31, at 10-11.

407 See Huygen et al., *supra* note 11, at 118 (explaining the European level sensible approach to avoid criminalizing individual users and rather focus on acts–mainly uploading–either of commercial nature or on a large scale). *But see* Cammaerts & Meng, supra note 31, at 8 (explaining the different approach of RIAA in the U.S., where it filed, settled or threatened lawsuits against more than 30,000 users from 2003 to 2008, all without reducing P2P uses).

408 *See, e.g.,* Cammaerts & Meng, supra note 31, at 2, and Huygen et al., *supra* note 11, at 122 (where the government's role in addressing these issues as part of its cultural and innovation polices is emphasized, as well as the importance or nurturing P2P as a driver for innovation and educating users, as opposed to criminalizing them).

409 *See* Yu, *supra* note 8, at 764.

410 *See* Ericsson, *supra* note 10, at 16 & n.68 ("…the jury is still out on P2P technology's ability to shape the law").

411 *Id.* at 5 (arguing for the use of copyright as competition promotion tool "through the encouragement of widespread non-exclusive licensing"). *See also* IPR Strategy, at 10-11.

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E.U. law, providing enough flexibility to adapt to innovation in P2P architectures, while maintaining copyright's characteristic of technological neutrality and the Internet's mantra of network neutrality. It has the potential to generate consumer welfare and adequately compensate rights holders through the monetization of a novel revenue stream. Society has a whole would also benefit via the low implementation costs of VCL, the decrease in litigation and additional access to out of print and orphan works that P2P incentivizes. Such benefits make VCL a strategically sound proposition, as its voluntary design and potential to coexist with other online business models will facilitate the momentum gathering required for its acceptance by all stakeholders.

The idea of Europe has been defined best by George Steiner through axioms that underscore values of cultural diversity and intellectual freedom, stemming not in a small way from the sharing of ideas and works.[412] Such fundamental principles are enshrined in the basic freedoms inherent to E.U.'s legislative framework. In the digital age, the cultural value of sharing and freedom is perhaps best epitomized by P2P. An apposite response befitting the E.U.'s underlying values is certainly not its repression but, we believe, its inclusion in a flexible and forward thinking fashion; what better solution than one premised on voluntary collective management?

412 George Steiner, The Idea of Europe (Nexus Institut 2004).

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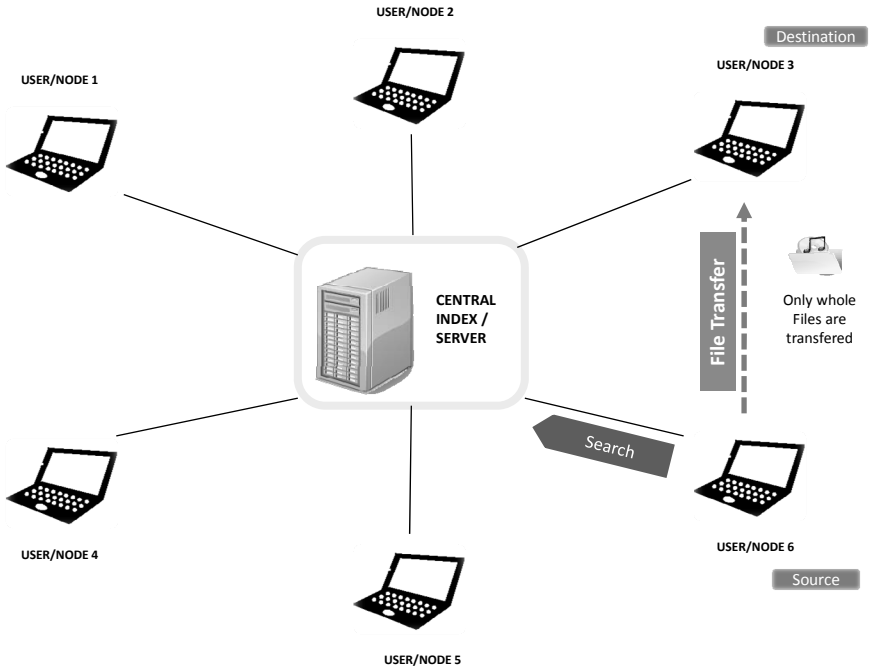
Fig. I.1. *P2P Centralized Model*[413]



In centralized P2P systems, despite the transfer of files occurring between users, some reliance exists on central servers that keep directories of IP addresses and shared files stored by users, which are constantly updated ("one-to-many relationship"; e.g., Napster).

