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.

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.

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.

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.

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).

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).

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.)).