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*.

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.