413 This figure draws its inspiration partially from OECD 2004 Report, *supra* note 10, *Forms of P2P file sharing*, at 3 Box 5.1. (containing a graphic representation of a "centralized" P2P system).

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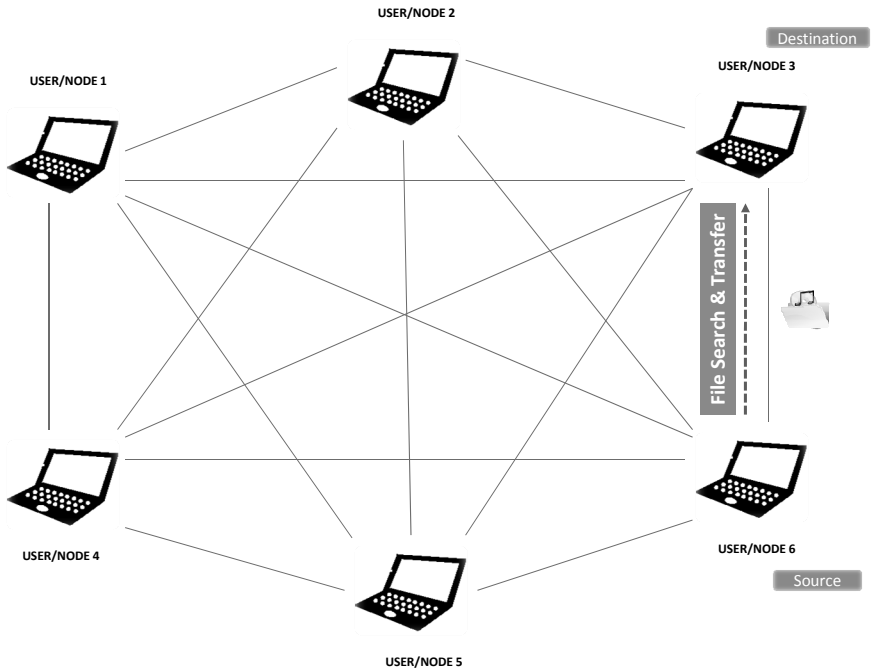
Fig. I.2. *P2P Decentralized Model*[414]



P2P decentralized systems are characterized by a "many-to-many relationship". Instead of resorting to a centralized directory, search queries are sent by a user to the computers of other users until the requested file is found (the query is thus "flooded" through the network). Once (and if) the file is found, information is sent back to the original searcher and a direct connection is established between the two peers (e.g., Limewire).

414 This figure draws its inspiration partially from OECD 2004 Report, *supra* note 10, *Forms of P2P file sharing*, at 3 Box 5.1. (containing a graphic representation of a "decentralized" P2P system).

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Fig. I.3.a) *P2P Third Generation Models (BitTorrent Tracker and Swarm)*

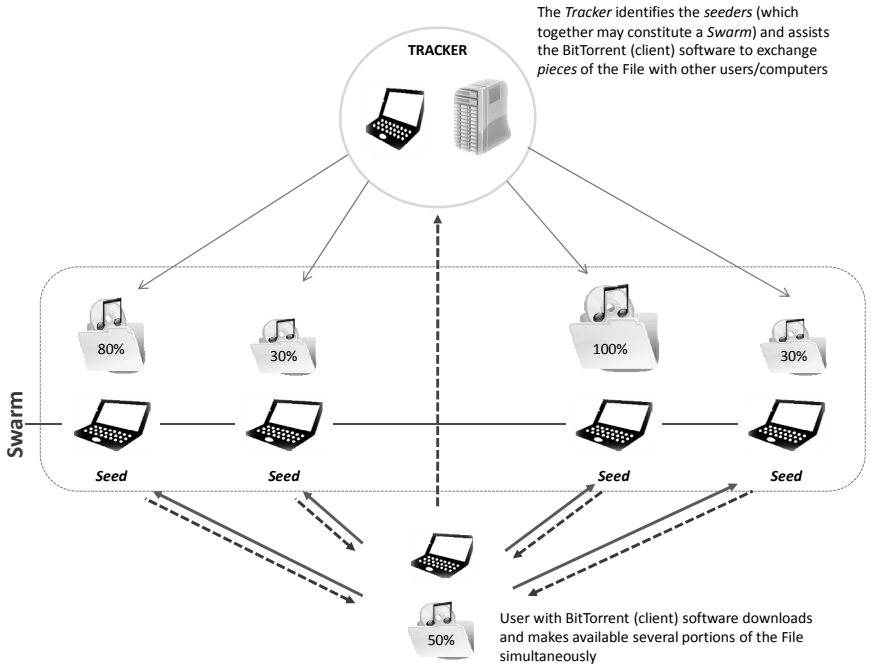

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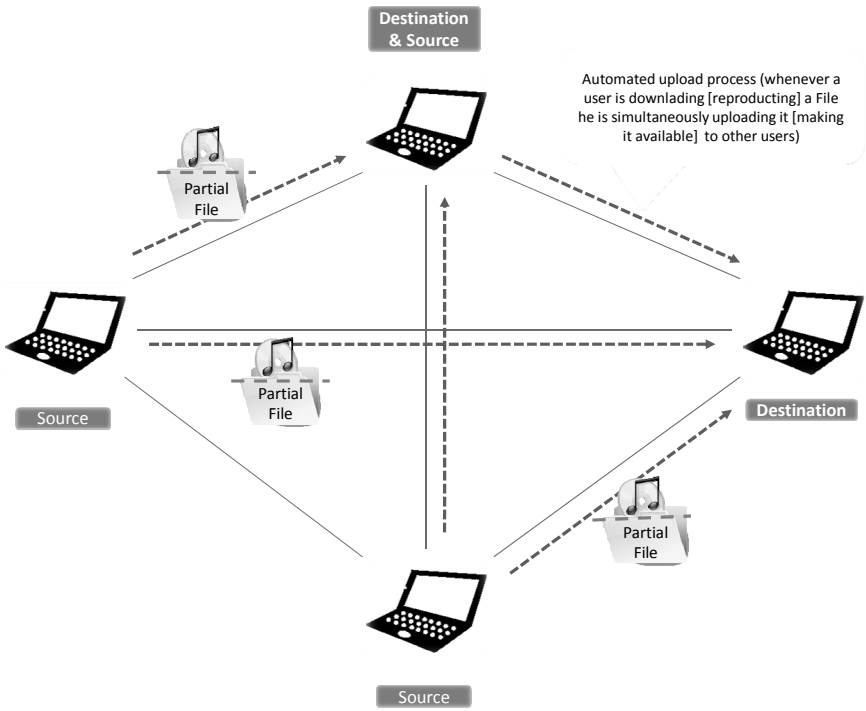
Fig. I.3.b) *P2P Third Generation Models (BitTorrent overview)*



Third generation systems use a "controlled decentralized framework" where peers identified by the P2P software as the high performance computers at any given time in the network are used as super (or overlay) nodes for carrying out administration functions of the online content and manage eventual scalability issues (e.g., KaZaA, Grokster and Pirate Bay).[415]

The most popular P2P protocol in the world is BitTorrent.[416] This protocol typically uses a central server (*tracker*)[417] that identifies other users downloading or uploading the requested file.

It performs this function by collecting IP addresses from the latter users and sharing them with the first, as well as recording data from each file or torrent tracked. Such data can include the file's unique identification code (*hash*), the

415 *See* OECD 2004 Report, *supra* note 10, at 3.
416 *See supra II.*A *and* note 25.
417 *See* Envisional Report, *supra* note 25, at 7 & n.7 (referring that trackers are the most common source of IP addresses gathered through this protocol).

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number of users that hold that file (*seeds* or *seeders*), those users downloading it (*leechers*), and sometimes the number of complete downloads.[418]

For efficiency reasons, a file is made available for download by multiple users which have a complete copy of the same (*seeders*), being that the final downloaded version consists of elements contributed by many and not just one *seeder*.

418 *Id.* at 7.

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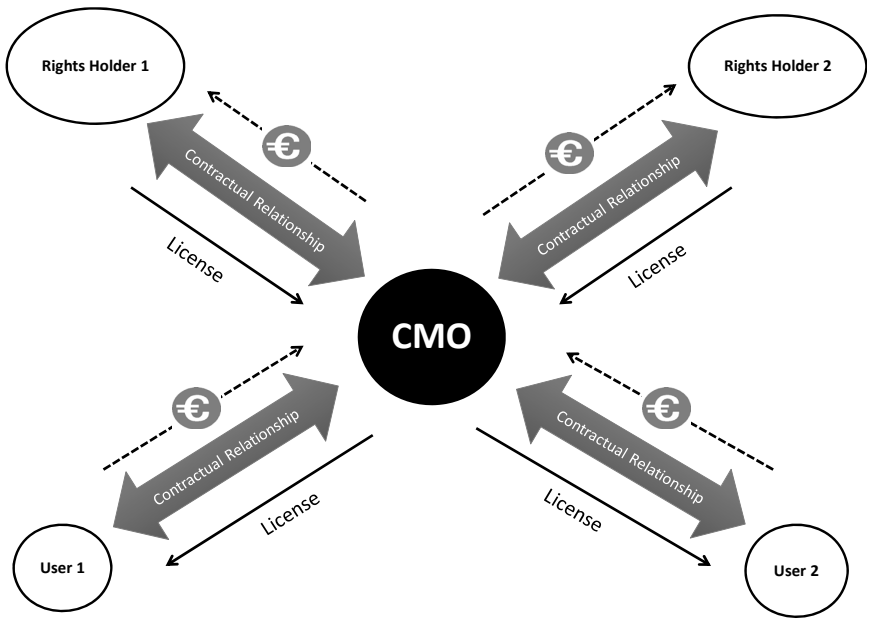
Fig. II.1 *CMOs as intermediaries in a two-sided market*[419]



419 This figure and its title draw its inspiration partially from Josef Drexl, Seminar lecture in the Munich Intellectual Property Law Center: Intellectual Property and Competition Law – Collecting Societies and E.U. Competition Law, *Collecting societies as intermediaries in a two-sided market*, at 2 (July 13, 2011) (on file with the author).

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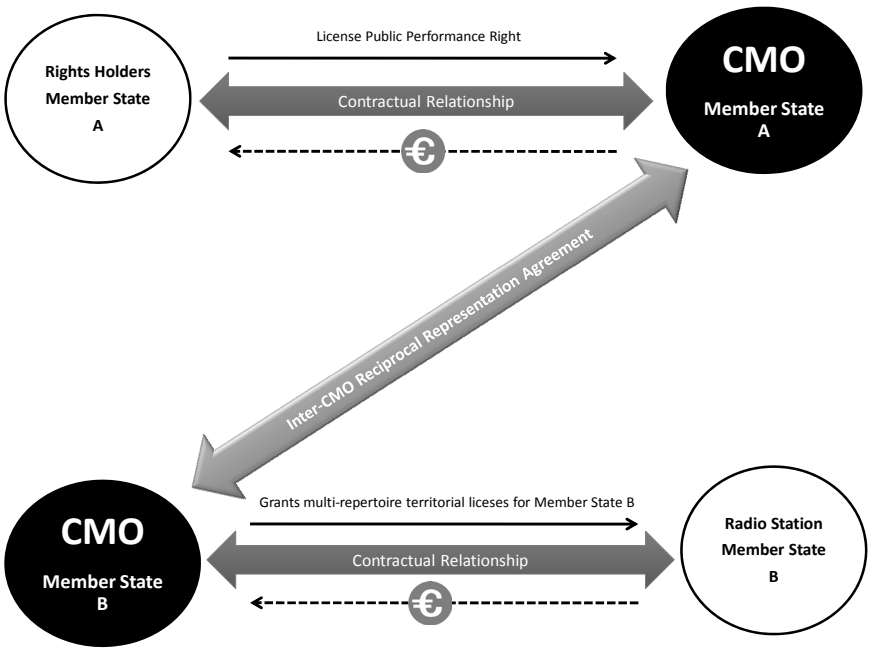
Annex III: CISAC Model for Cross-border Licensing

Fig. III.1. *CISAC model for cross-border licensing*[420]



420 This figure and its title draw its inspiration partially from Drexl, *supra* note 419, *The traditional CISAC approach to cross-border licensing*, at 4.

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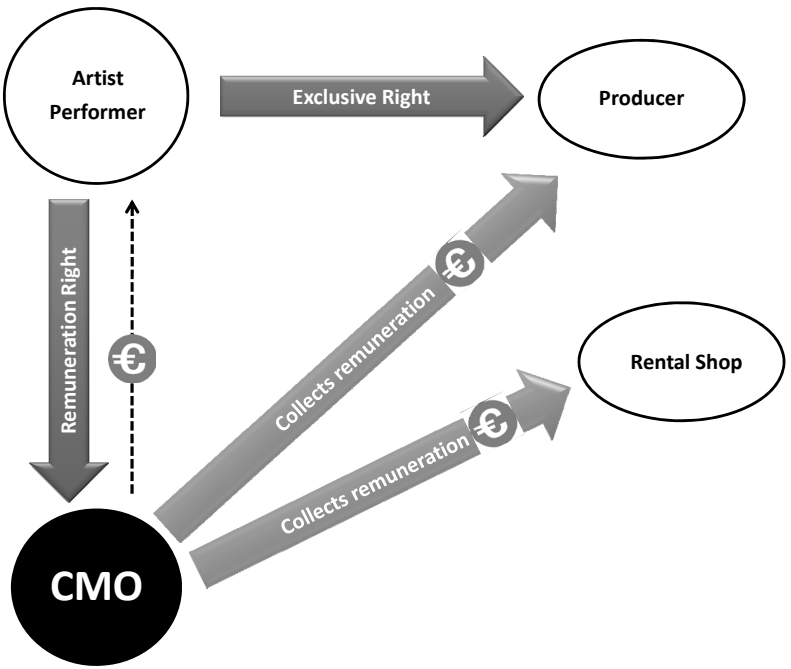
Annex IV: Mandatory Collective Management in the Rental Right Directive

Fig.IV.1. *Mandatory collective management model of the Rental Right Directive*[421]



421 This figure and its title draw its inspiration partially from Silke von Lewinsky, Dr., Division Intellectual Property and Competition Law – Max Planck Institute for Intellectual Property Competition and Tax Law, Lecture in the Munich Intellectual Property Law Center: European Copyright Law – Particular Issues in Selected EC Copyright Directives, *EC Rental Directive (1992/consolidated 2006)*, at 12 (Winter 2010) (on file with the author).

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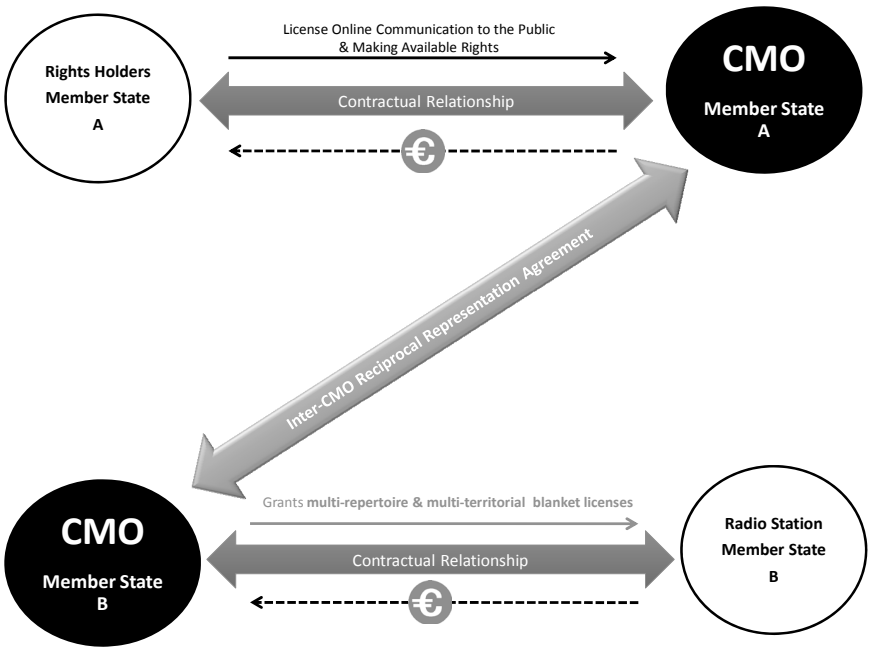
Annex V: Santiago Agreement Model

Fig.V.1. *Collective rights management model of the Santiago Agreement ("one-stop shop" with "economic residence clause")*[422]



422 This figure and its title draw its inspiration partially from Drexl, *supra* note 419, *Santiago and Barcelona: "one-stop shop" + "economic residence clause"*, at 8.

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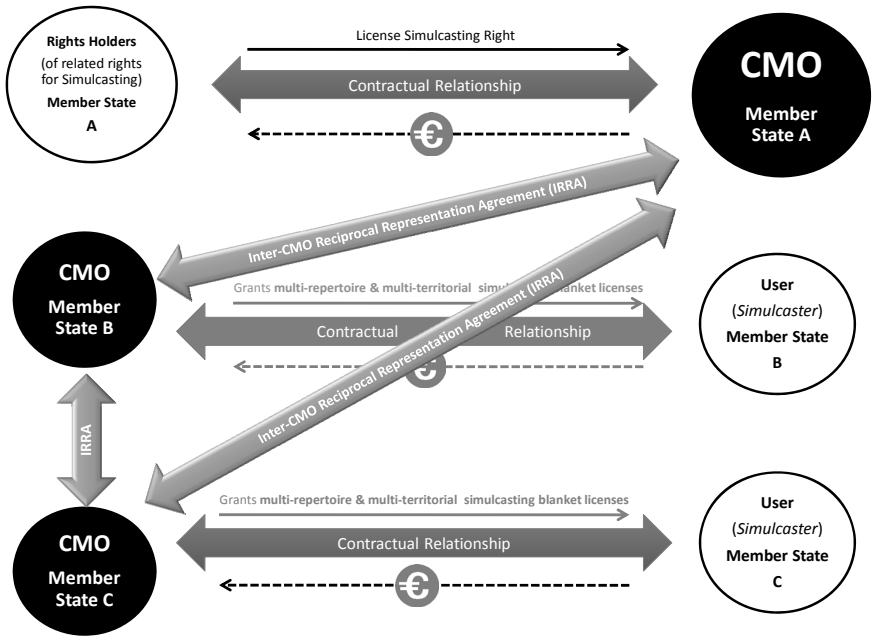
Fig. VI.1. *IFPI Simulcasting collective rights management model ("one-stop shop", multi-territorial, & multi-repertoire)*[423]



423 This figure and its title draw its inspiration partially from Drexl, *supra* note 419, *IFPI Simulcasting: "one-stop shop" (multi-territorial, multi-repertoire)*, at 6.

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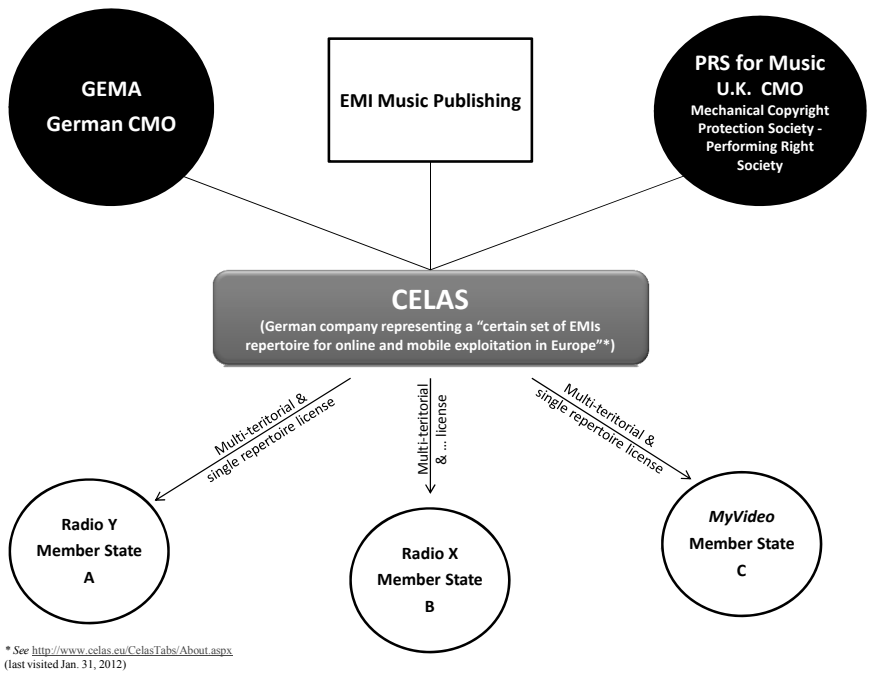
Annex VII: The Online Music Recommendation Model, CELAS and MyVideo

Fig. VII.1. *The Online Music Recommendation and CELAS model (multi-territorial & single repertoire; no one-stop shop)*[424]



424 This figure and its title draw its inspiration partially from Drexl, *supra* note 419, *The EU Recommendation 2005 and the CELAS model: Multi-territorial, but single repertoire (no one-stop shop)*, at 9.

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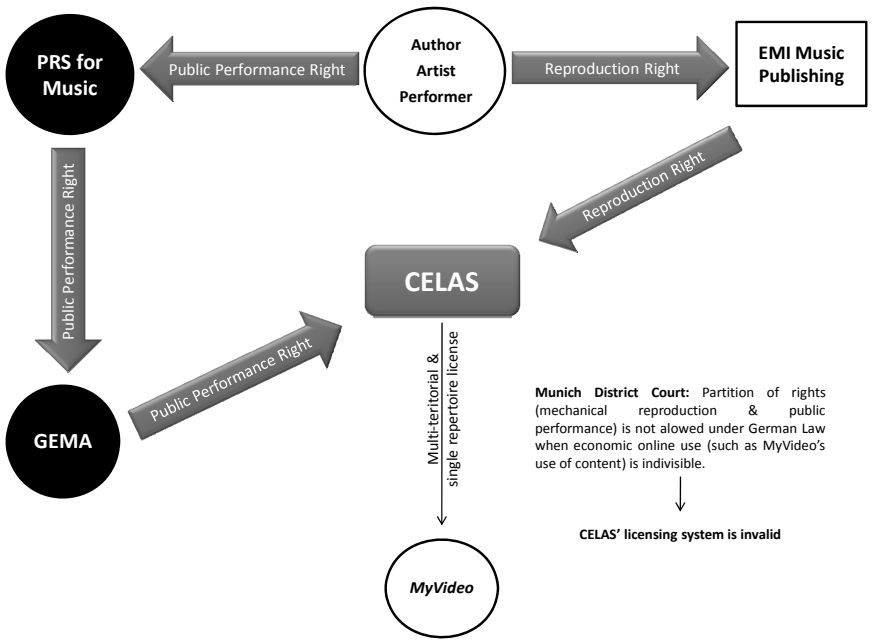
Fig. VII.2. *MyVideo Case*[425]



425 This figure and its title draw their inspiration partially from Drexl, *supra* note 419, *The MyVideo Case*, at 10.

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Annex VIII: ASCAP VCL Model

Fig. VIII.1. *The ASCAP Voluntary Collective Management Model*[426]

426 This figure is taken from ASCAP, *ASCAP Payment System-Keeping Track of Performances*, http://www.ascap.com/members/payment/keepingtrack.aspx. (last visited Jan. 31, 2012).

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